IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 325 OF 2014

BETWEEN:

KEVIN MILLIEN	**Claimant**
AND	
BT TRADING LIMITED	**1st Defendant**
GEORGE POPESCU	**2nd Defendant**
ALPHA SERVICES LIMITED	**3rd Defendant**

July 28 and August 13, 2014.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

Appearances: Mr. Eamon Courtenay SC, Ms. Priscilla Banner with him, for the Claimant.
Mr. Rodwell Williams SC, Mrs. Julie Ann Bradley with him, for the 1st and 3rd Defendants.

JUDGMENT

[1] Before the Court was an application by the 1st and 2nd Defendant, BT Trading Limited and George Popescu, for the discharge of an order made on July 2, 2014 granting an interim injunction order and for a stay of the proceedings. The Claimant filed a notice of application for the continuation of the said injunction, the terms of which were as follows:

> "The Defendants are restrained, whether by themselves, their servants or agents or any of them or otherwise howsoever from in anyway taking,

> selling, pledging, transferring, charging, diluting or in any way disposing of or taking any steps to bring about or facilitate or register the transfer of the ownership of the Claimant's shares held in or the assets of the 1st Defendant or its subsidiary, BT Prime Limited or Boston Prime Limited until July 30, 2014 or until further order of this Court."

The Court further ordered that the 3rd Defendant, Alpha Services Ltd., be restrained from registering any further resolutions, minutes or other such documents in respect of the 1st Defendant which would have the effect of altering the ownership of and/or transferring ownership and control of the 1st Defendant or the subsidiaries to any third party.

BACKGROUND

[2] The Claimant and 2nd Defendant are co-founders of the 1st Defendant, an international business company registered in Belize on November 3, 2009. At the time of incorporation, Kevin Millien and George Popescu were appointed as directors of the Company and were each issued 25,000 shares of the authorized share capital of $50,000.00 divided into 50,000 shares of one dollar par value. The share capital was decreased by resolution on November 18, 2009 to 25,000 shares of $1.00 each. As at December 18, 2009, the Claimant and the 2nd Defendant each held 12,500 shares and were the sole directors of the 1st Defendant.

[3] The Claimant and the Defendant are also shareholders of Boston Technologies Inc. in the proportion of 49%/51%. This company acts as vendor to the 1st Defendant and its subsidiaries, BT Prime Ltd. incorporated in the British Virgin Islands on April 27, 2010 and Boston Prime Ltd. (formerly BT Prime Limited) registered in England on November 10, 2009. Both subsidiaries were co-founded by the Claimant and the 1st Defendant. The 1st Defendant is the holding company and sole shareholder of BT Prime Ltd. which is in turn the holding company and sole shareholder of Boston Prime Ltd. The subsidiaries are engaged in the business of foreign exchange trading for clients for profit.

[4] A company search of the 1st Defendant carried out on June 18, 2014 at the instance of the Claimant revealed that the share capital had been increased from 25,000 shares to 150,000 shares without the knowledge or consent of the Claimant. Subsequently, the Claimant was informed that he was no longer a director of the 1st Defendant having been purportedly removed by a board resolution and that the 2nd Defendant was the sole signatory for the 1st Defendant. A request by the Claimant to inspect the books and records of BT Trading was denied.

[5] The foregoing inquiries by the Claimant followed upon his discovery by means of an article in the Forex Magnates that the 2nd Defendant had entered into a Letter of Intent to sell Boston Technologies to another foreign exchange services provider. In a later article in the said periodical, it was reported that BT Trading was being sold to yet another foreign exchange. However, it was reported that, by an invited comment, the 2nd Defendant affirmed the equal shareholding of himself and the Claimant in the 1st Defendant. This affirmation was at odds with an email previously sent by the 2nd Defendant denying that the Claimant held 50% of the voting stock of BT Prime Ltd.

[6] The Claimant swore that he was not privy to the terms of the intended sale of the 1st Defendant and its subsidiary. It was further averred that a named representative of the intended purchaser had informed him that the 2nd Defendant told him that he did not intend to distribute any of the proceeds of sale to the Claimant.

[7] In his affidavit in support of the application made without notice, the Claimant stated that he was not given notice of any meeting of the Board of Directors of the 1st Defendant and that he neither consented to nor authorized any resolution for his removal as a director of the 1st Defendant. The fear was expressed that his shareholding had been diluted and altered to take away his voting rights as a member of the 1st Defendant.

[8] The foregoing matters formed the basis of the Claimant's submission that there is a serious issue to be tried, which has not been challenged by the 1st and 2nd

Defendants. The submission was made in the framework of the Amended Memorandum and Articles of Association of the 1st Defendant. Under the Articles of Association a resolution of members is defined, inter alia, a resolution approved at a duly constituted meeting of the members of the company by the affirmative vote of a simple majority of the votes of the shares which were present at the meeting and were voted and not abstained or a resolution consented to in writing by an absolute majority of the votes of the shares entitled to vote on the resolution. The Claimant deposed that he never received notice of any meeting of the company or of its directors as required by Articles 7 and 10 of the Articles, hence there could be no resolution to amend the Memorandum to increase the authorized capital pursuant to Article 6.1.

THE APPLICATION FOR DISCHARGE

[9] The 1st and 2nd Defendants' application to discharge the interim injunction was made on two inter-connected grounds, first, that the Claimant's application was plagued by material non-disclosure as to the existence and purport of an arbitration provision in the Articles of Association; and secondly, that the said provision governs the dispute which ought to be referred to arbitration and the proceedings accordingly stayed.

[10] In his affidavit, the 2nd Defendant referred to and exhibited a notice of reference of the dispute dated July 16, 2014 signed by himself on behalf of BT Trading Ltd., the 1st Defendant, and addressed to himself and the Claimant.

[11] The Claimant addressed the arbitration issue in his second affidavit by stating that the issues which arose between himself and the 2nd Defendant as embodied in the Claim were not covered by Article 21 of the Amended Articles of Association of the 1st Defendant, in that the disputes in question are not as between the company on the one hand and a member of the company on the other hand as the provision contemplates. The assertion of material non-disclosure was rejected.

[12] It is convenient to here set out the said Article 21. It reads:

"21. ARBITRATION

21.1. Whenever any difference arises between the Company on the one hand and any of the members or their executors, administrators or assigns on the other hand, touching the true intent and construction or the incidence or consequences of these Articles or of the Act, touching anything done or executed, omitted or suffered in pursuant of the Act or touching any breach or alleged breach or otherwise relating to the premises or to these Articles, or to any Act or Ordinance affecting the Company or to any of the affairs of the Company such different shall, unless the parties agree to refer the same to a single arbitrator, be referred to two arbitrators one to be chosen by each of the parties to the difference and the arbitrators shall before entering on the reference appoint an umpire.

21.2 If either party to the reference makes default in appointing an arbitrator either originally or by way of substitution (in the event that an appointed arbitrator shall die, be incapable of acting or refuse to act) for 10 days after the other party has given him notice to appoint the same, such other party may appoint an arbitrator to act in the place of the arbitrator of the defaulting party."

[13] As authority for the granting of a stay of the proceedings, the 1st and 2nd Defendants relied upon section 5 of the Arbitration Act, Chapter 125 which enacts:

> "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the court against another party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such proceedings may at any time after appearance, and before delivering any pleading or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court is satisfied that there is not sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

[14] Issue was joined on both material non-disclosure and the entitlement of the 1st and 2nd Defendants to a stay of the proceedings on the basis of a referral to arbitration.

MATERIAL NON-DISCLOSURE

[15] It has become established in principle that upon an application made without notice it is incumbent upon the applicant to lay before the court all material facts whether favourable or unfavourable. The ultimate and almost invariable sanction for non-disclosure of material facts is the discharge of the injunction granted, the merits of the application notwithstanding.

[16] The pith and substance of the application by the 1st and 2nd Defendants for the discharge of the interim injunction was that the Claimant omitted to bring to the attention of the Court the existence of article 21 of the Articles of Association of the 1st defendant. It was further submitted that the said Article is binding on the Claimant and the 1st and 2nd Defendant and that the Claimant did not invoke the arbitration provision before resorting to legal proceedings. These matters were commended to the Court as amounting to non-disclosure by the Claimant.

[17] The relevant principles relating to the obligation to make full and frank disclosure have been restated in the distillation contained in the judgment of Ralph Gibson, LJ in **Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350** at p 1356. This guidance offered has been adopted by all parties to the proceedings. His Lordship stated:

> "In considering whether there has been non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:
>
> (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts". See **R v Kensington Income Tax General Commissioners, ex p Princess de Polignac, [1917] 1 KB 486, 515** per Scrutton, LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see **R v Kensington Tax General Commissioners, ex p Princess de Polignac**, per Lord Cozens-Hardy, MR at p. 504 citing **Dalgliesh v Jarvie (1859) 2 Mac & G 231, 238** and Browne-Wilkinson, J in **Thermax v Schott Industrial Glass Ltd [1981] FSR 289, 295**.

(3) The applicant must make proper inquiries before making the application: see **Bank Mellat v Nikpour [1985] FSR 87**. The duty of disclosure therefore 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.

(4) 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 defendant: see, for example, the examination by Scott J of the possible effect of the Anton Piller order in **Columbia Picture Industries Inc v Robinson [1987] Ch 38**; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade LJ in **Bank Mellat v Nikpour [1985] FSR 87, 92 – 93**.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty": see per Donaldson LJ in **Bank Mellat v Nikpour** at p 91, citing Warrington LJ in **Kensington Income Tax General Commissioners** case **[1919] 1 KB 486, 509**.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case been presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded": per Lord Denning MR in **Bank Mellat v Nikpour [1985] FSR 87, 90**. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> "When the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed" per Glidewell LJ in **Lloyd Bowmaker Ltd v Britannia Arrow Holdings plc [1988] 1 WLR 1337**, p 1343H – 1344A.'

[18] Learned Senior Counsel for the 1st and 2nd Defendants argued that the Claimant failed to disclose material facts in that he failed to bring to the Court's attention the fact that by the Articles of Association of BT Trading Ltd, the 1st Defendant, which Articles are binding on the parties, the Claimant and the 2nd Defendant were mandated to settle disputes in the nature of the present claim by arbitration. The essence of the argument was that the Claimant did not invoke the arbitration provision before commencing proceedings. It was said that the language of Article 21 encapsulates the very matters in dispute in the claim.

[19] Reliance was placed on the requirement of the Claimant to lay before the court all facts, documents or legal arguments that are relevant to the exercise of the Court's discretion. As authority, the dicta of Alan Boyle, QC in **Arena Corp Ltd v Peter Schroeder [2003] EWHC 1089** were cited as to the general rule that where the Court finds that there have been breaches of the duty of full and fair disclosure on an ex parte application, the general rule is that the interim injunction ought to be discharged and a renewal of the order until trial refused. It is, however, to be noted that there are no strict rules as to the exercise of the discretion to continue or re-grant the order, save that the Court must take into account all the relevant circumstances giving such weight to the factors identified in the cases as it considers appropriate.

[20] In his response, learned Senior Counsel for the Claimant relied on the judgment of Hariprashad-Charles, J in **Robelco Ltd et al v Svoboda Corp et al** – BVI Claim No. 311 of 2007 wherein the principles, (which I earlier set out) in **R v Kensington Tax Commissioners**, were embraced and then emphasized (at paragraph 55) that "it is important that the Court assess the degree and extent of culpability with regard to the non-disclosure, and the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the Court."

