

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 766

MC75/2021

In the ex parte matter of:

XIA MIN

(rep. by Mr. Audric Govinden standing for Mr. Rene Durup)

Applicant

versus

BIG TIME & HONEY HOLDINGS LIMITED

Respondent

(rep. by its director)

1st

And

VISTRA (SEYCHELLES) LIMITED

Respondent

(Rep. by its director)

2nd

Neutral Citation: *Xia Min v Big Time & Honey Holdings Limited* (MC75/2021)
[2021] SCSC 766 (19 November 2021).

Before: B Adeline, Judge

Summary: Preliminary discovery through Norwich Pharmacal orders

Heard: 3 November 2021

Delivered: 19 November 2021

FINAL ORDER

Preliminary discovery to find the identity of a wrongdoer – Norwich Pharmacal order – Relief available against any one whom the Plaintiff has a cause of action in relation to the same wrong – Order is only granted where it is necessary to serve the interest of the justice – The application has merits and accordingly this Court grants the application.

ORDER ON MOTION

Adeline, J

- [1] This is a Ruling on an application made ex parte by way of Notice of Motion supported by an affidavit filed in Court on the 1st October 2021 as MC75/2021, by one Xia Min of Unit 2529, West Bank OCT – LOFT BLK 2, N020 Middle XU Hong, RD Shanghai, PRC (hereinafter referred to as “*the Applicant*”).
- [2] The Applicant applies to this Court for an order of discovery of documents and information of Big Time and Honey Holdings Limited represented by its director at its registered office at Vistra (Seychelles) Limited of Vistra Corporate Services, Suite 23, 1st Floor, Eden Plaza, Eden Island, Mahe, Seychelles (*hereinafter referred to as “the 1st Respondent*”) in the possession of Vistra (Seychelles) Limited represented by its director at Vistra Corporate Services, Suite 23, 1st Floor, Eden Plaza, Eden Island, Mahe, Seychelles (*hereinafter referred to as “the Respondent*”).
- [3] In essence, clearly, this is an application for an order of discovery under the Norwich Pharmacal principles laid down in Rule 31.16 of the Civil Procedure

Rules of the Supreme Court of England often referred to as the white book. One may wonder, how comes, that the Supreme Court of Seychelles the one seised of such proceedings before it, has the jurisdiction to make such an order based on English law.

- [4] It is an undisputed fact, that the Supreme Court of Seychelles does have jurisdiction to make such an order given the provisions of Sections 5, 6 and 17 of the Courts Act, Cap 52 (*hereinafter referred to as "the Act"*). For the purposes of these proceedings, I find it necessary to remind ourselves of Section 6 and 17 of the Act that read as follows;

Section 6

"The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all acts of the due execution of such equitable jurisdiction is all cases where no sufficient legal remedy is provided by the law of Seychelles".

Section 17 reads;

"In all civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules and practice of the High Court of Justice in England shall be followed as far as practicable".

- [5] It is appropriate, at this juncture, to pay particular attention to the most relevant and needful averments contained in the affidavit of the Applicant to determine this application. Perhaps it is worth mentioning, that the Applicant's affidavit in support of the application is sworn by one Cheug Ka Wan, of 15/F, Tower one, Lippo Centre, 89 Queensway Admiralty Hong Kong, duly authorised by the Applicant to swear the affidavit on its behalf by virtue of a Power of Attorney dated 16th August 2021, exhibit Annex A.
- [6] To consider the relevant averments in context, as background information as transpired in the affidavit, the Applicant is a Chinese national who is married to one Kim William, a European (*hereinafter referred to as "Kim"*) and together they have jointly ventured in business undertakings.
- [7] It is averred in the Applicant's affidavit, that on the 14th January 2009, the Applicant and Kim jointly registered a company, Macseis International (WW) Limited in Hong Kong mainly to produce the clothing brand called Macseis.
- [8] It is also averred, that the set up of their business involved incorporating a Seychelles International Business Company, registered and incorporated as Big Time & Honey Holdings Limited, exhibit Annex B, the 1st Respondent. As per the averments at paragraph 5 of the affidavit, the sole purpose of

incorporating Big Time & Honey Holdings Limited was for it to hold the shares in Macseis International (WW) Limited.

[9] The Applicant avers, that Kim came up with the idea of replacing Macseis HK with a new European Company which it acceded to, and a new subsidiary call Macseis Europe SLU, subject to a company resolution, was to be incorporated. As per the Applicant's averment, instead of incorporating Macseis Europe SLU, Kim secretly incorporated his own company, Big Time Holdings Limited in Andorra which is a holding company of another company in Andorra, namely, "*Rocketex SLU*".

[10] The Applicant also avers, that "Kim has been causing agreements to be entered in Europe by fraudulently misrepresenting to other parties, that the brand Macseis is fully owned by Rocketex SLU when in fact, it is owned by Macseis HK. As per the Applicant's averment "Kim has also fraudulently used funds of Masceis HK to set up his own secret company structure in Andorra".

[11] It is averred by the Applicant, that "Kim has also wrongfully kept the bank account of Macseis HK in Switzerland to himself refusing access to it from not only it but also from staff of Macseis HK. According to the Applicant the proceeds of sale going into the Swiss Bank account was intended to be used

to pay the factory operation and office in Shanghai” and Kim’s action is having a detrimental effects to this.

[12] It is the Applicant’s averment that Kim passed a resolution in early 2021 attempting to remove it, exhibit Annex D, and now Kim is attempting to remove it from Macseis HK, exhibit Annex E. The Applicant avers, that it is taking legal action in Seychelles and Hong Kong for a declaration that the acts of Kim are invalid.

[13] At paragraph 14 of the Applicant’s affidavit, the Applicant avers the following;

“In the meantime, in view of the wrongful, misrepresentation and fraudulent acts of Kim, the Applicant needs and requires documents and information of the 1st Respondent in the possession of the 2nd Respondent to enable the Applicant to pursue further legal action against Kim”.

[14] At paragraph 15 of the affidavit, the Applicant seeks for the following relief in the terms specified here under;.

“In the light of the aforesaid, the Applicant hereby apply to the Supreme Court of Seychelles for a Norwich Pharmacal and disclosure order for the 2nd Respondent to disclose and produce, in its possession and which it holds on record, within 7 days of the order, either to the Applicant or her Attorney-at-

Law in Seychelles, and not to inform any third party of these proceedings of the order, the following;

- (a) The Share Register (including names and addresses of shareholders).
- (b) Register of Directors (including names and addresses of directors).
- (c) Register of beneficial owners (including names and addresses of beneficial owners).
- (d) Minutes of any meetings of shareholders.
- (e) Copies of all written resolutions of the shareholders.
- (f) Minutes of any meeting of the directors.
- (g) Copies of all written resolutions of the directors.
- (h) Copies of any written communication sent to and from the Respondent in respect of the company and of any company director/shareholder or any company's director's/shareholder's representatives.
- (i) Copies of all documents relating to the 1st Respondent pursuant to the 2nd Respondent's obligations under the Anti Money Laundering Act, and any other due diligence regulations.
- (j) Service Agreement between the 2nd Respondent and client on record to incorporate the 1st Respondent and any instructions to alter the said document".

[15] Prior to giving due consideration to the merits of this application, it is necessary for this Court to determine, whether the institution of these proceedings for a Norwich Pharmacal order by way of Notice of Motion in accordance with FORM 17 of the Seychelles Code of Civil Procedure, supported by the affidavit of the Applicant is proper, given that in England, such proceedings is commenced by “*originating summons*” which is foreign to our law. Relying on the case of *Denone Asia Pte Limited and Ors v Offshore Incorporation (Seychelles) Ltd CS310/2008*, which was the first case of an application for a Norwich Pharmacal order made by way of Notice of Motion, followed by other cases such as *Otkritie Securities Ltd v Barclays Bank (Seychelles) Ltd SLR 2012 67*, *Shchukin v MayFair Trust Group Limited 2015 SCSC*, and most recently, *Ramkalawan v The Agency of Social Protection (MC8/2016 [2016] SCSC 88 (15 February 2016))*, I am satisfied, that it is clearly established by case law rules, that the Applicant has followed the correct procedure.

[16] To consider the merits of this application, I am reminded, that a Norwich Pharmacal order (NPO) is an order which compels an innocent third party to provide information about another party who may have been mixed up in a wrong doing. If granted by the Court, such an order will compel the Respondent (*the third party*) to disclose certain documents or pieces of

relevant information to the Applicant. These orders are typically used by a party to identify the proper defendant to an action or to obtain information required to plea a claim. If the order is granted, it is typically made against a party who is not likely to be a party to the eventual proceedings. The Respondent is “usually mixed up in the wrong doing”. The order is only granted where it is necessary to serve the interest of justice.

[17] Norwich Pharmacal order emerged from the case of Norwich Pharmacal Co v Customs and Excise Commissioners [1924] AC 133 which was before the House of Lords of the United Kingdom. *Inter alia*, the Court held at page 175;

“the authorities seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious act 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”.

[18] In the very same case, Lord Reid determined, that in circumstances where a party is a “*mere witness*” preliminary discovery will not be opened to the Applicant. Therefore, Lord Reid formulation of the law, indicates, that

“preliminary discovery to find the identify of a wrongdoer is available against anyone whom the Plaintiff has a cause of action in relation to the same wrong.

[19] This was clearly echoed in the Court of Appeal judgment of Bankers Trust Co v Shapira and others [1980] 1 WLR 1274 where the principles spelt out in Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 were applied. The Court held;

“allowing the appeal and granting the order sought against the D bank, that though the Court would not lightly use its powers to order disclosure of full information touching the confidential relationship of banker and customer, such an order was justified even at the interlocutory stages of an action where plaintiffs sought to trace funds which in equity belong to them and of which there was strong evidence that they had been fraudulently deprived and delay might result in the dissipation of the funds before the action came to trial, and that is the new and developing jurisdiction where neutral and innocent persons were under a duty to assist plaintiffs who were the victims of wrong doing, the Court would not hesitate to make strong orders to ascertain the whereabouts and prevent the disposal of such property, but the plaintiff should be correspondingly bound to undertake that such information would be used only for the purpose of the action to trace the funds and not for any other purpose”.

[20] Clearly, therefore, the Norwich Pharmacal order is a discretionary remedy. It is potentially a very intrusive measure, and that requires the Court to balance the right and interest of each party to determine whether or not the order ought to be granted. Some of the factors which the Court has to consider are;


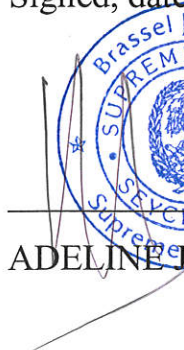
- (i) Whether a wrong has been carried out by the ultimate wrongdoer.
- (ii) Whether the person against whom the order is sought is involved in the wrongdoing, and is not a “*mere witness*” to the wrongdoing.
- (iii) Whether the Applicant is genuinely trying to right a wrong by obtaining this information, and
- (iv) Whether the granting of this remedy is necessary and proportionate given the circumstances of the case.

[21] On account of the uncontroverted affidavit evidence, I am satisfied, that based on the law as it presently stands, this application has merits and accordingly, this Court grants the application in that, it hereby makes a discovery and inspection order in favour of the Applicants against the 2nd Respondent, as per the following terms;

- (i) The 2nd Respondent shall disclose and produce, and which it holds on record within 7 days of this order, the documents and information herein above specified at paragraph [14] of this order to the Applicant or its Attorney-AT-Law in Seychelles for inspection, and

- (ii) Shall not inform any third party of this order pertaining to these proceedings, and
- (iii) The Applicant shall bear all the cost associated with the inspection as sought and granted, and cost associated to this application, as well as reasonable cost to the 2nd Respondent for complying with this order.

Signed, dated and delivered at Ile du Port on 19 November 2021



ADELINE