SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

IN THE MATTER of Section 249 and 295 © of the Companies Act, Cap 13.01 of the Revised Laws of Saint Lucia

AND IN THE MATTER of Articles 1966 (5) 2028, 2029 & et seq of the Civil Code of Saint Lucia Cap. 4.01 of the Revised Laws of Saint Lucia

CLAIM NO SLUHCV2012/0615

BETWEEN

M. Group Resorts, S.A.

Claimant/Appellant

And

(1) BRIAN KENT HORNE
(2) JEFFREY C.COYNE
(In his capacity Receiver/ Manager of M Group Resorts S.A.)

Respondents/Defendants

Appearances:

Geoffrey DuBoulay and Cheryl Goddard D'Orville with him for the Applicant
Bota McNamara for the Respondents

2012: 25th July
13th August
20th August

DECISION

[1] **Belle J**: On 9th July 2012 M. Group Resorts, S.A. ("M Group") of Soufriere ,Saint Lucia filed an application seeking injunctive relief against Brian Kent Horne and Jeffrey C Coyne, (in his capacity as Receiver and Manager of M. Group Resorts , S.A.) pursuant to a Deed of Appointment dated 21st June 2012.

Analysis of Affidavit Evidence

[2] In his affidavit filed on July 9th 2012 Ali Pascal Mahvi (Mr Mahvi) stated that M. Group is a Panamanian company which was incorporated on 9th June 1981 as "Emmyan Financial". On 17th August 1982, the Company's name was changed from "Emmyan Financial" to "M Group Consultants S.A." and on April 29th 1988, the Company's name was again changed from "M. Group Consultants S.A." to M Group. On 6th January 2006, M. Group was registered as an External Company No. F001/2006 under the provisions of the Companies Act of Saint Lucia.

[3] Mr. Mahvi outlined that by Deeds of Sale by Beau Estates Inc. to M. Group registered at the Land Registry on 5th July 1988 as Instrument No. 3484/88, M Group purchased 316 acres of land situate at Jalousie Estate, Soufriere, Saint Lucia. In addition by two leases by the Crown to M. Group registered at the Land Registry on 26th September 1974 as instrument Nos. 3698/94 & 3697/94. M. Group also leased approximately 10.35 acres of Queen's Chain (coastal land in Saint Lucia). In 1989 M. Group undertook and successfully completed the construction of a hotel comprising 114 one and two bedroom cottages together with leisure facilities at Jalousie Estate commonly called "Jalousie Hotel" or "Jalousie Plantation".

[4] Further details were also given to establish the good standing and value of the property referred to as Jalousie Enclave. Mr Mahvi stated that Jalousie Enclave was in May 2012 valued at approximately US$185,000,000.00.

[5] Mr Mahvi described Jalousie Enclave as a development placed within the UNESCO World Heritage site and designed to be an exclusive luxury residential resort development offering 5 star accommodations to its residents and guests. The development which was officially launched on 5th December 2009, when completed will employ over 300 persons and will comprise:

a. 30 luxury residences;
b. 35 luxury homes;
c. A luxury spa of 10 treatment rooms;
d. A club house /hotel with 30 rooms
e. 1 fine dining restaurant;

f. A swimming pool; and

g. A lake.

[6] Mr Mahvi gave details of the fiscal incentives given to M. Group by the Government of Saint Lucia. He also set out the details of all infrastructural works being undertaken at the Jalousie Enclave by M. Group. This project was financed partly by a US$10 million loan granted by Intro Verwaltungs GmbH ("Intro"). Mr Mahvi listed a number of infrastructural projects which had been completed at the development as part of the Jalousie Enclave development plan.

[7] To further bolster the Applicant's case Mr. Mahvi outlined the extensive marketing campaign costing approximately US$600,000.00 which had been undertaken ensuring that the development was listed with numerous real estate agents including but not limited to Sotheby's International, Resorts Consultants Limited, Caribbean Real EstateSeclect, Caribbean Consultants, The Caribbean Report and Prudential Douglas Elliman Limited of New York.

[8] By Mr Mahvi's account there was extensive marketing material on the internet on Jalousie Enclave. There had also been a New York Times Feature "Great Homes and Destinations" wherein M. Group is specifically mentioned as the developer of the Jalousie Enclave.

