BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV(COM) 2011/13 and 14

BETWEEN:

HUGH BROWN & ASSOCIATES (PTY) LTD

Claimant

and

KERMAS LIMITED

Defendant

AND BETWEEN:

MERLIN MINERAL RESOURCES LIMITED

Claimant

and

KERMAS LIMITED

Defendant

Appearances: Mr Stanley Brodie QC for the Claimants/Applicants
Mr Brian Doctor QC for the Defendant/Respondent

JUDGMENT

[2011: 6, 7June]

(Applications for freezing injunctions in same terms as injunction continued in earlier proceedings between the same parties at contested *inter partes* hearing – whether change of circumstances following previous *inter partes* hearing – whether injunctions to be granted)

[1] **Bannister J [ag]:** These are my written reasons for dismissing, on 7 June 2011, applications for freezing orders made by two claimants, Merlin Mineral Resources Ltd ('Merlin') and Hugh Brown

and Associates (PTY) Ltd ('HBA') on 4 March 2011, although I continued a freezing order made on 16 December 2009 in favour of the same parties in earlier proceedings for fourteen days after the handing down of these reasons in order to enable Merlin and HBA, if so advised, to get before the Court of Appeal.

Background

[2] On 16 December 2009 I made a freezing order *ex parte* against Kermas Ltd ('Kermas') in proceedings brought by Merlin and HBA in aid of an arbitration being conducted in South Africa between the same parties. Subsequently, as I shall explain, each of Merlin and HBA brought its own proceedings in the Commercial Division here and sought separate freezing orders in each of those claims in applications issued on 4 March 2011. It was those applications which I dismissed on 7 June 2011.

[3] Merlin's claim in the arbitration was that Kermas was in breach of Heads of Agreement made between a predecessor of Merlin (1) (to whose rights Merlin claims to have succeeded), Kermas (2) and a company incorporated for the purpose, originally called Samancor (HK) Ltd and now known as BMM International Limited ('BMM') (3). The Heads of Agreement were intended to govern the relationship of the parties in a project to secure an exclusive licence from the government of Burundi for BMM to exploit mineral deposits to be found (or which it was hoped would be found) in an area known as the Musongati.

[4] The role of Kermas pursuant to the Heads of Agreement was to be that of project leader, financier marketer and administrative manager, while Merlin (or, more strictly, its predecessor) was to act as project designer, planner and overall project site and operations supervisor in association with HBA during what was described as 'the BFS phase' and construction. HBA is a company owned or controlled by Hugh Brown ('Mr Brown'), a South African resident with experience in the mining industry.

[5] By clause 7 of the Heads of Agreement the parties were to procure the securing of provisional and subsequently final tenure and, importantly, a so-called bankable feasibility study ('BFS'). Kermas

was obliged under the Heads of Agreement to pay the costs of getting to the stage of completion of the BFS, estimated in the Heads of Agreement at US$30m. As I understand it, the purpose of the BFS was, as its name suggests, to enable the parties to make presentations to institutions likely to be prepared to provide finance for developing the project into an ore producing mine or, as it is put in the Heads of Agreement, 'the development of mines within the Concession area and the beneficiation and exportation of mineral products produced from such mines from Burundi.' There was some evidence at the hearing that the costs of developing a working mine on the site could approach US$2bn. An alternative use for the BFS might be in attempting an IPO on the back of it. The Heads of Agreement dealt with this phase by providing that after the BFS had been completed the parties would pursue a process whereby they would jointly seek purchasers for the shares of BMM or its business and stated that 'this will be planned mainly for securing technology, raising further funding or facilitating market access as may be required.'

[6] It was the expectation of the parties that it would take until around the end of 2011 for completion of the BFS.

[7] In the spring of 2009 Kermas, through the Chairman of its board of directors, Dr Koncar, indicated that it was no longer interested in the preparation of a BFS. I do not need to go into the differences which subsequently arose between the parties about the direction in which the project should go. There was a telephone conversation on 28 June 2009 between Dr Koncar and Mr Brown. Its terms are in dispute, but it is the evidence of Mr Brown is that he was told that the services of HBA were being dispensed with and that Dr Koncar had no further interest in progressing the venture on the terms of the Heads of Agreement. It is Merlin's case that it has accepted a repudiation of the Heads of Agreement by Kermas and that Kermas has wrongfully refused to transfer to it the 5% holding in BMM to which Merlin claims to be entitled[1]. Kermas denies that it acted in breach of the agreement or that Merlin has any standing to sue on it. Merlin claims US$55m as its loss flowing from Kermas' alleged repudiation and refusal. The figure is reached by estimating the value of the mine as fully developed and taking 5% of that figure (US$1.1bn) as representing the value of 5% of BMM's shares. At the same time, HBA claims that following this rupture, to use a neutral term, it

[1] Kermas is the legal owner of the shares in the Company. It has subsequently offered to transfer 5% of the shares to Merlin.

has lost the sum of nearly US$600,000 which, it says, it was entitled to and would have received as payment for its services down to the completion of the BFS had it been retained for that purpose. That entitlement is disputed.

[8] Some time in late 2009 the parties agreed to the appointment of an arbitrator under the South African Arbitration Act in order to arbitrate the claims of Merlin and HBA against Kermas.

[9] On 16 December 2009 Merling and HBA applied jointly in the Commercial Division here for *ex parte* freezing injunctions against Kermas in aid of the arbitration proceedings in South Africa. I made an order is fairly standard terms but with a financial limit of some US$56m. The usual undertaking in damages was given by the Applicants. At the hearing Mr Brodie QC, who appeared for the Applicants, offered to fortify the undertaking with a sum of US$100,000, but I indicated that I would require US$1m as a condition of grant of the injunction. After a short adjournment to enable Mr Brodie to take instructions, he returned to inform the Court that that sum would be put up by way of security and I made the order on those terms and that was done. The Court was thus given the impression that Merlin and/or HBA were persons of substance able in a matter of moments (speaking a little figuratively) to agree to an uplift of US$900,000 in the amount they were to be required to put up by way of fortification. There was a return date of 11 January 2010, on which Kermas did not appear, and an order was made in the same terms until the determination of the arbitration proceedings. On the return date I also made a separate disclosure order, which was complied with on 26 January 2010.

[10] On 18 March 2010 Kermas issued an application to discharge or vary the freezing order, which came on for hearing on 2 June 2010. I gave an extempore judgment on 4 June 2010. Having dismissed certain objections made by Mr Christopher Parker QC, who appeared on that occasion for Kermas, as to the fullness of Merlin/HBA's disclosure at the *ex parte* stage and as to the strength of HBA's case, I turned to Mr Parker's objections based on the lack of any real evidence as to dissipation. I found that while there was no evidence of dissipation in the sense of assets being spent or consumed to prevent them being available to satisfy a judgment or award, the evidence did show what I described as a settled intention on the part of Kermas to dump Merlin and HBA and exploit the Musongati project, if it could, for its own benefit. That evidence was the

then admitted fact that Kermas had attempted to sell the project off for its own benefit for a sum of US$900m, from which Merlin would clearly be excluded. I also held that the position of HBA was in effect parasitic on that of Merlin and that the HBA claim could for practical purposes be ignored in deciding whether to grant interim relief. The same approach was adopted on the present applications. I took into account Kermas' admission that it was not being harmed by the continuation of the injunction and on the basis that there was a real rather than imaginary risk to Merlin/HBA if the injunction was not kept in place, I refused to set it aside or vary it.

[11] On 2 March 2011 Merlin/HBA applied *ex parte* in the same set of proceedings for the freezing orders to continue until the determination of fresh proceedings to be issued in the Commercial Division here. The reason for this was that Merlin/HBA took the view that the arbitration process in South Africa had been frustrated by Kermas and had come to an end and it wished to have matters dealt with in Court here rather than in the South African arbitration. I made an order on 3 March 2011 extending the freezing order until the earlier of 16 March 2001 or the hearing of applications in two claims which were issued in the Commercial Division on the same day by Merlin and HBA respectively, mirroring the claims that had been advanced in the arbitration proceedings. Those applications came before me on 6 June 2011, the freezing orders having been extended by agreement and undertakings. I understand that the arbitration proceedings have come to an end, although there may be costs issues outstanding.

The parties' submissions

[12] Because strictly it was necessary for Mr Brodie QC, who again appeared for Merlin/HBA, to apply for the new freezing orders, he opened the case. After a short time it appeared to me that this was an inappropriate way of proceeding, because although Mr Doctor QC, for Merlin/HBA, was technically opposing fresh applications, he very properly took the view that in reality he had to show that fresh circumstances had arisen since the orders previously made which justified a refusal of the relief sought by Mr Brodie QC in the new claims. In those circumstances I thought it right to let Mr Doctor QC go first so that Mr Brodie QC could deal with the new case, as it were, after it had been put.

[13] Mr Doctor QC relied upon the following matters as changes of circumstance.

[14] First, he said that the evidence upon which I relied in continuing the injunction on 4 June 2010 (the attempted sale of BMM for US$900m) had not been dealt with earlier because it had not been seen as critical, was hearsay evidence anyway and had now been answered in a third affidavit sworn by Dr Koncar on 17 March 2011. The short answer to this point is that the sale had been both admitted and relied upon at the hearing of June 2010. The natural meaning of the relevant passage in Dr Koncar's affidavit is that he did indeed try to sell BMM to Norilsk, but not for US$900m.

[15] Mr Doctor QC relied next upon evidence that Kermas' assets have nearly doubled since its first affidavit of assets was made in January 2010, from some US$400m to over US$900m. He says that this evidence shows an intention to accumulate, rather than dissipate assets and he relies upon the fact that some of the assets disclosed are publicly traded and can be monitored by Merlin/HBA with no difficulty. Mr Brodie QC makes two criticisms about this. First, he says that some of the additional assets relied upon by Kermas are hard to credit. For example, he says that a shareholding valued at nil in the original statement of assets is now said to have been sold for US$50m, with the proceeds represented by cash at bank. I accept that there are questions as to some of the additional assets relied upon, but there can be no doubt that Kermas has increased its holding in Ruuki Group PLC by the acquisition of over 3 million additional shares (although the value of the overall holding has gone down since January 2010). These shares are traded on the Helsinki and London Stock Exchanges and are thus visible to Merlin. His other criticism is that this is not a relevant change in circumstances. What is relevant, says Mr Brodie QC, is the fact that I found in June 2010 that it was Kermas' intention to make any recovery by Merlin if not impossible, then at least difficult and troublesome. That finding is unaffected, submitted Mr Brodie QC, by the fact that Kermas has accumulated additional wealth in the interim.

[16] I agree with Mr Brodie QC that these acquisitions would not on their own justify discharge or variation of an existing injunction granted on the grounds which I relied upon in June 2010. I think that Mr Doctor QC's real point was that I should not have relied upon the attempted disposal of BMM at the hearing on 4 June 2010 in the face of the mass of assets disclosed in Dr Koncar's affidavit of 26 January 2010, but he was too polite to put it like that.

[17] Next, Mr Doctor QC said that since the first injunction was granted Kermas has acquired beneficial ownership of a further 6% of the issued shares of BMM, buying, first, 5% for US$5m and then an additional 1% for US$1m. It seems to me that this is both a change in circumstances and persuasive. What it demonstrates is that so far from attempting to get rid of BMM so as to exclude Merlin from benefit, Kermas is now committing itself to the company. It is true that it may still have the ultimate intention of disposing of it, but further investment in BMM seems to me to carry a flavour more of permanence than of cutting and running in order to frustrate Merlin's chances of recovery. In my judgment this is a material change of circumstance which significantly erodes the strength of the finding upon which I based my refusal to discharge or vary the injunction in June of last year.

[18] By far the most important change of circumstance relied upon by Mr Doctor QC, however, is the disclosure by Merlin/HBA in the arbitration proceedings of a copy of a so called Payment Rights Agreement ('PRA') made on 1 December 2009 between (among others) Merlin and HBA on the one hand and an entity called Africa Alpha Fund 1 LP ('the Fund') on the other. The application by Kermas for disclosure of this document was fiercely resisted. Merlin/HBA initially was prepared to disclose only a heavily redacted version of this document. An unredacted version of it was not prised out of Merlin/HBA until 3 December 2010.

[19] I do not think that it is necessary for me to set out passages from the document in any detail, since its principal terms are simple. Under the PRA the Fund was to make an immediate advance to Merlin/HBA of US$1.4m. In return for the initial advance and the further support of the Fund, Merlin/HBA agreed to remain parties to the arbitration until its final resolution. The Fund made itself liable for all liabilities, costs and expenses. Clause 4.1 provided that Merlin/HBA had no right to take any step (or refrain from taking any step) or make any decision in relation to the arbitration. Instead, all such rights were ceded to the Fund. Merlin/HBA obliged itself to comply with instructions from the Fund and its Counsel and was to have no authority to act on its own behalf in relation to the arbitration. Settlement offers were to be referred to the Fund, which had the sole right to settle the arbitration. By clause 5.2, the Fund was (after 1 June 2010) entitled to the first US$15m of any recoveries made in the arbitration with any proceeds over that amount being split according to a formula. Clause 6.1 (subject to certain exceptions) precluded Merlin/HBA from

disclosing the existence or terms of the PRA (described as a 'proprietary product developed by the Fund'). By clause 9.1 the Fund could assign its rights (although not its obligations) under the PRA.

[20] On 28 February 2011 the same parties entered into a Supplementary Payment Rights Agreement ('SPRA'). This document was designed to apply (with minor variations) to the claims to be commenced in this Court on 3 March 2011 the same regime as had been applied by the PRA to the arbitration. As in the case of the PRA, the Fund is said 'to have an address' in Bermuda but its address on the execution page is given as in Geneva. This appears to be the address also of an entity called the Commercial Intelligence Group ('CIG'), which may or may not control the Fund. What may be said with certainty, however, is that neither CIG nor the Fund is subject to the jurisdiction of this Court. Where those behind CIG/the Fund are actually to be found is a matter for speculation only.

[21] Finally, I should mention that in an affidavit sworn for the purposes of this application on 6 May 2011, Mr Brown says that neither Merlin nor HBA has any tangible assets or cash at its disposal.

[22] At no stage until the hearing of the present application had the Court been told (a) that Merlin/HBA are acting (by reason of the terms of the PRA and at any rate until recoveries exceed US$15m) as mere nominees for the Fund in this litigation; (b) that neither Merlin nor HBA, which are the parties having given undertakings to the Court, has any tangible assets or cash at their disposal; or (c) that the litigation is being controlled entirely by the Fund. All of these are materially significant changes so far as the Court's knowledge is concerned.

[23] Mr Brodie QC says that none of this matters. He says that there is nothing unlawful about funding litigation in return for a share of the spoils. I have not been addressed on the question whether that is the position in this jurisdiction and for present purposes I shall assume (without deciding) that he is correct. I accept, of course that it is commonplace for third parties to control litigation brought in the names of others – insurance cases being obvious examples. Where injunctive relief is being sought, however, it seems to me that different considerations come into play. What is at issue here is whether a person asking the Court, through a penniless nominal claimant, to exercise its equitable jurisdiction by the grant of freezing orders in its favour may do so (a) without disclosing its

own identity or whereabouts and (b) without submitting itself to the jurisdiction of the Court as liable co-extensively with the nominal claimant on the cross undertaking.

[24] It does not need saying that on an *ex parte* application an applicant must take the Court into its confidence. Failure to do so may result in the discharge of any relief obtained and, in a proper case, the Court may refuse to grant relief in substitution. This, however, is not an *ex parte* application and it is made after (some of) the truth has been has been extracted from the Fund. Ought that to make any difference? Depending on the particular facts, in another case I can see that it might. In this case, however, I think that the combination of the impecuniosity of Merlin/HBA and the Fund's unwillingness to submit to the jurisdiction in order to give substance to the cross undertaking is fatal to its application.

[25] In my judgment, where the real party in interest to proceedings asks the Court for an interim injunction in the name of an impecunious nominal party, it must, unless there are exceptional circumstances, take steps to inform the Court of the position and offer to make itself liable on the cross undertaking. In the present case and despite frequent suggestions from Mr Doctor QC that that ought to be done if the Fund wished to enjoy injunctive relief pending trial, no offer to that effect has been forthcoming.

[26] On the contrary and despite protestations from Mr Doctor QC, the Fund has not responded to suggestions that it disclose exactly who it is and precisely where it may be found. It is true that the Fund (or those behind it) must be taken to have put up the US$1m which presently fortifies Merlin/HBA's undertaking in damages, but there is no material permitting the Court to be satisfied that that will be sufficient to meet any claim upon it. Mr Doctor QC says that the mere existence of the injunction may hamper Kermas[2] in any attempt to obtain finance and I do not think that I need evidence before I can take judicial notice of such an obvious fact. It is plain, despite the criticisms levelled at Kermas' evidence of assets by Mr Brodie QC, that Kermas is in the business of handling very large financial transactions. The present position, therefore, is that Kermas has to hope that

[2] There is no difference, from this perspective, between a freezing order with a limit of US$55m and one with a limit of US$600,000.

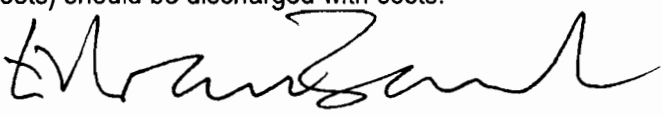
between now and judgment it will not suffer losses by reason of the freezing order in excess of US$1m, because if it does there is no one from whom it will be in a position to recover them.

[27] That does not seem just and the position was not improved by the suggestion of Mr Brodie QC (which I did not accept) that Kermas should be obliged to resort to the US$1m fortification money for payment of its costs of the applications. The Fund had every opportunity during a one and a half day hearing to engage with the Court to ensure that the position of Kermas was fully protected by way of an undertaking upon which it would be liable in its own right and which could be enforced against it, but did not respond. Instead it wishes to remain outside the jurisdiction and out of the reach of the Court and thus, of Kermas. It is entitled to do so, but must not be surprised when the Court declines in those circumstances to offer it its protection.

Conclusion

[28] My reasons for refusing to grant the Fund the injunctions which it sought in these proceedings are first, that I consider that the new evidence of the fresh investment made in BMM by Kermas removes the sting from the attempted sale upon which I relied in my judgment in the previous proceedings and, secondly, because I consider it unjust to grant protection to the Fund in circumstances in which the Fund is not prepared to offer reciprocal protection to Kermas (above the fortification money) in support of interim relief.

[29] The costs of the previous injunction proceedings were reserved. In my judgment Mr Doctor QC is right when he says that an application to discharge the order made in those proceedings would be bound to succeed on the grounds of non disclosure. The earlier proceedings were not, however, before me on the present applications. I am prepared, in the absence of agreement, to listen to submissions on the matter at a later date, but I give a strong indication that in my present view the earlier orders (including that part of the orders reserving costs) should be discharged with costs.



Commercial Court Judge
14 June 2011