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
MYRZALY LIMITED
NORGULF HOLDINGS LIMITED
INCOMEBORTS LIMITED
TIGERKHAN LIMITED

Defendants/Applicants

Appearances:

Mr Lawrence Cohen, QC of XXIV Old Buildings, London with him Mr James Drake and Mr Andrew Thorp of Harney Westwood and Riegels for the Claimant
Mr Phillip Jones QC of Serle Court, London with him Mr Paul Dennis of O'Neal Webster for the 5th and 6th Defendants
Mr Oliver Clifton and Ms Julie Engwirda of Walkers BVI for the Receiver.

2007: May 02
2007: May 16

JUDGMENT

[1] HARIPRASHAD-CHARLES J: By Orders dated 29 March 2007, this Court appointed Mr William Tacon ("Mr Tacon") as Receiver over the 5th Defendant, Norgulf Holdings Limited Norgulf") and the 6th Defendant, Incomeborts Limited ("Incomeborts") which are both International Business Companies ("IBC") incorporated in the British Virgin Islands ("the BVI"). The Orders provided for a return date of 25 April 2007 which, by consent, was adjourned to 27 April 2007 and subsequently, to 2 May 2007.

[2] No formal application was filed on behalf of Norgulf and Incomeborts to discharge the receivership orders but it was clear to all parties and the Court that Learned Queen's Counsel, Mr Philip Jones appearing as Leading Counsel for the Defendants intended to make such an application. As a result, the Court had no difficulty in proceeding to hear the present application to discharge the Orders appointing Mr Tacon as Receiver.

Some background facts

[3] The overall factual matrix of these proceedings is already set out in some detail in a Judgment of the Court given on 9 March 2007[1]. For present purposes, it needs no extensive recapitulation. Briefly, the claimant, Michael Wilson and Partners Limited ("MWP") has alleged that during the term of their employment with MWP, Mr John Emmott ("Mr Emmott"), Mr Robert Nicholls ("Mr Nicholls") and Mr David Slater ("Mr Slater") diverted work away from MWP, offered, solicited and performed legal and advisory roles to existing clients and contacts of MWP and failed to account to MWP for fees received which included receiving reward for the services which they were rendering to clients as employees of MWP. MWP alleged that these various breaches of fiduciary, contractual and other duties amounted to a fraud against MWP of approximately US$30 million. As a consequence, MWP has commenced several proceedings in Australia, London, Jersey, United States of America and the BVI against its three former employees and their purported various corporate and trust vehicles/nominees.

[4] On 10 April 2007, MWP filed an amended Statement of Claim alleging that the 1st and 2nd Defendants (referred to as "the Temujin Companies") have conspired with each other and with Messrs Emmott, Nicholls and Slater, the 3rd Defendant, Hakissan, the 4th Defendant "Myrzaly", Norgulf, Incomeborts and the 7th Defendant, Tigerkhan and/or others (including Mr Sinclair and Mr David Risbey) to injure MWP by unlawful means and have caused damage to MWP. Further or alternatively, Mr Emmott and/or Mr Nicholls and/or Mr Slater and/or others (including Mr Risbey) have conspired with Hakissan, Myrzaly, Norgulf, Incomeborts and/or Tigerkhan to injure MWP, by unlawful means, including (without limitation) by fabricating and falsifying evidence with the object of concealing and

[1] See paragraphs 1 -35 of the Judgment of the Court delivered on 6 March 2007.

attempting to render judgment proof, assets belonging to Mr Emmott and/or Mr Nicholls, Mr Slater, the seven Defendants and/or others (including Mr Risbey) or assets to which MWP might lay claim in equity.