[9] Mr Mahvi admits that M.Group in order to fund the development of the Jalousie Enclave has entered into loan agreements and has secured certain credit facilities from lenders. One of the lenders was the respondent Brian Horne. Mr. Horne's facility secured advances up to a limit of US$1,500,000.00 with interest at the rate of 5% per annum. Mr Mahvi refers to this facility as the Horne Debenture.

[10] However Mr Mahvi states:

> *"At no time prior or subsequent to the execution of the Horne Debenture was any promissory note other agreements or contracts referring to the below described Debts executed between the parties."*

[11] In fact much time was spent in court discussing the impact of an agreement between Mr. Horne, Exquisite Caribbean Resorts and M Group. This document was referred to as exhibit "BH7." This

agreement provided for Mr. Horne's right to use any means available under the Debenture to recover the companies' debt to him.

[12] Paragraph 1 of the body of this Agreement states:

> *"The Company agrees that if the Horne Debt is not repaid to Horne by September 24, 2011, Horne is entitled to immediately exercise his rights and remedies as provided in the Mortgage and take ownership of the Secured Premises."*

[13] The first paragraph of "BH7" states:

> *"This agreement is made and entered into this 23rd day of August 2011, by and among M.Group Resorts, S.A ("MGRSA") and Exquisite Caribbean Resorts, LCC ("ECR") (MGRSA and ECR collectively referred to as the "Company") , on the one hand, and Brian Horne ("Horne") on the other hand (individually), a "Party" and collectively the "Parties")."*

[14] The challenge to the Applicant for much of the hearing was to dispel the allegation from the Respondents that the Applicant was guilty of material non-disclosure and of deception.

[15] The Applicant's answer was that the failure to disclose the "BH7" agreement was inadvertent, the document having been overlooked by counsel among the many relevant documents which had to be perused in preparation for the application before the court. Apart from this the Applicant argued that this document was produced by trick and deception between the respondent Horne and his former lawyer Mr. Wilson.

[16] Mr. Horne's affidavit filed on 23rd July 2012 states at paragraphs 24 to 29,

> *" In the M. Group Agreement "Further to the McIntyre Agreement and the Horne Debenture M. Group , ECR , and I entered into an agreement dated August 23, 2011 ....*
>
> *The M. Group Agreement stated that I have made loans and paid other debts of M. Group and ECR and that I am continuing to make loans to M. Group and pay debts on behalf of M. Group and ECR without which M. Group and ECR would be forced to cease operations, their sole operation and purpose being the development of Enclave, and liquidate its assets.*
>
> *The M. Group Agreement further stated that to secure the debt to me the Group had executed and recorded the Horne Debenture for a parcel of real estate in St.*

Lucia designed as C44, being Block 0028B parcel 118, together with all buildings and equipment.

In the M. Group Agreement M. Group and ECR acknowledged the debt to me and that I was entitled to be repaid by M. Group and ECR. M. Group and ECR further acknowledged the validity of the Horne Debenture and that the purpose of the Horne Debenture was to secure Debt due to me.

M. Group and ECR agrees that if the debt due to me by M. Group and ECR is not repaid to me by September 24th , 2011, that I am entitled to immediately exercise my rights and remedies as provided for in the Horne Debenture that includes the appointment of a Receiver. I relied on the content and intent of the M. Group Agreement to my financial detriment.

This means that contrary to paragraph thirteen of Mahvi's affidavit filed herein on July 9, 2012 prior and subsequent to the execution of the Horne Debenture by the parties there are agreements referring to the below debts due to me."

[17] Earlier in the affidavit Mr. Horne had pointed out that he had made enquiries about Mr. Mahvi and M. Group on entering an investment relationship with ECR, He was satisfied that the history of M. Group included the purchase of 316 acres of land situate at Jalousie Estate, Soufriere, Saint Lucia and that M. Group did lease approximately 10.35 acres of Queen's Chain adjacent to the said land.

[18] Horne said that while it was true that M. Group had completed the construction of a hotel comprising 114 one and two bedroom cottages together with attendant leisure facilities at Jalousie Estate commonly called "Jalousie Hotel" or "Jalousie Plantation" he had recently discovered that M. Group had "failed terribly in operating the said Hotel."

[19] Mr. Horne went on at paragraphs 9-10 of the said affidavit of July 23rd 2012,

"That in order to save the hotel from financial ruin due to M. Group inadequacies, M. Group entered into a joint venture with The Government of Saint Lucia and Comfort Inns B.V. Jalousie 1996 Limited hereinafter referred to as (Jalousie 1996) was formed in furtherance of the joint venture and Jalousie Hotel was duly transferred to Jalousie 1996..... As noted at page 3 of exhibit BH4, Jalousie 1996 was set with the task and purpose of reopening and operating Jalousie Hotel and ensuring that debts accumulated by M. Group were paid off.

This means that from M. Group arrival in Saint Lucia, it has from its own activities and failures made it a matter of public record that its financial integrity and reputation are questionable. M. Group's actions in 1996 show that it has had to

seek third party assistance for it save its failing development. (This is as it appears in the affidavit.)

This is in stark contrast to the story as set out in exhibits BH1 and BH3."

[20] This exchange of information and views on the Jalousie Enclave goes to the credibility of Mr. Mahvi and M. Group. This is a very important issue since Mr Mahvi's and M. Group's evidence would have to be credible if the application for an injunction is to succeed.

[21] The Parties agreed as to the principles to be applied in this application for an injunction. These principles established in the authority **American Cyanamid Co. v Ethicon Ltd.** [1975] AC 396 are that the court should be guided in exercising its discretion after determination of the following issues:

1. Whether there is a serious question to be tried.
2. Whether damages would be an adequate remedy in the circumstances.
3. Whether on the balance of convenience the status quo should be maintained.
4. Whether the Applicant is prepared to make an undertaking in damages which can be enforced.

[22] I would add that since the issue arises in this application, it is trite law that an applicant for the discretionary imposition of an equitable remedy such as an injunction must come to court with clean hands.

The Applicant's arguments

[23] The Applicant submits that the issue to be tried is very simple and it is whether there is a debt due by the Applicant, to the First Respondent. The applicant having tendered the amount due and it having been refused by the First Respondent the action of appointing a receiver manager of the company pursuant to his Mortgage Debenture No. 2747/2011 is unconscionable and high- handed.

[24] Counsel submitted that this conclusion was arrived at after the Applicant engaged an independent Accounting firm to review their accounts, books, records and ledgers of not only the Applicant but also the books, records and ledgers of its affiliate Exquisite Caribbean Resorts (ECR).

[25] According to counsel by contrast Horne relies only on an email dated 17th May 2012 from Ali Pascal Mahvi, Managing Director of the Applicant to Horne and an Accounts Payable Listing for ECR dated 31st October 2011. Counsel argued that in both instances, the evidence, contrary to Horne's assertion proves that the alleged debt of US$682,776.78 was in fact a debt owed by ECR to Horne and not by M Group to Horne.

[26] Counsel argued that the court should consider Horne's high-handed behaviour as a good reason to impose an injunction against Horne and the Receiver. He applied the dicta of Lord Macnaughton in **Colls v Home and Colonial Stores Limited** 1904 AC 179 at 193 where he stated:

> *"in some cases, of course , an injunction is necessary- if , for instance, the injury cannot fairly be compensated by money- if the defendant has acted in a high-handed manner-if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction."*

[27] Counsel submitted that the high-handed behaviour was Mr. Horne's failure to respond to requests for further information about the debt by letters after the threat was made to invoke the devastating remedy. Counsel for Mr. Horne only provided the information requested on the last day of the demand.

[28] The Applicant argues that the Applicant's behaviour was diligent, conscientious and punctilious and it endeavoured to settle any debt due to Horne.

[29] With regard to the issue of the adequacy of damages the Applicant relied on the dicta of Lord Diplock in **American Cyanimid** , already cited where the learned Lord Diplock said at page 408B,

> *"The governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award for damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the*

time of the application and the time for trial. If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

[30] Counsel argued that the facts of the case will show that, if the interim injunction is not granted and the Applicant is successful in the substantive action, the damage which the Applicant will sustain cannot be adequately remedied by a pecuniary payment and conversely, if the interim injunction is granted and the Applicant is unsuccessful at trial, the Defendants can be adequately compensated in damages.

[31] Counsel referred to the affidavit evidence of Mr. Mahvi which outlined the damage which could be caused to the applicant if the injunction is not granted. Among the damages outlined were:

(a) Damage and loss of the long successful history of the Applicant stemming back to 1988.
(b) The damage and loss of reputation of being an established developer.
(c) The loss and damage to the Applicant's reputation with the Government of Saint Lucia.
(d) The damage and loss of its reputation in the real estate marketplace.
(e) The damage and loss of its reputation among lenders including, but not limited to, its current lender Intro Verwaltungs GmbH.
(f) The loss and damage to its current sale and the implications for its reputation as being a financially secure and stable developer.

