

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 21 OF 2003

BETWEEN:

IPOC INTERNATIONAL GROWTH FUND LIMITED

Applicant

and

- [1] LV FINANCE GROUP LTD.
- [2] TRANCONTINENTAL MOBILE INVESTMENT LIMITED
- [3] 000 CT-MOBILE
- [4] SANTEL LIMITED
- [5] AVENUE LIMITED
- [6] JANOW PROPERTIES LIMITED
- [7] BARROWS ALLIANCE LIMITED
- [8] CORMACK SELCT LTD
- [9] STEGMAN UNIVERSAL LTD
- [10] SMART FINANCE LIMITED
- [11] CARBERT INTERNATIONAL LTD
- [12] RAMPTON ENTERPRISES LIMITED
- [13] ALAMOSA HOLINGS LIMITED
- [14] NORMANTON LIMITED
- [15] 000 ALFA-ECO

Respondents

Before:

The Hon. Mr. Brian G.K. Alleyne

Justice of Appeal

2003:December 9;
2004: January 12;

JUDGMENT

- [1] **ALLEYNE J.A.:** This is an application for an extension of time (should an extension be necessary) within which to apply for leave to appeal, and for leave to

applicant also seeks an order for an expedited hearing of the appeal, leave to appeal a costs order made on 20th November 2003 following an unsuccessful application to the High Court for leave to appeal the order of 4th November, and costs of this application.

- [2] The application arises out of an amended application by the applicant filed on 23rd October 2003 seeking, against the Receivers (not named in the title of the action), an order directing them forthwith to transfer to the applicant, without prejudice to its claim for specific performance of an option agreement, the sum of US\$16 million approximately, together with all interest earned thereon, held by them. The applicant also sought the following further orders;

(3) An order directing the receivers to take all necessary and lawful steps to have themselves entered as stakeholders in the charter of CT Mobile in place of the Fourth to Sixth defendants.

(4) An order directing the Receivers to exercise the legal rights of stakeholders in CT Mobile, including certain specified rights listed in a schedule to the application notice, to the extent that such is necessary or desirable for certain stated purposes.

(4A) Further or alternative directions as to the Receivers' future conduct of the receivership as the court shall think fit.

(5) Against the fourth to sixth defendants, an order requiring each of them forthwith to take all such steps and execute all such deeds or documents or powers of attorney as the Receivers may reasonably request for certain specified purposes.

(6) An order restraining the said defendants during the period of the Receivers' appointment from doing certain specified acts in relation to CT Mobile.

(7) An order empowering the receivers, in the event of breach of the order sought in paragraph (5), to take all such steps and execute all such deeds, documents and powers of attorney on behalf of the defaulting defendants as was envisaged by the receivers' request.

[3] The matter came on before the High Court on 4th November, at which time all named parties were represented by counsel. There was no appearance of or for the Receivers. Mr. Mann Q.C. for the applicants stated at the outset "My Lady, we are before you for directions on injunctions." He went on to say that the Receivers had asked them (the applicants) for clarification "and we apply (for directions) on their behalf." Mr. Mann Q.C. continued; "We don't anticipate that Your Ladyship will be asked to make any directions today save only this direction which is to allow the Receivers to release \$16 million which they are holding at the moment pending the outcome of the dispute." Learned Queens Counsel then referred to a direction which he said was being noted on behalf of the Alfa Purchasers, Mr. Levy and Mr. Husbands, counsel for the fourth to sixth defendants. These defendants are referred to as the Alfa Purchasers. He continued; "I don't think that Mr. Elkinson and Mr. Carrington (counsel for the first, and the seventh to fifteenth defendants respectively) are totally in agreement with it, but I suspect there won't be much between us." I take this to mean, and I do not think there is any disagreement on this, that Mr. Mann was generally in agreement with that proposal which, as he explained, anticipated that the judge would deliver judgment on the hearing which concluded on the 1st October, and in the meantime, if the court's list could accommodate it, the application for the several orders would be heard on 26th November.

[4] The learned judge immediately informed the parties that the court's list could not accommodate that proposal. Mr. Mann appears to have accepted that situation and proceeded to explain to the court the "great urgency" of the receivership directions. However, he conceded that he could not then, on that day, argue that urgency, and said in respect of the receivership directions "We have to take it on the chin," and continued "but we have notified the party that we would like to have a \$16 million in which nobody but us has an interest back. I should be able to dispose of it rather quickly. The Receivers take a neutral position about that and will abide by the order of the court." Learned Queens Counsel then briefly put forward his case for the return of that sum, and said; "As for directions, My Lady, I

won't deal with that any further at the moment, because I no doubt will listen to what the other counsel have to say about that. All I would urge is that it is inordinately urgent for us that we have these directions. The Receivers are not able to do anything effectively." Counsel explained briefly the nature of his concerns and the basis of his sense of the "extreme urgency and importance" of the receivership directions.

- [5] A further proposal was then put forward (the Carrington directions). Learned counsel for the applicant takes issue with the directions given by the learned judge which were essentially the Carrington directions with some modifications. He complains that the learned judge accepted the defendants' proposals for the directions made, over the objections of the claimant, without giving any reasons for her decision. At page 56 of the transcript the learned judge, after hearing all parties on the issue of the directions, and on other issues, made this comment; "It appears that everyone is in agreement with the draft as given by Mr. Carrington." Extensive exchanges followed between the judge and counsel for the second defendant as to certain details of the order, and Mr. Levy for the fourth to sixth defendants expressed concern that the proposed order would push back the timetable for hearing Mr. Mann's applications on behalf of the claimant. Mr. Mann Q.C. interjected with the words "I have not been - - I have not", the learned judge pointed out that it was 10.05. After further exchanges, Mr. Mann said to the court, apparently expressing some irritation;

"Please allow me. I know it is a nuisance to have to listen to Mr. Mann, but I have got to make the point. You obviously appreciate that we are desperately concerned. It is equal arms, isn't it? We are all fighting our corner, but we all think at the moment, on our instructions, we all have as good a case against each other as the other and Your Ladyship - - knows that you have heard me say a great deal about the urgency and you have heard the other clients, no urgency. You would not expect them to say it is urgent, because it is in their interest to prolong, and it is in our interest to expedite them."

- [6] Learned Queens Counsel for the applicant then reiterated his concerns about the effect of delay, and after some further exchanges, then says (page 66 and following of the transcript);

"There is one matter that does disturb me and I am grateful for Your Ladyship's directions. The one thing that Mr. Carrington's order prevents is anything happening between the date that you deliver your judgment and something like three weeks and an uncertain number of weeks thereafter. So is Your Ladyship anticipating delivering your judgment in the court and the order should have no effect whatsoever until such time as there is a hearing, until the parties are present? - - -

And what I am going to propose to Your Ladyship now is that this is an extremely heavy matter which is obviously taking up a lot of time.

THE COURT: I am sure the lawyers who have come for the other case would like to see the back of you.

MR. MANN: Is there any possibility of it being indicated that a special charge just to deal with this matter so that the list is not otherwise interrupted?

- [7] Following further argument on costs, Mr. Mann said this;

"The only opposition to that has come today as a result of Mr. Carrington's submissions. So it was a directions hearing which had to take place."

The judge's failure to give reasons for her decision:

- [8] Learned counsel for the applicant Mr. Mann Q.C., submitted that it is a good ground for overturning a judge's decision that no reasons were given for the decision. Counsel relied on the English case of *English v Emery Reimbold & Strick Ltd. (CA)*¹. In the headnote to that case it is stated that while judicial decisions which affect the substantive rights of parties should be reasoned, some judicial decisions, e.g. interlocutory case management decisions, do not require reasons. At page 2416, Lord Phillips of Worth Matravers, MR, put it this way;

¹ [2002] 1 WLR 2409

Where a judicial decision affects the substantive rights of the parties we consider that the Strasbourg jurisprudence requires that the decision should be reasoned. In contrast, there are some judicial decisions where fairness does not demand that the parties should be informed of the reasons underlying them. Interlocutory decisions in the course of case management provide an obvious example.

[9] Mr. Mann Q.C. argued strenuously that this was not a case management order, in that its effect was to cause delay in the resolution of substantive issues, which delay would have the effect of seriously prejudicing the applicant's substantive rights and interests. I do not accept that that fact alters the nature of the order. I do not doubt that the applicant has genuine concerns surrounding the scheduling of his application. Nevertheless, apart from the order concerning the return of the applicant's \$16 million, with which the applicant has no complaint, the order is undoubtedly a case management order, a conclusion which is consistent with the view expressed by learned Queens Counsel for the applicant himself as quoted in paragraph 3 of this judgment.

[10] The case management functions of the court are intended primarily to promote the overriding objective of the Civil Procedure Rules 2000 (CPR) to deal with cases justly by, among other things, saving expense, dealing with cases in ways which are proportionate to the amount of money involved, the importance of the case, and the complexity of the issues, and, very importantly, allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. An examination of the transcript of the proceedings in this matter make it manifest that the learned judge was acutely aware of these considerations, went out of her way to accommodate the hearing, and, in the circumstances that exist, sought to do the very best she could to advance the resolution of all the issues. It is to be hoped and expected that the delivery of the reserved judgment will in all the circumstances be expedited so that the timetable set by the learned judge may proceed at an appropriate pace.

[11] In light of the above, it should be clear that I am of the view that the proposed appeal will have little chance of success, and on that ground I would refuse the

application for extension of time to file the appeal, and the application for leave to appeal.

Costs:

[12] Counsel argued the issue of costs relative to the proceedings both here and in the High Court. Learned counsel for the applicant argued that it was unnecessary for the defendants to appear at the hearings, and that the interests of their clients could have been adequately protected by written submissions. This submission appears to go counter to the argument of learned counsel that the hearing was more than a case management hearing and affected the substantive rights of the parties or, at any rate, of the applicant.

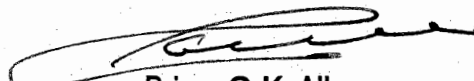
[13] *Jolly v Jay*² concerns the circumstances in which, under the Civil Procedure Rules (UK), a respondent may be awarded costs after he has resisted successfully an application for permission to appeal. Unlike our own Civil Procedure Rules 2000, there are provisions in the UK Rules and practice direction by which notice of such a hearing "need not be given to the respondent unless the court so directs", and as to the rights of the respondents to a copy of the bundle if notice is given to them of the hearing. Under CPR 2000 Part 62.2, no reference whatever is made to the respondent, and standing alone, it would appear that the respondent has no right to be notified or heard on an application for leave to appeal. Part 6.8 provides that the court may dispense with service of a document if it is appropriate to do so.

[14] It may well be that, in this jurisdiction as in the UK prior to *Jolly v Jay*, as opined by Neuberger J at first instance in that case, "The position of a respondent to an application for permission to appeal ... is somewhat unclear. ... In some cases the court thinks the respondent's appearance is unhelpful, in other cases it thinks it is helpful; in other cases it thinks it is necessary."

² [2002] EWCA Civ. 277

[15] The applicant served the respondents with notice of the application for directions, and for leave to appeal. They were certainly, in my view, entitled to appear at the hearings in response to such notice, and it cannot be doubted that their participation in the hearings was of great assistance to the trial judge and to myself, although I might be permitted to express the view that their several responses on the issue of the return of the \$16 million were less than helpful in the context of their duty under CPR 1.3 and led to a considerable waste of time in the High Court on this issue, which in my view could and should have been disposed of in no more than a couple of minutes had all parties clearly stated that they had no interest in that fund. In my view the 'without prejudice' reservations of the applicant should have been of no consequence and ought not to have been allowed to consume so much of the valuable time and resources of the very busy court. The learned judge reserved the costs of the application for the release of the \$16 million and of the directions hearing, and no doubt she will deal with that issue in due course.

[16] In light of the above, it is my view that the respondents are entitled to their costs of this application, which I fix at \$2,500.00 in favour of each group of respondents represented at the hearing.


Brian G.K. Alleyne
Justice of Appeal