[5] MWP alleged that Norgulf has:

a) dishonestly assisted Messrs Emmott, Nicholls and Slater in their breach of fiduciary and other duties, and/or in receiving and attempting to retain the proceeds of their breaches and are, therefore, liable as an accessory in equity (or knowing assistance);

b) received property, impressed with trusts in favour of MWP, otherwise than as a bona fide purchaser for value without notice of MWP's interests or, alternatively, has unconscionably received trust property passed to it in breach of trust, or property passed to it in breach of fiduciary duty (or knowing receipt). Accordingly, such property, or its traceable proceeds, remains the property of MWP and/or Norgulf is a constructive trustee thereof for MWP, and Norgulf is liable to MWP for equitable compensation;

c) further, or alternatively, Norgulf has conspired with Messrs Emmott, Nicholls, Slater and Risbey, Hakissan, Myrzaly, Incomeborts, Tigerkhan and/or the Temujin Companies to injure MWP by unlawful means, with the object of concealing and attempting to render judgment proof assets of Messrs Emmott, Nicholls and Slater and/or the Temujin Companies or assets to which MWP might lay claim in equity.

[6] Similar allegations were made in respect of Incomeborts. MWP further alleged that Mr Risbey was closely involved in the transactions concerning Max Petroleum plc (""Max"), an English company, being a director of a large number of companies holding significant percentages of Max shares. Those companies included (without limitation) Incomeborts and Norgulf which received ten million (10m) shares and five million (5m) shares respectively in Max in August 2005 amounting to approximately 8.07% of Max issued

share capital for a non-cash contribution suffering from the same defects as in the case of Myrzaly.

[7] To sum up, MWP's case is that Messrs Emmott, Nicholls and Slater, in breach of their fiduciary, contractual and other duties owed to MWP, had taken for their own benefit, shares in Max, while working for MWP on the floatation of Max, and they have hidden these shares in Norgulf (5m shares) and Incomeborts (10m shares) which it is alleged, are owned by Messrs Nicholls and Slater and/or Mr Emmott..

[8] MWP argued that there are good grounds for the appointment of the Receiver and that nothing has significantly occurred since the ex parte hearing on 29 March 2007 to warrant a discharge of that order. MWP also argued that the evidence proffered by Norgulf and Incomeborts about a month after the appointment of the receiver simply failed to address a number of key questions about the role of Mr Garifolla Kachshapov ("Mr Kachshapov") and his company, Horizon Services NV ("Horizon") and that the evidence advanced, conflicts with important public statements made on the occasion of the admission of Max to London's Alternative Investment Market ("AIM").

The grounds for the appointment of Receiver

[9] At the ex parte hearing, the Court relied substantially upon the 6th affidavit of Mr Michael Wilson, ("Mr Wilson") Managing Director of MWP in appointing Mr Tacon as the Receiver over the assets of Norgulf and Incomeborts. On the basis of the documents then available to MWP, it was believed that:

a. Norgulf and Incomeborts were owned directly or indirectly, by Mr Nicholls and/or Mr Slater or, perhaps, trusts or other companies controlled by them.

b. Norgulf and Incomeborts have received shares in Max.

c. The allocation of these shares was by way of reward to Messrs Emmott, Slater and Nicholls for services performed whilst working for MWP.

d. Accordingly, these holdings of Max shares by Norgulf and Incomeborts belonged to MWP.

[10] MWP also alleged that because of the conduct and flagrant breaches of the BVI Court Orders thus far, the assets held by Norgulf and Incomeborts remain in jeopardy and if notice is given of this application, there is real concern that these companies through Messrs Slater and Nichols will seek to dissipate assets as before, rendering them judgment proof to this Court.

Norgulf and Incomeborts: The Max shares

[11] It was alleged that the Max shares were allocated to Norgulf (5 million) and Incomeborts (10 million) in August 2005 before Max re-registered as a public company.[2] According to MWP, the allocation of these shares to Norgulf and Incomeborts was not part of the process of making a public offering , but rather, as a result of the individuals behind these companies being "insiders" or persons close to the taking of Max to the market; and the monetary price for these shares (£0.01) per share , if paid at all (there is no evidence so far of payment) was but an infinitesimal fraction of the price paid on the public offering approximately 3 months later (£0.35) per share.