[32] Counsel had referred to the affidavit evidence of Mr. Mahvi in which he mentioned receipt of a letter threatening possible calling in of the Intro debt along with the possible loss of a sale of a parcel of land being sold by M. Group.

[33] Counsel argued that this amounted to unquantifiable and irreparable damage or "substantial damage that cannot be adequately remedied by a pecuniary payment."

[34] Counsel was of the view that any damage Horne would suffer would be plainly quantifiable as nothing greater than would be determined is owed and interest.

[35] On a balance of convenience the irreparable loss and damage that would be suffered by the Applicant would far outweigh the quantifiable loss to Horne that would be compensated for by a pecuniary payment counsel argued.

[36] Counsel applied the dicta of Lord Hoffman in **National Commercial Bank Jamaica Limited v Olint Corp. Limited** [2009] UKPC 16 where he sated;

> *"... The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."*

[37] Counsel assured the court that the Applicant had made an undertaking in damages and had demonstrated that it had the ability to honour the undertaking on its own and by the fortification of its affiliate.

[38] Counsel concluded that in light of his submissions and the authorities cited in support, the court should exercise its discretion and grant the interim injunction prayed.

Arguments for the Respondents

[39] Counsel for the Respondents relying on the same authorities says that there is no serious issue to be tried. He argues the Mr. Mahvi has acknowledged the existence of the debt due and owing from Exquisite Caribbean Resorts L.L.C to Horne and Exhibit BH 7 denotes that M. Group committed itself and property through the Horne Debenture to the debt of ECR and the agreement further declared that Horne could exercise such remedies as are available under the Horne Debenture, including the appointment of a receiver. Hence there is no serious question to be tried.

[40] Counsel further submitted that a qualified receiver will ensure that only the correct amount due is paid out. Therefore the only question for determination is whether the true amount is as set out in the Mahvi Affidavit which acknowledged owing over US$400,000.00 on the account of ECR.

[41] The gist of the respondent's argument on the issue of adequacy of damages is that if there is no serious question to be tried and damages would be an adequate remedy then there should be no

injunction granted. Indeed the Applicant had already tarnished its reputation by its past financial failings in Saint Lucia and by its current failings to develop the Jalousie Enclave by 2010.

[42] The court's concern here has already been stated, if exhibit "BH7" is a genuine document signed by the applicant's Mr. Mahvi on behalf of the Applicant the Applicant cannot claim to have been the object of high-handed behaviour. All that could be left in this regard for the court to do is to construe exhibit "BH7."

[43] Based on the wording of "BH7" the only intention behind it would be to secure Mr. Horne's debt by making the Applicant liable to pay the said debt even though under the Horne Debenture the debt is due from ECR and not M. Group. But counsel argues that an email sent by Mr. Mahvi when the demand was made makes it clear that the other security namely parcel C44 is also in jeopardy based on Mr Mahvi's threats.

[44] Parcel C44 was assigned to Mr. Horne in return for financial support given to the Jalousie Enclave through ECR. In the email referred to above Mr. Mahvi issued threats to neglect and do harm to the property C44.

[45] The question then is whether M Group has come to the court with clean hands. The answer requires a more in depth analysis of the evidence.

[46] Firstly one has to look at the structure of the related businesses in which Mr. Horne invested and over which Mr Mahvi had managerial control. Equitable Caribbean Resorts LLC (ECR) a Delaware Limited Liability Company owned 78.64% of the shares in M.Group Resorts , S.A a Panamanian Company. Exhibit "BH3" appears to contain email which implies that M.Group share-holders would eventually contribute their equity in M.Group to ECR. Mr Horne had been invited to invest in ECR.

[47] There is another letter from the law firm McCarthy, Lebit, Crystal & Lippman Co., L.P.A dated November 26, 2003 addressed to the Members of ECR in which the lawyers set out the value of the jalousie Resorts property and aspects of the structure of the business.

