

JERSEY / JUDGMENT

# Tacon v Montrow [2007]

## JRC 186 (02 October 2007)

[2007] JRC 186

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### judgment

the deputy bailiff: 1. This is an application by the representor ("Mr Tacon") for an order that he be discharged from the undertaking ("the Undertaking") given by him in his fifth affidavit dated 7 th June 2003 to the effect that he would not seek further information from or examine the second respondent ("Mr Grimshaw") in his capacity as a director for the third respondent ("Montrow") without further order of this Court. We announced our decision at the end of the hearing and now give our reasons. The factual

### background

2. The background to this matter is set out in full in the judgment of this Court delivered on 1 st June 2007 (

[2007] JRC 107 ) and the judgment of Beloff, JA as a single judge of the Court of Appeal refusing leave to appeal on th July 2007 (

[2007] JCA 144 ). We do not think it necessary to repeat matters in detail for the purposes of this judgment and the reader is referred to those judgments as necessary. 3. Suffice it to say that, on 7 th March 2007, Kensington Investments Limited ("Kensington") applied to the High Court in the British Virgin Islands ("the BVI Court") for an order that Montrow and its wholly owned subsidiary Likouala SA (a company incorporated in the Republic of Congo ("Congo") be placed in liquidation on the grounds that it was just and equitable to do so. The grounds for the application were essentially that the Likouala/Montrow structure was a sham and that the underlying economic interests in the oil field ultimately owned by the structure was in truth an asset of Congo and was therefore available for its creditors, of whom Kensington was one. On 9 th March, following an ex parte hearing, the BVI Court appointed Mr Tacon as provisional liquidator of the two companies. 4. On 13 th March, following an ex parte application, this Court made an order recognising Mr Tacon's appointment as provisional liquidator. On 14 th March, following receipt of a letter of request from the BVI Court, this Court ordered that Mr Tacon as provisional liquidator be permitted to exercise various powers within the jurisdiction of Jersey. These powers were as specified in the letter of request and included at paragraph 2(g) the following:- "To

examine by interview any director or officer of Montrow and/or Likouala in particular Mr Grimshaw and/or any other employee of Nautilus who is reasonably believed to have in his or her possession any property of Montrow and/or Likouala or any information concerning the promotion, the business dealings or affairs of Montrow and/or Likouala."

5. The order made by this Court also included a provision that Mr Grimshaw and Nautilus should produce any books, papers etc in relation to Montrow and Likouala and this order was complied with on 16 th March. 6. On 13 th April the BVI Court refused an application by Montrow for a stay of the provisional liquidation and ordered that it should continue. 7. Montrow then applied to this Court for an order that the powers of the provisional liquidator in Jersey should be stayed. As Mr Tacon had already received all of the files (as referred to above), it was agreed that the argument really concerned whether Mr Tacon should be permitted to interview Mr Grimshaw pursuant to paragraph 2(g) of the order of 14 th March. The main grounds relied upon in support of the application for a stay were that there were in contemplation a number of challenges of the various orders in the BVI and reasons for thinking that Mr Tacon's appointment would be short lived, that Mr Tacon had gone beyond the proper powers conferred upon a provisional liquidator and was in effect using his powers to obtain information for Kensington as plaintiff in order to support its claim for a just and equitable winding up, that the balance of prejudice lay in favour of granting a stay because information, once obtained and released, could not be recovered and there was no urgency which required the matter to proceed immediately and finally, that there was an entire absence of evidence that the companies were shams and assets of Congo. 8. This Court refused to stay the order of 14 th March for the reasons set out in its judgment of 1 st June and leave to appeal against that decision was refused by Beloff, JA as a single judge of the Court of Appeal on 19 th July. He further refused a stay pending any application to the plenary Court of Appeal for leave to appeal but extracted an undertaking from Mr Tacon in the following terms:- "Required Mr Tacon, as a result of the refusal of the stay, to undertake not to disclose (without further order of the Royal Court) any information to Kensington International Limited, its servants, agents or advisers arising out of his interview with Mr Grimshaw" 9. Meanwhile, in the BVI, Montrow had applied for a stay of the provisional liquidation pending appeal against the decision of the BVI Court to allow it to continue. The BVI Court refused a stay pending appeal on 16 th May and on 5 th and 6 th June the Eastern Caribbean Court of Appeal also refused leave to appeal and refused a stay pending appeal in relation to the refusal of the BVI Court to stay or limit the powers Mr Tacon enjoyed. 10. One might have thought that the position was by now clear and that Mr Tacon would be able to proceed with an interview of Mr Grimshaw pursuant to paragraph 2(g). However, certain events in the BVI caused Mr Tacon to give the Undertaking and it is necessary to describe what occurred in that connection. 11. On 23 rd May, on an ex parte application by Kensington, the BVI Court appointed Mr Christopher Stride as receiver over the shares in Montrow. By an order made the next day, the BVI Court allowed Kensington to use the documents and information obtained by Mr Tacon in support of their application and also directed Mr Tacon, "... to supply to the receiver within a reasonable period the information and

documentation that he has obtained in the course of the provisional liquidation." These orders were made without reference to Mr Tacon, who was not aware of the application which was to be made. 12. When obtaining the order from this Court of 14 th March, Mr Tacon had undertaken "not to use any documents or information received pursuant to the orders other than for the purposes of his appointment and the powers vested in him." It can immediately be seen that that the order of the BVI Court on 24 th May was in conflict with the terms of the undertaking given to this Court by Mr Tacon on 14 th March. In those circumstances when judgment was delivered by this Court on 1 st June, counsel for Mr Tacon stated that Mr Tacon was undertaking not to seek further information from or examine Mr Grimshaw, in his capacity as director of Montrow, until further order of this Court and that undertaking was confirmed in the fifth affidavit of Mr Tacon sworn on 7 th June 2007. 13. Mr Tacon then applied to the BVI Court for a variation of the order of th May. In this he was successful and on 6 th June the BVI Court revoked the provision which required Mr Tacon to provide information and documents to the receiver. 14. Again, one might have thought that this disposed of any difficulty, so that, following rejection of leave to appeal by Beloff, JA, there would be no difficulty in Mr Tacon obtaining a release from the Undertaking so as to permit any interview of Mr Grimshaw to proceed. However, certain other events have taken place in the BVI upon which Mr Cadin relies. 15. First, there is an application by Montrow to remove Mr Tacon as provisional liquidator. The main ground for the application is that Mr Tacon has allied himself too closely with Kensington and is no longer to be regarded as properly independent. The application was in contemplation at the time of the original hearing before this Court in May on the application for a stay, although it was not served until 8 th May. It was heard by the BVI Court on 15 th May when judgment was reserved. Before the decision was given Montrow applied for leave to file further evidence comprising (i) the fifth and sixth affidavits of Mr Tacon sworn in the Jersey proceedings and (ii) the refusal by the French court to grant Mr Tacon relief against, inter alia, BNP Paribas. The BVI Court granted the application and a further hearing was scheduled for 19 th September. 16. Secondly, on 14 th August, Montrow lodged an ex parte application with the BVI Court seeking directions as to the manner in which Mr Tacon should exercise his powers as provisional liquidator and also seeking a stay or setting aside of the letter of request to this Court. The grounds of the application included that there was no risk of dissipation of the assets, that examination of the directors of Montrow was not necessary for the proper conduct of the provisional liquidation and that there was a real risk, if a stay of the letter of request was not granted, that Mr Tacon would conduct the provisional liquidation in a manner prejudicial to Montrow and to the fair trial of the main application for the liquidation, by passing information to Kensington. 17. The application was considered on the papers and on 3 rd September the BVI Court, having noted the terms of the Undertaking, the undertaking given on 18 th July to the Jersey Court of Appeal, that an application by Mr Tacon to be released from the Undertaking was scheduled for hearing before this Court on 10 th September, and that an application for the removal of Mr Tacon as provisional liquidator was due to resume on 19 th September, gave various directions for an inter partes hearing

but inter alia ordered at paragraph 5 "Mr Tacon should not disclose any information he has or may obtain from the directors of Montrow to Kensington, its servants or agents, without leave of the Court." The BVI Court further directed that the inter partes hearing should be fixed for the first available date in October, although no date appears as yet to have been fixed. 18. The main hearing on whether Montrow should be placed in liquidation on the grounds that it is just and equitable to do so is now to be heard early next year. Discussion 19. Mr Tacon's case for being released from the Undertaking is simple. The only reason for giving the Undertaking in the first place was the existence of the order of 25 th May in the BVI requiring him to disclose information which he had obtained as provisional liquidator to the receiver. That order placed him in conflict with the undertaking which he had given to this Court to use information and documents obtained in Jersey only for the purposes of the provisional liquidation. That conflict had now been resolved by reason of the order of the BVI Court on 6 th June revoking the relevant part of the order of 25 th May. He was therefore no longer under any obligation to pass information to the receiver. Furthermore there was additional protection available to Montrow and its directors by reason of the order of the BVI Court of 3 rd September which provided that Mr Tacon should not disclose any information obtained to Kensington. This Court (supported by Beloff, JA) had refused to stay the order enabling the provisional liquidator to exercise his powers in Jersey. Now that the problem caused by the order of 25 th May had been resolved, there was no need for the Undertaking and Mr Tacon should be at liberty to interview Mr Grimshaw in order to fulfil his role as provisional liquidator and his duty to preserve the assets. This involved finding out all he could about the affairs of Likouala. 20. On behalf of the directors of Montrow, Mr Cadin put forward a number of reasons why it would not be appropriate to release Mr Tacon from the Undertaking so as to allow him to interview Mr Grimshaw. (i) The application to the BVI Court to remove Mr Tacon as provisional liquidator was due to resume on 19 th September. The result might well be that Mr Tacon was then removed. This Court should not allow Mr Tacon to exercise the power to interview Mr Grimshaw when he (Mr Tacon) might well be removed from office very shortly. (ii) The application to the BVI Court for directions as to how Mr Tacon should exercise his powers and whether the letter of request should be stayed or set aside was outstanding and due for hearing some time in October. It would be wrong to allow Mr Tacon to exercise the power to interview Mr Grimshaw when there was a real possibility that the BVI Court might make an order to contrary effect or might stay or set aside the letter of request. This Court should not run the risk of making an order which might be inconsistent with a subsequent order of the BVI Court. (iii) He accepted that the order of the BVI Court dated 3 rd September provided that Mr Tacon should not disclose anything which he currently has or may obtain from the directors of Montrow to Kensington without leave of the BVI Court. However, he said that there was always the risk of inadvertent or accidental disclosure. Any information disclosed to Kensington could not be recovered and there was a real risk of Montrow incurring substantial prejudice as a result, because Kensington might use such information in support of its application to place Montrow in liquidation in circumstances where it should not have had the

information in the first place. (iv) The only reason why Mr Tacon was applying to be released from the Undertaking was that the order of the BVI Court of 24 th May had been amended by that of 6 th June so as to remove the obligation on Mr Tacon to supply information to the receiver. However Kensington had appealed against the order of 24 th May as amended on 6 th June. It was not clear whether, if Kensington were successful in its appeal, the order of 24 th May would be reinstated in its original form so that the conflict would be re-introduced. (v) Finally, he submitted that there was no urgency. The affidavits of Mr Grimshaw and Mr Bahoumina had disclosed the full position in relation to Likouala. It was unlikely that the interview process with Mr Grimshaw would add to this and there was no risk of diminution of the assets of Montrow in the period between now and resolution of the various applications in the BVI in September or October. Decision 21. We are in no doubt that Mr Tacon should be released from the Undertaking. Our reasons are as follows:- (i) It is true that there is a pending application to remove Mr Tacon as provisional liquidator. However the application is limited to the identity of the provisional liquidator. Thus, even if Mr Tacon were to be removed by the BVI Court following the hearing on 19 th September, a new provisional liquidator would be appointed with the same responsibilities as Mr Tacon, namely to maintain the value of the assets owned and managed by the company. Thus, if we consider an interview of Mr Grimshaw to be a proper action by a provisional liquidator, it matters not that, if Montrow is successful, the identity of the provisional liquidator may change shortly. (ii) In relation to the application in the BVI for directions to be given to the provisional liquidator, it is noteworthy that the Court refused to give any such directions ex parte. On the contrary, it is clearly envisaged in the order of 3 rd September that Mr Tacon may well be released from the Undertaking so as to enable him to interview Mr Grimshaw. The BVI Court has built in appropriate protection by ordering that any information obtained by Mr Tacon (which would include information obtained from Mr Grimshaw) should not be disclosed to Kensington. The position remains therefore (as it was when the matter came before the Royal Court in May and before Beloff, JA in July) that the BVI Court has issued a letter of request that Mr Tacon should be authorised to exercise his powers as provisional liquidator in Jersey and there is no stay ordered by the BVI Court in relation to Mr Tacon's exercise of such powers. (iii) We consider that the order of the BVI Court dated 3 rd September gives adequate protection to Montrow and those behind it. We accept, as Mr Cadin submitted, that there is always a risk of inadvertent disclosure but we consider this to be remote. The effect of the order of rd September is that Mr Tacon may not disclose any information which he obtains by interviewing Mr Grimshaw to Kensington and we have no reason to think that he will not comply fully with such an order. It follows that we do not consider that there is any material risk of prejudice to Montrow if we allow the interview to proceed. Any information obtained from Mr Grimshaw will be produced only to the provisional liquidator, whose sole duty is to step into the shoes of Montrow and preserve the value of its assets. (iv) The fact that Kensington is appealing the order of 6 th June in the BVI is not material. We were shown a letter confirming that Kensington is seeking only to restore the order of 24 th May as amended by the order of 6 th June in relation to the disclosure of

information by Mr Tacon to the receiver. In other words, Kensington is not seeking to restore the provision of 24 th May requiring Mr Tacon to disclose information to the receiver, which order caused Mr Tacon to give the Undertaking in the first place. (v) In summary, the deletion of the relevant part of the order of 24 th May removes the reason for the provision of the Undertaking in the first place. Coupled with the provision in the order of 3 rd September which prevents Mr Tacon from disclosing any information obtained from Mr Grimshaw to Kensington without the approval of the BVI Court, this means that there is no reason for Mr Tacon not to proceed with the interview of Mr Grimshaw pursuant to paragraph 2(g) of the order of 14 th March. We have not forgotten Mr Cadin's submission that there is no need for Mr Tacon to exercise this particular power in the light of all the information he now has and that there is no urgency in his doing so. However, Mr Cadin's submissions in this respect are essentially a repetition of those put before this Court and before Beloff, JA when Montrow was originally seeking a stay of the order of 14 th March. They were rejected by both of those courts and in our judgment nothing material has changed since then. On the contrary, we would quote from the judgment of Beloff, JA as follows:- "34 If anything the desirability of the exercise of Mr Tacon's powers has been increased by a revelation which has come to light since the hearing before the Royal Court that there is now evidence of an underlying insolvency of Likouala and that the assets of Montrow are at any rate pro tem worthless. Mr Tacon wishes to explore the material circumstances in which this has apparently occurred in proper pursuit of the objects of his appointment as provisional liquidator. It may be simplistic to observe that if Mr Grimshaw is neither a party nor privy to a fraudulent scheme, he should have no objection at all to confirming this in interview with Mr Tacon, but even weighing in the balance the concerns that he expresses and the context of the forthcoming hearing in the British Virgin Island court in February 2008, (directions for which were supplied to the Court) this cannot outweigh the risk which, if it exists, must increase with every day that passes, that if Congo are intimately involved in the structure the path to tracing any assets of Montrow may turn into a cul de sac." 22. Finally, Mr Cadin submitted that, if we were against him on the question of releasing Mr Tacon from the Undertaking, we should nevertheless order that any interview of Mr Grimshaw should be by way of written questions followed by answers on affidavit. Mr Tacon is willing to proceed in this manner initially but wishes to reserve the right to conduct an oral interview should he consider this necessary following receipt of Mr Grimshaw's affidavit. We agree that it would be sensible to proceed by way of written questions initially and we were provided with a list of the questions which Mr Tacon proposes to ask of Mr Grimshaw. However it is not for this Court to micro-manage the way in which a provisional liquidator chooses to carry out his duties and we place no stay upon the ability of Mr Tacon subsequently to proceed by way of oral interview of Mr Grimshaw pursuant to paragraph 2(g) of the order should he in his discretion think fit. 23. In summary we release Mr Tacon from the Undertaking so that he is free to exercise the powers conferred upon him by paragraph 2(g) of the order. We also release him from the undertaking referred to in paragraph 3 of the order of the Court of Appeal dated 18 th June 2007

referred to at paragraph 8 above. Our reason for releasing Mr Tacon from this latter undertaking is that the position is covered by the order of the BVI Court dated 3 rd September. We think it should be entirely a matter for that court as to whether Mr Tacon should be permitted at any time in the future to disclose to Kensington information obtained from Mr Grimshaw. It would not be helpful to have both the Jersey and the BVI Courts considering this issue. The BVI Court is the primary court in relation to this matter because Montrow is a BVI company and the decision on this issue should therefore properly rest with that court rather than this Court. Authorities Tacon v Nautilus Trust Co. and Others

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