[12] It was already drawn to the Court's attention[3] that Mr Emmott received shares in Max as compensation for work that he did in the structuring listing on the AIM and related transactions, whilst he was a Director of MWP. Mr Emmott (through his Bahamian trust, Eagle Point) received 14.75m shares, although the original number of shares proposed to be issued to Mr Emmott/Eagle Point was apparently $24,000,000 and not 14,750,000[4]. MWP does not know whether these extra shares were allotted or, if so, to whom. What MWP alleged, is that Mr Nicholls was deeply involved in the Max project during his employment with MWP. In September 2005, when Mr Slater joined MWP, he too became involved, albeit, in the very late stages of the project pre-floatation and after the share allocations of 5 August 2005 to Norgulf and Incomeborts. He was, however, heavily

[2] See Share Register of Max exhibited at MEW 6 –page 1.
[3] See paragraph 24 of the Judgment of 9 March 2007.
[4] See pp 119-129 of MEW 11.

involved in work for an immediately post-float transaction for Max known as the Astrakhansky transaction, by which Max acquired exploration, development and extraction rights in the Astrakhansky oilfield for cash and options to acquire shares in Max.

The emails [5]

[13] MWP alleged that the inference that could reasonably be drawn from four emails passing between Messrs Emmott, Nicholls and Slater is that they are the beneficial owners of Norgulf and Incomeborts and the shares in Max. It is worthwhile to examine those emails.

[14] In January 2006, Mr Slater left the employ of MWP and Mr Nicholls followed shortly thereafter in March 2006. In April 2005, Mr Slater embarked on an attempt to raise finance from Macquarie Bank of Australia against the security of these 15 million shares held by Norgulf and Incomeborts in Max. In an e-mail from Mr Slater to a Louisa Kerr of the Macquarie Bank dated 5 April 2005[6] entitled "US$10 milllion facility - Temujin International Limited", Mr Slater spoke of using the 15 million shares in Max as security. Learned Queen's Counsel, Mr Cohen submitted that the Court ought to have regard to the following:

(i) The borrower was stated to be Temujin International, a newly incorporated company with no trading history enabling it to service such a loan.

(ii) It is staggering to see how Mr Slater could sensibly be offering security for a loan to Temujin International of shares which he (Mr Slater), or one of his co-participants in that company, did not own. It is even more staggering that a third party would be offering shares with a market value of more than £20m as security for a loan to a start -up company such as Temujin, on an arm's length basis.

(iii) Mr Slater referred to "*clients*" in the correspondence, but does not divulge who his clients are, as would be expected in this type of transaction. In the light of the heading of the e-mails indicating that it referred to a US$10 million facility

[5] See pages 30 -36 of Exhibit MEW 6.

to Temujin International, it is to be inferred that it must be them or, possibly, Norgulf and Incomeborts who were providing that security, or perhaps, Mr Nicholls.

(iv) In an e-mail from Mr Nicholls to Mr Slater of 19 April 2005[7], Mr Nicholls stated that it would be more practical for the loan to be made in UK pounds sterling ("GBP") given that its intended use is in an equity investment. Without any trace of consultation with a client or, ostensibly opportunity to consult, the very next day, Mr Slater reported back to the bank that "…the client…was also happy to borrow the sum in GBP"[8]. There is no other reference to a client for instructions and the very strong indication is that the client, in this case, is actually Mr Nicholls and/or Slater and that Norgulf and Incomeborts are vehicles holding their shares in Max.

(v) It appears that the borrowing was never effective; the problem for Macquarie Bank being that it required unencumbered shares for the deal to go ahead, yet Incomeborts and Norgulf's shares were the subject of a lock-in agreement entered into at the time of the listing.

(vi) The correspondence indicates that the purpose of the loan was for investment, and that the investment appears to have been an investment in the Chillisai Phosphate project.

[15] Mr Cohen drew attention to the involvement of Mr Emmott at this stage; at a time, i.e. April 2005 when he was still a director of MWP. In an e-mail correspondence dated 14th April 2005, between Messrs Emmott, Nicholls and Slater in relation to the Chillisai Phosphate project[9], Mr Emmott advised Messrs Nicholls and Slater regarding a "*Purchaser Accession Agreement*". This was a project on which Mr Emmott worked during his employment at MWP, and subsequently Messrs Nicholls and Slater continued with it at Temujin International following their departure from MWP. Mr Cohen contended that the Court should infer that monies were being raised by Messrs Slater and Nicholls to make an

[7] See page 33 of Exhibit MEW 6.
[8] See page 32 of Exhibit MEW 6.
[9] See Page 34-37 of Exhibit MEW 6.

equity investment in the project. He next contended that it is apparent that Mr Emmott cannot at this stage, properly, have been giving advice and assistance to Messrs Slater and Nicholls in this regard.

