

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2015/0013 AND BVIHCMAP2015/00014

On Appeal from the Commercial Court of the Virgin Islands BVIHC (COM) 2015/0096

BETWEEN

**[1] STORCA INTERTRANS. CORP
[2] EVGENY MULYUKOV**

Claimants/ Respondents

and

**[1] NORVALO (OVERSEAS) LIMITED
[2] MINCO ENTERPRISES LIMITED
[3] MIKHAIL GOLUB
[4] IAN SMITH
[5] RUMA DEVI ANURADHA KISSOONDHARRY
[6] ATTENDUS TRUST COMPANY AG
[7] CURATUS TRUST COMPANY (MAURITIUS) LIMITED
[8] CURATUS NOMINEE SERVICES ONE LIMITED**

Defendants/ Appellants

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster

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

On written submissions:

Mr. Robert Levy QC and Mr Matthew Freeman of Lennox Paton
for the First and Second Defendants/Appellants)

Mr. John Wardell QC and Mr. Alistair Abbott of Forbes Hare
for the Third Defendant/Appellant

Mr. Andrew Willins of Appleby for the Fourth to Eighth Defendants/Appellants

Mr. Neil Kitchener QC and David Welford of Maples and Calder for the Claimants/
Respondents

Civil appeal – Costs – Freezing orders – Recusal order – Document retention order – Interim injunction – Civil Procedure Rules 2000 – CPR 69B.13 – Court to determine which party should pay costs and quantum – CPR 64.6 – Guidelines for determining liability for costs – CPR 65.13(2)(b) – Power of Court of Appeal to depart from general rule regarding costs of appeal

JUDGMENT ON COSTS

[1] **WEBSTER JA [AG.]:** At an *ex parte* hearing on 6th August 2015, the learned judge of the Commercial Court, Leon, J. made the following orders:

- (i) Worldwide freezing orders against the 1st, 2nd and 3rd defendants (“the Freezing Orders”)
- (ii) Document retention orders against the 1st – 7th defendants requiring the retention and non-destruction of relevant documents (“the Documents Retention Order”)
- (iii) An interim injunction against 6th, 7th and 8th defendants preventing them from taking control of the 1st claimant (“the Company Preservation Order”).

These orders are referred to collectively as “the *ex parte* Orders”.

[2] On 12th August 2015, the claimants applied to continue the *ex parte* Orders. The continuation application was heard on 3rd and 4th September 2015. At the conclusion of the hearing, the judge continued the *ex parte* Orders pending the delivery of his full decision.

[3] On 18th September 2015, the judge issued an order by an email addressed to the lawyers for the parties by which he continued the *ex parte* Orders “*without either*

*the provision of information orders or any mandatory provisions...*¹ and maintained the *“injunctive/prohibitory provisions”*. He reserved his decision on *“Reserved Applications”* and went on for several paragraphs in the email to give the parties advice on further orders that could be made and guidance on the future conduct of the application. Up to the time of the hearing before this Court on 16th November 2015 the judge had not delivered his reserved decision.

[4] The judge’s email is unclear and contains language that is inappropriate for an order of the court. Orders of the court, and in particular injunctive orders, should not be in this form and should be in clear terms.

[5] My interpretation of the judge’s email, for the purposes of this judgment, is that he continued the *ex parte* Orders and indicated that he would issue a reasoned decision in due course. In the meantime, the parties were to consider the other matters that he mentioned in the email and try to come to a common position.

[6] Three notices of appeal were filed by the defendants and are grouped as follows:

- (i) By the 1st and 2nd defendants who I will refer to together as “the Minco/Norvalo Appellants” and individually as “Minco” and “Norvalo” respectively.
- (ii) By the 3rd defendant, Mr Mikhail Golub (“Mr. Golub”).
- (iii) By the 4th to 8th defendants who I will refer to as “the Appleby Appellants”.

The appeals were numbered 13 and 14 of 2015 and on 2nd October 2015 this Court made a case management order consolidating the appeals.

¹ Italicised words and phrases in this paragraph are taken from the judge’s email.

[7] The consolidated appeals were heard on 16th November 2015. At the conclusion of the hearing, the Court accepted undertakings from the claimants, Mr Golub and the Minco/Norvalo Appellants regarding the assets of the 1st claimant and made the following orders:

- (i) “The order made by the Honourable Justice Barry Leon by email dated 18 September 2015 be set aside.
- (ii) The Claimants/Respondents are at liberty to file and serve a fresh application for injunctive relief (the “Fresh Application”) within 28 days of this order.
- (iii) The Fresh Application shall be heard by a judge of the High Court of the British Virgin Islands other than the Honourable Justice Leon.
- (iv) If the Claimants/Respondents do not file and serve a fresh application for injunctive relief within 28 days, the First, Second and Third Defendants shall each be immediately released from their respective undertakings set out above without the need for any further order.
- (v) The Sixth and Seventh Defendants are ordered not to vote their shares in the First Claimant/Respondent to appoint or remove directors unless ordered to do so by the Court in Mauritius.
- (vi) Any future civil proceedings, wherever located, between the Second Claimant/Respondent and one or more of the Sixth, Seventh and Eighth Defendants arising out of the Second Claimant’s directorship of the First Claimant, may be served on the Second Claimant at Mishcon de Reya, Africa House, 70 Kingsway, London, UK, WC2B 6AH. Service at this address shall be deemed to be valid service of such proceedings (without prejudice to any argument the Second Defendant might make as to jurisdiction).
- (vii) The parties shall make submissions as to costs of the appeal in writing within 14 days of the order herein”.

[8] We received comprehensive and very helpful submissions from the four law firms representing the parties and we record our gratitude for their assistance.

[9] Before proceeding with the analysis of the principles and the resolution of the issues, I should make the following observation regarding the hearing on 16th November 2015. The appeals involved several complex issues and the hearing lasted 12 hours including breaks. In the latter stages of the hearing, undertakings were offered by counsel for the parties, some of which were accepted by the Court. We were then able to work with counsel to make the orders set out above. At no stage did the Court make findings on the relative strengths or weaknesses of the parties' positions on the main issues in the appeal and any submission that we did is not accepted.

Costs Principles

[10] It was settled by this Court's decision in **Westford Special Situation Funds Ltd v Barfield Nominees**² that the costs of an appeal should be determined as assessed costs in accordance with rule 69B.13 of the **Civil Procedure Rules 2000** ("CPR 2000"), and not prescribed costs under rules 65.6 and 65.7 and Appendix B as stated in rule 65.13(1). The requirement in rule 69B.13 is that after giving its decision on an application, in the absence of agreement between the parties, the court must determine which party should pay the costs and the quantum of such costs.

[11] The guidelines for determining the liability for costs are set out in rule 64.6 as follows:

² HCVAP2010/0014 (delivered 22nd September 2010 and 28th March 2011, unreported).

“64.6 (1) Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

(3) This rule gives the court power in particular to order a person to pay

- (a) costs from or up to a certain date only;
- (b) costs relating only to a certain distinct part of the proceedings; or
- (c) only a specified proportion of another person’s costs.

(4) The court may not make an order under paragraph 3(a) or 3(b) unless it is satisfied that an order under paragraph 3(c) would not be more practicable.

(5) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(6) In particular it must have regard to –

- (a) the conduct of the parties both before and during the proceedings;
- (b) the manner in which a party has pursued –
 - (i) a particular allegation;
 - (ii) a particular issue; or
 - (iii) the case;
- (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;
- (d) whether it was reasonable for a party to –
 - (i) pursue a particular allegation; and/or
 - (ii) raise a particular issue; and
- (e) whether the claimant gave reasonable notice of intention to issue a claim.”

Costs in the appeal

[12] There are four sets of costs to be determined in connection with the following matters:

- (a) The Freezing Orders

- (b) The Recusal Order
- (c) The Document Retention Orders
- (d) The Company Preservation Order

The Freezing Orders

- [13] The Freezing Orders restrain the Minco/Norvalo Appellants from removing any of their assets from the BVI, and from dealing with, disposing of or diminishing any of their assets whether in or outside the BVI with the exceptions that the restrictions do not prohibit them from dealing or disposing of their assets in the ordinary and proper course of business with the proviso that the claimants must be given 48 hours' notice of transactions exceeding \$100,000.00. They can also spend reasonable amounts for legal advice and representation.
- [14] The restrictions in the Orders against Mr. Golub are that he is not to remove from the BVI any of his assets up to a value of \$25 million or deal with, dispose of or diminish any of his assets whether in or outside the BVI with the exception that he can spend up to \$50,000 per week on his personal living expenses and a reasonable amount for legal advice and representation.
- [16] The undertakings that were given by the Minco/Norvalo Appellants at the hearing of the appeal are not to dispose of their assets except for the payment of legal fees and for expenses in connection with these and any other proceedings, and for transactions in the normal course of business, but without the restriction of having to give notice to the claimants of transactions exceeding \$100,000.00.
- [17] Mr Golub undertook not to dispose of his assets and to restrict his spending on living and reasonable personal expenses to \$50,000.00 per week. He could also

pay for ordinary business expenses and for his legal fees and expenses in connection with these and any other proceedings.

- [18] The claimants/respondents submitted that the appeals filed by Mr. Golub and the Minco/Norvalo Appellants were geared to a full discharge of the Freezing Orders and all the restrictions placed on the defendants by the Orders. The Freezing Orders were discharged by this Court but on terms that the defendants are still restricted in how they can deal with the assets as set out in the undertakings that they gave to the Court. As such the claimants were partially successful on the appeal and this should be reflected in the costs order by awarding them 80% of their costs of the appeal in respect of the Freezing Orders.
- [19] Counsel for Mr. Golub submitted that that his client's position on the appeal was completely vindicated by the Order of the Court of Appeal in that the Court set aside the injunction against him in exchange for a limited undertaking of determinate length.
- [20] The submissions by the Minco/Norvalo Appellants are along the same lines as those of Mr. Golub with the added dimension that they, through their counsel Mr. Robert Levy QC, in oral submissions at the *inter partes* hearing on 4th September 2015, offered the judge an undertaking in virtually the same terms as the undertaking that was accepted by this Court at the hearing in November. I do not attach any weight to this submission because the position of the Minco/Norvalo Appellants on the appeal was that the Freezing Order should be discharged.
- [21] Without going any further into the details of the submissions on the Freezing Orders, which in any event is difficult because the Court did not make findings of fact, I am satisfied that both sides of the dispute enjoyed some success on the appeal. The defendants obtained the removal of some of the restrictions on

dealing with their assets and the claimants kept some of the restrictions on those dealings. It is difficult to measure the extent of each party's success and in the circumstances I think that the order on the Freezing Orders should be that the parties bear their own costs.

The Recusal Order

- [22] The notices of appeal of the defendants sought orders that another judge hear the remainder of the proceedings in this matter. In the case of the Minco/Norvalo Appellants, the relief sought was that "the case, and all applications in it be heard by a judge other than the Honourable Leon J"; Mr. Golub sought an order that "the learned judge be directed to recuse himself from all further proceedings in this matter"; and the Appleby Appellants sought an order that "...their jurisdiction challenge and all questions of case management be reserved to another judge". The issue of the recusal of the judge was contested at the hearing of the appeal and there was no compromise. Having considered the written submissions and the oral arguments, the Court ruled that "The Fresh Application be heard by a judge of the High Court of the British Virgin Islands other than the Honourable Justice Leon". This is not a complete victory for the defendants but they have achieved in substance what they sought in their notices of appeal and I would order that they receive their costs of the Recusal Order.

The Document Retention Orders

- [23] The Document Retention Orders were issued against the 1st to the 7th defendants. In the case of the first three defendants, it directed them to gather and make available to the Court on the return date details of their assets worldwide exceeding \$100,000.00; not to remove from the BVI any documents that are in their possession; and not to destroy, alter or dispose of any documents that are in

their possession worldwide. In relation to the 4th to the 7th defendants, it restrained them from removing from the BVI or destroying, disposing of or altering any documents that are in their possession relating to Storca and Minco.

[24] The claimants/respondents submitted firstly that there was no disclosure order in the *ex parte* Orders and nothing was made of the issue of disclosure in the appeal. The only thing that was required by the Order was that the defendants should gather the relevant information and have it available at the *inter partes* hearing, and not to alter, destroy or dispose of any relevant documents. I accept that the defendants were not ordered to disclose documents or information. But the defendants had to gather the information and have it available, and they could not deal with their documents freely. These are real obligations and restrictions and the defendants were entitled to challenge them.

