

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Procedural Appeal No. P368 of 2019**

**BETWEEN**

**Select Properties Limited**

Appellant/Applicant

**v.**

**CL Financial Limited**

First Respondent

**Trincity Commercial Centre Limited**

Second Respondent

**The Attorney General of Trinidad & Tobago**

Third Respondent

**First Citizens Bank Limited**

Interested Party

**Panel:**

A. Mendonca J.A.

A. des Vignes J.A.

**Date of Delivery:** February 6, 2020

**Appearances:**

Mr. A. Ramlogan SC, Mr. J. Jagroo and Mr. A. Pariagsingh, instructed by Mr. V. Siewasaran, on behalf of the appellant

Mr. B. Reid, instructed by Ms K. Richardson-Dumitriu, on behalf of the First Respondent

Ms D. Peake SC, Mr. R. Heffes-Doon, instructed by Mr. R. Thomas, on behalf of the Third Respondent

Mr. S. Singhon behalf of the Interested Party

## **JUDGMENT**

**Delivered by A. des Vignes, J.A.**

### **Introduction**

1. This is a procedural appeal against the judgment of Ramcharan J delivered on November 19, 2019 in relation to the appellant's application filed on October 16, 2019 whereby several orders were sought. By his judgment Ramcharan J refused to set aside an earlier order made by him on a notice of application dated June 10, 2019 by the Joint Liquidators whereby permission was not granted to CL Financial (in liquidation) (the company), Home Construction Limited (HCL) and Trincity Commercial Centre Limited (TCCL) to sell a portion of lands situate in the City of San Fernando, and instead authorised the advertisement of the lands along with other lands owned by the company and its subsidiaries for sale. He also refused to unseal the court file so that the appellant could have sight of the proceedings.
  
2. There are four issues to be determined in this appeal:
  - (i) whether the appellant, not being a creditor or contributory, had locus standi to file the application dated October 16, 2019 seeking inter alia, a stay of the implementation of the order and an order that the court file be unsealed;
  - (ii) whether the judge erred in refusing to unseal the file and grant the appellant access to the application filed by the Joint Liquidators;
  - (iii) whether the appellant's rights to due process, procedural natural justice, the right to a fair hearing and protection of the law were breached by not having an opportunity to be heard.
  - (iv) whether the judge erred in refusing to grant approval for the sale.

### **Summary of decision**

3. The appeal is allowed for the following reasons:

- (i) the appellant, as a purchaser under the agreement for sale with TCCL, had locus standi to make the application filed on 16 October 2019 for, inter alia, a stay and to have the court file unsealed;
- (ii) the appellant had a legitimate interest in the application of the joint liquidators for approval of the sale and ought to have been served with the application and be granted an opportunity to be heard on the hearing of same;
- (iii) the appellant should have been granted access to the application of the joint liquidators and the affidavit in support in a redacted form insofar as it related to the lands which they had agreed to purchase;
- (iv) the appellant is entitled to be heard on its said application after it has had an opportunity to peruse and consider the redacted application and the affidavit in support as well as a redacted copy of the transcript of the hearing of the joint liquidators' application for approval of the sale before the judge.

#### **The Facts**

4. TCCL is a subsidiary of HCL which is a subsidiary of the company. TCCL entered into an agreement with the appellant for the sale to it of a parcel of land comprising 16 acres at South Park, Tarouba (the lands) for the price of \$60,000,522.00. This agreement was entered into on January 9, 2019. A supplemental agreement was subsequently signed on April 26, 2019 which contemplated that an application would be made to the court for approval to complete the sale of the lands and if the court should prevent the completion of the sale the appellant shall be entitled forthwith to a refund of its deposit with no further recourse for any claim for damages and/or loss. Under the sale agreement a 10% deposit was paid by the appellant.
5. The court-appointed joint liquidators by application dated June 10, 2019 sought approval for the sale. Ramcharan J on September 18, 2019 on hearing the application

withheld permission for the sale and instead authorised the advertisement of the lands along with other lands owned by the company and its subsidiaries for sale to ensure that the highest price possible was obtained for the lands. The judge also ordered that the court file be sealed except for the orders of the court.

6. The appellant was subsequently informed of the court's order and was refunded the deposit.
7. The appellant filed an application on October 16, 2019 seeking, inter alia, a stay of the order of Ramcharan J, that the file be unsealed to permit the appellant to have sight of the application made by the joint liquidators and to obtain an audio CD of the hearing before the judge and an order setting aside or varying the judge's order refusing permission for the sale of the lands and permitting the sale to proceed.

#### **FINDINGS OF TRIAL JUDGE**

8. On November 19, 2019 Ramcharan J dismissed the appellant's application, refused to stay his order made on September 18, 2019 and declined to unseal the court file to allow the appellant to view the application, or to have access to an audio CD of the proceedings. He noted that the transaction between TCCL and the appellant was a small part of the entire application of June 10, 2019 made by the joint liquidators and was referred to together with another agreement for sale which had been executed by one of the various subsidiaries. He found that it would be of little benefit for the appellant to have sight of the application as nothing arose from it. He indicated that the application as it related to the sale of the lands was a mere recital of the bare facts surrounding the sale, and devoid of any particulars. He also stated that there was information contained in the application which did not relate to this sale transaction in any way.

9. While the judge indicated that the joint liquidators had stated in their application that the proposed purchase price was within the range of values for the subject land, he found that it would be of little benefit to the appellant to have sight of the application. This was so since the interests and the rights of the appellant as purchaser did not fall to be considered because the court had to consider whether approving the sale agreement would best serve the interests of the liquidation in terms of the realisation of the company's assets.

#### **THE APPEAL**

10. The appellant filed a notice of procedural appeal dated November 26<sup>th</sup>, 2019 challenging the decision of Ramcharan J. This procedural appeal was heard on January 13, 2020.

#### **THE ISSUES ON APPEAL**

11. As earlier indicated, the issues which arise for determination of this court may be summarized as follows:
- (i) whether the appellant, not being a creditor or contributory, had locus standi to file the application dated October 16, 2019 seeking, inter alia, a stay of the implementation of the order and an order that the court file be unsealed;
  - (ii) whether the judge erred in refusing to unseal the file and grant the appellant access to the application filed by the joint liquidators;
  - (iii) whether the appellant's rights to due process, procedural natural justice, the right to a fair hearing and protection of the law were breached by not having an opportunity to be heard; and
  - (iv) whether the judge erred in refusing to grant approval for the sale.

**Issue No. (i) – whether the appellant not being a creditor or contributory had locus standi to file the application dated October 16, 2019 for inter alia, a stay and an order that the court file be unsealed**

**THE APPELLANT’S SUBMISSIONS**

12. The appellant submitted that its application dated October 16, 2019, was properly made. **Section 376** of the **Companies Act** establishes the powers of the liquidator in relation to a company that is in liquidation. Such powers are to be exercised with the sanction of either the court or the committee of inspection. Under **section 376(3)** of the **Companies Act**, any creditor or contributory may apply to the court to challenge any exercise or proposed exercise of any of the powers of the liquidator. It was submitted, however, that under **section 376(2)** the liquidator can perform certain functions without the permission of the court such as sell the real and personal property of the company by public auction or private contract.
  
13. Since neither TCCL nor HCL was being wound up, the application filed by the joint liquidators could not have been for the court’s sanction of the sale but was rather an application for directions pursuant to **section 377(3)** of the **Companies Act**. This was because of the order dated April 12, 2018 made by the court in the substantive winding up of the company which was to the effect that the joint liquidators were given the power to oversee the continuing business affairs of the company’s subsidiaries, (which include TCCL and HCL) pending realization of the value of those subsidiaries by sale of the shares or otherwise. Accordingly, the application made by the joint liquidators for directions on the sale could only have been made pursuant to **Section 377(3)** of the **Companies Act**. Thus, the appellant, pursuant to **section 377(5)** of the **Companies Act**, had locus standi to make the application.

## **THE COMPANY'S SUBMISSIONS**

14. In response, the company submitted that because it is a holding company that can only realise assets through its subsidiaries, whether through the sale of the subsidiary itself or the “stripping” of assets of the subsidiaries, it was not only entitled to seek the court’s approval for sale, but the court itself was entitled to review any agreement in relation to the company to ensure that the monetization of any assets obtained was at the best price.
15. Although the joint liquidators made the application for the approval for the sale they remained impartial in their dealings. In light of the court order, the joint liquidators are duty bound to protect the interests of the company’s creditors from the effects of the appellant’s application.
16. The company further submitted that the appellant had no standing to make the application. Only a party with a tangible interest in the liquidation has a legitimate interest in the sanction application. The persons who have the primary interest in the company’s winding up are its creditors: **Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd** [1976] AC 167; **David Montgomery, Provisional Liquidator of KPA Services Limited v. JasseraniChattergoonPersad&Ors** CV2010-00118. Therefore, the duty of the court and the joint liquidators in any liquidation action is to the company’s creditors alone. A potential purchaser has no interest in the winding up of an insolvent company. Thus, the only recourse available to the appellant would be contractual remedies against TCCL.

## **THE AG'S SUBMISSIONS**

17. This issue was not addressed by counsel for the AG in its submissions.

## LAW & ANALYSIS

18. **Section 376** of the **Companies Act** sets out the powers of the liquidator in a winding up by the court. **Section 376 (1) (a) to (f)** sets out the specific powers which the liquidator can exercise with the sanction of either the court or the committee of Inspection. Under **section 376 (2)** a liquidator in a winding up by the court may also exercise certain powers. **Section 376(2)(a)** confirms the power of the liquidator to sell property of the company by public auction or private contract:

*“376(2) The liquidator in a winding up by the Court may—*

- (a) sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in parcels; . . .”*

19. However, the exercise of all the powers conferred on the liquidator in a winding up by the court is subject to the control of the court and any creditor or contributory may apply to the court to challenge any exercise or proposed exercise of any of the liquidator’s powers— see **section 376(3)** which provides as follows:

*“376(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.”*

20. **Section 376** specifically deals with a company in liquidation. The lands which are the subject of this procedural appeal are owned by TCCL which is a subsidiary of the company but which is not in liquidation. The agreement for sale of the lands was made between TCCL and the appellant and not between the joint liquidators and the



appellant. The joint liquidators were empowered by court order of Ramcharan J dated April 12, 2018 to oversee the continuing business of the company's subsidiaries pending realisation of the value of those subsidiaries by sale of the shares or otherwise. In dealing with the assets of TCCL, the joint liquidators filed an application dated June 10, 2019 seeking the approval of the sale. However, since the Judge ordered that the file be sealed, the appellant has not had sight of the application and affidavit in support.

21. It is apparent from the submissions made before this court that there is no dispute that the application of the joint liquidators was an application for directions made pursuant to **section 377 (3)** of the Companies Act which provides as follows:

*“377. (3) The liquidator may apply to the Court in the prescribed manner for directions in relation to any particular matter arising under the winding up ...”*

22. The appellant, as a purchaser under the sale agreement with TCCL, had an equitable interest in the subject property. By the supplemental agreement made between TCCL and the appellant, it was agreed between the parties that approval of the sale by the court would be necessary. When the joint liquidators applied to the court for approval of the sale, they failed to serve the appellant with the application and affidavit in support. On September 18 2019, the Court made an order that permission is not granted to the company nor its subsidiaries, including TCCL, to sell the lands which are the subject of the sale agreement.
23. It is clear that this order adversely affected the interest of the appellant in the lands since approval was not granted to sell the lands to the appellant and permission was granted to the company and its subsidiaries to take such steps as are necessary for the advertisement of the lands. In the premises, we are of the view that, having regard to the equitable interest of the appellant therein, the application of the joint liquidators ought to have been served on the appellant to afford it the opportunity to be heard on

the application. Further, we are of the view that the appellant had locus standi to challenge the order made on September 18, 2019 by way of the application filed on October 16, 2019.

**Issue No. (ii) - whether the judge erred in refusing to unseal the file and grant the appellant access to the application filed by the Joint Liquidators.**

**Issue No. (iii) whether the appellant's rights to due process, procedural natural justice, the right to a fair hearing and protection of the law was breached by not having an opportunity to be heard.**

#### **THE APPELLANTS' SUBMISSIONS**

24. The appellant submitted that the judge erred in finding that it would be of "little benefit" for the appellant to have sight of the application because "nothing arises from it" as this was not a finding which was open for the judge to make. Such findings are inconsistent with the principles of open justice, due process and procedural fairness: **Al Rawi & Ors v. Security Service & Ors.** [2011] UKSC 34.
  
25. The court ought to have allowed the appellant to have access to a copy of the application filed by the joint liquidators. There is a need for the court to balance the need for protection of sensitive commercial information and the need for open justice. Open justice is of constitutional importance because it is the bedrock of public confidence and respect: **Central Bank of Trinidad & Tobago & CLICO v. Lawrence Duprey & Ors** CV2011-02140.

### **THE COMPANY'S SUBMISSIONS**

26. The company concurred that open justice is not to be departed from lightly and the court must subject an application for derogation to intense scrutiny in order to determine whether the circumstances are ripe for derogation. While the applicants in **Central Bank of Trinidad & Tobago & CLICO v. Lawrence Duprey & Ors** (supra) did not satisfy the court that their records should be sealed, the company in the instant matter has already satisfied the test and has been granted its order. Therefore, the appellant's reliance on this case is misinformed.
27. Unsealing the file in whole or in part will be to the disadvantage of the company in its ability to satisfy the debts of its creditors. Additionally, it would be a surprising outcome if the sealing order is disturbed on account of the appellant who has no tangible interest in the liquidation and who would seek to exploit the information to its own advantage.
28. The appellant has not adduced any evidence to suggest that the judge's decision to seal and his refusal to unseal the court file was based on some error of law or principle or that the decision could not be reached by a reasonable court.

### **THE AG'S SUBMISSIONS**

29. The Third Respondent submitted that the hearing of the joint liquidators' application did not take place in camera or in secret. The appellant despite being aware that the court was adjudicating upon whether the sale should be completed, freely chose not to attend court and participate and has not furnished any reasons for its non-attendance and lack of participation in the decision making process.

30. The court has the power under the common law to grant access to documents if the open justice principle requires this. However, the court must conduct an evaluation of the potential value of affording access to the requested material in advancing the open justice principle. It is evident from the judge's decision at paragraphs 10 and 11 that the relevant principles were considered in determining whether access to the application should be granted. The appellant's arguments to the contrary should therefore be dismissed.

### **LAW & ANALYSIS**

31. **Scott v. Scott** [1913] A.C. 417 at page 463 explains the importance of the principle of open justice wherein it was said that it is: *"on the whole, the best security for the pure, the impartial and efficient administration of justice, the best means for winning for it public confidence and respect"*. Open justice is not to be departed from lightly. Derogation from same ought only to be had in wholly exceptional circumstances. In determining whether circumstances are ripe for derogation, the court must subject the application for same to intense scrutiny. A heavy onus rests with the party seeking derogation to establish that it is strictly necessary in the sense that the relief sought is not only necessary but proportionate: **Central Bank of Trinidad & Tobago & CLICO v. Lawrence Duprey & Ors** (supra).
32. The Civil Proceedings Rules 1998 (as amended) contain no provision which deals with the right of access by non-parties to certain documents filed. The open justice principle is all the more important and any application to derogate there from ought to be subjected to even greater scrutiny.
33. In the recent case of **Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)** [2019] UKSC 38, the Supreme Court considered the common law powers of the courts to order release of court documents to applicants

who are not parties to the proceedings (“non-parties”). The court upheld the decision of the Court of Appeal that, for good reason, the court can order release to non-parties of certain court material, in its inherent jurisdiction. The decision was based on the open justice principle.

34. The application of the open justice principle to all common law courts “exercising the judicial power of the state” is explained in **Cape Intermediate v Dring** at paragraph 41 as follows:

*“[41] The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court’s rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court’s jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case.”*

35. While the court has the power to allow access to the documents to non-parties, the applicant has no right to be granted access unless he can demonstrate a good reason for seeking access. This was succinctly explained at paragraphs 45 to 46 of the judgment in **Cape Intermediate v Dring**:

*“[45] However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for*

*seeking access. But there are others who may be able to show a legitimate interest in doing so ... the court has to carry out a fact-specific balancing exercise. On the one hand will be “the purpose of the open justice principle and the potential value of the information in question in advancing that purpose”.*

*[46] On the other hand will be “any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others”. There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality.”*

36. In exercising the inherent jurisdiction, this court must balance the non-party's (the appellant's) reasons for seeking disclosure against the company's reasons for wanting to preserve confidentiality. This court is in favour of granting access to the appellant as the appellant has a legitimate interest in inspecting the documents, in particular the application made by the Joint Liquidators as well as the affidavit in support and a transcript of the audio CD of the hearing before the judge. In our opinion, it is not sufficient to say, as Counsel for the Third Respondent argued, that the appellant was aware that the court was adjudicating on the application of the joint liquidators and that they chose not to attend on the hearing. This is because it seems clear to us that the First and Third Respondents would have objected to any attempt by the appellant to be supplied with the application of the joint liquidators and supporting affidavit and to be heard on the application and as things transpired before the judge at the hearing of the appellant's application that objection would likely have succeeded. Attendance at the hearing would have counted for very little or nothing in those circumstances. We also find that the judge's order to seal the file was disproportionate because by so doing he deprived the appellant, who had an equitable interest in the subject parcel of land by virtue of being a purchaser and a legitimate right to be heard on the joint

liquidators' application, sight of the application and supporting affidavit and any real and proper opportunity to be heard on the application..

37. We are of the view that the court file ought to be unsealed in relation to the application of the joint liquidators and affidavit of David Holukoff both filed on June 10, 2019 as well as a transcript of the hearing so that this court can determine what parts of these documents, if any, are to be redacted. The application and the affidavit of David Holukoff are to be provided to the court by the company's Attorneys under confidential cover in a sealed envelope on or before 4.00 p.m. on Friday 7<sup>th</sup> February 2020. This court will arrange for a transcript of the hearing to be prepared as a matter of urgency. Upon receipt of the application, the affidavit in support and the transcript, this court will determine what parts of these documents are not relevant to the approval of the sale of the subject parcel of land to the appellant and ought to be redacted: **Ravin Ramkisoan v. Estate Management & Business Development Company Limited** Civil Appeal No. P16 of 2018. This court will provide copies of the redacted documents to the Attorneys-at-Law for the joint liquidators within fourteen (14) days. Thereafter, the joint liquidators' attorneys are to file and serve the redacted documents on the appellant, the Attorney General and First Citizens Bank Limited on or before February 27, 2020 and the Judge is directed to list the application for urgent hearing.

**Issue No. (iv) - whether the judge erred in refusing to grant approval for the sale**

38. Having regard to our decisions on the first three issues, we are of the view that at this stage it is not appropriate for us to decide this issue. In our opinion, when the appellant is provided with a copy of the redacted application together with the redacted affidavit of David Holukoff and the redacted transcript of the hearing, the appellant's application filed on October 16, 2019 ought to be remitted to the judge to hear the submissions from the parties in the light of the new material and to decide whether or not to stay

his order dated September 18, 2019 and/or grant approval of the sale agreement made between TCCL and the appellant.

### **DISPOSITION**

39. It follows that this appeal must be allowed. The order will be:
- i. The decision of Mr. Justice Ramcharan delivered on November 19, 2019 is hereby set aside;
  - ii. The appellant's application filed on October 16, 2019 is hereby remitted to Mr. Justice Ramcharan for re-hearing;
  - iii. The court file is to be unsealed in relation to the application of the joint liquidators filed on June 10, 2019 so that this court can determine what parts, if any, of the application, the affidavit of David Holukoff and the transcript of the hearing ought to redacted;
  - iv. Copies of the application and the affidavit of David Holukoff are to be delivered by hand by the company's Attorneys to this court addressed to the Clerk of Appeals, Court of Appeal, Third Floor, Hall of Justice under confidential cover in a sealed envelope on or before 4.00 p.m. on Friday 7<sup>th</sup> February 2020;
  - v. The court will arrange for a transcript of the hearing of the application of the joint liquidators to be prepared and determine what parts of the application, the affidavit of David Holukoff and the transcript ought to be redacted and provide copies of the redacted documents to the Attorneys-at-Law for the joint liquidators on February 21, 2020. The company's attorneys shall arrange to collect the copies of the redacted documents from the Court of Appeal Registry by 2.00 p.m. on that date.



- vi. Upon receipt of the copies of the redacted documents from the court, the Joint Liquidators' Attorneys are to file and serve the redacted documents on the appellant, the Attorney General and First Citizens Bank Limited on or before February 27, 2020;
- vii. The appellant be permitted to file and serve on the Respondents further evidence, if necessary, in support of its application filed on October 16, 2019 within seven (7) days of service of the redacted documents;
- viii. The Respondents be permitted to file and serve affidavits in response, if necessary, within seven (7) days of service of any further evidence filed by the appellant;
- ix. The judge is directed to list the appellant's application for urgent hearing.

40. We will hear the parties on the issue of costs.

Dated the 6<sup>th</sup> day of February, 2020.

A. Mendonca,  
Justice of Appeal.

A. des Vignes  
Justice of Appeal.