BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 41 OF 2007

BETWEEN:

KENSINGTON INTERNATIONAL LIMITED

Applicant

AND

MONTROW INTERNATIONAL LIMITED
(In Provisional Liquidation)

Respondent

Appearances:

Mr. Stephen Moverly-Smith Q.C. Q.C., Mr. James Hilsdon, Ms. Sheryl Rosan of Appleby for the Applicant

Mr. Michael Black Q.C., Ms. Karen Troy-Davis, Mr. Nicholas Tse of Forbes Hare for the Respondent

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2007: July 4th and 18th

SECOND JUDGMENT

(Procedure - Discharge of ex parte order - order granting permission to an applicant seeking winding-up of a company to use documents and information obtained by the provisional liquidator to enable it to obtain the appointment of a receiver by separate action over the company's shares and directing the provisional liquidator to provide said documents to the receiver on request – application to set aside on the grounds that no good reason established and material non-disclosure)

[1] Joseph-Olivetti, J.: This is an application by Montrow International Limited ('Montrow") by Notice of Application filed 5 June 2007[1] to discharge or set aside two *ex parte* Orders obtained by Kensington International Limited ("Kensington") and made by Hariprashad-Charles J, on 25 April 2007[2] and 24 May [3] as varied on 6thJune,[4] together the Orders. By the Orders the learned Judge inter alia granted Kensington permission to use documents and information obtained by the provisional liquidator in the course of the provisional

[1] [D/17 Vol.1]
[2] [D/17 Vol.1]
[3] D/18]
[4] [D/19]

liquidation of Montrow in support of its application in separate proceedings (Suit No.70/2007) to appoint a receiver over the shares of Montrow. The application is supported by the fourth affidavit of Mr. Robert Nader a lawyer with Forbes Hare. [5]

The Background

[2] An idea of the background to this action will help to put this application in perspective. I gave a synopsis of the background in the first judgment delivered just prior to this and methinks it will suffice to restate it here with some additions pertinent to this application. However, one must bear in mind that this does not purport to be an entire history of the proceedings in this court as the action has seen numerous applications of one sort or the other.

[3] Kensington is a company incorporated in the Cayman Islands. It claims to be a judgment creditor of the Republic of Congo, "the Congo" for some US$93 Million on default judgments obtained in England. It apparently obtained the benefit of these judgments at a discount by assignments from the original judgment creditors. The judgments have since been registered in the British Virgin Islands. Kensington alleges that for some considerable time it has been seeking to enforce the judgments but that the Congo has used every means to prevent it from doing so. Kensington's specific allegation in this action is that the Congo has sought to put its assets beyond reach of its creditors by creating sham structures and it is Kensington's case that the Congo has with the assistance of the French oil company, Total E&P, set up one such sham structure in relation to one of its offshore oilfields, Likouala and that Montrow, a BVI company, and its wholly owned subsidiary, Likouala S.A., a Congolese company, which now owns the majority interest in the Likouala oilfield are alter egos of the Congo. The shares in Montrow are owned by a charitable trust, the Montrow Trust established in Jersey and its directors are professional fiduciaries in Jersey. Kensington petitioned this court for liquidation of Montrow on the just and equitable ground pursuant to the Insolvency Act 2003. It has also made a parallel claim against Likouala S.A. here in the BVI.

[4] The court on Kensington's application without notice on 9th March 2007 appointed Mr. William Tacon of Kroll BVI provisional liquidator ("the PL") of both companies pending the

[5] D22

hearing of the petitions. Montrow disputes the action and Likouala S.A. has made jurisdictional challenges.

[5] On 11th March the parties as well as the PL appeared on Montrow's application for adjournment and a stay of the powers of the PL. The PL's appointment was continued on the basis of an inter partes order of 13 April 2007 [D/18]. This order imposed restrictions on the use that could be made of documents or information obtained by the PL. See the first Order, paragraph 2, as corrected by paragraph 2 of a further Order of 25 April 2007 [D/19, 2nd Order] and as varied by paragraph 1 of another Order of 1 May 2007 [D/16, 3rd Order].It is also noted that the directors of Montrow were given express permission to conduct the defence in this action. The directors of Montrow are provided by Nautilus Trust Company Limited based in Jersey.

[6] The PL in accordance with the court's order lodged his interim report in Suits 41 and 42 on 10th April. In his report, a redacted version of which he provided to the parties' lawyers, he detailed the initial steps taken to protect the assets of Montrow and Likouala.

[7] On 20th April Kensington issued its application for leave to use the documents. This application was supported by the second affidavit of Mr. Donald Schwarzkopf filed 20th April. On 25th April Hariprashad- Charles J. heard Kensington's ex parte application. It appears that the court also heard ex parte on the same day and at the same time Kensington's application for the appointment of a receiver in Suit 70. It appears from Mr. Hilsdon's explanation referred to later that the court reserved its decisions and on 24th May made an order in Suit 70 appointing Mr. Christopher Stride receiver of the Montrow shares and the first order with which we are concerned although it still is not clear whether an order was made on the 25th April. This order of 24th May in essence empowered Kensington to use documents and information obtained by the PL in support of its application in Suit 70/2007 to appoint a receiver over the shares of Montrow. In addition, the court directed that the PL upon request from the receiver and upon obtaining his undertaking to use same solely for the purposes of the court appointed receivership provide the receiver with information obtained during the course of the provisional liquidation.

[8] It appears that this order was not drawn up and served on Montrow in a timely manner. Montrow took issue with this. Mr Hilsdon was permitted from the bar table to give the

reason for this apparent breach of normal procedure. What the court gleaned from his explanation is what I have referred to earlier as to the hearings on the 25th April and to the actual dates that the orders were actually made.[6] The transcript of 25th April does not shed much further light on this state of affairs. Suffice it to say that this state of affairs do not strike the court as being altogether satisfactory and Appleby cannot be heard to cavil with the misgivings expressed by Forbes Hare as to the conduct of the proceedings on that application.

[9] The principal grounds for the current application are set out in the Notice. However, as Mr. Black Q.C. learned counsel for Montrow pointed out the Notice was issued before the transcript of the *ex parte* hearing of 25th April was made available to Montrow and he sought leave to advance further grounds having regard to what was disclosed by the transcript.

[10] The grounds advanced by Montrow are primarily three-fold. First, Mr. Black Q. C. says that there was no good reason for the appointment of a receiver in the first place and, in any event, there were no cogent or persuasive reasons for permitting the use of documents and information obtained in the provisional liquidation of Montrow for that purpose. Further that misleading representations were made at the hearing and that there was material non- disclosure.

[11] The alleged misrepresentations include allegations by Mr. Schwarzkopf that the directors of Montrow had failed to hand over documents or to co-operate with the PL and that they had accepted or were accepting instructions from Congolese officials. He also seemed to indicate hat the PL had doubt about the owners of Montrow.

[12] With regard to the misrepresentations or omissions the principal submissions are that counsel for Kensington had failed to bring to the court's attention the fact that no transfer of the Montrow shares could be registered without the approval of the PL and that the shares generate no income and that in any event no dividends could be paid without the approval of the PL and that if Montrow were liquidated its assets would be for the benefit of its creditor and not its shareholders. Further, and to my mind most significantly, as it

[6] Mr. Hilsdon said that he was not present at the initial hearing of the application on 24th April but he understood from counsel who appeared that the ruling was reserved. He attended on the 24th May to take the ruling whereupon he understood that two orders had been made. He then obtained the second paragraph of the 24th May order. The extremely unsatisfactory manner in which Forbes Hare was apprised of these hearings is set out full in Mr. Nader's affidavit.

relates to the imminent risk of dissipation, counsel had failed to specifically draw to the court's attention that Montrow had had ample warning that Kensington was seeking to enforce its judgments and that if in fact there was a real risk of dissipation that was a risk which would have been realized long before the ex-parte hearing.

[13] Finally, Mr. Black Q.C. accepted that the learned judge had a discretion to permit Kensington the use of the documents and information and a discretion to do so on an ex parte application. However, he submitted that Kensington needed to advance "cogent and persuasive reasons" for such an order and that it had failed to do so. See Crest Homes PLc v. Marks.[7] And that in the absence of Montrow the learned judge ought to have treated the application as an exceptional one in which she needed to be astute to ensure that the restrictions were not rendered otiose or abused in anyway.

[14] Mr. Moverly-Smith Q.C. learned counsel for Kensington sought to defend the Orders on the several grounds set out in his written submissions and in addition attempted to answer the allegations about not having represented the case fairly. The gist of his submissions is that the Orders were wholly justified because Kensington had a duty of full and frank disclosure to the Court; it had had sight of the PL Report and so had to refer to it as part of that duty and that in any event the court itself had had the benefit of the report. Second, that apart from the Attorney General, the parties to Suit 70 are privies of Montrow and/or are in fact the source of the documentation the PL relied on in making the PL Report. Third, that none of the information and documentation obtained by the PL was subject to legal professional privilege and all could have been obtained on an application for specific disclosure or further information. In addition, counsel relied on events which occurred after the making of the Order to justify them - namely that the suggested directions by Forbes Hare propose a common hearing for all three actions and that evidence in this action be treated as evidence in the others. At this common hearing it is proposed that PL be cross-examined. Therefore, says Mr. Moverly-Smith Q.C. it is Montrow's own suggestion that information and documentation obtained by the PL should be able to be deployed in the Receivership Application and thus Montrow cannot complain of the Orders. Counsel also argued that the PL's Report has been since deployed in accordance with the permission given and any order now made preventing the use of documents can only affect future

[7] [1987] AC 829 at p.859G.

use. It cannot have retrospective effect as to do so would place Kensington in contempt of Court. And, to make an order preventing future use in the Receivership Application would be wholly inconsistent with the said proposed directions sought by Montrow at the upcoming case management conference.

Court's Analysis

[15] The court starts from the basis as properly conceded by Mr. Black Q.C., that the learned judge had a discretion both as to the grant of the permission to use the documents as well as to allowing an ex parte application. This is in no way concerned with the exercise of those discretions as this lies wholly within the province of an appellate court which this court is clearly not. This application has to do with the discharge of an ex parte order. It would normally have been heard by the same judge who made the Order but the Court of Appeal gave directions for this matter to be heard by a different judge. CPR Rule 11.15 mandates that after the court has disposed of an application made without notice the applicant must serve a copy of the application and any evidence in support on all parties. Rule 11.16 provides that a respondent to whom notice of an application was not given may apply to vary or discharge the order made on the application within 14 days of service of the application. This rule then gives this court its jurisdiction to entertain this application.

[16] It is a basic principle of fairness that an order should not be made against a party without giving him an opportunity[8] to be heard and this is the cornerstone of our system of justice. There are however exceptions to the general rule (See CPR 11) and it is well established that a party seeking an order without notice has a duty to make full disclosure to the court of all material facts and matters. This is summed up thus:- "The application in all its aspects must be made fairly, accurately, without misrepresentation or non-disclosure of anything which may be material whether of fact, law, practice or expectations".[9]

[17] I have considered the submissions made on behalf of Kensington in support of the Orders. Those seeking to justify the Orders by events which occurred after the making of the Orders to my mind are without merit. If the Orders were improperly obtained in the first

[8] Gee Commercial Injunctions 5th edn. p.217
[9] Gee op.cit. p.232 para. 8.012

place the fact that information which was permitted to be used by the Orders will be used by the consent of the parties subsequently at the trial of the actions does not render the Orders valid.

[18] I must confess that I do not follow the argument on Kensington having to disclose the PL Report to the court as part of its duty to make full disclosure and that somehow that entitled it to the Orders. The court was fully aware that the PL had provided copies of his report to the court as evidenced by the covering letter to the Registrar accompanying the PL Report on the court file and all Kensington need have said when it made its ex parte application for the appointment of a Receiver is that it had had sight of the PL's Report as it certainly could not have used the information provided therein in support of its application in Suit 70 without permission. The reality of the situation is that Kensington did not have any or any sufficient grounds to apply for a receiver without relying on the documents which came into its possession through the PL. I remark that according to the report, the PL even though he had taken great pains to secure the assistance of professionals both here and abroad still saw it fit to seek the advice of Mr. Schwarzkopf, the key witness for Kensington, and to share documents and information he had obtained during the course of the liquidation with him on the basis that he needed his help to understand them and this when the PL knew of the grave allegations of fraud being made. Small wonder then that Kensington became aware of the contents of the documents and sought permission to use the information against the Montrow shareholders to further its own cause.

[19] With respect to the contention that the Orders were properly obtained as they related to material which was generated by Montrow and or the parties in Suit 70 .The short answer is that by the express terms of the order continuing the appointment of the PL the documents generated by the PL were not to be used for any other purpose and the fact that parties in one suit are identical or related to parties in another suit does not detract from this restriction or provide valid reason for lifting it. Crest Homes Plc was concerned with an application to use documents obtained pursuant to an Anton Piller Order in one action in another action. It appears that the matter was heard inter partes. The court in speaking of the effect of the implied undertaking contained in the order not to use the documents for any collateral or ulterior purpose had this to say (Nourse L.J) –" In my judgment the use of documents disclosed in one action for the purpose of anther

action will usually, perhaps invariably be a collateral or ulterior purpose. That I think is the view which has consistently been taken in the previous authorities even when the parties to both actions are identical." See p. 837 f (Emphasis added). It follows then that the mere fact that the parties in this action and in Suit 70 may be related, or be privy to the documents is no answer as that by itself would not justify the use of the documents in that suit.

[20] Now to the argument that the Order cannot be discharged if found to have been improperly made on the basis that it would render Kensington's deployment of the information illegal. It is established law that an order of the court, even if improperly obtained, is valid until it is set aside and it follows that so too are any acts done pursuant to the order. There is no danger of Kensington being found to be in contempt of court if it acted in accordance with the Orders if they are subsequently set side. This too, with all due respect to Mr. Moverly-Smith Q.C., is without merit.

[21] In short I am not persuaded that Kensington has answered the objections made by Montrow. I am satisfied that it failed to present its case fairly to the judge on the aspects highlighted by Montrow. In particular I find that Kensington misrepresented the factual situation about Montrow's directors not cooperating with the PL; it was not fair in its representations as to who were the owners of the Montrow shares having regard to the PL Report, it did not specifically bring to the learned judge's attention that the directors of the Montrow Trust were professional fiduciaries governed by Jersey law and the likelihood of them acting to further an improper or illegal purpose, neither did it advert the judge to the matters surrounding a possible transfer of the shares or to the fact that the shareholders and Montrow knew of Kensington's attempts to enforce the judgments and that the shareholders would have had ample opportunity to dispose of the shares in the interim, (I note that no specific evidence was given by Mr. Schwarzkopf as to any steps taken to effect a transfer or any evidence that such a transfer was imminent.). I note too that Kensington did not even see it fit to give notice to the PL of an application which involved him directly and I am concerned about the lack of representations made to the court giving rise to the part of the order ostensibly made to assist the receiver. Surely, the court ought to have been alerted as to the ramifications of the order as detailed by Mr. Black Q.C. in his submissions and at the very least this should have been left to the receiver in due

course to determine whether he needed the PL's assistance and an opportunity afforded to the PL to make representations on his own behalf. As pointed out earlier we do not have the benefit of the transcript of that hearing (24th May) which resulted in that part of the order and one can only assume that these concerns were not raised at the hearing.

[22] Further, I agree that looking at the matter in the round Kensington failed to establish good and cogent reasons for the grant of the Orders as it would have had to satisfy the court that it in the first place had good grounds for seeking the appointment of a receiver. I too am concerned about the manner in which the Orders were processed and the delay in service. This highlights the disadvantages and risk of prejudice to parties who are not given an opportunity to be heard and how jealously a court must guard its right to hear mattes without notice. Taking all the circumstances into consideration in my judgment the interests of fairness demands that the Orders granting leave to use the documents should be discharged as the application was not fairly made. I, of course appreciate the impact this will have as the order appointing the receiver in Suit 70 and no doubt the parties will take such steps in that suit as they may be advised.

[23] Montrow is entitled to the costs of this application to be assessed in accordance with CPR 65.11 if not agreed.

[24] I must express my appreciation for the invaluable assistance rendered by both counsel and the efficiency and economy with which they conducted the proceedings.

Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands