

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NOS. 20 OF 2003 AND 1 OF 2004

BETWEEN:

IPOC INTERNATIONAL GROWTH FUND LIMITED

Appellant

and

[1] LV FINANCE GROUP LIMITED
[2] TRANSCONTINENTAL MOBILE INVESTMENT LIMITED
[3] OOO CT-MOBILE
[4] SANTEL LIMITED
[5] AVENUE LIMITED
[6] JANOW PROPERTIES LIMITED
[7] BARROWS ALLIANCE LIMITED
[8] CORMACK SELECT LIMITED
[9] STEGMAN UNIVERSAL LIMITED
[10] SMART FINANCE LIMITED
[11] CARBERT INTERNATIONAL LIMITED
[12] CARBONELL TRADING LIMITED
[13] RAMPTON ENTERPRISES LIMITED
[14] ALAMOSA HOLDINGS LIMITED
[15] NORMANTON LIMITED
[16] OOO ALFA-ECO

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Denys Barrow, SC

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Michael Mann QC for the Appellant
Ms. Dawn Smith for the 1st Respondent
Mr. Clyde Williams for the 2nd Respondent
Mr. John Carrington for the 3rd and 7th -15th Respondents
Mr. Stephen Smith QC for the 4th-6th and 16th Respondents

2005: September 22;
2006: January 16.

JUDGMENT

- [1] **BARROW, J.A.:** Three days after delivering judgment dismissing the appellant's appeal against two decisions of the High Court, this court heard counsel on the terms in which the order should be drawn up. The principal issues that engaged counsel were whether there should be assessed costs or prescribed costs; if assessed costs, whether the cap of 10% of the total value of the claim that was placed by CPR 2000 on procedural applications applied or not; at what point and on what basis should the value of the claim be determined; whether the court should make an order for the interim payment of costs; whether the decision of this court should be treated as a dismissal or stay; and whether this court should issue a stay of its decision or an injunction to prevent dealings with the shares in a Russian telecommunications company (the Megafon stake) that were the ultimate target of these proceedings.¹ It was agreed in the course of the hearing that the costs of an earlier application by the respondents for security for costs should be treated as part of the costs of this appeal.

Stay or dismissal of proceedings

- [2] The first of the decisions of the High Court that was appealed was an order dated 1st October 2003 that "discharged in full in respect of the 3rd and 16th Defendants" an ex parte order that had been made appointing receivers of specified property including the Megafon stake and permitting the appellant to effect service out of the jurisdiction upon, among others, these two respondents.
- [3] The second decision of the High Court that the appellant appealed was an order expressed in a written judgment delivered by the judge on 21st January 2004 in

¹ Subsequent to this hearing and before the delivery of this judgement this court heard applications from the claimant both for leave to appeal to Her Majesty in Council and for an injunction. This court refused leave but granted a holding injunction until the hearing of an application for special leave to appeal to Her Majesty in Council.

these terms: “ ... the [ex parte] orders should be discharged in its entirety against all the remaining fourteen named [respondents] and I so order”.

- [4] The decision of this court was to dismiss IPOC’s appeals. The effect of that dismissal was to leave intact the orders of the High Court. There having been no appeal by the respondents seeking the variation of the orders of the High Court there is no basis for this court to embark on a review of their terms. The High Court orders, therefore, take effect according to their terms: the orders for service out and for the appointment of receivers were discharged. The High Court made no pronouncement on the matter of staying or discharging the claim. It would not be appropriate for his court to pronounce on the matter.

Costs

- [5] In the course of the hearing it seemed to have become generally accepted that the appropriate method of quantifying costs was by assessment, although some of the written submissions contended for prescribed costs as the applicable method. The argument in favour of assessed costs relied on rule 65.3, which describes the ways in which costs are to be quantified and states that if neither fixed costs, nor prescribed costs nor budgeted costs apply then costs are to be quantified by assessment in accordance with rules 65.11 and 65.12.
- [6] Counsel thought that this court should provide some guidance on the assessment. Mr. Carrington, for his respondents, thought that this court should clarify that rule 65.11 was not the applicable rule but rather that rule 65.12 should apply. The difference between the two provisions is that, unless the court thinks there are special circumstances of the case justifying a higher amount, rule 65.11 limits the assessed costs of a procedural application to one tenth of the amount of the prescribed costs appropriate to the claim.

