COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/00424

BETWEEN

ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Applicant

AND

PIERINO ZANGA

1st Respondent

AND

ORNELLA GHILARDI

2nd Respondent

AND

REDONA S.A.

3rd Respondent

Before Hon. Mr. Justice Ian R. Winder

Appearances: Tiffany Moss for the Applicant
Sophia Rolle-Kapousouzoglou with Valdere Murphy for the 1st Respondent

29 April 2021

DECISION

WINDER, J

This is the 1st Respondent's (Zanga's) application for a discharge of the ex parte restraint order made in this action on 3 April 2020.

[1.] On 24 October, 2017, the Ordinary Court of Milan following a summary judgement convicted Zanga of various offences, which included, bankruptcy, tax fraud, criminal association, money laundering and corruption.

[2.] On 5 February 2018 the Applicant received a Letter of Request from the Office of the Public Prosecutor in Italy ("the Prosecutor"). The Prosecutor advised that Zanga and the Second Respondent were being investigated for crimes including fraudulent bankruptcy, embezzlement, falsification of documents and fraudulent appropriation of values. According to the Letter of Request:

> "...[O]n October 24th, 2017, the Ordinary Court of Milan, following the summary judgement, issued the sentence of first instance against the suspect of the recalled criminal proceedings condemning, between other sentenced persons, ZANGA Pierino at the penalty of 7 years and 10 months of imprisonment and confirming, in totality, the confiscation of the aforementioned assets (movable, real estate properties and financial resources) already ordered to confiscation for equivalent.
> ...
> The following preliminary inquiries are, therefore, formulated:
>
> 1. All documentation relating to the current accounts on the Banks indicated above [i.e. Equity Bank and Trust and Ansbacher];
> 2. Seize the sums of money (cash) and securities and any financial resources which do not [sic] recover on the aforesaid current accounts or deposits;
> 3. Seizure of what is contained in safety deposit boxes;
> 4. Investigations in relation to any possible assets of other nature in addition of the above-mentioned reports, namely: lands, houses, hotels or other ancillary activities;
> 5. Any other operation or measure or information useful to our investigation."

[3.] The conviction of Zanga was affirmed by the Court of Appeal of Milan on 24 September, 2018. By paragraph 14.7 of the Milan Court of Appeal Judgement a confiscation order was made as against Zanga in the amount of €1,780,024.50.

[4.] On 17 February 2020 the Applicant received a Supplemental Letter of Request from the Prosecutor. The Supplemental Request provided:

> "In answer of your letter on 12 February, 2020, we're asking you to block the account held at "Equity Bank & Trust (Bahamas) Ltd. Referable to ZANGA PIERINO and to his spouse GHILARDI Ornella (both as legally authorized representative to operate) fictitiously held by the company REDONA S.A based on Panama..." and the money on about in January 2017 1,383,450.40 Euros
>
> Zanga Pierino was convicted with irrevocable sentence on 28, September, 2018"

[5.] The proceedings in this action were instituted by the Applicant against Zanga, Ornella Ghilardi (his wife) and Redona S.A. on 24 March 2020. This Court subsequently made an ex parte Order on 3 April 2020 which provided, in part, as follows:

> *A. Pursuant to paragraph 26 of the Proceeds of Crime (Designated Countries and Territories) Order, Chapter 93, the 1st- 3rd Respondents, their agents, servants, assigns, legal representatives, nominees, ... are prohibited from disposing of or otherwise dealing with funds in Account No. 13160 or any account, safety deposit boxes and any funds or interest accruing on all accounts in the name of or for the benefit of the 1st - 3rd Respondents as well as all the income or interest granted up to the date of this Order, whether capitalized, due to fall due to at Equity Bank and Trust Bahamas Limited, Equity Trust House, Caves Village, West Bay Street, P.O. Box N-10697, New Providence, The Bahamas.*
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> *B. Equity Bank and Trust Bahamas Limited, Equity Trust House, Caves Village, West Bay Street, P.O. Box N-10697, New Providence, The Bahamas provide to the Attorney-General, authenticated and certified copies of all account documentation relating to Account No. 13160 and any and all accounts existing and/or closed in the names of or for the benefit of the 1st – 3rd Respondents. ...*
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> *C. The aforesaid documents be provided to the Attorney-General, the Applicant herein by Equity Bank and Trust Bahamas Limited, Equity Trust House, Caves Village, West Bay Street, P.O. Box N-10697, New Providence, The Bahamas within two (2) weeks of service of the Order on the said institution;*
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> *D. Any person affected by this Order granted pursuant to section 24 of the Proceeds of Crime Act, 2018, may apply to discharge or vary this Order in relation to any property affected by this Order...*

[6.] The application for the ex parte Order was supported by the affidavit of Lynette King dated 24 March 2020. Whilst the Lynette King Affidavit identifies the conviction and imprisonment of Zanga there is no mention of the confiscation order made in the Milan Court of Appeal decision of 24 September 2018.

[7.] Zanga has applied by Notice of Motion dated 13 October, 2020 seeking the discharge of the 3 April 2020 ex parte Order. The Notice is supported by the affidavit of Lenthera Culmer dated 13 October 2020 and seeks the discharge on the following grounds:

(i) the Applicant breached its duty to make full and frank disclosure of all material matters;

(ii) the Court had no jurisdiction in the circumstances to grant a restraint order relative to Account No. 1360 or any account and safety deposit boxes at Equity Bank and Trust Bahamas Limited ("the Bahamian Property") on the basis that the Bahamian Property is not specified and/or referred to in the Italian confiscation order;

(iii) the Court's jurisdiction to grant a restraint order is limited to realizable property, and the Bahamian property in the circumstances is not releasable property in accordance with paragraph 4(3)(a) of the Third schedule of the Proceeds of Crime (Designated Countries and Territories Order, 2001;

(iv) the applicant failed to establish on the evidence that there was a real risk of dissipation of the Property.

[8.] Paragraphs 25-28 of the Lenthera Culmer Affidavit provides:

25. Firstly, as averred at paragraph 4(c)(x) of the King Affidavit, various assets of Mr. Zanga in Italy have been seized for confiscation. The value of the seized real property are not less than €7,500,000.00. In addition to the real property, I am advised by Mr. Marco Pievani, Mr. Zanga's Italian Counsel and verily believe the following assets have been seized for confiscation: the assets on the current accounts of Mr. Zanga and his family members and those on the accounts of the Real Estate companies Salice Verde and Locanda Armonia, believed to be traceable to Mr Zanga, for a total amount to about €1,900,000.00, part of which (up to the amount of €1,780,024.50) will be transferred to the "Fondo Unico di Giustizia ("FUG") for the final execution of the confiscation order (the FUG is the Italian single justice fund to facilitate the satisfaction of the confiscation order).

26. Given that the confiscation order of the Court of Appeal of Milan was in the amount of €1,780,024.50, I am advised by Mr. Pievani and verily believe

that an application, in separate proceedings is pending before the Court of Appeal of Milan, as authority of the enforcement procedure, for the restitution of assets to those entitled whose value exceeds the amount of the external confiscation order [i.e. €1,780,024.50]. The date for the hearing of the application has not yet been scheduled.

27. It is therefore unclear why the Italian Prosecutor would seek the Applicant's assistance in restraining the Bahamian Property at this stage on the basis that the value of the assets which have been seized in Italy are substantially in excess of the amount of the confiscation order.

28. In effect, the Applicant has sought a restraint order over assets greater in value, when one considers the value of the assets seized in Italy, than the amount of the confiscation order.

The Culmer Affidavit, filed since 13 October 2020, has not been responded to or challenged by any evidence on behalf of the Applicant.

[9.] Whilst there are several grounds raised by Zanga, I am satisfied that his Notice could be disposed of upon consideration of the first ground alone. In this ground, Zanga argues that the restraint order would not have been made if the Court was properly apprised of the material facts and as such, the order should be discharged due to the failure of the Applicant to give full and frank disclosure. I accept this submission.

[10.] There is considerable authority as to the law relative to the issue on non-disclosure/failure to be full and frank on an ex parte application. The appropriate starting point is the oft cited dicta of ***Ralph Gibson LLJ*** in the English case of ***Brink's Mat Ltd. v Elcombe [1988] 1 WLR 1350 at 1356***. The principles in ***Brink's Mat Ltd. v Elcombe*** were recently approved by the Bahamas Court of Appeal in ***Blue Planet Ltd. v Downie.*** According to ***Ralph Gibson LLJ:***

> In considering whether there has been relevant 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 *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, *per* Scrutton L.J.

(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 *Rex v. Kensington Income Tax Commissioners,* per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 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 an *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 L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 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 L.J. in *Bank Mellat v. Nikpour,* at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners'* case [1917] 1 K.B. 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 being 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 M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material nondisclosure 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 nondisclosure, 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 L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.*,ante, pp. 1343H-1344A.

[11.] According to the learned editors of The Proceeds of Crime, Law and Practice of Restraint, Confiscation and Forfeiture 1st ed at paragraphs [7.19] and [7.20]:

> [7.19] Applications for restraint orders are subject to the usual rule of civil procedure that a litigant who asks the court to make an order without giving notice to the other parties to the action must give full and frank disclosure of all material facts whether they support his case or not. The requirement to give full and frank disclosure is imposed because the defendant has no opportunity to attend and address the court as to why an order should be made. If granted, a restraint order can have a drastic effect on the defendant, his family and business…Full and frank disclosure is thus essential to enable the court to determine the application fairly.
>
> [7.20] The obligation to give full and frank disclosure is a strict one and applies not only to matters known to the person making the witness statement but also to all other matters known to other offices of the prosecuting authority. The duty also extends to matters which ought to have been known to the prosecuting authority if all proper enquiries had been made prior to making the application. It matters not that the deponent was unaware of or did not believe the omitted facts to be relevant or important. Relevance is a matter to be determined by the court and not by the applicant or his legal advisers. Implicit in the duty of full and frank disclosure is an obligation to take proper care to ensure that all matters so disclosed are accurate.

[12.] Relying on the authorities, Zanga submits that the Applicant failed in its duty to make proper inquiries before making the ex-parte application and to disclose those matters "*known to the applicant or his agents, or matters which they would have known, had they made all the inquiries which should reasonably have been made prior to the application*". They say that in order to comply with the duty of full and frank disclosure, the Applicant ought to have disclosed inter alia:

(i) the existence of the Italian COA Judgement (inclusive of the confiscation order);

(ii) that the Italian Proceedings were concluded at the time of the ex-parte Order;

(iii) full details as to why the Applicant (or Italian Prosecutor) believed that the Bahamian Property would be dissipated if the restraint order was not made; and

(iv) the fact that prior to the ex-parte Order assets belonging to Mr. Zanga in excess of the confiscation order [i.e. €1,780,024.50] had been seized in Italy.

[13.] Zanga also relies on the case of ***Banco Turo Romana SA v Cortuk [2018] EWHC 662 (Comm).*** In that case ***Popplewell J*** stated at paragraph [45] that:

> The importance of the duty of disclosure has often been emphasised. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in Re OJSC ANK Yugraneft v Sibir Energy PLC [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction.

[14.] The Applicant concedes that there has been some level of non-disclosure but submits that the Applicant AG provided to the Court all of the information in his possession at the time of the ex parte application. According to the submissions:

> 24. We acknowledge that the King Affidavit does not mention the confiscation order. On 27th April, 2021, the Applicant was advised by the Authorities that the court considered the confiscation of the 1st Respondent's assets at the time he was convicted. The Authorities further advised that there is no specific confiscation order "document" and that all matters concerning the confiscation are found in the court's judgment of the 28th September, 2018. In any event, the confiscation order does not mention the restrained funds. It is doubtful that it would have any bearing on the restraint order which the court had jurisdiction to grant otherwise; i.e. pursuant to paragraphs 26(1) and (2)(b).
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> 25. The Rules of court require affidavits to contain only matters of which the deponent had first-hand knowledge. Paragraph 9 of the King Affidavit states:
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> > "That this Affidavit is filed in support of the Ex-Parte Originating Summons herein and is made from information received by me in my aforesaid

employment capacity from sources I verily believe to be credible and reliable and with whom I work.

...

28. The 1st Respondent contends a failure to draw to the Court's attention, the existence of separate proceedings which are pending before the Court of Appeal of Milan for the restitution of assets. In the circumstances, the existence of the separate proceedings to which the 1st Respondent refer have not been brought to the Applicant's attention by the requesting authorities. It is not unreasonable to conclude that there was no compelling reason to give notice of separate proceedings that are not the subject of the request for assistance.

The Applicant contends that, in the circumstances, it has discharged its duty to make full and frank disclosure of all information provided and known at the time of the ex-parte application.

[15.] The basic principles, which apply where material non-disclosure is established, is that the Court will usually discharge the ex-parte Order. In the event the breach is substantial, the Court will usually set aside the order and not renew it, even where the breach is innocent. I do not accept the Applicant's submissions that it is absolved from its duty to be full and frank where there is material information in the hands of the prosecution authorities, in this case the Prosecutor, but not shared with it. I am satisfied that the information provided to me was less than full and frank and that the absence of the information impacted my decision to grant the restraint and disclosure orders which I made. I am satisfied that the Applicant failed to disclose the following material information:

(a) The existence of the Italian Confiscation Order which undoubtedly should have been brought to the attention of the Court. At paragraph [8] of the King Affidavit, it is stated that "the information being sought is directly relevant to proceedings in Milan Italy". At that time the proceedings before the Italian Court of Appeal had already been concluded. The Italian Court of Appeal Judgement was handed down on 24 September, 2018. The Letter of Request was made by way of correspondence dated 5 February, 2018 at a time when proceedings were pending in Italy. However, at the time the Applicant moved this Court [i.e. 3 April 2020] to

seek relief, the proceedings in Italy had concluded and substantial property, in excess of the confiscated amount, seized.

(b) The fact that the value of the seized property in Italy is substantially in excess of the amount of the Italian Confiscation Order should have been brought to the attention of the Court, In effect, the Applicant has sought a restraint order over assets greater in value, (when one considers the value of the assets already seized in Italy) than the amount of the Italian Confiscation Order.

(c) The Applicant failed to draw to the Court's attention the existence of separate proceedings which are pending before the Court of Appeal of Milan, for the restitution of assets of the Respondents, the value of which exceeds the amount of the confiscation order.

[16.] I am satisfied that the disclosure which the Applicant has failed to put before the Court was material in the result that the ex parte Order should be discharged in its entirety and not reinstated. In any event, it would appear, from the evidence advanced by Zanga (which has not been responded to or challenged by new evidence) that the substratum for the restraint and disclosure has fallen away. The proceedings to which the Letter of Requests related were concluded at the time of 3 April 2020 ex- parte Order and a confiscation order made in the Italian proceedings resulting in the confiscation of the assets of Zanga in excess of the amount ordered confiscated. In the joint appeals of ***Nepsis Investment S.A. and others v The Attorney-General et al SCCivApp Nos.150, 151 and 152 of 2017*** the Bahamas Court of Appeal set aside a disclosure order on this very basis. According to ***Barnett JA*** (as he then was) at paragraph [12] of the decision in ***Nepsis*** that:

> The Notice of Appeal filed by Lotte and Nepsis respectively advanced 16 grounds of appeal while Advisers Notice raised 15 grounds. However, in our judgment this appeal can be determined on one ground which is common to all three appeals and relates to the question whether having regard to the conviction of Mr. Costa the information sought by the Letter of Request was no longer relevant to the investigation of Mr. Costa. In other words whether because of the fact that proceeding #5026212-82.2014.404.7000 had been concluded it followed that the substratum of the Letter of Request had fallen away and thus no further disclosure should be made.

[17.] In submissions, the Applicant sought to suggest that additional criminal proceedings have been filed against Zanga and wished to uphold the restraint order to enable a second Supplemental request for international legal assistance. Firstly there was no evidence advanced to support this assertion and more importantly it reinforces the point that the substratum of the original claim has been eroded. The separate proceedings are not the subject matter of the extant request for mutual assistance.

[18.] On the question of costs, the Applicant argues that the provision relating to costs under the POCA Order has been omitted and that it is not the intention of Parliament that costs be awarded in matters of this nature. Reliance was placed on the case of ***Attorney-General of the Commonwealth of The Bahamas v. Anguilar***, Respectfully, having found that there was a failure to be full and frank, I am not persuaded that the observations of ***Small J*** in ***Anguilar*** would be relevant to these circumstances. Zanga shall have his reasonable costs to be taxed if not agreed.

Dated this 20th day of July 2021

Ian R. Winder

Justice