

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**Civ. App. No. P16 of 2018
CV2017-04551**

BETWEEN

Ravin Ramkissoon

Proposed Appellant/Applicant

AND

Estate Management & Business Development Company Limited

Proposed Respondent/Claimant

- (1) Bank of Baroda (Trinidad & Tobago) Limited**
- (2) First Citizens Bank**
- (3) First Citizens Investment Services Limited**
- (4) RBC Royal Bank (Trinidad & Tobago) Limited**
- (5) JMMB (Trinidad & Tobago) Limited**
- (6) Republic Bank Limited**

Respondents/Defendants

Panel:

R. Narine J.A.

J. Jones J.A.

A. des Vignes J.A.

Appearances:

Mr. R. Charles instructed by Ms. M. Clarke appeared on behalf of the applicant

Mr. D. Phillips QC and Ms. T. Toolsie appeared on behalf of the respondent

Mr. Manwah appeared on behalf of the 1st respondent

Mr. S. Singh appeared on behalf of the 2nd, 3rd & 4th respondents

Ms. C. Ramnarine held for Mr. G. Pantin on behalf of the 5th respondent

Mr. Singh held for Mr. M. Lee Quay on behalf of the 6th respondent

DATE DELIVERED: 29th October, 2018

I have read the judgment of Narine J.A. and agree with it.

J. Jones,
Justice of Appeal.

I too, agree.

A. des Vignes,
Justice of Appeal.

JUDGMENT

Delivered by R. Narine, J.A.

1. There are three applications before us:
 - (i) A notice filed on 4th April, 2018 seeking permission to appeal the Norwich Pharmacal Order made by Mohammed J on 20th March 2018 wherein the second respondent (FCB) and the fifth respondent (JMMB) were ordered to disclose the applicant's banking records.
 - (ii) A notice dated 17th April, 2018 seeking a variation of the order of Yorke-Soo Hon JA, made on the 9th March 2018 whereby she ordered that redacted copies of specified documents filed by EMBD in support of its application for the Norwich Pharmacal order be served on the applicant's Attorneys-at-Law.
 - (iii) The applicant also seeks a stay of the order of Mohammed J and injunctive relief against the Proposed Respondent/Claimant (EMBD) restraining it from using and/or further using any of the financial documents obtained pursuant to the order, pending the determination of this application.

BACKGROUND

2. The applicant is the Creative Director of a company called Commotion Studios which is a digital cinematography company duly registered in Trinidad and Tobago. EMBD is a limited liability company established by the Government of Trinidad and Tobago as a Special Purpose State Enterprise.

3. EMBD is involved in litigation with a number of contractors concerning civil engineering works. Its case is that certain contractors and other persons, conspired to form a cartel that dishonestly manipulated the tendering process so that contracts were awarded to predetermined contractors at inflated prices and that these contractors engaged in other acts of dishonesty and impropriety.
4. As part of its investigations EMBD sought and obtained its first Norwich Pharmacal order from Donaldson-Honeywell J on 7th May 2017. That order directed the production of banking records of the contractors. Those records revealed that some of the contractors had made significant payments to two individuals, one of whom was the applicant. Those records revealed that the applicant was in receipt of 19 payments totalling a sum of \$12,955,000.00. Subsequently on 18th December, 2017, EMBD made a second application for a Norwich Pharmacal order seeking production of the financial records of the applicant. On 20th March 2018, Mohammed J granted the orders sought by EMBD. He also imposed obligations of confidentiality on all the parties. The applicant was not a party to those proceedings.
5. By Notice filed on 4th April 2018, the applicant sought leave to appeal the orders of Mohammed J. While Mohammed J made six orders on that date directed at six different financial institutions, the applicant's application was only in relation to the orders made against FCB and JMMB for disclosure of the applicant's financial records from these two financial institutions.
6. At the hearing of that application on 9th April 2018, Yorke-Soo-Hon JA, ordered that redacted copies of documents filed by EMBD were to be delivered to the applicant's Attorneys-at-Law on or before the 12th April 2018. It was ordered that the redactions be limited to the material which was relevant to the applicant for the purpose of permitting him to obtain legal advice.
7. Subsequently, on 17th April 2018 an application was filed on behalf of the applicant for a variation of the order of Yorke-Soo Hon JA that the applicant's Attorneys-at-Law be given unredacted copies of the documents and/or that these documents be

delivered to the court so that the court could determine what parts if any were to be redacted. The applicant also sought a stay of the order of Mohammed J and injunctive relief against EMBD from using and/or further using any of the financial documents obtained pursuant to the order, pending the determination of this application.

LEAVE TO APPEAL

8. The applicant is aggrieved by the order of Mohammed J. He submits that he is prejudicially affected by the order and has a realistic prospect of success on appeal. He submits that the judge was plainly wrong in making the order, since he could not have been satisfied that there was a good arguable case of wrong doing on his part. The application was based on mere suspicion. It did not meet the required standard of a good arguable case of wrong doing. EMBD did not identify the wrongdoer and the extent to which the applicant was involved in wrongdoing. The application in fact amounted to a mere fishing expedition.
9. In addition the applicant submitted that he had been denied an opportunity to be heard on the application, and so had been deprived of the due process of law. His Attorneys were prevented from making submissions on his behalf, and from informing him of the effect of the orders, and advising him in relation to them.
10. EMBD opposed the applicant's application for permission to appeal on five grounds:
 - (i) The applicant was not a party to the Norwich Pharmacal application. It is not desirable neither is it just and convenient for the applicant to be permitted to pursue the appeal. The applicant has a personal interest in intervening in the proceedings. There is a likelihood that he could obstruct and obfuscate the proceedings. He is fully protected by undertakings incorporated in the order which limit the use that can be made of the disclosed material. In such

circumstances it is therefore neither necessary nor desirable for him to be a party.

- (ii) The applicant has offered to provide copies of the records voluntarily therefore there is no purpose to the appeal.
- (iii) The orders have been complied with and the bank records have been disclosed, therefore there is no substantive matter that can be appealed.
- (iv) The appeal stands no realistic prospects of success as the applicant has advanced no argument to demonstrate that the judge was plainly wrong in the exercise of his discretion to grant the Norwich Pharmacal orders.
- (v) New material confirms suspicion about the applicant's involvement.

11. A Norwich Pharmacal Order permits a prospective claimant to obtain information from a third party who has in some way become involved in the wrongdoing of another. It originated in the case of **Norwich Pharmacal Company & Ors. v. Customs and Excise Commissioners** [1974] AC 133. Lord Reid explained the rationale for the making of such an order at page 175:

“...if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration.”

12. In **Mitsui & Co. Ltd. v. Nexen Petroleum UK Ltd.** [2005] 3 All ER 511, Lightman J identified three conditions to be satisfied for the grant of a Norwich Pharmacal order. These conditions were cited and applied by Flaux J in **Ramilos Trading Ltd v. Valentin Mikhaylovich Buyanovsky** [2016] EWHC 3175 at paragraph 11:

- (i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
- (ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
- (iii) the person against whom the order is sought must:
 - (a) be mixed up so as to facilitate the wrongdoing; and
 - (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

13. In **Orb ARL v. Fiddler** [2016] EWHC 361 (Comm) at paragraph 84, (cited with approval by Flaux J in **Ramilos Trading**) Popplewell J elaborated on the first condition set out above:

*“84. The first condition is that there must have been a wrong carried out, or arguably carried out, by an ultimate wrongdoer. The “wrong” may be a crime, tort, breach of contract, equitable wrong or contempt of court. It is not necessary to establish conclusively that a wrong has been carried out; it will be sufficient if it is arguable that a wrong has been carried out. The strength of the argument will be a factor in the exercise of the discretion, but an arguable case is sufficient to meet the threshold condition. The wrongdoing must be identified by the applicant at least in general terms: see **Ashworth Hospital Authority v MGN Limited** [2002] 1 WLR 2033 per Lord Woolf CJ at paragraph [60].”*

14. In deciding whether a Norwich Pharmacal order should be made, the court must consider a number of factors as set out by the Privy Council in **Rugby Football Union v. Consolidated Information Services Ltd.** [2012] UKSC 55 at paragraph 17:

"[17] The essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors. Various factors have been identified in the authorities as relevant. These include:

- (i) the strength of the possible cause of action contemplated by the Applicant for the order: ...;*
- (ii) the strong public interest in allowing an Applicant to vindicate his legal rights: ...;*
- (iii) whether the making of the order will deter similar wrongdoing in the future...;*
- (iv) whether the information could be obtained from another source: ...;*
- (v) whether the Respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing: ...;*
- (vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result: ...;*
- (vii) the degree of confidentiality of the information sought: ...;*
- (viii) the privacy rights under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed...;*
- (ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed...;*
- (x) the public interest in maintaining the confidentiality of journalistic sources, as recognised in s 10 of the Contempt of Court Act 1981 and art 10 ECHR...."*

15. In order to determine whether EMBD had a good arguable case, the evidence before Mohammed J must be analysed. The evidence before him in support of the Norwich Pharmacal application comprised of an affidavit deposed by Mrs. Savitri Sookraj-

Beharry, Attorney-at-Law acting on behalf of EMBD filed on 18th December 2017, to which is annexed a copy of an affidavit of Andre Rudder, Attorney-at-Law representing EMBD, which had been sworn on 4th May 2017, in support of the first Norwich Pharmacal application before Donaldson-Honeywell J.

16. In paragraph 4 of her affidavit, Ms. Sookraj-Beharry stated that the matters contained therein are based on her own knowledge, documents to which she has access and information "derived from others". In paragraphs 7 and 8, she sets out the case for EMBD, which is that certain named contractors, "with the intention of enriching themselves and injuring EMBD, knowingly procured and/or obtained the EMBD contracts, certifications and payments from EMBD, by reason of collusion between themselves and others that was designed to ensure that specific companiesby a wrongful and unlawful agreement or combination, were awarded specific contracts at inflated amounts and received payments that were not due (the "Cartel Arrangements")". Further, it was EMBD's case that the then Minister of Housing and Urban Development and certain representatives of EMBD "participated in the Cartel Arrangements and/or inappropriately sought to favour the EMBD contractors for the purpose of giving effect to the Cartel Arrangements".
17. In paragraph 15 she stated that the basis for the application against FCB and JMMB, was that they were the applicant's bankers. A spreadsheet was produced showing the number of payments made to the applicant from the contractors. This revealed that the applicant had received a total of \$12,955,000.00 in 19 separate payments made by Kalco, Namalco, Ramhit and TNR during the period 20th August 2015 to 14th September 2015.
18. In her affidavit she continued at paragraph 15.8 as follows:

"EMBD has no knowledge about the activities of Mr. Ramkisson and is not aware that they had any involvement in Caroni Road Works, nor with any of the other contracts alleged to be part of the Cartel Arrangements. EMBD does not know of any legitimate explanation for the payments made

to Mr. Ramkissoon [redacted] in their personal capacity by the named EMBD Contractors within a period just short of one month. At its lowest, EMBD believes that the payments give rise to strong grounds for suspicion of wrongful conduct.”

19. In paragraph 15.9, Ms. Sookraj-Beharry is advised by Queen’s Counsel that the making of such substantial payments to “these individuals” (including the applicant) from sums paid by EMBD is “highly suspicious in itself, and also in the context of the wider evidence of Cartel Arrangements and wrongdoing summarised in the Rudder Affidavit”.
20. The Rudder affidavit which she annexes, was filed in support of the Norwich Pharmacal application which was before Donaldson-Honeywell J in May 2017. In paragraph 9 of the affidavit, Mr. Rudder sets out the case for EMBD and the AG (who was a party to that application). The case was that:
 - a. One contractor (TNR) procured the award of certain contracts by bribery, and offered a further bribe to the former CEO of EMBD (one GP).
 - b. Alternatively, GP’s close relationship with TNR created a conflict of interest in relation to GP’s duties to EMBD, which ought to have been disclosed to the board of EMBD whenever GP made or recommended decisions favourable to TNR.
 - c. The Minister of Housing and Development participated in the bribery scheme and/or the breach of GP’s duties.
 - d. There were widespread, systematic and serious irregularities in respect of the Caroni Roads Contracts, and payments under them, which collectively demonstrated an orchestrated and inappropriate “cartel scheme” designed to award the Caroni Contracts, and to make inflated and inappropriate payments to the contractors as a preferred group.
 - e. These preferred contractors were assisted to win those contracts, and to receive inappropriate payments under them, by GP and one MB, former Divisional Manager, Projects of EMBD.

21. Mr. Rudder refers in his affidavit to SMS messages between GP, the Minister, and one TR of TNR, a company which received contracts and is alleged to be one of the companies involved in the cartel scheme. It is submitted by EMBD that these messages reveal an improper relationship between GP and TR, and the receipt of a house by GP from HDC due to interventions made by TR and the Minister. Mr. Rudder also makes reference to a report by QSPM Consulting which analysed pricing patterns in the bids made by the preferred contractors, and notes of interviews by Price Waterhouse Coopers, with GP, one KB (Project Manager), NR, former Project Engineer and SL, Finance Technician. From these sources, Mr. Rudder identifies information from which he suggests that inferences may be drawn that the preferred contractors were assisted in winning the contracts and inflated and inappropriate payments were made to them.
22. This court has carefully examined the affidavit evidence that was before Mohammed J. On this evidence we are unable to conclude that the judge was plainly wrong in finding that a wrong has been carried out or arguably carried out by an ultimate wrongdoer. The evidence before the judge, in our view, went beyond "mere suspicion" and provided an evidential basis for at least an arguable case that a wrong has been carried out against EMBD.
23. We are not unmindful of the applicant's complaint that an order has been made compelling the respondents to disclose his personal banking information without giving him an opportunity to be heard on the application. The Norwich Pharmacal procedure is indeed draconian in this respect. However, one can see that the procedure may lose its effectiveness, if notice is given to the intended target of the process, in view of the risk of removal or transfer of assets that are being traced. However, in this case the applicant has pleaded that no case has been made out that he is involved in any kind of wrongdoing against EMBD. However, it may well be that EMBD's case is not that the applicant is the ultimate wrongdoer but may have become innocently mixed up in wrongdoing. The Norwich Pharmacal procedure

provides for this kind of situation. In order to protect a person in the applicant's position, limits may be placed by the court on the use of the information and for non-disclosure of the information to third parties.

24. For these reasons, we are not minded to grant permission to appeal the order of Mohammed J.

VARIATION OF THE ORDER OF YORKE-SOO HON JA

25. On 9th April, 2018, Yorke-Soo Hon JA ordered that EMBD serve the applicant redacted copies of the fixed date claim form with the affidavit filed in support thereof, and the skeleton arguments filed before Mohammed J, subject to the condition that the documents were to be used to obtain legal advice by the applicant, and were not to be disclosed to third parties. The redacted documents were duly served on instructing Attorney for the applicant on 12th April, 2018. The applicant now applies to this court for an order that unredacted documents should be served on him, or alternatively, that EMBD do deliver to this court unredacted original documents, and that this court shall determine what parts, if any, are to be redacted.
26. In fact, shortly before the hearing of this appeal unredacted copies of the documents were delivered to this court. The court examined the documents, and satisfied itself that the redactions that were made to the copies served on the applicant were made to delete information relating to another person whose accounts were ordered to be disclosed by Mohammed J to EMBD. This information was not relevant to the applicant, and quite rightly should not have been disclosed to the applicant in the interests of protecting the confidentiality of the material as it related to the other target of the Norwich Pharmacal order. Accordingly, the court is not minded to order that the unredacted documents be served on the applicant.

27. However, it seems to us that the applicant is correct in principle in asserting that the making of redactions or the extent of such redactions, should be made by the court, and should not be left to the discretion of instructing attorney for the party applying for the order. The correct procedure, we suggest is that the court which makes the order, should direct which parts of the order ought properly be redacted to protect the identity of a third party and the confidentiality of that information from the party to be served with the order. To this extent, we uphold the contention of the applicant that the procedure adopted was wrong in principle.

INJUNCTIVE RELIEF/STAY OF EXECUTION

28. The applicant seeks a stay of execution of the order of Mohammed J, and an injunction restraining EMBD from using and/or making any further use of the account documents and/or information it received from the 2nd and 5th respondents. EMBD submits that the orders of Mohammed J have been complied with, and so there is nothing to stay. Further, EMBD contends that there is no legal basis for seeking to restrain EMBD from using the documents that are lawfully in its possession. There is no case filed by the applicant that could raise a legal issue, and even if there was, the balance of convenience lies against granting an interlocutory injunction. In EMBD's submission, if the material does not implicate the applicant in wrongdoing, then no damage will be caused to him. If the material implicates him, then the interests of justice require that EMBD should be able to use the information.

29. This court finds much force in the submissions of EMBD on this aspect of the appeal. There appears to be no useful purpose in granting a stay of execution of the orders of Mohammed J at this time. The orders have been carried out. The information has been provided by the 2nd and 5th respondents. There is at this time nothing to stay. On the question of granting injunctive relief to restrict the use of the information disclosed, we agree that the balance of convenience favours EMBD. If the applicant is not implicated in the wrongdoing he will suffer no loss. If he is implicated, the justice of the case requires that EMBD should be permitted to use the information. In

this regard we note that in the schedule to the orders made by Mohammed J, EMBD gave an express undertaking that it shall not without the permission of the court use the information provided otherwise than for the purposes of tracing funds paid under the Caroni Roads Contracts and for enforcing its rights in relation to their recovery. The information provided can only be used for this limited purpose, which we expect has already been carried out. Accordingly, we are not minded to grant the injunctive relief requested by the applicant.

DISPOSITION

30. It follows that this application is dismissed except for our conclusions with respect to the redaction of the documents which were served on the applicant's attorneys. We will hear the parties on costs.

Dated the 29th day of October, 2018.

R. Narine
Justice of Appeal.