[7] In contrast, costs assessed under rule 65.12, which applies to proceedings other than a procedural application, are not similarly limited. This court is therefore being asked to decide for the Registrar or Master whether the appeal was or was not a procedural application.

[8] We have not had the benefit of full argument on the matter; counsel for IPOC did not have the opportunity to consider the issue. In my view it is a determination that the Registrar or Master should be left to make after having the benefit of argument, including reference to previous decisions, if any. This course will also allow for consideration to be given to the broader question of what is the proper method of quantifying costs on an appeal. Is it a valid premise that either rule 65.11 or rule 65.12 applies to the quantification of the costs of this appeal? Can an *appeal* be regarded as or equated to an *application*, whether procedural or not? Or is it the case that an appeal² is an appeal and therefore the rule relating to applications simply does not apply? In this regard it seems that there is one method for the quantification of costs applicable to appeals generally, that is, rule 65.13, which states:

“unless the –

(a) Court of Appeal on an application made in accordance with rules 65.8 and 65.9 makes an order for budgeted costs; or

(b) parties to the appeal agree otherwise; the costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7 [all of which relate to prescribed costs] and Appendix B [which contains the scale of prescribed costs] but must be limited to two thirds of the amount that would otherwise be allowed.”

Counsel have not drawn to our attention any discussion or judicial determination of this matter. If it is a novel point, as it presently appears to be, it would be desirable that this court should have the benefit of the view, informed by the arguments of counsel, of the Master or Registrar.

² Other than a procedural appeal; for the definition of which see rule 62.1 (2). Essentially, a procedural appeal is defined to mean an appeal from a decision which does not directly decide the substantive issues in a claim but excludes any such decision made during the course of the trial, an order for committal or sequestration of assets, an order granting any relief made on an application for judicial review an order granting or refusing an application for the appointment of a receiver and orders for specified interim relief granted under Part 17.

- [9] That course also seems a fitting way to deal with the issue of the value of the claim on which a determination will need to be made since a number of issues hinge on it. From the respondents' side it was suggested that the value of the subject matter of the claim was approaching US\$1 billion. The estimate of costs actually incurred by the various respondents ranged as high as US\$2.9 million, for the Alfa Respondents. These figures justify a full consideration of the method of quantification as well as the matter of the valuation of the claim by the Registrar or Master. That course would allow the issue to be further considered on an appeal from the decision of the Registrar or Master – a possibility that is far from remote - which would be denied were this court to make a first instance determination.

Interim payment of costs

- [10] The respondents also sought an order for an interim payment on account of costs of sums going as high as \$1 million. It was disputed whether part 17 authorized the making of an order for the interim payment of costs as opposed to interim payment of damages. Even if the jurisdiction exists, Mr. Mann submitted for IPOC, none of the parties was hurting for money. There was no need for such an order, he submitted.
- [11] I am attracted to that argument. None of the respondents advanced any evidence or suggestion of need. While it must be left open for argument, I would be inclined to think that the justification for making an order for an interim payment would include the need for such a payment to be made. In addition, I note, there is the sum of US\$40 million that is paid into court to secure costs and an undertaking in damages as a condition of the grant of an injunction. There is no risk, therefore, that a delay in obtaining payment diminishes the likelihood of payment. Before this court makes an order for the interim payment of costs, it should be clearly established that it possesses the jurisdiction to do so and, if that is established, it is equally important that a clear basis for making such an order is established. The

court must be very clear as to what it is doing before it takes a first step in exercising a jurisdiction (if it exists) to grant applications for interim payment of costs. Because no clear basis has been shown for making it, I would refuse the order for interim payment of costs.

Conclusion

[12] I would therefore order that costs be determined by a Master or the Registrar of the Court of Appeal.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal