IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NOS. 2013CD 00156; 2013 CD00116; 2013 CD00157; 2014 CD00076

CONSOLIDATED CLAIMS

BETWEEN	**SAM PETROS**	**CLAIMANT**
AND	**GEORGE MURRAY**	**1ST DEFENDANT**
AND	**KARIN MURRAY**	**2ND DEFENDANT**

Contract – Tomlin Order – Variation – Terms of Variation - Whether Variation an Enforceable Agreement – Whether Terms include "Close of Business" – Whether Conditional Contract-Specific Performance.

Mr. Hugh Small QC and Adam Jones instructed by Hart Muirhead & Fatta for Claimant

Lord Anthony Gifford QC and Carol Davis instructed by Carol Davis & Co. for Defendants.

Heard: 22nd, & 23rd February 2016; 11th March 2016 and 19th May 2016

COR : BATTS J

[1] These consolidated claims concern issues, which have gone unresolved for a long time. In the course of litigation, the court has already written three (3) judgments on the matter. The claims now come before me for trial.

[2] The parties are directors and shareholders in two companies Tensing Pen Ltd and Tensing Pen (Cayman) Ltd. The former company manages and operates a hotel in Jamaica and the latter company owns the land on which the hotel is located. The Claimant owns 50% of the shares in the Companies and the Defendants (husband and wife) together own the other 50%.

[3] As a result of a deteriorating relationship, primarily due to differing ideas on how the hotel should be developed, deadlock ensued. In consequence **Suit 2011 *HCV06390 (now 2013 CD00066) Sam Petros v George and Karin Murray*** was filed. Relief was claimed pursuant to section 213A of the Companies Act. That action was settled by agreement between the parties, which took the form of a Tomlin Order, on the 28th November 2011. The agreement attached to the Tomlin Order had 14 substantive clauses. The ones material to the issues before me were:[Agreed Bundle pages 65 -69]

> **"4. 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.**
>
> **10. 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.**
>
> **11. 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 within 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 US$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 shareholder's interest pro-rated based on such offer price.

13. 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 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."

[4] The parties did not give full effect to Clause 11 of the said Tomlin Order. After an attempted sale on the open market fell through the parties opted for another approach to the bidding process. This involved the independent Chairman of the Board ,Mr Ken Tomlinson, making the decision as to who was to purchase the shares. The detailed terms of this new agreement will be among the matters for my consideration. Suffice it to say that, at the end of the process disharmony continued and further claims were filed.

[5] On the 25th June 2013 Sam Petros filed a Claim 2013HCV03772 (now CD00156) in which the following relief was sought:

(1) Specific Performance compelling the Murrays to execute the Agreement for Purchase and Sale of shares as "was accepted by Mr. Tomlinson on behalf of" the Murrays.

(2) Alternatively an Order requiring the Registrar of the Supreme Court to sign the Agreement on their behalf.

(3) Further or alternatively damages.

[6] The Defendants filed a Defence and counterclaimed for relief which may be summarised as follows:

a) The appointment of an independent director.

b) That the sale proceeds as per the original terms of Clause 11 of the Schedule to the Tomlin Order.

c) Alternatively that the Murrays be permitted to purchase the Sam Petros shares.

d) That the decision of Mr. Kenneth Tomlinson as to who was to purchase the shares be set aside.

[7] On the 25th June 2013 Sam Petros also filed a Fixed Date Claim 2013HCV03766 (now CD2013 0157) against the Murrays in which he claimed:

a) That Karin Murray be removed as a Director of the Company

b) An injunction restraining the Murrays from taking steps to remove Sam Petros as a director and from attempts to dispose of assets of the Company.

c) An order for the appointment of an additional director

d) An Order that the Murrays sell their shares to Sam Petros.

Affidavits in response were filed by the Murrays.

[8] On the 2nd August 2013 the Murrays filed a Claim CD00116 of 2013 against Sam Petros. The relief sought may be summarised thus:

a) The appointment of an independent director or the appointment of a new director for the companies.

b) Clause 11 of the schedule to the Tomlin Order be given effect

c) That Mr. Ken Tomlinson's decision to accept Sam Petros' offer be set aside.

d) That Sam Petros be ordered to give effect to a sale to the Murrays in terms of the offer they had made or of the price they had offered.

Mr. Sam Petros filed a Defence to this claim.

[9] On the 30th day of June 2014 the Murrays filed a Fixed Date Claim No. 2014CD00076 against Sam Petros. The relief claimed was for:

a) The appointment of an independent director who would be Chairman of the Board.

b) Alternatively a new director be appointed.

c) An order directing Sam Petros to sign the financial statements prepared by the auditors for year ending 30th June 2013.

d) A declaration that the "1st Defendant" is empowered to pay out dividends for final year ending 30th June, 2013.

e) Alternatively an Order that the Murrays be compensated by payment of dividends for year ending 30th June 2013.

Sam Petros filed affidavits in answer to the affidavits filed in support of this Fixed Date Claim.

[10] The Murrays applied, in Claim No. 2013 CD00066 (formerly 2011 HCV06390), by Notice of Application filed on the 7th March 2013, for an order that:

1. "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 Ltd. and Tensing Pen (Cayman Islands) Ltd 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 prorated based on such offer price.

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

[11] By an amended notice of application filed in that action on the 14th June 2013, the Murrays also sought the following relief:

> [1] That Mr. Kenneth Tomlinson be removed as an independent director and Chairman of the Board.
>
> [2] That an independent director be agreed between the parties within 7 days and in the absence of agreement be appointed by the court.
>
> [3] That the purported acceptance by Mr. Tomlinson of the offer of the Claimant dated 6th March 2013 be set aside.
>
> [4] That the court directs that the new Board and/or the parties and/or the new Chairman accept the offer of Paul Elsenor made on the 8th May 2013 in the sum of US$3,750,000 pursuant to Clause 11 of the schedule to the Tomlin Order herein.

[12] This application was heard by the Honourable Mrs. Justice Sinclair Haynes (as she then was) in the period May to July 2013. By a judgment in writing the learned judge decided that :

> a) The court had jurisdiction to enforce the terms agreed in the schedule to the Tomlin Order without an application to restore the action
>
> b) The court could not order the appointment of a new director as the terms agreed in the schedule to the Tomlin Order had been complied with in that regard and an independent director had already been agreed upon and appointed

c) The terms agreed in the schedule to the Tomlin Order had been varied by the parties. They had ignored the terms of Clause 11 of the schedule to the Tomlin Order.

[13] Justice Sinclair Haynes, stated, [Para 29 of her judgment]:

> **"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 disposed the new board of that authority. <u>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."</u> [Emphasis mine]**

[14] Justice Sinclair Haynes, be it noted, considered the same emails, which affected the variation of the terms of the Tomlin Order, as have been placed before me. She concluded that the variation of the terms agreed in the schedule to the Tomlin Order was not sufficiently precise as to the time bids were to close as to allow for summary enforcement. As such, and because the parties had "entirely departed" from the terms of the schedule to the Tomlin Order, the court had no jurisdiction to summarily enforce the terms of the Tomlin Order. The application by the Murrays was therefore dismissed.

[15] Sam Petros by Notice of Application filed on the 20th February 2014 applied to have the Murrays claim in CD00116 of 2013 [see above] struck out. He also applied for summary judgment. The decision on that application was handed down by the Honourable Miss Justice Carol Edwards (as she then was) on July 7 2014. The same factual background was before the learned judge. She stated in the course of her written judgment:

> ".Para 8."...***What is clear, however, is that the board of directors no longer had the responsibility of accepting the bid as***

> ***contemplated in the schedule of the Tomlin Order. That responsibility now resided with Mr. Tomlinson as independent director and chairman. He was to act as agent for both parties."***
>
> Para 9. ***"Some of the correspondence between the parties referred to a final day of acceptance and the time being the close of business at that date ... there was no definition of close of business in the correspondence for either side (and in my view no real agreement whether it was close of business or end of that day)."***

[16] Justice Edwards declined to strike out the Murray's claim or to grant summary judgment against them, because the variation of the schedule created a new contract. No court, and in particular Sinclair Haynes J had not, adjudicated on that new contract. Further as the independent director had resigned, and as the application to appoint a new director was pursuant to section 213 of the Companies Act and not pursuant to the schedule to the Tomlin Order, the court had jurisdiction so to do. She did strike out pleadings to the extent they sought enforcement of the Tomlin Order. At paragraph 50 of her judgment Justice Edwards stated,

> "50. ***I do not agree that Sinclair-Haynes J made any definitive finding as to what was agreed by the parties, neither do I agree that even if such a finding was made, that it is binding on any court which was being asked to determine the terms of the contract as varied between the parties and whether there was a breach of that contract"***

and having reviewed the correspondence.

> 55. ***"What is clear, however, is that the variation contains wording which requires judicial interpretation to determine the true meaning and effect. This cannot be done in a summary way. These are questions of fact, which cannot be determined by a judge in chambers on affidavit evidence only. The issue of what offer Mr. Tomlinson was authorised to accept and the***

interpretation of the meaning of the governing words, as well as the issue of when the bidding was to be closed are questions which are subject to further consideration by the court."

[17] By application filed on the 13th July 2015, the Murrays sought Summary Judgment and/or a striking out of Sam Petros' action in 2013CD00156. By a similar application filed on the 24th July 2015 Sam Petros sought similar relief in suit 2013CD00116.

[18] Both applications were set down before me and heard in the period 15th to 23rd October 2015. The Murray's application was considered first and I decided that it would be dismissed. The issues were triable and should be determined after evidence was lead and there had been cross-examination. Mr. Sam Petros thereupon withdrew his application of the 24th July 2015. My decision in that matter was reduced to writing.

[19] Claims 2013CD 00156; 2013 CD00116; 2013 CD00157; 2014 CD00076 have been consolidated by Order of the court. This consolidated action is now for trial before me. On the first morning of trial both parties agreed that I should only resolve the issues pertaining to the claims for Specific Performance. If it becomes necessary, the other matters will be tried at a later date. In effect, I am to decide the issues of interpretation admirably summarised by Edwards J and related at paragraph 16 above.

[20] In his opening for the Claimant Queen's Counsel Mr. Hugh Small, stated among other things that the agreed variation of the Tomlin Order, empowered, Mr. Tomlinson to choose the "best offer." The question for the court, he submitted, is whether the exchange of emails created an enforceable contract. In addition to the Claimant himself Messrs. Conrad George attorney at law and Kenneth Tomlinson, were called to give evidence in support of the case for an enforceable agreement.

[21] In his opening for the Defence Lord Anthony Gifford QC, asserted that the issues for determination were -

a) What was agreed, and the construction to be put on the terms as were agreed

b) Whether or not the acceptance of a conditional offer by Mr. Tomlinson, was outside the scope of his authority

c) Whether Specific Performance of the Murrays "offer" ought to be ordered.

He further submitted, and I think this was common ground, that it is only if specific performance is refused that a second hearing will need to be held on the issues dealing with Section 213 of the Companies Act. The Defendants called the attorney at law who represented them, Mrs. Jennifer Messado, to give evidence. The Second Defendant also gave evidence.

[22] Each party thereafter filed written submissions and authorities and each counsel spoke to the written submissions of the other. I am greatly indebted to counsel for the comprehensive yet concise manner in which the case was conducted and the submissions presented. It has rendered my task considerably easier. I should mention that I acceded, having heard submissions, to Lord Gifford's application to amend the Defendants' statements of case in terms of a document, which was handed up to me.

[23] It is fair to say, the several witnesses for each party notwithstanding, that the factual issues were not many. The matter is essentially one of construction of documents and my decision for the most part will involve mixed issues of law and fact. The respective claims. it must be remembered, I consider at this stage are for Specific Performance, and are therefore equitable. I will in the course of this judgment reference only such parts of the evidence and the submissions as I deem necessary to explain my decision. The parties are to rest assured that I have carefully read and considered their respective cases evidence and arguments.

[24] The first matter to determine is what are the terms of the agreement to vary and are they sufficiently certain to be enforceable. It is common ground that there

was an agreement to vary. However, the details of the terms agreed are in dispute as well as their enforceability. The parties contemplated an auction on the 25th February 2013. This was it seems, to be conducted by Business Recovery Services Ltd. It was intended that the parties would attend the auction and bid against each other [see letter dated the 22nd February 2013 Jennifer Messado to Hart Muirhead & Fatta p. 89 Agreed Bundle of Documents]. There followed oral discussions and an exchange of email. In the end the idea of a formal auction was dispensed with and an agreement, the terms of which I am to determine, was arrived at.

[25] It is necessary at this juncture to set out verbatim the relevant correspondence.

a) Email dated the 25th February 2013 Jennifer Messado to Hart Muirhead Fatta [page 93 Agreed Bundle of Documents]

"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.**

Regards."

It is common ground that "discussions" in paragraph 4 of this email is a misprint for "decision". It is clear from Mrs Messado's witness statement that the decision was to be made by Mr Ken Tomlinson

[Para 4 of her witness statement dated the 17th February 2016].
.

b) Email dated 25th February 2013 from Jennifer Messado to Ken Tomlinson, Conrad George and Karin Murray [page 94 Judges Bundle]

"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 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."

It is again common ground that "discussions" in paragraph 4 of the email was intended to be the word "decision".

c) Email dated the 25th February 2013 from Conrad George to Mr. Ken Tomlinson.

"Dear Ken:

Please see the attached

Best regards,

Conrad

From: Conrad George

Sent Monday February 25, 2013 2:38 p.m.