[16] It was the submission of Learned Queen's Counsel that the (sensible) view formed by MWP was that the shares in Incomeborts and Norgulf were directly or indirectly the property of Messrs Nicholls and Slater (and/or possibly Mr Emmott).

Application to discharge receiver

[17] Against this backdrop of the view formed by MWP that Messrs Slater and Nicholls are owners of the shares in Norgulf and Incomeborts, Mr Keith Edward Oliver, ("Mr Oliver") an English solicitor, deposed that he was duly authorised to make the affidavit on behalf of Mr Kachshapov, Norgulf and Incomeborts.

[18] Mr Oliver took issue with the view formed by MWP from the e-mail,[10] headed *"USD 10 million facility – Temujin International Limited"* that Messrs Slater and Nicholls must be the beneficial owners of the shares being offered as security, notwithstanding, the fact that the body of the e-mail refers quite clearly to a "client". He disagreed with Mr Wilson that in these types of transactions it is surprising that the clients' names were not divulged. He stated that from his professional experience, he did not consider that the client's name would always or necessarily be revealed during this type of transaction.

[19] At paragraphs 10 and 11 of his affidavit, Mr Oliver asserted that: (i) Incomeborts was incorporated on 5 November 2004 in the BVI. It has issued 50,000 bearer shares. Mr Oliver said that this certificate is in Mr Kachshapov's office in Almaty (and that steps are being taken to produce it); (ii) Mr Ian Taylor ("Mr Taylor") of Vanuatu was the nominee director of Incomeborts; and (iii) a Power of Attorney was given by Incomeborts to Mr Kachshapov on 5 November 2004 (i.e. the date of incorporation). With respect to Norgulf (i) it was incorporated on 15 July 2005 in the BVI and that its shares are owned by Commonwealth Services (Belize) Limited; (ii) Mr Taylor was the nominee director of

[10] Page 30 of exhibits to Mr Wilson's 6th affidavit

Norgulf; and (iii) a power of attorney was given by Norgulf to Mr Kachshapov on 15 July 2006.

[20] Mr Jones submitted that Max is a company that has rights to explore, develop and produce oil in Kazakhstan and that it substantially acquired its assets from companies in which Mr Kachshapov had a substantial interest. As a result, Mr Kachshapov was issued with 15 million shares which he decided to hold in the names of Norgulf and Incomeborts; companies which he already beneficially owned and continues to beneficially own.

[21] According to Mr Oliver:

(i) Mr Kachshapov has, and at all material times, been the ultimate beneficial owner of the shares in Norgulf and Incomeborts;

(ii) the Macquarie Bank US$10 million loan facility to Temujin International was in fact Mr Kachshapov considering making an investment in a project to construct a bitumen plant near Moscow; and

(iii) Messrs Slater and Nicholls were assisting Mr Kachshapov to raise funds for this project by way of a loan secured on the Max shares held by Norgulf and Incomeborts.

[22] Mr Cohen quizzically inquired: "why have Norgulf and Incomeborts not produced one single piece of paper in support of any part of this assertion?" Learned Queen's Counsel noted that, in particular, (a) there is no document produced relating to the bitumen plant investment in Moscow; and (b) there is no documentary evidence relating to the engagement of Mr Kachshapov of Messrs Slater and Nicholls to provide "assistance."

[23] Furthermore, Mr Cohen argued and quite correctly, that this evidence is diametrically opposed to that given by Mr Slater who stated that he was engaged by Shaikenov &

Partners and is unaware of the identity of the directors and shareholders of Norgulf and Incomeborts.[11]

[24] MWP advanced concerns with the dating of the power of attorney given by Incomeborts to Mr Kachshapov on the same date of the incorporation of the company. Mr Cohen submitted, albeit, unenthusiastically, that it seemed highly unlikely that the incorporation of the company was known about at that time. However, I am persuaded by the submissions of Mr Jones Q.C. that there is nothing sinister about the power of attorney being issued on the same date when the company was incorporated. It is normal to incorporate a company and provide information later.

[25] MWP also asserted that the Register of Directors for Norgulf is dated 10 August 2005, i.e., it is almost 18 months out-of-date and it is not certified by the registered agent as representing the current position; additionally, unless the company was formed for Mr Kachshapov and not off the shelf, as is usual, it is difficult to see how the register can be accurate, given that there would be initial directors who would have resigned.

[26] MWP asserted further, that the same applies to the Register of Members for Norgulf, i.e., it is dated 15 June 2005 and is not certified; additionally, unless the company was formed for Mr Kachshapov, it is difficult to see how the register can be accurate given that there would be initial subscribers/members who would have resigned and transferred their shares to the purchasers.

[27] MWP contended that the above comments apply equally to the registers provided for Incomeborts (the registers are dated 5 November 2004).

[11] See paragraphs 27 -29 of Mr Slater's sixth affidavit sworn to on 10 April 2007.

[28] Mr Cohen submitted that barring the various uncertainties surrounding the corporate records disclosed thus far, and whilst MWP is of course willing to consider any material provided by Incomeborts and Norgulf, to date, there has been no rational explanation of the various matters raised in correspondence relating to the role played by Mr Kachshapov and Horizon in this dispute.

[29] Learned Queen's Counsel, Mr Jones submitted that neither Norgulf nor Incomeborts has anything whatsoever to do with Messrs Emmott, Nicholls and Slater. He argued that the companies have at all times been owned by Mr Kachshapov and that documentary evidence has now been supplied which conclusively establishes that Messrs Emmott, Nicholls and Slater have no nexus at all with these two companies[12]. Mr Jones contended further, that the Registered Agent's Certificates by Commonwealth Trust Limited ("Commonwealth Trust") certified that Mr Kachshapov was and is the beneficial owner of Norgulf and Incomeborts and that the Certificates also verified that Messrs Emmott, Nicholls and Slater have not had any beneficial interest in or ownership of the shares in Norgulf and Incomeborts. Mr Jones boldly asserted that these disclosures put the issue of ownership beyond doubt.

[30] For my part, the documents that are exhibited to Mr Oliver's affidavit provide helpful information to the Court. They provide information in respect of the date of incorporation, the type of shares, number of shares and in relation to Norgulf, the registered holder of those shares. The registered holder of Norgulf shares is Commonwealth Services (Belize) Limited. Mr Kachshapov signed the indemnity to Nominee Director for both Norgulf and Incomeborts as beneficial owner. In the body of this document it stated:

> "In acting as Nominee Director you should take written instructions and directions from Mr Garifolla Sapaevich Kachshapov Beneficial Owner of the Company or other person properly authorised by me from time to time ("my officials")."

[12] Exhibited to Mr Oliver's affidavit are the letters of indemnity given by Mr Kachshapov as beneficial owner to the nominee director of the companies and the general powers of attorney granted to Mr Kachshapov.

[31] The Lawful Purposes Declaration and Authority to Act [13] for both companies were signed by Mr Kachshapov. It provided that:

> "In connection with our request that COMMONWEALTH TRUST LIMITED, ROAD TOWN TORTOLA, BRITISH VIRGIN ISLANDS, incorporate and become Registered Agent of the above IBC, we, the beneficial owners of the above IBC hereby vouch that the above company will never be used for unlawful purpose nor will it handle or deal in any way with monies derived from narcotics or any other drugs, arm…….
>
> We further vouch that the following person/s will be the only person/s from whom you are to take instructions unless we notify you otherwise in writing by a notarized mandate."

[32] It appears from the documents which were exhibited that Mr Kachshapov is the beneficial owner of Norgulf and Incomeborts. But MWP's claim is that these companies are owned directly or indirectly by Messrs Nicholls and Slater or perhaps trusts or other companies controlled by them. There is no information on whose behalf Commonwealth Services (Belize) Limited holds the shares in Norgulf. Only bearer share certificate is issued for Incomeborts and the owner of those shares is the bearer of the certificate.

[33] On a perusal of the documents, I am constrained to find that the documents thus far disclosed by Commonwealth Trust contained (i) nothing as to the identity of the ultimate beneficial owner of each of these companies and (ii) no identity of the person/entity on whose behalf it owns the shares. In fact, the Certificates, though useful are not of immense assistance in determining the critical issue of the ultimate beneficial ownership of these companies.

[34] Mr Jones forcefully argued that MWP's case is founded on inferences drawn from four emails. He argued that the emails conclusively ascertained that Messrs Emmott, Nicholls and Slater are not the beneficial owners of Norgulf and Incomeborts. Mr Jones

[13] See Tab 11, 12 and 13 of Trial Bundle.

painstakingly took me through the emails. In the end, he opined that the view taken by MWP is incongruous given the contents of the emails.

[35] In my respectful view, the submission advanced by MWP with respect to the emails appears more plausible. [14]

The ownership of the Max shares

[36] MWP is troubled about the ownership of the Max shares held by Norgulf and Incomeborts because it is cognizant that Mr Kachshapov was the ultimate beneficial owner of Horizon, the vendor to Sokol and onward to Max of 80% of the company's interests in the Block A&E and East Alibek contracts. The agreements under which those assets were sold consist of no obligation that Mr Kachshapov or anyone on his behalf, received further consideration in respect of those assets. In those circumstances, MWP inquired:

(i) On what basis did Norgulf and Incomeborts acquire (presumably from Sokol) of the blocks of 5 million and 10 million shares of Max in 2005?

(ii) What was the consideration for the allocation of these Max shares? How, when and by whom was it paid? Is there any documentation of any such consideration?

(iii) Are these holdings in Max said to be owned by Norgulf and Incomeborts themselves or held on trust for some other party and if so, who? Is there any documentation of any such trust arrangements?

[37] Mr Cohen submitted that there appears to be a fundamental paradox between what MWP is told now as to the beneficial ownership of Incomeborts and Norgulf and the disclosures to the market in the AIM admission document for Max (and in the Max 2006 Annual Report).

[14] See paragraphs 14 to 16 of the Judgment [supra].

(i) In the AIM admission document[15], Mr Kachshapov is described as owning 100% of the share capital of Horizon. He is also described as a "Senior Manager".

(ii) In the AIM admission document[16], in the section dealing with "Directors', Senior Managers' and Other Interests", in what is a declaration of the interests (legal and beneficial) in Max held by directors, senior managers and others, Mr Kachshapov is said to have no shares at all in Max, both before and after the placing. However,

(1) By its terms, the declaration by Max in this regard, includes all interests in Max shares held by Mr Kachshapov or by a "connected person" as defined in section 346 of Companies Act; thus, it amounts to a statement that neither Mr Kachshapov nor any company with which he is associated, nor any trust in which he (or any member of his family) is a beneficiary, holds any Max shares.

(2) The declaration in this regard as to ownership of Max shares by directors and senior managers is made only after they have "taken all reasonable care" to ensure that the information accords with the facts[17].

(3) Interests held by directors and senior managers are plainly material in the context of a market offering of shares; not only is Mr Kachshapov's 20% interest (via Horizon, Madiran and Sherpico) in Blocks A&E and East Alibek material but also, quite clearly, is his stake of nearly 6% in the issued shares of Max.

(iii) In the same section of the AIM admission document[18], there is a declaration that Incomeborts owns 3.85% of the Max shares on placement, but there is no mention here of the 1.93% held by Norgulf. If Incomeborts and Norgulf were indeed in the same ownership, surely the holdings should have been aggregated and declared as an aggregate interest of 5.78%?

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[15] See page 62ff of AH-1, at p81.
[16] See page 154 AH-1)
[17] See preamble at page 61.
[18] See page 155.

(iv) The same is true in relation to the 2006 Annual Report.[19] In that Report, Mr Kachshapov is described as the "owner of Horizon and of Samek LLP". Nothing is said however as to his ownership of Incomeborts and/or Norgulf.

Horizon's payments to Temujin

[38] MWP has discovered (via documents produced on subpoena in New South Wales) that a number of sizeable payments were made by Horizon into the Australian bank account (with Westpac Banking Corporation) of Mr David Slater. Funds were paid into Westpac by Horizon in January 2006 ($59,594), February 2006 ($134,838) and April 2006 ($66,839). Despite requests, Horizon/Mr Kachshapov have supplied no explanation of these payments.

[39] For his part, Mr Slater now says that the payments represented interest free loans to Temujin International Limited for which Messrs Emmott, Nicholls and Slater are responsible for repayment of one-third each. Indeed, this means that these "loans" were made to, at a time, when Messrs Mr Emmott and Nicholls were employed with MWP and owed contractual and fiduciary duties to MWP.

[40] MWP stated that this reason mind-boggling. Added to this, there has been total silence from Horizon / Kachshapov as to these payments.

[41] Mr Cohen insisted that Horizon and/or Mr Kachshapov should provide (indeed, should already have provided) a justification as to the payments to Mr Emmott/ Nicholls/ Slater and the particulars of any such payments: the amounts, the dates and the documents. Additionally, if indeed such payments were interest free "loans", Horizon/ Mr Kachshapov should provide an explanation as to why they were made at all, and why they were made

[19] See page 23 of AH-1 (the draft affidavit of Mr Harvey exhibited to Singleton 2).

to two (then) current senior employees of MWP and a third recently departed MWP employee.

[42] Mr Cohen next submitted that it has been asserted by Mr Emmott (and others) in these proceedings and elsewhere that Mr Kachshapov made generous gifts to Mr Emmott (and to Mr Rigoll and Mr Sinclair) "as a mark of Mr Kachshapov's personal gratitude" for Mr Emmott's involvement on the Sokol transaction. It is said that Mr Kachshapov, as vendor, was so pleased with the performance of these men acting for the buyer that he made substantial gifts totalling $950,000: $350,000 to each of Messrs Sinclair and Rigoll and $250,000 to Mr Emmott.

[43] Mr Cohen persuasively submitted that, on the face of this explanation, it does seem that there is every reason to believe that these "loans" by Horizon/Mr Kachshapov to Temujin International are of the same class and are, in reality, benefits received by Messrs Slater and Nicholls for their performance in providing MWP services to Horizon. I entirely agree with all of these submissions canvassed on behalf of MWP and can do no better than to gratefully adopt them.

The applicable legal principles

[44] Part 51 of the Civil Procedure Rules, 2000 ("the CPR") provides for the appointment of receivers. It outlines the procedure by which such applications are to be made. In Audubon Holdings Limited v The Treasure Island Company Limited and others[20] and Spectrum International Holding Limited v Modern Perfect Developments Limited and Another[21] Rawlins J. (as he then was) relied on the learning from the authors of *Kerr on the Law and Practice as to Receivers and Administrators* (17th edition) and stated that the main object for the appointment of a receiver is to safeguard or preserve property for the benefit of those who are entitled to it.

[20] BVIHCV2002/0227 - Judgment delivered on 17 March 2003
[21] BVIHCV2005/0071- Judgment delivered on 3 and 30 May 2005.

[45] The Learned Judge went on to identify the two classes of cases in which the court may appoint receivers namely: (i) cases in which the applicant already has an existing right. In these cases, the appointment is usually made as a matter of course as soon as the applicant's right is established and there is no need to allege any danger to property and (ii) cases in which a receiver is appointed to preserve property to ensure its proper management pending litigation to decide the rights of the parties. In these cases, the applicant has to allege and prove some peril to property. In the latter case, the court should cautiously exercise its discretion to appoint a receiver. Undoubtedly, the case at bar falls in the latter category.

[46] The authors of *Kerr on the Law and Practice as to Receivers and Administrators* state:

> "If the court is satisfied upon the materials it has before it that the party who makes the application has established a good prima facie title, and that the property, the subject matter of the proceedings will be in danger, if left until the trial in the possession or under the control of the party against whom the appointment of receiver is asked for, or, at least, that there is reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed, the appointment of a receiver is almost a matter of course. If there is no danger to the property, and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed. The duty of the court upon a motion for a receiver is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think it properly belongs. On a motion for a receiver, the court will not prejudice the action, or say what view it will take at trial. Indeed the court will not appoint a receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person whom the demand is made is fending off the claim."

[47] In Audubon [supra], Rawlins J. stated that the tests for the appointment of receivers and the grant of injunctive relief should be equated in one regard, that is, that the applicant for the appointment of a receiver should also be required to show that there is a serious issue to be tried. He stated that this would be on the same rationale that was stated by Lord Diplock in American Cyanamid Co. v Ethicon Ltd[22].

[22] [1975] A.C. 396 at pages 407-408.

[48] A Court will not grant injunctive relief except when it is satisfied that it would be just and convenient in all the circumstances of the case to grant the relief sought. In practice, two key factors which should be considered are whether:

1. the claimant has a good arguable case against the defendant and;

2. there is a real risk that judgment will go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained by court order from disposing of them.

[49] The test can also be stated as whether the claimant has a "good arguable case."[23] In Rasu Maritima v Perusahaan Pertambangan[24], Lord Denning observed that this test was "in conformity with" the test for granting injunctions laid down by the House of Lords in American Cyanamid case. In Ninemia Maritime Corporation[supra], Mustill J described a "good arguable case" as "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."

[50] It follows therefore, that the prerequisites for the appointment of receivers appear to be three-fold in nature namely (i) there is property to be preserved; (ii).there is sufficient evidence to show that there is a serious issue to be tried or a good arguable case and (iii) the claim or application is not frivolous or vexatious.

Danger of dissipation

[51] The court should only appoint a receiver if there is danger of dissipation of property and there is evidence to show that it is necessary and expedient to do so. Mr Cohen submitted that a receiver should be appointed over Norgulf and Incomeborts because:

1. Both Max and the Chillisai Phosphate projects were specifically part of the disclosure order made against the Temujin companies by this Court and Mr Slater who stated

[23] Ninemia Maritime Corporation v Trave GmbH (The Niedersachsen) [1983] 1 WLR 1412, at 1415-1417.
[24] [1978] Q.B. 644 at 661

that he was the beneficial owner of both Temujin Companies made no mention of any interest or involvement in Norgulf and Incomeborts.

2. There is no reference in the individual and personal disclosure affidavits of Messrs. Slater and Nicholls of any interest or involvement in Norgulf and Incomeborts.

3. There are major inconsistencies between the disclosure given by Mr Slater on behalf of the Temujin companies in these proceedings and the personal disclosure by Messers. Slater and Nicholls in the New South Wales proceedings. In these proceedings Mr Slater stated that he was the ultimate beneficial owner of the Temujin Companies. However, in the New South Wales proceedings, he stated that he is not the director or beneficial owner of any of the shares of the Temujin Companies.

4. There is a clear disregard of the Court Orders and a propensity by the parties to seek to render judgment proof assets which are the subject of the claim.

[52] It appears from the evidence that Mr Slater has been inconsistent in his disclosures in the BVI and New South Wales and he and Mr Nicholls have failed to disclose their interest or involvement in Max and the Chillisai Phosphate projects. This begs the question as to why. The Temujin Companies have failed to comply fully with the disclosure and freezing orders made by this Court.

[53] I am of the view that the Max shares held by Norgulf and Incomeborts are in danger of not being available when the parties' right have been determined at trial.

Security

[54] With respect to security, like MWP and Mr Tacon, I myself find it difficult to see how the receivership carries with it any material risk of loss. The 15 million shares of Max are held and are secured. Should the directors of either company wish to dispose of these shares, I see no reason why this could not be done quickly on a request to Mr Tacon. I confirmed

this with Mr Tacon in court. He was even willing to provide his mobile number to those acting for Norgulf and Incomeborts.

Conclusion

[55] In light of the materials that have been presented thus far, I am satisfied that MWP has established a good prima facie title, and that the shares are in danger of dissipation, if left until the trial in the possession or under the control of the directors of Norgulf and Incomeborts. The duty of the court is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think the property properly belongs.

[56] In the premises, I will continue the receivership order that I made on 29 March 2007 with some adjustments as reflected below. [25] In addition, the Receiver is to produce his report by 16 July 2007. Costs to MWP are to be assessed if not agreed.

Indra Hariprashad-Charles

High Court Judge

[25] Paragraph 5 (d) is deleted. Paragraph 9 is varied as follows:: The words "and to the claimant" appearing in lines 2 and 7 are deleted.