[2013] JMCC Comm. 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013CD00066

BETWEEN	**SAM PETROS**	**CLAIMANT**
A N D	**GEORGE MURRAY**	**1ST DEFENDANT**
A N D	**KAREN MURRAY**	**2ND DEFENDANT**

Mr. Conrad George instructed by Hart Muirhead Fatta for the Claimant

Mr. Ransford Braham QC and Ms. Carol Davis for the defendants

TOMLIN ORDER – VARIATION OF SCHEDULE TO TOMLIN ORDER – WHETHER VARIATIONS FUNDAMENTALLY ALTER SCHEDULE

HEARD: **29th & 31st May, 2013 and 7th, 24th, 25th, 26th, 27th, June, 2013 and 5th and 19th July 2013**

SINCLAIR-HAYNES J

[1] The defendants and the claimant are shareholders in two companies known as Tensing Pen Limited and Tensing Pen (Cayman) limited. The defendants are husband and wife and they are the owners of 50% of the shares in each company. The claimant owns the remaining 50%. For several reasons the relationship between the defendants and the claimant deteriorated and has become so acrimonious that they are unable to continue together in business.

[2] Consequently, the claimant sought the intervention of the court to appoint additional directors *inter alia*. That action however was compromised by the parties who instead approached the court for a Tomlin Order. Mangatal J acceded to their request and such an order was made on the 28th November 2011.

[3] The essence of the schedule to the Tomlin Order was to provide directives for the sale of the properties. The schedule also provided that the hotel and properties were to be sold to a purchaser who was known to the parties. There was an offer for the sum of US$4.2 million. In the event of failure to sell to that purchaser, the properties were to be sold by a broker. The shareholders were entitled to bid for the properties upon the failure of the broker to sell the properties in accordance with the mechanism outlined in the schedule.

[4] Consequent on the provisions contained in the schedule to the Tomlin Order:

(a) the 1st defendant resigned as a director. (Hitherto both defendants and the claimant were directors); and

(b) Mr. Kenneth Tomlinson was appointed director in place of the 1st defendant and chairman of the company.

[5] Paragraph 11 of the schedule provides for bids on behalf of the defendants and claimant in the event of their failure to sell to a third party. A number of bids has been submitted by the parties. They however agreed that the final bidding would be closed on the 6th March 2013. The claimant's bid was accepted. As a consequence of the chairman's acceptance of the claimant's bid, the defendants have moved the court's summary jurisdiction, by way of Re-Issued Amended Notice of Application for Court Orders dated 7th March 2013, for the following orders:

1. *Liberty to apply*

2. *That Kenneth Tomlinson, the Chairman of the Board of Directors, accept the offer of US$1,700,000.00 made by the First Defendant and Second Defendant to purchase the shares owned by the Claimant in Tensing Pen Limited and Tensing Pen (Cayman Islands) Limited, which is:*

   "the highest such offer for the Corporate Entities, the shareholder who has made such offer shall be entitled to purchase the other shareholder's interest pro-rated based on such offer price."

4. *The claimant be barred from making any further offer to purchase the shares in Tensing Pen Limited and Tensing Pen (Cayman Islands)Limited.*

[6] By way of Amended Notice of Application, filed June 14 2013 the defendants also seek the following orders:

1. *That Mr. Kenneth Tomlinson be removed as an independent director and Chairman of the Board of Directors of Tensing Pen Limited, forthwith or at such other time as determined by this Honourable Court.*

2. *That an independent director be agreed by the parties within 7 days of the date thereof, and in the absence of agreement be appointed by this Honourable Court.*

3. *That the purported acceptance by Mr. Tomlinson of the offer of the Claimant dated 6th March, 2013 be set aside.*

4. *That this Honourable Court direct that the New Board and/or the parties and/or the independent Director Chairman of the New Board accept the offer of Paul Elsener made 8th May, 2013 in the sum of US$3,750,000 pursuant to clause 11 of the Schedule to the Tomlin Order herein.*

[7] The court is unclear as to whether the defendants intend that their application to compel Mr. Tomlinson to accept their offer still subsists in the face of Mrs. Messado's evidence that the parties commenced the bidding process prematurely as the price had not fallen below US $3 million, which was required by the schedule. Her evidence is that having belatedly realized the error, Mr. Elsener's bid which was received on the 8th May in the sum of US $3,750.000.00, is currently the best and highest offer.

[8] This court is of the view that the defendants' applications are wholly inconsistent. The court is being asked to accept Mr. Elsener's offer because the parties erroneously omitted certain required steps and prematurely began bidding. At the same time, its application of 7th March 2013 requiring the acceptance of its offer subsists. It seems to me to be a classic example of the impermissible approbation and reprobation

Mr. Georges Preliminary objection

[9] Mr. Conrad George challenges the defendants' ability to bring this claim. His challenge is two pronged. His first attack is that the proceedings are stayed. In the absence of an application to restore, the court has no jurisdiction. There is no application to lift the stay; there is only an application for liberty to apply which has been granted by the Tomlin Order itself. The schedule to the Tomlin Order is a part of the Order. It is a contract between the parties which is enforceable by way of suit and appended to a Tomlin Order for more efficient enforcement.

[10] The court's jurisdiction is limited to the making of orders which "carry into effect" the terms of the schedule. The only remedies which are available to the court are orders for specific performance, injunction or for declaration of rights. Any other order sought can only be enforced by fresh action to enforce the contractual obligations in the schedule, if at all they can be enforced. He further submits that liberty to apply to restore is limited to enforcement of the terms of the schedule. None of the orders sought by the defendants concerns the schedule. There is therefore no right to restore the proceedings.