To: Talong@hmf.comkjm

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 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 these terms.

Best Regards,

Conrad"

This email it is to be noted was not copied to Jennifer Messado. Mr. George says it was an oversight and admits it ought to have been copied to her. He contends that it reflects the terms agreed orally with Mrs. Messado and that "close of business" as the deadline on the 6th March 2013, was expressly agreed. Mrs. Messado denies this. [see Witness Statement Conrad George at paragraph 8 and witness statement of Jennifer Messado at paragraph 8].

[26] I am satisfied that the attachment to the email sent to Mr. Tomlinson by Mr. Conrad George on the 25th February 2013 @3:17 p.m. contains the terms agreed between himself and Mrs. Jennifer Messado. They do not, apart from the reference to "close of business", depart significantly from those outlined in Mrs. Messado's two emails. I accept also that his failure to copy the other side on the correspondence was an oversight. That failure is consistent with the, for want of a better description, surprisingly cavalier approach to the transaction. Mr. George did not, for example, compose a letter (or an email) to Mr. Ken Tomlinson outlining the terms agreed upon. What he did was send to Mr. Ken Tomlinson an attachment. That attachment was an email from Mr. George to another attorney in his firm. It was captioned: "Draft email to be sent to Ken Tomlinson for your perusal." Mr George's omission to respond to Mrs. Messado's email sent at 12:19 p.m. on the 25th February, although it expressly asked that he "confirm and approve", is another example. To my mind this pattern is consistent with someone who might, and as I find did in fact, in error fail to copy the other party with the agreed instructions. I accept Mr. George as a truthful witness and his recollection of the conversation with Mrs. Messado as accurate.

[27] I am fortified in my conclusion on this by the manner in which some evidence was given. Mr. George appeared more focussed and earnest whilst Mrs. Messado was imprecise and at times rather flippant. The content of the oral evidence also influenced me on the issue. So that in cross-examination of Mrs. Messado:

"Q: you said in the course of your statement at Para 5 and elsewhere that discussions partly oral and partly in emails

A: that is correct we had conversation and then confirm it

Q: Do you keep notes of conversation

A: No because I have a good enough memory.

Q: that's your opinion

A: Sometimes I do"

And later,

"Q: when you make reference to latest position would that have been an email dispatched shortly after a conversation with Mr. George that same day.

A: There was a time we met at Mr. Tomlinson office and not sure if that was the occasion

Q: You say you don't take notes because you have a good memory and because you send emails shortly after so I am asking whether the email at page 94 [of agreed Bundle] reflects what took place in a conversation that same day.

A: It most certainly but if you asking me if at 10 or 11 I can't say."

Mrs. Messado admitted that her email which was sent on the 25th February 2015 at 12:19 p.m. [page 94 Judge's Bundle] did not contain all the terms. In particular that a deposit of US$100,000 was to be paid. Mrs. Messado was less than candid as it related to the deadline of 6th March 2013:

"Q: Was it the agreement made between yourself and Mr. George that offers must be in by 6th March, 2013

A: That's a fact

Q: *Pardon*

A: *That is correct*

Q: *Was it anticipated that offers could be made on 7th March 2013.*

A: *It was anticipated that offers would not be considered until the litigation that was filled by Clough Long & Company was heard.*

Q: *Clough, Long had filed litigation*

A: *Initially on behalf of the Murrays*

Q: *Seeking what relief*

A: *Clarification of the Tomlin Order*

Q: *I am directing your attention to the sentence #6 in the email and asking whether it was contemplated that the parties would have 24 hours after the 6th March to respond to a bid.*

A: *To make a counterbid*

Q: *Could it be that your placement of #6 after #5 was an error.*

A: *Absolutely not*

Q: *Could it be that the facility for making counter offers within a 24-hour period after a bid had been made referred to offer made prior to the final date of bidding March 6 2013.*

A: *That was not our understanding .....{And a few questions later]*

Q: *Answer my question, having regard to #3 do you still say it was open to the parties to make counter bids after the 6th March.*

A: *It was open in my view*

Q: *Based on 42 years experience as a lawyer do you agree what was being discussed with Mr. George was a process of bidding akin almost to an auction.*

A: We were trying to get the

Q: Question repeated

A: I would not 100% agree because an auction is very finite with slam of the hammer.

Q: In the world of commerce it is frequently the case that there is a deadline beyond which bids would not be accepted.

A: sometimes

Q: Oftentimes

A: I am not going to say that this is my experience

Q: Specifying a time beyond which offers will not be entertained helps to make an agreement for bidding finite

A: I am not going to agree with you.

Q: You do not agree that setting a time beyond which bids would be accepted helps to make the process finite.

A: I am much more interested in the strength of the bid."

[28] This effort by Mrs. Messado to leave the gateway open for bids even after the 6th March, 2013 does her no credit. It was clear from all the documentation and the evidence thus far that no bids were to be accepted after the 6th March, 2013. The intention of both sides was to have a period for bidding and counter bidding after which the decision would be made by Mr. Ken Tomlinson as to which bid to accept. The issue is whether the period was to end at the "close of business", on the 6th March or twelve midnight on the 6th March. Both emails, Mr. George's and Mrs. Messado's, are clear, that no further bids were to be accepted after the 6th March.

[29] Mrs. Messado's answers on that matter of "close of business" are to my mind also instructive. When cross-examined,

"Q: Next sentence has nothing to do with highest and best, said who determines what is close of business.

A: I remember writing that and I would do so again today.

Q: Is that a phrase you have ever encountered in your then 39 years of practice.

A: It is not something I use or work with as it has no proper meaning or applicability.

Q: Have you ever encountered it

A: I must have but does not mean I interact with it.

Q: It was not the first time you heard phrase used in this process.

A: it was nothing that was elucidated upon or agreed upon

A: Had the phrase been used in the course of this issue of bidding

A: There was discussion like everything else.

Q: Who were participants

A: there was a practical document that Mr. George was trying to author

Q: Are you sure

A: there was a practical document cannot say it was agreed cannot say if words were in it that is why we had no agreed protocol

Q: Are you confusing it with document created by previous attorneys for the Murrays look at pages 78 and 80 Agreed Bundle

A: I am aware of it

Q: Is that the document you were referring to earlier

A: Yes"

Mrs. Messado it appears was reluctant even to admit familiarity with the phrase "close of business." The words do not appear in the document she referenced.

[30] Her responses to suggestions on this issue were also unconvincing.

> "Q: I suggest it does not contain negotiated position that all bids to be in by close of business on 6th March, 2013.
>
> A: I would not use those words
>
> Q: It was used in discussions with Mr. George
>
> A: No.
>
> Q: When brought to your attention on the 6th March you never protested.
>
> A: I never answered anything in that email at all except I was going to the court for guidance."

[31] This leads me to my final reason for rejecting the Defendants' denial that the phrase "close of business" formed part of the terms agreed. In the period 5th to 6th March there were emails exchanged between the parties as follows:

a. On the 5th March 2013 Jennifer Messado wrote to Conrad George, [p. 126 Agreed Bundle]

> "**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."**

b. Mr. George responded on the same date, with a copy to Mr. Ken Tomlinson, as follows: [p. 126 Agreed Bundle]

> "**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 challenge that:

- **The parties agreed to submit offers by 3:30 p.m. 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 & Co. as well as from Hart Muirhead & Fatta. 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."

c. In her next email on 6th March 2013 at 7:07 p.m. Mrs. Messado encloses an offer from her clients (their third). The "text hidden" is that third offer. Mr. George at 7:29 p.m. on the 6th March wrote to J. Messado, Kevin Murray and Raymond Clough as follows:

> **"The cut-off for offers was close of business today, at your client's 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 client's previous offers, 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 we urge him accordingly."

d. Mrs. Messado responding at 7:33 p.m. on the 6th March 2013 [page 127 Agreed Bundle] from her blackberry:

"**We are going to suggest sealed bids within 7 days to the court. Who determines what time is close of business."**

Mrs. Messado's concern manifestly, was that her bid of the 6th March at 7:07 p.m. be considered. She did not deny that "close of business" had been agreed. It is somewhat strange that she did not deny it even after receiving the email from Mr. George of 5th March at 5:30 p.m. which referred to "close" and "close of business" in two separate parts of the email. Had there been no such term agreed I would have expected a clear explicit and prompt rebuttal from Mrs. Messado.

[32] As to the meaning of the phrase "close of business", I accept the evidence of Mr. George and Mr. Tomlinson that the phrase is well known and often used in commercial dealings. It references the normal end of the workday. In this case, the evidence suggests anytime from 4:30 to 5:00 p.m. Mr. Tomlinson I believe puts it best:

Q: Close of business you say in Para 13[of your witness statement] by a cut off time which I was advised close of business, advice is in email of Mr. George.

A: Yes I have done many transactions. North American and Caribbean. Close of business means 4:30 to 5:00 p.m. anywhere in the world.

Q: Term Close of business was in Mr. George's email.

A: Correct

Q: When in your opinion would close of business be

A: On this occasion I say 5 pm

Q: did you say that to Mrs. Messado

A: I did

When it was suggested to Mr. Tomlinson that he ought to have accepted any offer reaching him before 11:59 p.m. he said,

> "I have done over 159 projects never seen bids after business hours. Never seen it."

[33] I therefore find as a fact that the terms agreed were as follows:

1) Each party would send a deposit of US$100,000 to Mr. Ken Tomlinson

2) Each would submit detailed offers to Mr. Tomlinson by 3:30 p.m. on the 25th February, 2013.

3) Mr. Tomlinson was then free to discuss each offer with the respective parties with a view to clarification or improvement of their offers. This process was to end by close of business on the 6th March, 2013.

4) Mr. Tomlinson in his complete discretion would decide which offer was the best. The decision which bid was to be accepted was to be solely that of Mr Ken Tomlinson.

[34] It was strongly urged by Queen's Counsel on behalf of the Defendants that the parties were each entitled to 24 hours to respond to the bid of the other. There is no doubt that such a term was at one time contemplated. However, it is clear, even from Mrs. Messado's email of the 25th February 2013 at 12:19 p.m. that the 24 hours did not extend beyond the 6th March 2013. That same email said, "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." This is reaffirmed by a later statement in that email that "the best and final offers must be in by March 6th 2013." If each party had 24 hours to respond to every bid submitted, including the "best and final offer," then not only would that offer not be final but the 6th March 2013 would not be the date bids "closed." As Mr. Tomlinson indicated in his evidence the process might be never ending and that is why commercial men in a bidding process almost always have a final cut off date. I find there was no agreement for a 24 hour or any period extending beyond the 6th March 2013, for the purpose of renewed offers. The agreement rather, was for initial bids to be in by the 25th February, 2013. Between then and close of business on the 6th March 2013 Mr. Tomlinson was at liberty to consider improved offers or counter bids. Thereafter he was to decide which offer was the best.

[35] Mr. Tomlinson considered the respective bids. He preferred that from the Claimant primarily because it was a cash offer when the Defendant's was dependent on financing. The bids submitted were as follows:

a) 25th February 2013 from the Claimant for US$1,600,000

b) 25 February 2013 from the Defendants for US$1,700,000.

c) 4th March 2013 from the Defendants of US$1,750,000

d) 6th March 2013 from the Claimant for US$1,750,000.00

e) 6th March 2013 from the Defendants for US$1, 850,000.00.

[36] The offer at (e) was not considered by Mr. Tomlinson as it was submitted after 7 p.m. on the 6th March, 2013. He has however stated, and I accept, that even had he considered it, he would not consider it the best offer. This is because, as with all previous offers from the Defendants, it was not a cash offer but was

dependent on financing from the bank, of which there was no certainty. Mr. Tomlinson explains his reason for preferring the cash offer thus:

> *"Q: I put it to you that if the Murray's offer was accepted but financing did not come through there would be no disadvantage to Petros as he would then be the only bidder.*
>
> *A: There would be. His offer was a cash offer. This offer seeking financing. No guarantee it would be completed within 3 to 6 months. Loss to Mr. Petros in respect to not receiving based on interest rates on US dollars to be more than dividends.*
>
> *Q: Cut off date of proof of financing was 14 days.*
>
> *A: Would not get proof of financing within 14 days. Practically nothing could be done in 14 days."*

[37] Mr. Tomlinson decided to accept the offer at (d) as in his opinion it was the best offer. It has been argued that Mr. Tomlinson accepted this offer even before he had read it and at a time when it contained new conditions, not contained in the previous offers. These conditions, which in cross examination Mr. Tomlinson accepted would affect the value of the bid, were as follows:[page 138 Agreed Bundle]

> **"It is a condition of this offer that, in the event of its acceptance, for the period between the acceptance of this offer and completion of the sale, the Murrays covenant with Sam Petros that prior to completion and without the prior written consent of Sam Petros, Tensing Pen Jamaica Limited shall not (and they shall so procure):**
>
> **(i) to iv)**
> **(v) save as is expressly provided for herein, declare, make or pay any dividend or other distributions or do (or) suffer anything, which may render its financial position less favourable than as at the date of this offer;**

(vi) to (viii)"

It has been argued that in accepting this offer Mr. Tomlinson broke the terms of his remit by:

a) Failure to give the Murrays an opportunity to respond within 24 hours or at all

b) Failure to consider the Murrays final offer

c) Failure to read Petros' new offer and therefore failure to consider the new conditions and their effect on the bid.