[25] The claimants submitted further that in any event the disclosure obligation was discharged by the judge's order which states that the injunction is to continue "without ... the provision of information orders." However, the issues relating to the Document Retention Orders continued to be alive in correspondence between the lawyers and in the skeleton arguments before the Court of Appeal. Considering the general uncertainty regarding the meaning of the judge's order the defendants cannot be faulted for seeking a formal discharge of all orders in the *ex parte* Order including the Document Retention Orders.

[26] The Document Retention Orders were discharged by this Court's order and I would order that the 1st to the 7th defendants receive their costs on this issue. The amount of these costs should reflect the limited amount of work associated with the issue.

The Company Preservation Order

- [27] The Company Preservation Order was made against the 6th, 7th and 8th defendants. It restrained each of them from removing or appointing directors of Storca Intertrans Corp. ("Storca"), transferring, diluting or encumbering the shares in Storca, and taking any steps to dismiss, discontinue or undermine the litigation in these proceedings.
- [28] The Appleby Appellants appealed against this injunction contending that there should be no restrictions against the 7th defendant (Curatus Trust Company (Mauritius) Limited) causing the 6th Defendant (Attendus Trust Company) to vote its shares in Storca. At the conclusion of the hearing, the Court expressed the view that an undertaking should be in place to restrain the 6th and 7th defendants from voting the shares in Storca to create a situation where the Appleby Appellants would be on both sides of the litigation in these proceedings. The Appleby Appellants did not propose an undertaking that was satisfactory to the Court. As a result, the Court made an order that the 6th and 7th defendants be restrained from voting the shares in Storca to appoint or remove directors of that company unless ordered to do so by the court in Mauritius. The effect of this order is that the claimants were substantially successful on the issue and they should have costs payable by the 6th and 7th defendants.
- [29] The 8th defendant was joined as a party because the shares in Storca were about to be transferred to it. It did not take an active part in the appeal and it gave the Court an undertaking to comply with any order the Court makes regarding the shares in Storca. In the circumstances, I do not think that it is appropriate to make a costs order against the 8th defendant.

Other Matters

- [30] The costs of the *ex parte* application, the application filed by the claimants on 12th August 2015 to continue the *ex parte* orders, and the application to discharge the *ex parte* Orders are remitted to the Commercial Court to be dealt with in the fresh application by the claimants.
- [31] Counsel for the claimants gave an undertaking to withdraw the claimants' application to continue the judge's *ex parte* order. This undertaking was given in the spirit of the other undertakings given by the parties at the hearing and was consistent with the order for a fresh hearing of the application for injunctive relief. The costs associated with the withdrawal fall to be determined in the fresh application – see paragraph 28 above.
- [32] The general rule of the Court of Appeal is to award costs at the rate of two-thirds of the amount awarded in the lower court, but the court can depart from the general rule and make such order as it sees fit.³ Counsel for Mr. Golub submitted that this is an appropriate case to depart from the general rule and order that the costs be assessed and paid in accordance with Rule 69C.11. Counsel for the claimants agreed with this submission and the other parties did not take a position on the issue. I also think that this is an appropriate case to depart from the two-thirds rule and order that the costs be assessed in accordance with the orders to be made in this judgment.
- [33] Finally, the requests for interim payment of costs by the claimants and Mr. Golub are refused.

Orders

- [34] I would make the following orders:

³ CPR 65.13(2)(b)

- (a) Each party will bear his or its own costs of the Freezing Orders.
- (b) The costs of the Recusal Order to the 1st to 7th defendants/appellants to be paid by the claimants/respondents.
- (c) The Costs of the Document Retention Order to the 1st to 3rd defendants/appellants to be paid by the claimants/respondents.
- (d) The costs of the Company Preservation Order to the claimants/respondents to be paid by the 6th and 7th defendants/appellants.
- (e) No order for costs against the 8th defendant.
- (f) All orders for costs to be assessed if not agreed within 21 days.
- (g) The costs of the ex parte application, the continuation application and the discharge application are remitted to the Commercial Court to be dealt with in the fresh application by the claimants.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal