BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.22 OF 2003

BETWEEN:

[1] ASTIAN GROUP LIMITED
[2] INDIAN OCEAN PETROLEUM SERVICES LIMITED

Applicants

and

[1] TNK INDUSTRIAL HOLDINGS LIMITED
[2] ALFA PETROLEUM HOLDINGS LIMITED
[3] OIL AND GAS INDUSTRIAL HOLDINGS LIMITED

Respondents

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Moverley-Smith with Mr. Michael Faye for the Applicants
Mr. Alan Boyle Q.C. with Mr. Phillip Kite and Mr. James Hilsdon for the Respondents

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2004: January 12; 13;
June 7.

JUDGMENT

[1] GORDON, J.A. [AG.]: By Notice of Application dated 28th November 2003 and filed on the same day, the Applicants applied for leave to file an Appeal against the judgment of Rawlins J. handed down on 17th November 2003 and the Order deriving therefrom. The Order complained of was the staying of proceedings on the grounds of *forum non conveniens*, in a Suit commenced by the Applicants seeking damages.

[2] The Respondents have opposed the Application and have themselves applied for an Order for Security for Costs in the event that leave to appeal is granted.

[3] The jurisdiction of this Court derives from the West Indies Associated States Supreme Court (Virgin Islands) Ordinance, Cap 80 of the Laws of the Virgin Islands. Section 30 (1)(b) and (4) of that Ordinance read as follows:

> "30. (1) (b) an appeal shall lie to the Court of Appeal, and the Court of Appeal shall have jurisdiction to hear and determine the appeal, from any judgment or order of the High Court and for the purposes of, and incidental to, the hearing and determination of any appeal…….. the Court of Appeal shall have all the powers, authority and jurisdiction of the High Court.
>
> "(4) No appeal shall lie without leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge except in the following cases ……..
>
> (iv) in such other cases, to be prescribed by rules of court, as may in the opinion of the authority having power to make such rules of court be of the nature of final decisions"

[4] In other words, an appeal to the Court of Appeal from a final judgment of the High Court is as of right and from an interlocutory judgment of that Court is only with leave[1]; the framers of the law recognized that there would be judgments from the High Court that were technically interlocutory, but in fact disposed finally of a matter, and made provision for the appropriate authority to make rules negating the need for leave in such, or certain of such, circumstances. That such rules have not been made does not, in my view, gainsay the clear intent of the legislation.

[5] There are two tests to determine whether a judgment of the Court from which an appeal derives is a final or an interlocutory judgment, the application test and the order test. In Sylvester v Singh[2] this Court expressed a preference for the application test and applied that test in that case.

[1] Owens Bank v Cauche [1988] 36 W.I.R 221
[2] Civil Appeal No 10 of 1992, St. Vincent and the Grenadines

[6] In the instant case the judgment being appealed derives from an interlocutory application and, notwithstanding the effect of finality of the judgment, is, on the application test, an interlocutory judgment. Leave to appeal is therefore required. The issue for decision which thus arises in the above circumstances is what criteria are to be applied in the granting or withholding of such leave. I am of the view, and do so hold, that a Judge or Court in assessing whether to grant leave to appeal from what is technically an interlocutory judgment, but which judgment effectively finally brings the matter to an end, should use the most liberal criteria possible in the exercise of its discretion to grant leave to appeal. It must not be understood that I am in any way undermining the need for leave to appeal in these circumstances.

[7] In this case, learned Queens' Counsel for both the Applicant and the Respondent argued forcefully for more than a day on the issue of leave, and the Court was not tolerant of either irrelevancies or repetition. In effect, learned Counsel on both sides argued in large measure the substance of the Appeal being on what grounds a Court may stay proceedings on the grounds of *forum non conveniens* and to what extent considerations of alleged corruption in the alternate jurisdiction should impact that decision. I am of the view that the issue is deserving of a determination by the full Court and so do hereby grant leave to the Applicant to file its Notice of Appeal. In coming to this decision, it is not to be understood that I opine in any way as to the merits of either side's case.

[8] The Respondents have filed a Notice of Application for Security for Costs supported by an Affidavit sworn by Phillip R. Kite of the firm of Harney Westwood and Riegels, solicitors for the Respondents. Mr. Kite swears that the Applicant companies have no assets within the jurisdiction. The Applicant does not controvert this fact. On the other hand the Applicants in their submissions argue that notwithstanding their lack of assets within the jurisdiction, they nevertheless have assets worth in the region of $1.9 million comprising shares in two Russian

companies and indicate a willingness to give an undertaking not to dispose of those shares.

[9] I am mindful of the lack of any reciprocal enforcement of judgment treaties between the British Virgin Islands and Russia and so in the exercise of my discretion I find it appropriate to order that the Applicants do furnish security for the costs of the appeal as calculated below, such security to be paid into Court within two months from the date of this judgment.

[10] The original claim by the Applicants, according to the submission by their Counsel was for damages in the sum of $383,173,392.00. Based on the calculation of prescribed costs as set forth in Part 65 of the Civil Procedure Rules 2000, I agree with the submission of Counsel for the Applicants that if the original claim were to go to trial of the substantive issues, then, according to the schedule in Appendix B the prescribed costs would be $1,099,443.48. Learned Counsel then submitted that in the circumstances of this case, costs would only be 45% of that latter sum ($494,745.07) in that the matter has not progressed beyond a Statement of Claim pursuant to Appendix C of Part 65. Counsel argues that the 45% referred to is then further reduced pursuant to Part 65 (11)(7) to 10% of the 45%. Part 65(11) deals with allowable costs on procedural applications and Part 65(11)(7) reads as follows:

> "(7) The costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount

I do not agree with Learned Counsel's submission in this latter issue. I am of the view that the whole sum, of which one tenth is to be taken is the prescribed costs that would apply if the claim went to full trial on the issues. Hence, my calculation is one tenth of $1,099,443.48 or $109,944.39. Costs for an appeal are two thirds of the costs in the court below which, by my calculation, is $73,296.26.

[11] My Order therefore is as follows:

[1] Leave is hereby granted (subject to paragraph 3 of this Order) to the Applicants to appeal to the Court of Appeal against the decision of Rawlins J contained in the Order dated 17 November 2003

[2] The Applicants do provide security for costs in the sum of $73,296.26 such security to be paid into the Court within two (2) months from the date of this judgment..

[3] That until as such security is paid the appeal is stayed

[4] The costs of this application shall be costs in the appeal.

Michael Gordon, QC
Justice of Appeal [Ag.]