[21] The arbitration clause was indeed before the Court at the hearing of the application without notice by virtue of the exhibiting of the Amended Memorandum and Articles of Association of the 1st Defendant to the first affidavit of Kevin Millien. It was tacitly conceded that the actual arbitration clause was not specifically drawn to the Court's attention. This scenario was addressed by the learned authors of Commercial Litigation: Pre-emptive Remedies and the disclosure by merely exhibiting documents was deprecated as insufficient. The passage reads:

> "It may be tempting for the applicant to attempt to fulfil his duty by exhibiting to his statement or affidavit documents from which the court could infer or deduce the points that could be made against the applicant. Such a temptation should, however, be resisted. In such cases, it is likely that the court would conclude that the applicant was in breach of his duty. The points that can be made against the applicant should be set out clearly in the body of the statement or affidavit."

This issue engaged the attention of Mangatal, J in **Tri-Star Engineering Ltd v Alu Plastics Ltd [2013] JMCC Comm 7**. At paragraph 38, Her Ladyship stated that the existence of an arbitration clause ought to have been brought to her attention specifically by affidavit or in submissions with an explanation either as to why the arbitration clause was not being honour or why the claim did not fall within the arbitration clause.

[22] In my view, there has been a failure to disclose the arbitration clause. However, in order to properly exercise its discretion as to whether to discharge, continue or order a fresh injunction order, the court must make an assessment of the case as a whole,

taking into account all the circumstances, inclusive of the ambit of the arbitration clause. Also of relevance, as pointed out on behalf of the Claimant, was the importance and significance of the outcome of the application for an interim injunction, although it must at once be said that this would not be of paramount importance to the Court.

ARBITRATION CLAUSE

[23] Learned Counsel for the 1st and 2nd Defendants contended that the non-disclosure is material and the Claimant had been silent on the issue. It was said that the existence of the arbitration clause gave rise to the issue of whether a statutory stay of the proceedings was warranted. I must add that neither side disputed the efficacy of a contractually agreed dispute resolution mechanism. The disagreement lay in whether or not the arbitration clause encompassed the dispute embodied in the Claim.

[24] The Claim Form with Statement of Claim was filed on June 27, 2014 seeking declarations that the increase of the share capital of BT Trading Ltd is unlawful, null, void and of no effect, that purported resolutions and meetings to carry into effect the increase in the share capital and the removal of the Claimant as a director were invalid and that the Claimant and 2nd Director hold shares of the same class in BT Trading Ltd in the proportion of 50% each. In addition, certain other ancillary orders including a permanent injunction and damages were sought. The claim was encapsulated in paragraph 4 of the 1st affidavit of the 2nd Defendant in this way:

> "This Claim is brought by the Claimant against the Defendants on the basis that he was allegedly irregularly removed as a director of the First defendant Company and deprived of his ownership interest in shares of the First Defendant Company and of his right to making decisions in respect thereof."

The Claimant has adduced evidence on affidavit to support his fear of the 1st Defendant and its subsidiaries being sold by the 2nd Defendant as a consequence of his unlawful removal as a director and the dissipation of his equal shareholding in the 1st Defendant. These matters form the essential part of the circumstances informing the discretion

whether to discharge the interim injunction. It is significant to this Court that the 2nd Defendant has not addressed the allegations as to the proposed sale of the 1st Defendant and its subsidiaries nor has he offered an undertaking not to dispose of the said companies while the issue goes to arbitration.

[25] The approach to be adopted to an arbitration agreement is set out in Russell on Arbitration (19th edition). It reads at page 187:

> "Where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement, commences an action to have the dispute determined by the court, the prima facie leaning of the Court is to stay the action and leave the plaintiff to the tribunal which he has agreed ... once the party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay."