[48] In this letter the lawyers indicated that,

> *"The ownership of the Company for United States citizens will be through membership in Exquisite, and non-United States citizens will hold their interest directly. Approximately twenty two percent of the Company is owned by non –US citizens, and therefore they will not be part of the Exquisite membership group. This leaves approximately seventy-eight percent (78%) of the value of the Company (the "contributed property') being contributed to Exquisite in exchange for all of the Company's units by its members"*

[49] In a letter dated January 12, 2004 the same lawyers write to Mr. Abolfah Mahvi ,. In that letter the lawyers stated:

> *"Dear Mr Mahvi;*
> *Pascal asked me to forward to you copies of the documents sent out to the members of Exquisite Caribbean Resorts LLC. As an explanation of the enclosures , M. Group Resorts S.A. currently owns a percentage of Jalousie 1996 Limited, which entity in turn owns the property in St. Lucia. M.Group Resorts S.A. is owned in part by Mercury Trust and in part by various other individuals. The individuals other than Mercury Trust have regrouped their ownership into a Delaware limited liability company called Exquisite Caribbean Resorts LLC. Under this restructuring of ownership of M Group Resorts S.A., the Mercury Trust will own 21.36% of M. Group Resorts S.A. and Exquisite Caribbean Resorts will own 78.64% of M. Group Resorts S.A.*
>
> *The reason for restructuring the ownership of M. Group resorts into two separate groups, one consisting of Mercury Trust and the other group consisting of Exquisite Caribbean Resorts, is for both business and tax planning purposes. Please note that profits from the Jalousie Resort will ultimately flow from M. Group Resorts S.A., which is a St Lucian Company, to its shareholders, which are Mercury Trust and Exquisite Caribbean Resorts LLC. Exquisite Caribbean Resorts LLC and its members are all U.S. citizens and will be subject to US income tax on its share of flow through profits. The ownership interest of Mercury Trust is separate, so it will not be subject to U.S. income tax on its share of the profits flowing to it from M. Group Resorts S.A.*
>
> *Any questions concerning the legal restructuring may be addressed to Pascal or to me.*
> *Very truly yours,*
> *E. Roger Stewart"*

[50] The letter was copied to Mr Pascal Mahvi, Kenneth B. Liffman, Esq. and Glenn R. Wilson.

[51] In their July 31st certificate of exhibits attached to the affidavit of the same date there are a number of emails which show that there was some on-going conflict about a lien on lot C44 and the payment of the lawyers' fees and other issues. Based on these emails Mr Glenn Wilson told Mr. Mahvi that his suggestion to have a meeting with the principles of the company is not calling him a liar. It was and is good advice. This was in August 2011.

[52] It is more than coincidental that the Agreement "BH7" followed this apparent period of tension and conflict and was signed on 23rd August 2011. The agreement appears to be the culmination of a conflict and tension involving Mr Horne, other investors and Mr. Mahvi and his lawyers. "BH7" bought time for M Group and ECR and also placed them on notice as to the possible consequences of not paying the debt due to Mr. Horne. The situation begs the question, if the money is owed by ECR and not M Group why does ECR not tender a cheque and make arrangements for payment rather than hanging onto the technical argument that M. Group only owes $12,000.00?

[53] At the end of the day the picture that emerges is that Mr. Mahvi, ECR and M Group were having difficulty with creditors and did not follow their lawyers' advice.

[54] In the latest exchange of affidavits further evidence of the crux of the problem between Mr Mhavi's and M. Group's lawyers and himself emerges.

[55] Exhibit "BH 11" displays an email in which Mr Mhavi was threatening to refuse to convey utilities to the lot allocated to Mr Horne, namely C44 and to establish a pig farm nearby and kill pigs and invite the locals to come for their share. Counsel says there was no tone of reconciliation in this. It is notable that in another email Mr Mahvi was telling share-holders that he was going to be working on settling the debt to Horne.

[56] Mr. Mhavi decided to attack his US based lawyers and accuse them of conspiring with Mr. Horne to force him to pay their fees in August 2011. This is in spite of the fact that he was praising Mr. Wilson in an email dated 16th May 2012.This is an unfortunate accusation since his US based lawyers led by Mr Wilson are not parties to these proceedings and they cannot properly defend themselves because of lawyer client privilege.

[57] In the circumstances, the court will have to give the lawyers the benefit of doubt. Consequently the court will reject the accusations against the lawyers and find that the applicant was not cooperating with his lawyers in their effort to salvage the situation that had developed.

[58] I also have to conclude that "BH7" was not accidentally omitted from the documents disclosed but that it was purposely suppressed by Mr. Mahvi because he understood the issues which it would raise. But even if the omission was inadvertent, the result may have been the same for failing to disclose "BH7" which was material to matter. See: **Kenton St Barnard v Attorney General** Case no 0084 of 1999, Grenada, a decision of Barrow J (Ag) as he then was.

[59] The final issue left to be resolved is the respondent's argument in favour of the Respondent creditor's right to recover the debt.

[60] The gist of this argument is encapsulated in the final paragraph of the Respondents' submissions.

[61] There counsel submits:

> *"It is a clear case that by the words stated by Mahvi in Exhibit BH1, Horne to his detriment moved his position and invested in ECR, the Applicant and Jalousie Enclave. It is clear that by the words stated by Mahvi, as director of ECR and the Applicant, in exhibit BH7 and the Horne Debenture, Horne to his detriment moved his position and leant money to ECR and the Applicant. It is clear that the purport of exhibits BH1 and BH7 and the Horne Debenture and the reason for entering into the agreements to lend money, was that irrespective of whether the debt was incurred by ECR or the Applicant it was all for the development of the Jalousie Enclave on M.Group's land by ECR and that once a debt was due from ECR and /or the Applicant Horne could employ all remedies under the Horne Debenture. The Applicant must be estopped from denying this state of facts and therefore cannot be permitted to bring an injunction against the appointment of Coyne by Horne."*

[62] In his submissions in favour of the merits of the claim counsel cites a passage from **American Cyanamid Co v Ethicon** where Lord Diplock is quoted to have said,

> *"it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case."*

[63] I must state that I prefer to proceed with caution in this regard, and I do not intend to make any determination on the merits of either party's case at trial. It is clear that this is not the time to engage in arguments of great technical difficulty and to try to determine complicated facts.

[64] However to the extent that one is able to assess the merits of the respondents' argument that there is a debt to be paid and that the appointment of a receiver is justified I would say that this argument goes to the issue whether on the balance of convenience Mr. Horne would suffer no less than Mr Group. Mr Horne says he lent money to ECR in good faith and is now trying to recover some of what he lent ECR and Jalousie Enclave by extension.

[65] Counsel argues that even if no default has been made ,[a creditor] may have a receiver appointed if he satisfies the court that his security is in jeopardy as in ; **Wildy v Mid-Hants Rly Co** (1868) 18 LT 73 and a line of cases following. In this regard he refers to Horne's affidavit to which an email from Mr. Mahvi threatening the sanctity of the property charged under the Horne Debenture is attached. Horne is therefore well within his rights to seek assistance of a receiver to protect and preserve the property so charged.

[66] In my view this submission adds to the doubt already cast upon the Applicant with regard to his right to seek equitable relief where he has not come to the court with clean hands.

[67] I treat the submission that the Applicant should be estopped from denying the effect of "BH7" as one of the issues to be determined at trial. But "BH7" exposes the problems existing in the relationship between Horne and the Applicant which arose months before the Receiver was appointed. There was an attempt to ignore or suppress this issue and focus only on the fact that the law firm McNamara did not reply to requests for information about the nature of the debt due. I have already alluded to the technical nature of this approach and would prefer not to counter one technical argument with another. Suffice it to say that "BH7" creates an obstacle for the applicant to surmount by laying bare the basis upon which the receiver was appointed and countering the argument that there was no basis for the appointment. Based on this evidence I would conclude that Mr. Horne's action was not unconscionable even if found later, at trial, to be unlawful. It would also be incorrect to refer to the action as high-handed. It would be incorrect to conclude that he is trying to steal a march.

[68] Also put in doubt is the ability of either ECR or M Group to pay the debt of $682,776.78. A debt of at least $417,512.00 is admittedly owed to Horne by ECR.

[69] Finally I acknowledge that Mr. Horne's counsel casts doubt upon the respondent's ability to pay damages if it found that the imposition of an injunction caused damage to Mr. Horne. Counsel's submission holds some weight since as I have indicated earlier, if the entire matter can be settled by way of an offer of payment by ECR to Mr Horne based on "BH7" then why is this not being done? The scenario tends to justify the allegation that neither ECR nor the Applicant has any money to pay damages Mr. Horne is therefore justified in taking steps to secure the debt owed to him.

[70] In the circumstances I would refrain from making an order to enjoin Mr Horne and the Receiver from proceeding with the intended receivership. If there are issues of illegality to be tried then I am sure they will be heard and determined in due course. If the Applicant or ECR have access to the funds being claimed by Mr. Horne then their failure to obtain the injunction may encourage them to seek other ways to address the alleged debt to Horne from ECR.

[71] The Applicant's application for an injunction is therefore dismissed with costs awarded to the Respondents pursuant to Part 65 of the CPR 2000.

Francis H V Belle
High Court Judge