[38] I have already decided that (a) and (b) above were not a breach of any term agreed. Furthermore it is not, I think, for this court to sit on appeal from Mr. Tomlinson's decision. The parties agreed to allow him to decide based on his best judgment. The criticism at (b) is in any event unfair. In the first place Mr. Tomlinson clearly articulated to the Murrays his concern that their offer was not for cash see for example his email of the 26th February, 2013 [page 103 Agreed Bundle]. In the second place given the agreed "close of business" deadline and the time at which he received the Claimant's second offer (the one ultimately accepted), there was no time to afford a further response to the Defendants. The response which ultimately came was a counter offer which was still dependent on as yet unsecured financing. Therefore the Murrays' final offer, which arrived after close of business, in Mr. Tomlinson's opinion, still suffered from the same malaise as the earlier ones.

[39] Finally, Mr Tomlinson's admission, that at the time he made his decision he had not yet read the Claimant's second offer, is of no great moment. The evidence is that by the time he put pen to paper to advise the parties of his decision he had seen the offer. Furthermore, in his opinion, its terms do not affect the comparative superiority of the offer. This is because, on his reading of the conditions only a payment of dividends which affected the viability of the company was prohibited, see his evidence in cross-examination:

"Q: Looking at condition on page 139 [of Agreed Bundle] do you agree it was a condition of agreement that they should not pay any dividend.

A: Yes, as far as it renders the financial condition less favourable.

Q: Your view

A: Yes"

[40] I agree with Mr. Tomlinson's construction of the offer. The condition, properly construed, relates to the period between acceptance of the offer and completion. It stipulates that the Defendants will covenant not to pay any dividend or other distribution or do anything "which may render its financial position less favourable than as at the date of the offer." In the context of the prior dealings and discussions between Mr. Tomlinson and the parties this is the only credible way to construe the condition. This is because, not just a few weeks earlier, Mr. Tomlinson, as Chairman of the Board, made it clear to both parties that a dividend would be paid prior to the sale, see email from Ken Tomlinson dated 21st February 2013 to Karin Murray and copied to Richard Murray and Sam Petros [p. 88 Agreed Bundle]

"**We will discuss the issue surrounding an interim dividend at the next Board of Directors meeting.**

I have indicated to Sam that prior to the transfer of the shares to the successful bidder, all shareholders would be entitled to some form of dividend based on the profits of the company, as at the date of the transfer.

Let us await the outcome of the February 2013 unaudited financials and then we can determine the level of distribution.

Please note that based on the unaudited results for January 2013 Tensing Pen has just turned the corner in relation to profitability for this financial period, and it would be prudent to await the February accounts to see if the profitability projections are achieved.

I would hope that we are in a position to keep a meeting sometime in March 2013 to discuss same."

[41] Mr. Tomlinson is of the opinion that the amount of dividend being discussed would not render the company's financial position less favourable than as at the date of the Claimant's offer. He explains his position thus,

"Q: These words affect the value of the bid

A: Let me explain

J: Answer before giving explanation

A: in some respects, yes. It is typical. Anything, the company is extremely profitable. In terms as of 6th March 2013, even if interim dividend declared it continues to make profit. It would not be less favourable even if a US $60,000 dividend was paid.

Q: If Mr. Petros bid required no dividend to be paid

A: Yes

Q: if he was he would get company assets and dividend money all cash

A: All the assets cash

Q: including all profits earned over the year

A: yes

Q: The Murrays offer you knew was to bid for the assets less any dividend

A: Yes

Q: so, if dividend declared in March under Murray offer that dividend would be distributed.

A: yes but whether or not even if Mr. Petros at US $1,750,000 declare US $60,000 dividend would not affect company none at all.

Q: If dividend of US $60,000 under Petros offer it stays in company under Murrays offer it gets paid out.

A: The US$60,000- it came up and what was said, I commit. But decision is a Board decision. How correlate but .... of Board. I said dividend should be paid up to date of transfers. So payment of dividend per se US$60,000 neither here nor there.

Q: at time, you made decisions Mr. Petros' offer was better by $1.00.

A: Yes and was structured"

I accept Mr Tomlinson's evidence ,and find as a fact, that the payment of a US $60,000 dividend would not render the company's financial position less favourable within the meaning of the condition.

[42] It has also been urged that this court ought not to order specific performance as no contract in terms of the offer accepted by Mr. Tomlinson has come into effect. One reason advanced is because the conditions stipulated in the offer are conditions precedent to the coming into existence of the agreement. These conditions include a "covenant" by the Murrays to Petros. No such covenant it is said has been given or will be given. The Defendants point to Mr. Tomlinson's evidence in this regard. It was his opinion that the failure to obtain such a covenant might be detrimental to the agreement, as he said:

"Q: Did you ever ask Murrays whether they were prepared to make these covenants.

A: No

Q: Put it to you if Murrays did not make covenant the offer would fail.

Objection: Don't think witness should be asked as it is a legal question. I intend to address you on all conditions.

Judge: I will allow the question. I think the understanding of the referee of the process is important.

A: Based on what is outlined here there is a probability the offer would fail in respect of the conditionalities."

[43] The Claimant on the other hand, says that Mr. Tomlinson's remit meant that the unsuccessful party (to the bidding process) was obliged to sell on whatever terms Mr. Tomlinson accepted. Furthermore, as the Defendant's final offer contained similar conditions(in the financing terms being offered by the financial institution) the Defendants are estopped from objecting to the terms. The Claimant contends that there arose a waiver by election inasmuch as the Defendants (a) submitted an offer with similar terms (b) took no objection to the conditions for almost 3 years. Reliance is placed on ***the "Kanchanjunga" [1980] 1 Cl Rp 391*** and ***Involnert Management Inc v Apriligange Ltd. 2015 EWHC 2225 (Comm).***

[44] I do not agree that an election by waiver arose, at any rate, not with respect to the specific conditions. This is because, in the first place, the Defendant's offer did not have such a condition. Their offer was conditional on financing being obtained. It is the financial institution, not the Defendants, which had, virtually buried in its documentation, certain requirements. It is difficult to see how the preconditions to financing offered by a third party, could preclude the Defendants from taking an objection to unreasonable terms.

[45] On the other hand I do believe an estoppel arises. This is because it was within the remit of Mr. Tomlinson to "accept" the best offer. His decision as to which offer was best binds the Defendants. They thereby became bound to honour the agreement. It has not been demonstrated that the conditions at (i) to (viii) are unusual or in any way unfair. Indeed they appear to be that which any well drafted contract of this type could reasonably contain .Had he accepted an offer without that term any effort by the vendor to depreciate the asset in the manner stated would in all likelihood be a breach of an implied good faith term. The purpose is to ensure that in between contract and completion nothing is done to undermine the value of the assets being sold. The fact that it is reasonable to include such provisions is demonstrable by reference to the conditions contained in the bank's offer of financing, because the terms are similar (although not identical) and serve a similar purpose. Mr. Tomlinson in accepting the offer has not therefore gone outside his remit and the Defendants are in consequence bound thereby. They are for that reason estopped or precluded from refusing to covenant accordingly. I so hold. I repeat for emphasis that, as found at paragraph 41 above, the covenant at (v) only precludes the payment of a dividend to the extent it renders the company's "financial position less favourable than as at the date of this offer."

[46] I find that Mr. Tomlinson's answers in cross-examination (outlined at paragraph 42 above) reflect his ignorance of the full legal implications of his mandate. The terms were reasonable and only to be expected in a contract of this nature. I find that whether he knew it or not, Mr. Tomlinson was, as agent of the parties, entitled to bind them to any reasonable term. This must be so or else their power to accept the best and final bid would really be rendered nugatory. This is because every contract has terms in addition to the purchase price. To subject the parties to a process of negotiation of those terms, after the best offer was accepted by Mr. Tomlinson, would empower the losing bidder to derail the entire process by taking unreasonable objection to otherwise reasonable terms. This indeed may be the thinking behind the decision of the parties to empower Mr. Tomlinson to accept not just "the best price" but the "best offer."

[47] In the final analysis I hold that Mr. Ken Tomlinson having accepted the Claimants offer as the best, bound the Defendants to honour all the terms of that offer including the giving of the covenant's stipulated. The conditions were therefore not conditions precedent in the classical sense. The word condition in the offer letter was used to denote the import of the term of the contract. In other words acceptance indicated that the vendors covenanted (and procured) the items at (i) to (viii) see Agreed Bundle page 139.

[48] I therefore make the following Orders and Declaration:

(i) Specific Performance compelling the Defendants George Murray and Karin Murray to execute the agreement for purchase and sale of shares in terms of the offer dated the 6th March 2013 as was accepted by Mr. Tomlinson on behalf of the Murrays.

(ii) The Registrar of the Supreme Court is empowered to execute the said agreement and all documentation necessary to give effect to this Order, in the event the Defendants or either or both of them fail neglect and/or refuse so to do.

(iii) It is Declared that on a true construction, the terms of the offer dated 6th March 2013 do not preclude the payment of dividends for the year ending 30th June 2013.

(iv) Liberty to apply

(v) Costs to the Claimant to be taxed or agreed.

David Batts
Puisne Judge