The 2nd Defendant has sworn that he is ready and willing to go to arbitration. This position was vehemently opposed by the Claimant by reference to the wording of Article 21 which was not challenged as not being valid and subsisting.

[26] Learned Senior Counsel for the Claimant submitted that there is no arbitration clause or arbitration agreement that applies to the dispute. The court was urged to exercise its jurisdiction to determine whether there is an arbitration agreement which covers the issues in dispute and listed six conditions which the 2nd Defendant was required to satisfy. The main condition to be highlighted and focused on by Senior Counsel was that: the legal proceedings must relate to a matter which the parties agreed to refer to arbitration under the arbitration agreement.

[27] The Claimant's position is that ex facie the dispute in the claim is as between the Claimant and the 2nd Defendant. Hence, any arbitration would be as between these two parties and the 1st Defendant Company would not be a party to this proposed arbitration. The nature of this dispute was considered against the language of the

arbitration clause and the conclusion drawn was that it was not encompassed and hence no arbitration agreement could be inferred.

[28] When one reads the first part of Article 21, it plainly speaks of a "difference" arising between the 1st Defendant on the one hand and a member of the company on the other hand. Both the Claimant and the 2nd Defendant are members of the Company within the definition under the Memorandum of Association. The dispute is between them although the subject matter is ultimately the company. The shareholding and control of the company must abide the outcome of the dispute between the Claimant and the 1st Defendant. The attempt by the 2nd Defendant to include the 1st Defendant Company in the referral to arbitration does not alter the true gravamen of the dispute. By its very language, Article 21 has proscribed the type of dispute contemplated. Accordingly, the 2nd Defendant, as I see it, has not proven that there is a binding arbitration agreement covering the issues embodied in the claim. In short, there is no agreement in existence for the Claimant and the 2nd Defendant to arbitrate their dispute.

[29] It follows from the finding of an absence of an arbitration agreement that the question of a stay of proceedings pursuant to section 5 of the Arbitration Act is not attracted and indeed does not arise for consideration.

EXERCISE OF DISCRETION

[30] At the outset, it needs to be said that had the court been exposed by the Claimant to Article 21 at the hearing of the application without notice, it would have been nevertheless minded to grant the interim injunction order. It should at once be said that this is not determinant of the matter of the exercise of the court's discretion whether to discharge or impose a fresh injunction order. Having regard to the finding that an arbitration agreement as between the Claimant and 1st Defendant as parties to the dispute forming the basis of the claim does not exist, it would be disproportionate to discharge the injunction. The Court must again refer to the events that the Claimant seeks to forestall, namely the sale of the 1st Defendant and its subsidiaries of which he

claims to be an equal shareholder with the 1st defendant, who has not addressed the issue of the threatened sale. In the premises, given the finding of non-disclosure on the part of the Claimant, the order of July 2, 2014 ought to be discharged but a fresh injunction order ought to be made in the exercise of the Court's discretion.

[31] By virtue of the foregoing reasons, the Court has made the following orders:

1. The injunction order made on July 2, 2014 be discharged.
2. The Defendants are restrained whether by themselves their servants or agents or nay of them or howsoever otherwise from in anyway taking, selling, pledging, transferring, charging, diluting or in any way disposing of or taking any steps to bring about or facilitate or register the transfer of the ownership of the Claimant's shares held in or the assets of the 1st Defendant or its subsidiaries, BT Prime Limited and Boston Prime Limited.
3. The 3rd Defendant is restrained from registering any further resolution, minutes or other such documents in respect of altering the ownership of and or transferring ownership and control of the 1st Defendant or the said subsidiaries to any third party, until the hearing and determination of the substantive claim or until further order of this Court.
4. The costs of the applications shall be the 1st and 2nd Defendants' in the cause.

It was further ordered that the defendants file and serve their Defence on or before September 30, 2014 and that the matter adjourned for case management conference.

_____

KENNETH A. BENJAMIN
Chief Justice