BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NOS.20 OF 2003 AND 1 OF 2004

BETWEEN:

IPOC INTERNATIONAL GROWTH FUND LIMITED

Claimant/Applicant

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 LTD
[9] STEGMAN UNIVERSAL LTD
[10] SMART FINANCE LIMITED
[11] CARBERT INTERNATIONAL LIMITED
[12] CARBONELL TRADING LTD
[13] RAMPTON ENTERPRISES LIMITED
[14] ALAMOSA HOLDINGS LIMITED
[15] NORMANTON LIMITED
[16] OOO ALFA-ECO

Defendants/Respondents

Before:

His Lordship, the Hon. Mr. Michael Gordon, QC — Justice of Appeal

Appearances:

Mr. Martin Mann QC, with him Mr. Adrian Francis for the Appellant
Mr. John Carrington for the 3rd and 7th – 15th Respondents
Mr. Steven Smith QC, with him Mr. Robert Levy
for the 4th – 6th and 16th Respondents

2004: November 8; 9; 10;
November 22.

JUDGMENT

[1] GORDON, J.A.: This judgment deals with two applications by the 3rd and 7th – 15th Respondents (hereafter the Todman Respondents) and the 4th – 6th and 16th Respondents (hereafter the Alfa Respondents) for security for costs in an appeal brought by the Appellant against a judgment of the High Court; an application by the Alfa Respondents for an extension of time to file and serve evidence; an application by the Alfa Respondents for an Order compelling the attendance of the Appellant's witnesses at the hearing of the application for security for costs so that they might be cross-examined; an application (amended) by the Appellant to strike out, stay or summarily dismiss the Respondents applications for security for costs, or in the alternative:

- an order adjourning the hearing for security for costs so that the Respondents do produce statements of their case in respect of the money laundering allegations;
- an order giving the Appellant time to file and serve evidence in reply to the evidence of fact served by the Alfa Respondents;
- an order excluding the expert evidence of the Alfa Respondents or limiting the same
- an order permitting the Appellant to file and serve expert evidence in reply to such, if any, expert evidence upon which the Alfa Respondents are permitted to rely
- an order that there be no cross-examination of deponents at the hearing of the security for costs applications

[2] In a judgment by Mitchell JA [Ag.] dated June 8, 2004, on an Interlocutory Application in this matter, the learned Justice of Appeal set out in adequate detail the general background of this litigation making it unnecessary for me to do the same save to the extent that it is necessary in the context of this judgment.

[3] As a result of two orders, one by the High Court and one by this Court the Appellant was ordered to pay into Court, and did so pay, the sum of

$40,000,000.00 in respect of any costs or damages that may be awarded against it in the event that its appeal should not succeed.

[4] The burden of the two applications for security for costs is that notwithstanding the payment into Court by the Appellant of $40,000,000.00 the Respondents were fearful that they would be unable to access these funds, should they have to, because of the alleged criminally tainted source of those funds.

[5] It is relevant at this point to quote the relevant portions of the applications. The application of the Alfa Respondents reads in part:

> "The Applicants are concerned about the provenance of the monies paid into the BVI court for the following reasons:
>
> A. In circumstances which appear in the affidavit in support of this application, the Applicants have been provided with a witness statement of Vidya Sharma, former president and director of IPOC, in which he gives evidence that IPOC is part of a sophisticated money laundering scheme that has been taking illegitimately obtained money out of Russia and cleaning that money for reinvestment into Russia;
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> B. In his evidence, Mr. Sharma gives a detailed explanation of how IPOC raised the said U.S. $30 million to be paid into court through a network of companies, all of which he says are part of the money laundering scheme.
>
> C. By a letter of 22nd April, 2004, the Applicants wrote to IPOC's solicitors requesting detailed information about the provenance of the monies paid into court. To date, IPOC has not provided any satisfaction as to the provenance of these monies in reply to that letter.
>
> D. It appears from the affidavit in support of this application, IPOC has demonstrated a marked reluctance to disclose details of who its beneficial owners are."

And that of the Todman Respondents reads in part:

> "1. The Appellant has refused the previous written request of the Applicants for security for costs…
>
> "4. Doubts have arisen as to the provenance of the sum of $30 million paid into court by way of security for costs in the High Court and to secure the undertaking of the Appellant given at the grant of the injunctive orders against the Applicants on the basis that such funds may have resulted

from criminal acts, and that the Appellant should be unable to rely on the availability of those funds as security for the costs of the appeals."

[6] Both the Respondents and the Appellant have filed voluminous evidence in the form of affidavits and exhibits related thereto. Suffice it to say that 17 or 18 large ring binders struggled to contain the material which the Court is asked to consider in resolving the issue of whether there has been or has not been criminal activity underlying the provision of the $40 million how being held in Court.

[7] The Court is conscious of its obligation under CPR Part 1, "the overriding objective". It must save expense and allot to each case an appropriate share of the Court's resources while taking into account the need to allot resources to other cases.

It is the estimate of one side that if the Court were to order, as was requested, cross-examination of affiants, the trial of the issue concerning the provenance of the funds could take some three weeks. To put this into context, the full Court sits on average for three weeks in the BVI jurisdiction during the year, and whilst it is true that an application for security for costs can be heard by a single Judge, it is likely [in this case almost inevitable] that the disappointed party in any judgment by such single Judge would seek to have that judgment overturned by the full Court. One, therefore, could reasonably anticipate that this matter would take not three weeks, but six.

[8] The Court enquired of Learned Queens' Counsel for the Alfa Respondents whether, the Court had any powers under the proceeds of Criminal Conduct Act, 1997, to declare that the funds already in Court could be confiscated. Learned Queen's Counsel for the Alfa Respondents conceded that there might be no such power, but argued forcefully that as a matter of public policy if the Court were satisfied that the funds were criminally tainted, it should not lend itself to the utilization of such funds by IPOC, and so in effect become part of the cleansing operation.

[9] Learned Counsel for the Todman Respondents concurred, going further in saying that whilst the Act contained no specific power under which the Court could act, nevertheless its structure taken as a whole was to prevent proceeds of crime being utilized by the perpetrator of that crime and, as such, was an expression of public policy by the BVI Government. Learned Counsel referred to a report which was attached to his skeleton argument entitled, "Caribbean Financial Action Task Force Mutual Evaluation Report of the British Virgin Islands" and invited the Court to see that report as an expression of the Executive's concept of public policy. I do accept that the issue of public policy must be given significant weight in the deliberations of the Court.

[10] I am of the view, however, that it is unnecessary for this Court at this time to make a determination, on the merits, of the Respondents' allegations of criminally tainted monies and money laundering. In the course of argument, Learned Queen's Counsel for the Alfa Respondents referred to the case of Finers [a firm] et al against Miro[1]. In that case, a case dealing with a Mareva Injunction, the English Court of Appeal held that a Court has jurisdiction to authorize payment of legal costs by a trustee who prima facie held assets on trust for a named person absolutely, but which might be subject to potential claims by other persons. That jurisdiction, which was not part of the Court's Mareva jurisdiction, but rather an inherent jurisdiction, would be exercised sparingly if the other potential Claimants to the assets had not been given an opportunity to be heard. In that case, the Court ordered an immediate payment of $100,000 to the Defendant to enable him to meet his legal expenses.

[1] [1991] 1 All ER 182

[11] The Court indicated to Counsel for the parties that it was thinking that a jurisdiction analogous to that exercised in the Finers case might be a solution to the dispute before the Court and invited Learned Counsel to consider:

> A. Whether in the circumstances of this case the Court had jurisdiction to order a portion of the funds held in court should be used as security for costs with no potential for an accusation of criminal conduct against the respondent's lawyers should they be successful in the appeal and be awarded costs from those funds, and;
>
> B. If the Court had such jurisdiction, would this be an appropriate case for the Court to exercise its discretion and so order.

[12] Learned Queen's Counsel for the Alpha Respondents and Learned Counsel for the Todman Respondents both conceded that the Court did indeed have such jurisdiction, but argued that the Court should avoid using its powers to so order. It was indicated to all parties after considerable argument, that the Court would use its powers and order that the security for costs sought by the Respondents be available from the monies in Court and commit to writing its reasons for doing so.

[13] I have already adverted to the serious impact that a trial of the issue would have on the resources of the court. A second consideration is that the sum involved in the application for security for costs, being some $315,000 in total, represented less than one percent of sums held in court paid in by IPOC.

[14] A further consideration which goes to the reluctance of the Court to determine the issue of criminality is that some of the evidence in support of criminality put forward by the Respondents deals with alleged criminal activity by persons who are not parties in the proceedings, and who would be seriously affected by any adverse decision of the Court. The Court further took into consideration that whilst the evidence indicated that these alleged acts of criminality had been on-going for nearly a decade, no evidence of any criminal charge being laid against any person had been put before the Court. In the circumstances, the Court was of the view that a determination of the issue of the provenance of the money could by

implication be seen as determining the guilt or innocence of persons who had no opportunity of advancing their cause before the Court, and who had, indeed, never been charged with any criminal offence.

[15] Learned Counsel for the Respondents brought to the Court's attention the case of United Mizrahi Bank Limited against Doherty and Others[2] which provided some help to the Court. In that case the first defendant worked for the Claimant bank and was dismissed for breach of his duty towards them. The Claimant alleged that in a series of transactions entered into by customers with the bank those customers had been induced to make payments to third parties for the benefit of the first defendant, which funds had been siphoned off to off-shore entities and had ended up in the hands of his wife and certain companies. The funds were then used to purchase properties which became the subject of the Bank's application to the court for breach of trust against the first defendant and in constructive trust and tracing against the other defendants. The court granted a worldwide Mareva injunction freezing the assets of the first defendant and his wife with a proviso allowing for reasonable living expenses and legal costs to be taken from the frozen properties. The issue was that even if there was no breach of the Mareva in funding legal costs because of the proviso, nevertheless, the bank would not be deprived of any proprietary claim it had against such monies. In other words, it might well be that the defendants' solicitors might become constructive trustees to the Claimant. The particular proceedings were filed to obtain an order as was obtained in the Finers case (see paragraph 8 above). The matter was heard in the Chancery division and a careful and well thought out judgment was delivered by Michael Burton Q.C., a deputy Judge of the High Court.

[16] The learned Judge expressed the conundrum faced by the Courts in this way:

> "…if the plaintiff succeeded in establishing in whole or in part a proprietary remedy at trial, not only might there be nothing left, but the money that would have been expended in the mean while would have been the plaintiff's own money; thus to add insult to injury, if the defendant on that

[2] [1998] 2 All ER 230

> basis were unsuccessful, he would not only have committed originally some conversion or breach of trust against the plaintiff, but then even that part of the plaintiff's property which was left at the outset of proceedings would have been dissipated by the time it came to the trial.; and the legal costs expended by the defendant making it more difficult for the plaintiff to obtain his eventual successful judgment would have been paid for by the plaintiff, or out of the plaintiff's own monies."

[17] The Courts have recognized that a balancing act has to be performed in the exercise of its discretion. Bingham MR expressed it in this way in Sundt Wrigley & Co Ltd v Wrigley[3]:

> "Is there so great a risk of injustice for the defendant if he is not represented as to justify recourse to enjoined funds which may be shown to be the plaintiff's funds held by the defendant as trustee or constructed trustee. ……. A careful and anxious judgment has to be made in a case where a proprietary claim is advanced by a the plaintiff as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may turn out to be a successful defence"

[18] In the British Virgin Islands, the Proceeds of Criminal Conduct Act No. 5 of 1997 provides at section 17 (1) that the High Court may make a restraint order prohibiting a person from dealing with any realizable property subject to such conditions and exceptions as may be specified in the order. Section 17 (2) reads: "Without prejudice to the generality of subsection (1), the Court may, in making a restraint order, include such provision as it thinks fit for living and legal expenses." In re Peters[4] Lord Donaldson MR described the Court's jurisdiction under a similar provision in the Drug Trafficking Offences Act 1986 in England as being closely analogous to the Mareva jurisdiction and said that it might not inaccurately be referred to as the Drugs Act Mareva.

[19] In the instant case there is no restraining order against the Appellant, nor, as far as the Court is aware, has there been any conviction of anyone associated with the Appellant, nor even any criminal complaint filed. I therefore have no hesitation in deciding that the Court is properly vested with jurisdiction to make the orders it

[3] [1993] CA Transcript 685
[4] [1988] QB 871

could have made in the much more restricted circumstances of there being in force either a Mareva injunction or a restraining order in respect of the monies in Court.

[20] For the reasons set forth above, and with the consent, or at any rate the absence of dissent, of learned Queens' Counsel for the Appellant I find it appropriate to exercise my discretion in favour of making the following Order:

1. The Registrar of the High Court be and is hereby ordered to segregate from the sum of US$40,000,000.00 presently being held in the Court to the account of the Appellant the sum of US$315,000.00 and to hold that latter sum in a separate account designated "High Court Civil Appeal No. 20 of 2003 and No. 1 of 2004 Security for Costs account"
2. The High Court Civil Appeal No. 20 of 2003 and No. 1 of 2004 Security for Costs account shall be proof against any restraining order or Mareva Injunction or similar order from any court ordered in the exercise of its criminal or civil jurisdiction.
3. In the event that the Todman or Alfa Respondents or their legal advisers should make use of the funds for the purposes hereinabove set out then they shall not be deemed to be constructive trustees of such funds
4. In the event that the Todman or Alfa Respondents or their legal advisers should make use of the funds for the purposes hereinabove set out then they shall be deemed to have disclosed to the Steering Committee their suspicions pursuant to the Proceeds of Criminal Conduct Act and the Financial Investigation Agency Act

[21] For the avoidance of doubt, the balance of the $40,000,000.00 presently being held by the Court remains, as before, as security for any damages as may accrue against the Appellant as ordered by the High Court and this Court.

[22] The issue of the costs of these applications will be addressed by a single Judge of the Court of Appeal after the hearing of the substantive appeals.

Michael Gordon, QC
Justice of Appeal