[11] Mr. Ransford Braham QC however, submits that a party to a Tomlin Order may apply to the Court without filing a new suit for an order to enforce the terms of the Tomlin Order. The defendants are entitled to an order "giving effect to the terms" of the agreement contained in the schedule to the Tomlin Order. It is his submission that specific performance and an injunction are not the only means of enforcing a Tomlin Order. The appropriate order will depend on the terms of the schedule, the facts before the court and the nature of the breach complained of. He further submits that the orders sought are mandatory injunction or request for specific performance. He relies **on Foskett** page 265 para 17-11 and on an extract from **Atkin's Court Forms/Compromise and Settlement (Volume12 (1)) Practice/D: ENFORCEMENT/32. Enforcing a compromise embodied in an order or judgment.**

The Law

[12] The learned authors, Vanessa and Professor Kodilinye state the law with clarity in their text, **Commonwealth Caribbean Civil Procedure** 2nd edition at page 165:

> *"A Tomlin Order is a consent order staying proceedings upon terms agreed between the parties and which are scheduled to the order. Such an order is particularly useful where (a) complex terms of settlement are agreed or, (b) where the parties wish to avoid publicity of the agreed terms, or (c) where they wish to agree terms which extend beyond the boundaries of action.*
>
> *The effect of the Tomlin Order is to stay the action whilst at the same time keeping it alive as between the parties for the sole purpose of enabling any party to apply to the court to enforce the agreed terms. It is not part of the judge's function to approve or disapprove the terms of the agreement and he has no power to make such an order in terms other than those agreed, though the court has the inherent power to rectify a Tomlin Order which, by mistake, does not reflect the parties' true agreement.*
>
> *In the event of a breach of the agreed terms, the action can be restored under the liberty to apply, and an order obtained requiring compliance by the defaulting party. Provisions in the schedule can be enforced even if it extends beyond the boundaries of the original action."*

Ruling on Mr. George's *objection in limine*

[13] The schedule to the Tomlin Order provides that the parties are at liberty to apply. It reads:

> *"all further proceedings in this claim be stayed save for the purpose of carrying such terms into effect and for that purpose the parties have liberty to apply"*

There is therefore no need to apply to restore. The defendants are not seeking to challenge the Order. The application is to enforce certain terms of the schedule.

[14] I am strengthened in this view by the statement of the learned authors of **Atkins Court Forms/Compromise and Settlement (Volume12 (1)) Practice/D: ENFORCEMENT/32. Enforcing a compromise embodied in an order or judgment.** Page 5 reads:

Tomlin Orders

> *Generally, in a Tomlin Order the terms of the compromise are set out in a schedule to the order staying the proceedings, and they are not therefore a judgment or order of the court and cannot be enforced as such. The body of the order should include a "permission to apply" provision and the innocent party should use this to apply to the court to convert the contractual obligation into one enforceable by the courts. The application is made by notice of application, supported if necessary by a witness statement. Depending on what provision it is that the innocent party wants to enforce, he may apply for an order that a sum of money be paid, an order for specific performance requiring certain acts to be undertaken or an injunction preventing some activity prohibited by the terms of the schedule. The court will not enforce terms of a schedule if they are too vague nor will it award damages for the breach of the terms of that schedule unless a new claim is launched for that purpose.*
>
> *In some cases the terms of the agreement are contained in the body of the consent order or judgment rather than in a schedule, and in such a case it may be possible to obtain enforcement of them in the existing claim. Usually, however, it is necessary to begin a fresh claim alleging breach of compromise or contract. The actual terms embodied in the schedule to a Tomlin order will determine the appropriate method of enforcement. In deciding how to seek enforcement, the innocent party should have regard to the requirement in the over-riding objective to save expense.*

[15] Goff"s J statement in the case of **E.F. Phillips & Sons Ltd. v Clarke** [1970] Ch 32, p. 322 also supports this view. At page 325 he said:

> *"In my judgment, provided the application is strictly to enforce the terms embodied in the order and the schedule, and does not depart from the agreed terms, an order giving effect to the terms may be obtained under the liberty to apply in the original action, notwithstanding the compromise itself goes beyond the ambit of the original dispute and the provision sought to be enforced is something which could not have been enforced in the original action and which, indeed, is an obligation which did not then exist but arose for the first time under the compromise."*

[16] Burton J, in the English case of **Kennedys Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG & others (Overseas Marine**

Enterprises Inc., third party), Brit UW Ltd and others v Starlight Shipping Co and another, Brit UW Ltd and others v Imperial Marine Co and others [2011] EWHC 3381 (Comm.) adopted a rather robust approach to the phrase *"save for the purpose of carrying into effect the terms of the settlement agreed."* The headnotes of that case read:

> *"The defendants were entitled to proceed summarily to enforce the settlement agreements, without issuing fresh sets of proceedings. It was wholly clear that enforcing the indemnity, seeking a declaration, and specific performance was "carrying into effect the terms agreed. Even in respect of damages, statutory provisions permitted damages to be given in lieu of an injunction or specific performance and also in addition to such remedies. Damages could as well be sought by reference to that jurisdiction as by reference to damages for breach of contract and the measure would be the same."*

Whether Mr. Tomlinson's Acceptance of the claimant's offer contravenes the provisions of the schedule

[17] Mr. Braham submits that Mr. Tomlinson's contention that the defendants' offer of US $1,850,000 was made after business hours and that the claimant's offer was the best offer is contrary to what the parties agreed to in the schedule. Clause 11 speaks to no time limitation as to when the offer ought to remain open. Mr. Tomlinson's rejection of the defendants' offer on that basis is therefore contrary to clause 11.

[18] It is also Mr. Braham's submission that Mr. Tomlinson's decision to accept the claimant's offer on the basis that it is the "best offer" is plainly wrong since the only requirement is "the highest offer". The defendants' offer of US $ 1,850,000.00 was made on March 6, 2013, was the highest and ought to have been accepted. He further submit that Mr. Kenneth Tomlinson decision that the defendants offer was not the better offer because the defendants were relying on loan financing in order to pay for the entire purchase price was also contrary to paragraph 11 which does not disentitle any party from obtaining loan financing. The imposition of the condition prohibiting loan financing is therefore wrong and so was his rejection of the defendants' offer on that basis.

[19] He submits that Mr. Tomlinson having resigned, the directives are now for the directors of the company. According to him, this is permitted by paragraph 10 of schedule which states:

> *"This agreement is being made to facilitate a settlement of the disputes herein and to effect the Sale. The New Board will make the final determination as to the acceptability of any offer, and the parties herein confirm the New Board's authority to do so."*

Mr. George's submission

[20] It is Mr. George's submission that parties have appointed an independent director pursuant to the schedule and there is no provision for the appointment of another director. The parties have already discharged the obligation to appoint an independent director. There is therefore nothing to enforce. Further, he submits that a director can only be appointed by the shareholders in a general meeting and/or the board of the company.

[21] Mr. George submits that the court has no jurisdiction to grant the reliefs sought in the defendant's amended application dated 20th June 2013 which seeks to have Mr. Tomlinson's acceptance of the claimant's offer set aside, compel him to accept the defendants' offer and bar the claimant from making any further offer. He cites the following reasons.

1. *Mr. Tomlinson is not a party to the proceedings.*

2. *There is no provision for the setting aside of a contract entered into by Mr. Tomlinson or for him to refrain from doing anything regarding the acceptance of a bid which could be enforced by the setting aside of the contract as such, an order would amount to a rescission / rectification of the contract. That remedy is not available under the court's summary jurisdiction in the absence of a clear obligation in the schedule preventing Mr. Tomlinson from entering such a contract.*

3. *There is no mention of Mr. Tomlinson in the schedule regarding the acceptance of any offer. There is no act in relation to the acceptance of the remaining which could be enforced by the setting aside of the contract.*

Ruling

[22] Regarding the defendant's application to appoint a director in the place and stead of Mr. Tomlinson, paragraph 4 of the Schedule provides:

> *"An independent director, agreed to by Sam and the Murrays, will be appointed to the Company's board of directors within 14 days of this agreement, and it is agreed that such independent director should be chairman. The company shall hold an Annual General Meeting within 60 days of the appointment of the independent director.*

The schedule stipulated the time frame within which the director was to be appointed. An independent director was duly appointed in the person of Mr. Tomlinson. The schedule does not provide for the appointment of another director. The court's hands are therefore tied in that regard.

[23] The parties have agreed to appoint Mr. Tomlinson. The court therefore has no *locus standi* to appoint another director in the face of the parties' agreement. There is the further hurdle regarding the appointment of a director which this court considers to be insurmountable. Directors are appointed in accordance with the provisions of the Companies Act. This court has no power to appoint a director in contravention of the Act unless the terms of the schedule so authorize the court. In the circumstances of the instant case, the court's function is to "*carry into effect the terms of the schedule*". It has no power to vary the terms except in circumstances which are permitted.

Court's power to set aside contract for sale of shares

[24] Inasmuch as the court's powers of enforcement in respect of the schedule to Tomlin Orders are circumscribed, the court does have the power to ensure that what is agreed between the parties is carried into effect. If Mr. Tomlinson has acted contrary to the clear terms of the schedule by failing to accept the highest offer and has imposed extraneous conditions, it must be the court's duty, upon application, to enforce the terms agreed. Enforcement might result in the setting aside of an acceptance if it was made

contrary to the terms of the schedule. The pertinent question however, is whether Mr. Tomlinson so acted.

Are the reliefs sought enforceable?

[25] The court now adverts to Mr. George further submission that the remedies sought are not for the purpose of "carrying into effect" the terms of the schedule to the Tomlin Order. He contends that the entire process governing the sale of the shares of the companies as laid out in the Tomlin Order has been amended. The reliefs sought are not enforcement of the schedule as the order bears no resemblance to the schedule to the Tomlin Order. The court therefore has no summary jurisdiction to enforce them.

Ruling

[26] The parties have deviated from the procedure outlined in the schedule. It is necessary to quote verbatim, paragraph 10 and 11 of the schedule. It reads:

> *"This agreement is being made to facilitate a settlement of the disputes herein and to effect the Sale. The New Board will make the final determination as to the acceptability of any offer, and the parties hereto confirm the New Board's authority to do so.*
>
> *In the event that the Sale is not effected, the parties agree that the Company (with the authority of Cayman, which its directors hereby give) will list the property with international hotel brokers to procure a purchaser at a price acceptable to the New Board. In the event that no acceptable offers are received with 12 months from the date of this Agreement, the parties shall lower the sale price as recommended by the said international hotel brokers or by 15% whichever is less. The price shall be further marked down as recommended by the said international hotel brokers every 4 months provided that if the price falls to USD$3M the shareholders shall be entitled to lodge bids with the New Board to purchase the Corporate Entities, and upon the New Board being satisfied that it holds the highest such offer for the Corporate Entities, the shareholder who has made such offer shall be entitled to purchase the other shareholders' interest pro-rated based on such offer price."*

[27] The sale having failed, the parties ignored the requirement of paragraph 11 of the schedule. The property was listed with the international hotel brokers but there was no downward adjustment of the price as was required by the schedule. The requirement that the new board should determine the highest bid was varied by the parties. The parties formulated independently of the schedule the methodology by which the bids

were to be made and accepted that Mr. Kenneth Tomlinson was solely invested with the authority to determine the acceptable bid.

[28] The court is unable to accept Mrs. Davis' submission that the parties' premature entry into the bidding process was a result of inadvertence. That assertion is difficult to fathom. The need for the down ward movement to the US$3 million sale price is stated in clear language. The attorneys on both sides are competent and experienced. Moreover, from the tenor of the mail exchanged among the parties, it is pellucid, that they consciously made the decision to circumvent the process of systematically reducing the price and instead commenced bidding between themselves.

[29] They further agreed to vary the contract by conferring upon Mr. Tomlinson the discretion to determine the acceptable bid. Instead of accepting the highest bid, the parties conferred on Mr. Tomlinson the discretion to accept the highest and best offer. In so doing, they dispossessed the new board of that authority. This variation removed the right which the schedule had given the party with the highest bid to have his bid accepted. The parties were of one accord until the claimant's bid was accepted. Scrutiny of the following emails exchanged among the parties makes this quite manifest.

Email from Mrs. Messado concerning the Auction to Kenneth Tomlinson", "Conrad George", "Karin Murray sent February 25, 2013 12:19PM

We refer to our discussions and to the latest position that has been agreed on by the Conrad George team.

