IN THE MATTER OF C.V 2013-01917 PETROTRIN v MR. MALCOLM JONES

ADVICE

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1. I have been asked by Instructing Attorney in this matter to prepare a note of advice to the Board of Petrotrin in relation to the company's duty to make disclosure of witness statements by former directors and senior management adduced by Petrotrin in arbitrations against WGTL Inc. Those witness statements relate to matters that may be relevant to the events which are the subject matter of Petrotrin's legal action against the directors. The Defendant, Mr. Malcolm Jones, is seeking the disclosure.

2. I have been informed that a new Board of Directors has now been appointed for Petrotrin. For the sake of completeness and fully informing the Board, I am attaching with this advice the advice rendered in 2011 by myself and a separate advice rendered by Mr. Russell Martineau QC.

The disclosure issue

3. I was not involved in the relevant arbitrations between Petrotrin and WGTL Inc., nor was I consulted regarding the drafting of the witness statements. I have been provided with the witness statements for Charmaine Baptiste, Anthony Chan,

Kevin Singh and Imtiaz Ali. I have not been provided with a copy of the arbitral award.

4. As a starting principle, arbitration proceedings are confidential. A stranger to such proceedings has no right to access the documents or findings in those proceedings. However, a court has a power to override that confidentiality and order disclosure to a non-party to the arbitration. Mr. Jones was not a witness and was not a party to the arbitration. The court's power is exercised on the basis of what is in the best interests of justice in determining the case before it. It is not always easy to define 'best interests of justice'. Unfortunately, often it is what the judge feels like on the day he is hearing the application and not based upon any bright line principle.

5. In the application by Mr. Jones he has indicated that in his Defence he will be relying on the outcome of the arbitration proceedings between Petrotrin and WGTL Inc and that the documents in the arbitration proceedings are "important and relevant to the defence of this matter". It is difficult to understand how the Defendant can say that he is relying on the outcome and that the documents are important when by his own admission he does not know what those documents are. Be that as it may, the central question remains to be answered as to whether it is in the interests of justice for the documents to be disclosed. In my opinion this is best approached from what I think a Court in Trinidad will order in the circumstances. There is a widespread approach that litigation should be approached with all cards on the table facing upwards. This means that a court will be inclined to order disclosure more often than not. In my view,

notwithstanding an argument of confidentiality/privilege, a court will order disclosure of the relevant documents. I therefore do not think that Petrotrin will be successful in resisting the application, though if looked at rationally, there is no real basis on which the witness statements will assist the Defendant because it is the evidence given at trial of this action which will be relevant for the determination of the issues and not what was said at the arbitration. Further, whatever may be stated in the arbitration award, it is a fundamental principle of the common law system that a court decides a case upon the facts presented to it and not upon the facts presented to another tribunal, particularly an arbitral tribunal.

The merits of the substantive action

6. As mentioned in paragraph 2 above, I have attached the advices originally rendered in this matter. I have considered the contents of Charmaine Baptiste and Anthony Chan's witness statement, which were not available in 2011 when the advices were rendered. Having considered them carefully, there is a basis for concluding that the Petrotrin Board, through bad business decisions, found itself committed to the GTL venture with WGTL Inc. The Board was naïve and probably duped by the WGTL Inc. principals. Once the Board discovered how deeply committed Petrotrin had become, it appears from the witness statements of the two directors that the company did what they could to protect Petrotrin's assets. I apprehend that Mr. Jones will testify at trial to the same effect. A court may very well find that the decisions which taken to achieve this were bad business decisions. However, a distinction is to be drawn between bad business

decisions and negligence. This is what will engage the court. I understand that Miss Baptiste and Mr. Chan were convincing witnesses at the arbitration proceedings. There is no reason to believe that they will not be equally convincing in a trial of this action. In the circumstances, there is a reasonable likelihood that a judge will be persuaded that there was a bad business decision but no negligence. This is a matter the Board will need to consider in the context of the future conduct of this action.

7. Subject to what is said in the preceding paragraph, I do not think that a good defence is open to Mr. Jones based on the limitation period – in other words Mr. Jones cannot rely an any contemporaneous knowledge of the Government as regards the Board's decision. The limitation point has been comprehensively argued in e-Teck v Julian & others. The Defendants in that matter have lodged an appeal with the Privy Council seeking to overturn the Court of Appeal's adverse decision.

8. If I can be of any further assistance in this matter those instructing me should not hesitate to contact me.

Vincent Nelson QC

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11 October, 2015.