THE EASTERN CARIBEAN SUPREME COURT
IN THE COURT OF APPEAL
VIRGIN ISLANDS

CIVIL APPEALS NO. BVI HAP 2003/20 & 2004/01

BETWEEN

IPOC International Growth Fund Ltd — Appellant

and

(1) LV Finance Group Limited
(2) Transcontinental Mobile Investment Limited
(3) OOO Ct-Mobile
(4) Santel Limited
(5) Avenue Ltd
(6) Janow Properties Limited
(7) Barrows Alliance Limited
(8) Cormac Select Limited
(9) Stegman Universal Limited
(10) Smart Finance Ltd
(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:

Don Mitchell QC — Justice of Appeal (Ag) (In Chambers)

Appearances:

Martin Mann QC, Adrian Francis with him, for the Appellant
Jeffrey Elkinson, Dawn Smith with him, for the 1st Respondent
Dancia Penn QC, Ricky Davis with her, for the 2nd Respondent
John Carrington for the 3rd and 7th-15th Respondents
Steven Smith QC, Robert Levy with him, for the 4th-6th and 16th Respondents

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2004: June 7,8

JUDGMENT

[1] Mitchell JA (Ag): IPOC has failed in a number of applications, has appealed, and now seeks an injunction to preserve the corpus of the disputed asset, shares and rights over shares. The respondents have applied for an order for security for their costs of the appeal, and for the appeal to be dismissed. At stake is a large and valuable interest worth between US$300 million and US$500 million in a major Russian telecommunications company called OAO Megafon.

THE BACKGROUND

[2] There are two option agreements between IPOC and the 1st respondent that are at the center of this litigation. IPOC alleges that pursuant to the option agreements between it and the 1st respondent, it had the right to acquire the entire share capital of the 2nd respondent, which owned the entire share capital of the 3rd respondent, which in turn owned a 25.1% blocking shareholding in the Russian telecommunications company OAO Megafon. The commercial purpose of the agreements, IPOC says, was to enable IPOC to acquire control of the 2nd respondent's wholly-owned subsidiary, the 3rd respondent, and its highly valuable blocking stake in OAO Megafon. IPOC claims that it has performed its obligations under the option agreements and had exercised the options, but that the 1st respondent has breached the agreements and conspired with other respondents to carry out a dishonest scheme to deprive it of the shares and to strip them of their value.

[3] The cast of characters include persons described as "oligarchs" and ministers of government in Russia. Their alleged activities include money laundering schemes. There are various other allegations that do not concern us at this stage. IPOC says its objective in this litigation is to have a number of sham transactions set aside and to have IPOC recognized as the true owner of the shares in dispute. These are all issues for other courts and are not to be determined in these proceedings.

[4] The option agreements contain arbitration clauses that require the dispute between the parties to be referred to arbitration. Arbitration proceedings are under way in Switzerland. The arbitration proceedings will not deal with all the claims between the parties and will not affect or bind third parties.

[5] The purpose of the BVI proceedings appears to be an attempt to enforce personal and proprietary claims that fall outside of the ambit of the Swiss arbitrations. IPOC says they are brought in the BVI because three of the respondents are BVI companies that control the shares in dispute.

[6] There were originally 16 respondents, but the claim against two of them has previously been dismissed. IPOC has applied to restore them and to add a further 12 respondents making a total of 28. Several of these are BVI companies. Others are incorporated in the Bahamas, the Seychelles, Russia, Belize, Turks & Caicos, Sweden, and Panama. IPOC itself was incorporated in Bermuda.

[7] There is a short but bulky and acrimonious history of litigation between the parties. While the history is relevant, I shall not detail here all of the cases and proceedings. Some of the more relevant ones are as follows.

[8] The case begins on 4th September 2003 when a judge, on the application of IPOC, appointed receivers over shares and other rights in the 2nd and 3rd respondents and over their property and assets. He gave injunctions restraining dealings in the property the subject of the receivership. IPOC had not served the application on the respondents, and the judge made that order without their knowledge. He also gave permission to IPOC to serve the documents on the non-resident respondents, namely, the 2nd, 3rd, 10th, 13th, 14th, 15th, and 16th.

[9] On 1st October 2003, another judge heard an application by the respondents for the discharge of the 4th September order. After hearing argument, she discharged the order in full in respect of the 3rd and 16th respondents. She ordered that all decisions taken by the receivers in respect of the 3rd and 16th respondents be set aside. The receivership was continued on altered terms until further order. It was subject to a condition that IPOC give security for an undertaking in damages and costs in the sum of US$30 million by 4 pm on 7th October 2003. She reserved her decision on the applications of the remaining respondents. On 11th November 2003, IPOC filed Appeal No 20/2003 against this decision.

[10] Meanwhile, on 19th January 2004, IPOC filed several other applications. One of them was an application for the re-appointment of the receivers. IPOC also sought an order staying any further order that might be made on the respondent's discharge applications in

consequence of the judgment listed for delivery on 21st January 2004 pending the determination of this application and any appeal against such further order that might be made on 21st January.

[11] On 21st January, the judge gave her reserved decision on the remainder of the application of the respondents for the discharge of the order of 4th September 2003. She determined that the BVI was not the appropriate forum for the trial of this cause. She found that Russia was the more appropriate forum. She by implication ordered a stay of the action. She discharged the order of 4th September in its entirety as against the remaining 14 respondents. She ordered costs of $10,000.00 to be paid by the appellant to each group of applicants represented at the hearing. While this ruling remains in place, IPOC has found further progress on its several remaining applications impossible.

[12] Immediately after the judgment of 21st January 2004, IPOC applied to the judge for a stay or similar injunctive relief. It again gave no notice to the respondents. The judge refused to hear the matter, holding that notice should be given to them for a hearing to be held the following week, and refused to grant any interim relief in the meantime.

[13] IPOC immediately applied without notice for such interim relief to the Court of Appeal. Byron CJ ordered notice of the application to be served on the respondents. The application was heard by the Chief Justice and Saunders JA on 23rd January 2004. Upon the 4th, 5th, and 6th respondents giving an undertaking to the court, the application was dismissed with costs of $1,500.00 to each group of respondents. The undertaking was to the effect that they would not cause the 3rd respondent to deal in any of the ownership stakes in its shareholding in OAO Megafon pending delivery of the judge's remaining judgment on the application of 19th January.

[14] On 27th January 2004, IPOC filed the second appeal, No 1 of 2004, against the order of 21st January 2004. The two appeals have now been consolidated.

[15] On 28th April 2004, the 4th-6th and 16th respondents applied for security for their costs of the appeal to be paid by the appellant. They ask that the appellant satisfy them that any funds ordered are not tainted by illegality, and provide a bank guarantee. They also ask that the appeals be dismissed.

[16] On 2nd June 2004, the judge gave her judgment on IPOC's application of 19th January 2004. She held that the only issue was whether IPOC had made out a case for a stay of the order of 21st January pending the hearing of an appeal to the Court of Appeal. She cited the authority of Erinford Properties[1] and Ketchum International[2] and Leicester Circuits case[3] and concluded that it would not be in accordance with the interests of justice for a stay to be granted. She refused the application for the stay and ordered that her decision was to take effect from 8th June 2004.

[17] On 2nd June 2004, IPOC applied to the Court of Appeal for a stay of the order of 21st January 2004 or such other injunctive relief in relation to the shares in dispute, pending determination of the conjoined appeals. This is one of the two applications now before the court. The ground of the application is that such relief is necessary pending appeal in order to ensure that such appeals are not made nugatory. The terms of the relief sought are to be found in the draft order as amended. They are for either:

> (a) a stay of the order of 21st January 2004, or such other injunctive relief restraining any disposal of or dealing with the participation rights in the 3rd respondent or in the 3rd respondent's 25.1% stake in OAO Megafon as the court sees fit to grant, pending the determination of the conjoined appeals; or, alternatively
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> (b) an order restraining any disposal or dealing with the participation rights in the 3rd respondent or in the 3rd respondent's 25.1% stake in OAO Megafon pending determination of the appeals.

[18] On 24th April 2004, the respondents filed an application for security for costs of the appeals. They claimed that there was an allegation that the sum of US$30 million presently held by the court was not adequate security, given the possibility that the funds might be confiscated as tainted money. The Court of Appeal has recently given directions for IPOC to answer the allegations and for the application to be heard in September 2004. The appeals themselves are scheduled to be heard in the October 2004 sitting.

[1] Erinford Properties Ltd v Cheshire CC [1974] Ch 261
[2] Ketchum International plc v Group Public Relations Holdings Ltd [1997] 1 WLR 4; [1996] 4 All ER 374

THE LAW

[19] The law is not in dispute. CPR 2000, Rule 62.19 provides that except as the court below or the court of appeal or a single judge of the court of appeal otherwise directs (a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and (b) any intermediate act or proceeding is not invalidated by an appeal. The rule is to be interpreted in the light of the cases that have applied it or its equivalent in similar jurisdictions.

[20] Ketchum International was an English Court of Appeal decision and is of persuasive authority. This too was a case of a disputed share option agreement. The principle finding is set out in the All England headnote. The Court of Appeal has an original jurisdiction to grant injunctive relief to restrain a defendant from disposing of assets pending the unsuccessful plaintiff's substantive appeal. That jurisdiction was similar to the jurisdiction exercised where an unsuccessful defendant sought a stay of execution pending an appeal and it was based on the principle that justice required that the court should be able to take steps to ensure that its judgments were not rendered valueless by an unjustifiable disposal of assets. Further, there was no reason in principle why the considerations applicable to the grant of a Mareva injunction should not be applied in favour of such a plaintiff. The test would be whether he had a good arguable appeal. Where leave was not required to appeal from the substantive judgment, injunctive relief of the type sought should not be granted unless leave to appeal would have been granted, had it been required. In this case, since the plaintiff did not have a sufficiently good arguable appeal to warrant the relief sought, his application would accordingly be dismissed. Stuart-Smith LJ quoted Megarry J to the following effect in the Erinford case[4]: There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in Wilson v Church (No 2)[5], where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, at p.458, 'when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.'

[3] Leicester Circuits Ltd v Coats Brothers plc CA (Civil Division) [2002] EWCA Civ.474
[4] Erinford Properties Ltd v Cheshire County Council [1974] Ch 261; [1974] 2 WLR 749; [1974] 2 All ER 448

[21] Leicester Circuits was another English Court of Appeal decision. The short facts were that the defendant supplied ink to the claimant for the manufacture of circuit boards. The court found at trial that the ink was unfit for the purpose. The defendant sought leave to appeal and a stay of execution of the judgment debt. The court gave permission to appeal, but refused the stay of execution. Potter LJ held that the general rule was that a stay of judgment on the execution of a judgment debt would not be granted. However, the court had an unfettered discretion. The proper approach was to make the order which best accorded with the interests of justice. Where the justice of applying the general rule was in doubt, the answer might well depend on the perceived strength of the appeal. In the instant case he found it was not in accord with the interests of justice for a stay to be granted. The claimant was prima facie entitled to its judgment and the defendant had a hard task ahead in relation to the appeal. The defendant was a large business but the claimant was smaller. Whilst, on the basis of the evidence, the claimant was likely to have sufficient substance to survive failing at the hearing of the appeal, it should be allowed to make good and hopefully profitable use of the judgment sum in the interim.

THE ARGUMENT

[22] The respondents raise a number of submissions as to why the relief sought should not be granted.

[23] Merit. The first is that it is extraordinary that the appellant should couch its primary application in terms of a stay of the order of 21 January. The effect of the order of 21st January had been to discharge the *ex parte* order of 4th September. Thereafter, for the past 4 ½ months, the receivership order has not been in place. The consequence is that the application was not for a stay but for the grant of a new receivership or injunction. The relief that the appellant seeks is equitable, and in the circumstances it should be refused. The appellant points out that the draft order as submitted by the appellant, as amended at the hearing, makes it clear that all that the appellant is seeking is to preserve the *status quo* as regards the disposal or dealing in the participatory rights in the 3rd respondent or in the 3rd respondent's stake in OAO Megafon, pending the determination of the appeal. I see nothing extraordinary about this. If there is any merit in the appeals, it is incumbent on the court to ensure that its decision will not be futile and nugatory. The relief sought does no more than to try to achieve this object.

[5] Wilson v Church (1879) 12 Ch D 454, CA

[24] Abuse. The second objection is that this is the fourth time that the appellant has made this application. It has failed on the first three occasions, and it should do so on this. Even the Court of Appeal has dismissed the application for a stay. The appellant points out that this is the first time that it is coming to court to seek a stay pending the hearing of its appeals. This is uncontestable.

[25] General Rule. The third objection is that based on the authorities cited above, the normal rule is for no stay. The respondents submit that the court's starting point should be to refuse the application for a stay. The appellant submits that to do otherwise would be to facilitate the possibility of an immediate transfer out of the hands of the parties the rights to which it lays claim. The respondents have quite properly not denied that that is a real possibility. Nor can I find in the evidence produced or the argument made any suggestion that the application is not *bona fide*, that it is for some indirect purpose and not for the purpose of testing the judgment of the court. In the Wilson case cited above, the question was whether a judgment relating to a fund in court should be stayed pending appeal. If the court did not exercise its discretion to stay the payment, the fund would be paid out to various persons some of whom resided overseas, and many of whom would never again be found. In the words of Brett LJ, looking at the matter from the point of view of a man of business, the practical result of paying out the fund would be that the fund never could be got back again if the appeal were successful. Similarly, in our case, there can be no doubt that if a stay is not granted, and the rights in question were to be transferred out to other IBCs and foreign companies incorporated in foreign jurisdictions, it would for all practical purposes be impossible for the appellant to track them down again.

[26] Absence of Proprietary Interest. The fourth objection is that the appellant cannot succeed in its claim because it cannot prove a proprietary or any other interest in the OAO Megafon shares. Those shares are owned by one or more of the intervening companies, and not by the appellant. The appellant would not be able to claim a proprietary claim in the shares without successfully piercing the corporate veil. The respondents rely on Trustor's case[6], which we need not go into, as the leading authority on the subject and which sets up a test that the appellant does not pretend to be able to meet. They point out that the appellant does not claim that one or more of the respondents hold the disputed shares in trust for it. The appellant responds that it does have a sufficient proprietary claim. I am satisfied that the appellant is not striving to pierce

the corporate veil. It pleads its claim in a variety of ways. First, it seeks to prove that it holds option rights which, if exercised, will result in IPOC being treated by the court as the owner. Secondly, by virtue of having exercised the option it is the owner of the disputed share rights. Further, if one of the intervening companies as a result of fraud has failed to do what it was supposed to do to protect its and IPOC's interests in the shares, then IPOC will be entitled to compel it to take what action it can to protect itself and IPOC. A proprietary interest in a chose in action or other intangible is as much a proprietary interest as one in a tangible asset.

[27] No Arguable Appeal. The fifth objection is that the appellants have lost every application to date, and the likelihood is that they will lose this one as well. The appellant has not paid any of the costs ordered by any of the courts in the previous proceedings. The appellant responds that it stands ready to pay the amounts of costs so soon as it is ordered by the court to do so. Further, that the appeal has every likelihood of success. That the judge gave no reasons for her decision. That she wrongly applied the law. That the Leicester Circuits case applied to a money order and was decided on the peculiar circumstances of the facts in that case. It is clear that the principle enunciated in that case is not indicative of a general bar to the granting of a stay or injunction pending an appeal. One will be granted where the justice of the case requires it. Without pre-judging it, it does appear that the appellant has a good arguable appeal.

[28] Inadequate Security. A sixth objection is that the US$30 million security for damages is now inadequate due to the passage of time. If it was based on a 10% value of the option rights assessed at the time as worth US$300 million, then the appellant has suggested that the rights are now probably worth more like US$500 million. Additionally, the sum presently in court is of questionable value, given the allegation that it is tainted funds. It may be confiscated and not be available in due course when and if required. The respondents have applied, in any event, for security for their costs of the appeals. The appellant's response is that the amount ordered was not based on any logical calculation, and it will seek to challenge the amount ordered and to secure its repayment. In any event, it submits, the amount of $30 million is more than adequate to cover the costs of the appeal, and no further amount should be ordered. It seems to me that the question of amount is a valid one, and can be met by a reasonable increase if the application is

[6] Trustor AB v Smallbone and others (No 2) [2001] 1 WLR 1177

granted. The merits of the judge having ordered any amount at all must wait until the appeal is argued.

[29] As to the question of taint, it is based primarily on a lengthy witness statement of Vidya Sharma one of the founders and former president of IPOC, but given on behalf of the respondents. A question arises, which I do not at this stage resolve, whether it falls to the respondents to allege that they participated in a money laundering scheme with the appellant, and to rely on their own alleged wrongdoing to prevent the court from preserving the status quo in relation to the control of the shares pending the determination of the appeal. There is no independent witness of integrity shown to me who will produce evidence of wrongdoing by the appellant. I am not satisfied at this stage about the worth of the allegation as to money laundering and taint relating to the amount presently in court.

CONCLUSION

[30] In the circumstances, the applications by the appellant for an injunction and by the respondents for further security are both granted. It is hereby ordered that

> (1) The appellant is granted an order restraining any disposal or dealing with the participation rights in OOO CT-Mobile or in OOO CT-Mobile's 25.1 stake in OAO Megafon pending the determination of the appellant's appeals in this matter.
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> (2) This order is conditional on the appellant within 14 days of the date of this order, ie, by 22nd June 2004, paying into court by way of further security for costs and damages in the event that the appeal should not succeed or that any costs or damages may be awarded against it, the further sum of US$10 million.
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> (3) This order is further conditional on the appellant by 22nd June tendering payment to the respondents of all costs previously ordered in these and related proceedings.
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> (4) There will be no order as to costs of this application.

[31] I shall now hear counsel on any further or consequential order that should be made and in relation to any directions that may be desirable at this stage prior to the September case management conference and the hearing of the appeals in October 2004.

Don Mitchell, QC
Justice of Appeal (Ag)