1. *Bidding with the details regarding same to be present by Monday the 25th February at 3:30 p.m.*
2. *Bidding to remain open for all parties to complete with details for the completion;*
3. *Bids to remain open at the discretion of the Board Chairman on the understanding that the time for presentation will not exceed the 6th March, 2013 when they will be closed;*
4. *The discussions to which bid is to be accepted will be solely that of Mr. Ken Tomlinson, the Chairman of the Board.*
5. *The best and final offers must be in by March 6, 2013;*
6. *Each party shall have 24 hours to respond to the bid;*
7. *Each party shall get a copy*

8. *The Murrays will execute the first offer made today the 25th but it is hereby agreed that they are entitled to receive their future offers under the authority of Mrs. Messado*

Please confirm and approve.

Email sent to Mr. Tomlinson by Mr. Conrad George, on February 25, 2013 2:38 PM
Subject: Draft Email to be sent to Ken Tomlinson for your perusal

Dear Ken:

I have had discussions with Mrs. Messado, who now represents the Murrays, and we have agreed that the auction of the shares in Tensing Pen Limited and Tensing Pen (Cayman) Limited scheduled for this afternoon will no longer take place. Instead, the Murrays and Mr. Petros will submit to you their respective offers to purchase the shares of each other, including price and any relevant terms by 3:30 p.m. today. You will be entitled to discuss each offer with the offerors with a view to obtaining clarification or improvement of any of the proposed terms (including but not limited to price) and having done so by no later than close of business on 6th March 2013, you will in your absolute discretion decide which offer is better. Upon you communicating your decision, the maker of the better offer will then purchase on the terms of such offer the shares of the other shareholder(s) in the above two companies, and such other shareholder(s) shall sell on those terms.

Best Regards,

Conrad
On February 21, 2013 02:25 PM, the following e mail was sent to Mr. Conrad George on behalf of Mrs. Jennifer Messado.

"This is to confirm our discussion that Mrs. Jennifer Messado will attend the auction sale together with the Murrays.

We also confirm that the auction sale will be held on Monday the 25th February 2013 at 3:00pm at your offices.

Further, we will present the cheque for US$100,000.00 made payable to Business Recovery Services Limited at that time.

We understand that Sam Petros will be represented by Conrad George under a Power of Attorney and we will need sight of the same prior to the auction. Further, we would also expect that Mr. George would be taking the cheque for the said sum US$100,000.00 for and on behalf of Sam Petros to the auction also.
JENNIFER MESSADO

Sent: Thursday February 21, 2013: 02:26 PM

From: on behalf of Kenneth Tomlinson

Hi Mrs. Mesaado,

The Tensing Pen Auction is tentatively set for Monday February 25, 2013 at 3:30 pm.

Based on recent discussions with Conrad and Sam, they are of the opinion that the US$100,000 deposit is to be held in a third escrow account until the conclusion of the auction process, and not by any of the attorneys.

Could you kindly have a discussion with Conrad ASAP surrounding the above issue.

Yours,

Ken

Sent: Thursday, February 21, 2013 2: 41 PM

From: .....on behalf of Conrad George

Agreed Ken. The escrow account should be under your control. We would be happy with you using your business account for the purpose.

Conrad

Sent: Thursday, February 21, 2013 2:43 PM

From: Conrad George

Hi Jennifer

Sam needs the funds to be with Ken prior to the auction. I suggest both sides sort that out by tomorrow or early Monday.

I do not see any need for a power of attorney. I will supply written authority from Sam before the auction.

Best Regards

Conrad

LETTER sent by Jennifer Messado to Hart Muirhead Fatta

February 22, 2013

Re: Auction- Tensing Pen, Negril

We refer to our discussions herein and confirm the following:-

a) *There will be no protocol agreement just an Agreement for Sale;*
b) *Each party shall present proof of the payment of monies to Business Recovery Services Limited in the amount of One hundred Thousand United States Dollars (US$100,000.00) upon attendance at the auction sale;*

c) *That Conrad George will present prior to the auction sale to the relevant letters of authority for the attendance at the auction, the signing of the Agreement for Sale and bidding on behalf of the other party, Sam Petors;*

d) *The remaining amount of the deposit for the successful bidder to make up the ten percent (10%) deposit of the agreed purchase price must be paid within 48 hours or two (2) business days to enable funds to be wired into the account;*

e) *The successful purchaser under the Agreement for Sale will have to present a financial letter of undertaking for the completion of the purchase forty-five (45) days from the date of the execution of the Agreement for Sale by both parties.*

f) *The completion date of the Agreement for Sale will be sixty (60) days from the date of execution of the Agreement by both parties bearing in mind that the transaction has to be completed in two different countries, Jamaica and Cayman*

g) *That Jennifer Messado & Co. Shall have carriage of sale if the Murrays are the successful bidders;*

h) *That Hart Muirhead Fatta shall have carriage of sale if Sam Petros is the successful bidder*

Please be guided accordingly.

Sent : ***Monday, February 25th, 2013 09: 36 AM***
From: *Jennifer Messado*
To: *Conrad George*

We refer to our discussions and to the latest position that has been agreed on by the Conrad George team.

1. *Bidding with the details regarding same to be presented by Monday the 25th February at 3:30 p.m.*
2. *Bidding to remain open for all parties to complete with details for the completion;*
3. *Bids to remain open until the 6th March 2013, when they will be closed;*
4. *The discussions to which bid is to be accepted will be solely that of Mr. Ken Tomlinson, the Chairman of the Board.*

Sent: ***Monday, February 25th, 2013 10: 30 AM***
From: *Jennifer Messado*
To: *Conrad George: Kenneth Tomlinson*

Can you please confirm that you are in receipt of these funds that we agreed to be in hand for the analysis of the bids for the purchase of one-half of the interest of this property?

Sent : ***Monday, February 25th, 2013 10: 45 AM***
From: *on behalf of Kenneth Tomlinson*
To:

Hi Mrs. Messado,

My accountant confirmed that the funds were wired to BRSL's account at NCB on Friday.

Sent : ***Monday, February 25th, 2013 11: 09 AM***
From: *on behalf of Sam Petros*

Please find current bank statements with more than enough cash to buy Tensing Pen Shares in cash.

Sent : ***Monday, February 25th, 2013 12: 19 PM***
From: *Jennifer Messado*

To: *Kennth Tomlinson, Conrad George, Karin Murray*
Subject: *Auction- Tensing Pen, Negril*

We refer to our discussion and to the latest position that has been agreed on by the Conrad George Team.

1. *Bidding with the details regarding same to be presented by Monday the 25th February at 3:30p.m.*
2. *Bidding to remain open for all parties to complete with details for the completion;*
3. *Bids to remain open at the discretion of the Board Chairman on the understanding that the time for presentation will not exceed the 6th March, 2013 when they will be closed;*

4. *The discussions to which bid is to be accepted will be solely that of Mr. Ken Tomlinson, the Chairman of the Board.*

5. *The best and final offers must be in by March 6, 2013;*
6. *Each party shall have 24 hours to respond to the bid;*
7. *Each party shall get a copy*
8. *The Murrays will execute the first offer made today the 25th but it is hereby agreed that they are entitled to receive their future offers under the authority of Mrs. Messado*

Please confirm and approve.

Sent : ***Monday, February 25th, 2013 03: 17 PM***

From: *Conrad George*
To: *Kenneth Tomlinson*
Subject: *FW: Draft Email to be sent to Ken Tomlinson for your perusal*

Dear Ken:
Please see the attached.
Best regards

From: *Conrad George*
Sent: *Monday, February 25, 2013 2: 38PM*
To: *Tracey Long*
Subject: *Draft Email to be sent Ken Tomlinson for your perusal*

Sent: Monday, February 25th, 2013 04: 19 PM
From: Jennifer Messado
To: Kenneth Tomlinson
Subject: Offer

We refer to our client's offer of US $ 1,700,000.00.

It is to be noted that the terms and conditions of our clients' offer are that the deposit of ten percent (10%) of the purchase price being the sum of US $ 170,000.00 will be at risk if they do not perform on the timely basis as previously indicated.

Sent : Monday, February 25th, 2013 05: 44 PM
From: Tracey Ann Long
To : Conrad George

Dear Ken,

Please advise whether you have received the good faith deposit from the Murrays. We cannot be discussing the terms of the offers unless you have received the deposits as agreed. We know that you have received our client's deposit.

Sent : Tuesday, February 26th, 2013 11: 35 AM
From: Conrad George
To: Kenneth Tomlinson
CC: Jennifer Messado
Subject: Re: Offer

Dear Ken:

I was surprised to discover yesterday evening that the Murrays, having been quite zealous in their demands for confirmation that Sam had paid into escrow his US $ 100,000.00, have failed to pay in theirs.

It is clear under the arrangements between the parties that no offer may be considered from any party who has failed to pay in its US$ 100,000.00

It also appears that, despite the statement in the Murrays' offer that it is not conditional on financing being obtained, it is, fact, subject to finance; the lapsed offer of finance from NCB that they say they will revive is in fact an offer to Tensing Pen Limited and not to the Murrays, which obviously could not be employed by them in support of their offer.

So, the Murray's offer is:

(i) Made in breach of the agreement that US $ 100,000 should be deposited with you beforehand; and
(ii) Unsupported by any substantial finance

Accordingly, the Murrays are completely without risk in making an offer to purchase; if they are successful and obtain no finance and are unable to complete, they lose not even the US $ 100,000 they ought to have deposited.

Accordingly, you should not consider their offer at all, as to do so would allow them to advance the price to Sam's detriment without themselves complying with the necessary requirements of the process, and without exposing themselves to any consequences of their non-compliance

Please confirm by return that the Murray's offer is not being considered

Sent : ***Tuesday, February 26th, 2013 23: 11 PM***
From: *Kenneth Tomlinson*
To: *Jennifer Messado*

Hi Mrs. Messado,

I have reviewed the offer sent to me on behalf of Richard & Karin Murray and respond as follows:

1. *Based on the third paragraph in your offer letter, you indicated that the offer is NOT conditional on obtaining financing. The Agreement for Sale is CASH in US dollars only and same is unconditional (Clearly the correspondence from NCB implies that you are seeking financing. Could you kindly give an explanation?)*
2. *What is meant by due diligence information that is required by NCB? This may impact on the time spent to close the transaction.*

3. *What is being sold is the 50% shareholding in the Tensing Pen companies. The companies continue as a going concern. What is meant by "the purchase price must include all cash in bank in US$ and J$ and all current liabilities of the operation of the hotel are to be dealt with and apportioned at the date of completion of the sale in the normal course of business?) (As pointed out to the shareholders previously, the Board of Directors have the right to declare an interim dividend up to the date of the transfer of the shares during this financial period)*
4. *My responsibility is to accept the best offer.*

Sent : ***Wednesday, February 27th, 2013 07: 47 AM***
From: *On behalf of Karin Murray*
To:

Dear Ken,

Further to your email below, I would like to clarify our position regarding item 3.

Our offer would expect to include all assets inclusive of retained earnings as indicated in the Balance Sheet with the exception of any interim dividend declared on unaudited profits for this financial period prior to completion.

We have discussed this previously and regard this as fair and equitable.

Best Regards,
Karin Murray

Sent: Tuesday, March 5th, 2013 10: 43 AM
From: *Jennifer Messado*
To: *Conrad George*

We refer to our many discussions and to the cash offer made by the Murrays a portion of which includes financing.

It appears that the Chairman of Tensing Pen needs guidance from the Court as to the clarification and description of the highest and best offer. Accordingly, we have sought the assistance of Dr. Raymond Clough in getting the determination from the Court.

The parties are acting in good faith and are only seeking a level playing field.

Sent: ***Tuesday March 5, 2013 16:41 (04:41) PM***
From : ***Jennifer Messado***
To: ***Conrad George***

Dear All,
As you are aware this matter is now the subject of further litigation. We therefore have to place on record that the CHAIRMAN cannot make any decisions regarding offers unless there are clear directions from the Court accordingly.

Sent: ***Tuesday March 5, 2013 5: 37 p.m***
From: ***Conrad George***
To: ***Jennifer Messado, Kenneth Tomlinson***

Dear All

On the contrary, the terms of the agreement between the parties in relation to the offers is clearly set out in the correspondence (letters and emails) exchanged between the attorneys acting for the parties and Mr. Tomlinson. It is beyond honest challenge that:

- *The parties agreed to submit offers by 3:30 pm on the 25th;*
- *The chairman may seek improvement on any of the terms of such offers until close on the 6th;*
- *At which point the Chairman will in his absolute discretion decide which offer is preferable.*

This is clear from correspondence from Jennifer Messado and Co as well as from HMF. In fact, the insistence on the 6th being the cut-off date came from the Murrays. Sam was prepared to leave it open to Ken to decide when he was satisfied he held the best offer obtainable.
Accordingly, Ken, having taken on the task on the above agreed terms, is obliged to choose by no later than close of business tomorrow.

Letter dated March 6, 2013 addressed to Mr. Raymond Clough, the then…from …

Attention: Dr. Raymond A. Clough

Re: Claim No. HCV 06390 of 2011 – Sam Petros v George Murray and Karin Murray

Dear Sirs,

We refer to your letter of yesterday's date to the Chairman of Tensing Pen Limited, a copy of which has been sent to us. We act for Sam Petros, holder of fifty percent (50%) of the shares in Tensing Pen Limited and Tensing Pen (Cayman) Limited ("together, the Companies").

We have reviewed your letter and draw your attention to the following points.

1. *Before you became involved in this matter, the parties (ie. your clients and ours) agreed to vary the terms of the Tomlin Order (specifically, paragraph 11 thereof – the paragraph quoted by you) to shorten the process of the disposing of the shares in the Companies, so the parties could be rid of one another more quickly.*

2. *Much time and effort were expended drafting a protocol designed to achieve this, but the details of the draft were never agreed.*

3. *Jennifer Messado & Co. then assumed conduct of the matter on behalf of your clients.*

4. *Following energetic negotiations, we agreed with that firm that:-*
   (a) the antipathy between the parties precluded agreement on the detail of the protocol;
   (b) it was, nevertheless, in the interests of both parties to shorten the time frame and procedure set out in the Tomlin Order and allow the parties to bid for each other's shares now;
   (c) the best way to effect this would be to abandon the attempt to agree to detailed protocol and simply to agree that Mr. Tomlinson would have an absolute discretion to decide who should sell to whom (ie. which bid/offer was the better);
   (d) an initial plan to hold an auction was abandoned in favour of each party putting in offers, and Mr. Tomlinson, in circumstances of full transparency, clarifying (and if possible detail improvement of) the terms of each and then deciding in this absolute discretion which was the better of the two.
   (e) the parties agreed to deposit US$100,000 with Mr. Tomlinson as a precondition to being allowed to take part in the process;
   (f) by giving Mr. Tomlinson an absolute discretion, we avoided the need to agree details that the parties seemed incapable of agreeing.

5. *All of the above terms were agreed in correspondence and by email, copies of which are supplied herewith.*

6. *It is not now open to either of the parties to rely upon the process set out in paragraph 11 of the Tomlin Order, it having been varied by agreement. Any attempt to do so will be opposed and an Order for costs sought.*

Please supply us with any application you intend to make, together with any supporting evidence.

Email from Mrs. Messado to Mr. George sent Wednesday, March 06, 2013 7:34 PM

We are going to suggest sealed bids within seven days to the court. Who determines what time is close of business.

What are the requirements for acceptance of the bid?

[30] The claimant's revised/increased offer of $1,750,001 was received via email at 4:23 p.m. This was communicated to Mrs. Messado at 5:35 p.m. by way of telephone. At 7:07, the chairman received the defendants increased offer of US $1,850,000 from their attorney. Their increased offer was subject to financing or mortgage. The defendants were not in possession of a commitment letter. The relevant section of the letter they obtained from NCB stated:

> *"Please note that this Indicative Financing letter is not a commitment on behalf of a National Commercial Bank(Jamaica)Limited and that* ***all terms and conditions herein are subject to completion of NCB's due diligence process and issuance of final credit approval by NCB."***

[31] It is remarkable that, up to the 7:pm on the 6th March 2013, the defendants failed to express any difficulty with Mr. Tomlinson power to accept the best offer. In fact, the defendants had or instituted legal proceedings for the court's construction of "highest and best offer". No issue was taken with the fact that such power resided with him. The application was for the court's guidance as to what constituted "highest and best".

[32] Inexorably, the parties agreed to vary the contract. They so operated until Mr. Tomlinson's acceptance of the claimant's offer. Upon receiving the following mail, controversy ensued as to when was "*the close of business*" and the inclusion of the word "best" as a consideration in the selection process.

Mr. George:

> *"The cut-off for offers was close of business today, at your clients' behest. You will recall that it was your clients that wanted a finite period for consideration, not Sam. Your client's re-worked offer is therefore out of time. In any event it suffers from the same lack of substance as all your clients' previous offers, but to an even greater event, as the further the offer is from zero, the more reliant it is on financing that does not exist. Mr. Tomlinson should pay it no mind, and urge him accordingly."*

Kenneth Tomlinson:

> *"I refer to the matter at caption and advise that I have, as at the close of business day today, March 6, 2013, received offers as follows, for the purchase of shareholdings in Tensing Pen Limited and Tensing Pen (Cayman) Limited.*
>
> 1. *Jennifer Messado & Company on behalf George & Karin Murray*
>   *Offer of US$1,750,000.00.*
>   *Payable – US$175,000.00 deposit thereafter provide proof of financing of balance within fourteen (14) days of Agreement.*
>
> 2. *Hart Muirhead Fatta on behalf of Sam Petros*
>   *Offer US1,750,001.00*
>   *Payable – 10% deposit with balance on or before thirty (30) days of execution of Sale Agreement.*
>
> *As was mutually agreed between the parties and their attorneys, I have made the decision to accept the highest and best offer, being that of Hart Muirhead Fatta for and on behalf of Mr. Sam Petros. Please be guided accordingly."*

[33] Mrs. Karin Murray, in her third affidavit in support of the application to have Mr. Tomlinson accept the defendants' bid, insists that her reference to the highest offer in her affidavit is correct. It is her evidence that Mr. Tomlinson is bound to act in accordance with paragraph 11. The defendants' challenge to Mr. Tomlinson's acceptance of the claimant's offer on the ground that it does not conform with paragraph 11 of the schedule which required only that it be the highest and not the best, is inconsistent with the Mrs. Messado's statement in the email which she sent to Mr. George on the 25th March and her averments in her 3rd affidavit.

[34] Paragraphs 12 and 13 of Mrs. Jennifer Messado's affidavit in relation to Mr. Elesner's offer reads:

"I verily believe that this is the best offer currently available for the purchase of the Tensing Pen property. In particular the offer expressly states that it does not include cash-in bank (except for deposits held for services not yet rendered). In the circumstances I believe that this is the highest and best offer available with respect to the Tensing Pen resort."

[35] In an email to George dated February 25 2013 she Mr. Tomlinson wrote:

"*The discussion (sic) to which bid is to be accepted will be solely that of Mr. Tomlinson, the chairman of the Board."*

The word "discussion" is clearly a typographical error. There is no challenge to the submission that the word "discretion" was intended.

Were the terms of the schedule varied pursuant to the schedule?

[36] It is Ms. Davis' submission that the parties prematurely entered into discussions among themselves regarding bidding. Consequently, the requirements of the schedule were ignored. It is her submission that in order to give effect to paragraph 11 of the schedule, Mr. Elsener's offer, which is in alignment with the terms of the schedule, should be accepted.

[37] Mr. George however stridently opposes this submission. He submits that any variation of the schedule removes the matter from the courts' summary jurisdiction. He is adamant that enforcement under the schedule is not permissible because the parties, having agreed and truncated the process, are not seeking to enforce paragraph 11 of the schedule. It is his submission that fundamental aspects of the schedule have been varied. The court cannot, in the circumstances, enforce the schedule by giving effect to a varied schedule.

[38] He relies on **Horizon Technologies International Ltd. v Lucky Wealth Consultants Ltd** [1992] 1 WLR 24 and the statement of Ramsey J in **Community**

North East (a partnership v Durham County Council [2010] 4 All ER 733 at page which **Ramsey J** said:

> **Community Care North East (a partnership) v Durham County Council** [2010] EWHC 959 (QB) Paragraph 34: *However, in any event, I do not consider that the court has a power to vary the agreement in the schedule to the Tomlin order on the basis sought. The decisions in* ***Cristel v Cristel*** *and S v S (ancillary relief: appeal against consent order),in my judgment, are directed at the circumstances in which the terms of a consent order can be varied. Whilst those cases relate to matrimonial proceedings where there may be other applicable principles, I accept that the principle may be extended to the power of the court to vary consent orders generally. However, when it comes to a Tomlin order, I can see no justification for a general power for the court to vary the terms of the agreement set out in the schedule on the basis that there has been a material or unforeseen change in circumstances after the order was made which might undermine or invalidate that basis of the agreement, unless that would give rise to a power to do so as a matter of the law of contract. Such a procedural power would provide an additional remedy in cases where the agreement is incorporated into a Tomlin order, which is not available in a case where the parties merely enter into a separate settlement agreement and leave any question of enforcement to a further set of proceedings. I do not see that this is the effect of a Tomlin order where the agreement in the schedule does not form part of the terms ordered by the court. ...*
>
> *... In the current case it is also argued by the council that the phrase "these proceedings be stayed save for the purposes of giving effect to the terms, for which there be liberty to apply' is sufficient to give rise to a liberty to apply to vary the terms of the agreement in the schedule. I do not accept this as correct. This is not a case where there is a general liberty to apply which gives a right to vary the agreement. Rather, it is a liberty to apply to give effect to those terms. In my judgment that requires the court to give effect to the terms of the settlement agreement as set out in the schedule. It is therefore a liberty to apply to enforce the terms not to vary them.*

Whether variations fundamentally alter the provisions of the schedule

Ruling

[39] Paragraph 13 of the schedule makes provision for variation and speaks to the manner in which variation from the procedure stipulated in the schedule can be made. It provides as follows:

> *"No part of this Agreement may be varied, altered, suspended or amended by any party or by any resolution of the board without the joint mutual consent of every party to this agreement and the parties agree that they will not vote at any meeting of shareholders or directors in such a manner as to make any part of this Agreement ineffective."*

Paragraph 13 requires the consent of each party. The evidence is that variations were made orally and by way of electronic mail.

[40] A critical issue is whether the departure from the letter of the schedule constitutes a variation of the contract pursuant to paragraph 13 of the schedule. Further, if it amounts to such a variation, whether the scheduled agreement has been abrogated and is now an impediment in the way of invoking the court's summary jurisdiction. The issue is whether this variation, as Mr. George submits, fundamentally changes that which was agreed to in the schedule.

[41] The salient questions are what was the intention of the parties? Was it their intention to abandon the provisions contained in the schedule and operate entirely under a new agreement? Was it their intention to extinguish the provisions of the schedule and to be governed entirely by a new contract? Are the substituted terms so inconsistent with those contained in the schedule to amount to a fundamental variation?

[42] Whilst it cannot be challenged that a court has no general power to vary the terms of a schedule to a Tomlin Order or to enforce terms that have been varied, in the instant case, paragraph 13 makes provision for variation, alteration, and suspension of the agreement. It is this court's view that if the departure by the parties from the procedure outlined in the schedule is made pursuant to paragraph 13, the court's summary power to give effect to the terms of the Order remains intact. Any variation made pursuant to paragraph 13 is therefore assimilated into the schedule. Such

variation would be distinguishable from the facts of the **Community Care North East (a partnership) v Durham County Council** case. In that case, the party sought to import extraneous terms into the schedule.

[43] The schedule to a Tomlin Order is a contract. Parties are free to contract what they will within the confines of the law. If it was their desire to allow for a variation, so be it. The court, in giving effect to the Tomlin Order cannot properly ignore that which the parties have agreed to pursuant to a term of the schedule. The pertinent question is whether the variation constitutes a variation pursuant to the schedule, or a rescission of the agreement.

The law

[44] The Learned authors of **Chitty on Contracts. Volume 1 – General Principles, Part 7 – Performance and Discharge, Chapter 22 – Discharge By Agreement, Section 5 – Variation** at paragraph **22-028** said:

> *"A rescission of the contract will also be implied where the parties have effected such an alteration of its terms as to substitute a new contract in its place. The question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form. The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances. Rescission will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it. The change must be fundamental and:*
>
> > *"...the question is whether the common intention of the parties was to 'abrogate', 'rescind,' 'supersede' or 'extinguish' the old contract by a 'substitution' of a 'completely new' or 'self-subsisting' agreement."*
> >
> > *It is not necessary to create a scintilla temporis between the old and the new agreement for there to be rescission and replacement; it can achieve concurrently in the same document...*

"As in the case of rescission of a contract, the terms of a deed or written instrument may be varied by a subsequent agreement, whether oral or written. This may be reconciled with the rule that extrinsic evidence is not admissible to vary or qualify the terms of a written instrument, for that rule only relates to the ascertainment of the original intention of the parties, and not to a subsequent variation. A contract required by law to be made in or evidenced by writing can only be varied by writing although, as we have seen, it can be rescinded by parol."

[45] There is a disagreement as to what time was the "close of business". Mr. George contends that it was agreed that the cut off for offers was at the "close of business". The question is whether there was indeed an agreement among the parties as to a precise time at which all bids were to be submitted. On the 25 February 2013, Mr. George, in an email to Mr. Tomlinson, stated that he had discussions with Mrs. Messado and it was agreed that the cut off for offers was at the close of business.

March 5, 2013

Dear All

On the contrary, the terms of the agreement between the parties in relation to the offers are clearly set out in the correspondence (letters and emails) exchanged between the attorneys acting for the parties and Mr. Tomlinson. It is beyond honest challenging that:

- *The parties agreed to submit offers by 3:30pm on the 25th March;*
- *The chairman may seek improvement on any of the terms of such offers until close on the 6th;*
- *At which point the chairman will in his absolute discretion decide which offer is preferable.*

This is clear from correspondence from Jennifer Messado and Co as well as from HMF. In fact, the insistence on the 6th being the cut-off date came from the Murrays. Sam was prepared to leave it open to Ken to decide when he was satisfied he held the best offer obtainable.

Accordingly, Ken, having taken on the task on the above agreed terms, is obliged to close by no later than close of business tomorrow."

[46] There is correspondence from Mr. George dated 6 March 2013 to Mrs. Messado in which he stated:

"The cut-off for offers was the close of business today, at your clients' behest. You will recall that it was your clients that wanted a finite period for consideration, not Sam.

Your clients' reworked offer is therefore out of time.

In any event, it suffers from the same lack of substance as all your clients" previous offers, but to an even greater extent, as the further offer is from zero, the more reliant it is on financing that does not exists. Mr. Tomlinison should pay no mind to it and we urge him accordingly.

"Mrs. Messado's response to that mail on the 6th March 2013 at 7:30pm was "Who determines close of business." She does not deny that there was an agreement that the 'cut off "for offers was at the close of business. She however questions the time at which business was to close. The acceptance of the claimant's client's bid preceded his mail to her. There is no evidence that there was the requisite consensus ad idem on the issue of time before his bid was accepted.

Paragraph 13 of the schedule requires "the joint mutual consent of every party to this agreement" for any variation or alteration. The parties have ignored the proscription set out in paragraph 13 and have embarked on a process of fundamentally changing that which was agreed. The agreement under which they operated bears little or no resemblance the terms of the schedule.

[47] In the English case of **T Comedy (UK) Limited v Easy Managed Transport Limited** [2007] EWHC 611 (Comm), Deputy Judge Jonathan Hirst QC said:

"For a variation to be effected there needs to be a mutual agreement between the parties."

Ramsey J in **Community Care North East (a partnership) v Durham County Council** [2010] EWHC] (QB) at paragraph 29 of the said:

"First if the terms of the consent order part of the Tomlin order included an express liberty to apply to vary the terms of either generally or in particular circumstances, the court would have the power to do so. However the scope of the liberty to apply would have to be clearly defined."

At paragraph 30 he cited with approval the statement of Somervell LJ **in Cristel v Cristel [**1951] 2 All ER 574]. He said:

"In dealing with the scope of the express liberty to apply, Somervell LJ said this..."

"Liberty to apply" is expressed...and, if it is not expressed, it is implied— where the order that is drawn up requires working out and the working out involves matters on which it may be necessary to obtain the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied."

[48] In the absence of an agreement among the parties pursuant to paragraph 13 as to a precise time at which bidding would close, the court is unable to intervene. The Privy Council in **Horizon Technologies International Ltd v Lucky Wealth Consultants Ltd** provides guidance. Sir Maurice Casey who delivered the judgment said:

"The terms scheduled to the Tomlin order represent an arrangement between the parties, and is not concerned with approving them although it may properly offer suggestions upon them if it appears to the court that they may cause some difficulty. The terms need not be within the ambit of the original dispute but the court will refuse to enforce terms which are too vague or insufficiently precise."

[49] The House of Lord's case of **Sirius International Insurance Company v FAI General Insurance Limited and others [2004] UKHL 54,** made it plain that the court must be able to determine the intention of the parties from the language use without more. At paragraph 18, Lord Steyn said:

"*The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of the specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene."*

[50] The application is for this court to give efficacy to the terms which the parties, have agreed, that is, *"to carry into effect"* the terms of the schedule. The parties have entirely departed from that which the court is asked to enforce thus removing the matter from the court's summary jurisdiction. This court is therefore bereft of jurisdiction to intervene. In light of the foregoing:

The defendants' applications are dismissed;

Costs are awarded to the claimant to be agreed if not taxed.