BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0088

THE ATTORNEY GENERAL

Applicant/ Respondent

-and-

(1) IPOC INTERNATIONAL GROWTH FUND LIMITED

First Respondent/Applicant

(2) JEFFREY GALMOND
(3) MICHAEL LUDWIG RUDOLF NORTH
(4) LAPAL LIMITED
(5) ALBANY INVEST LIMITED
(6) MERCURY IMPORT LIMITED

Respondents

Appearances:

Mr. David Allison and Ms. Arabella Di Iorio of Maples & Calder for the First Respondent/Applicant, IPOC
Mr. Hodge M. Malek QC and with him, Ms. Tamia Richards, Senior Crown Counsel and Ms. Christilyn Benjamin, Crown Counsel for the Attorney General

In attendance:

Mr. Jeffrey Elkinson and Mr. Richard Evans of Conyers Dill & Pearman; Mr. John Carrington of Mc W. Todman, Ms. Astra Penn of Dancia Penn & Co. and Ms. Annabel Gillham of Walkers representing various Civil Defendants in other related proceedings.

2007: September 20
2007: September 24, October 15

JUDGMENT

[1] HARIPRASHAD-CHARLES J: By a Notice of Application dated 8 June 2007, the Applicant, IPOC International Growth Fund Limited ("IPOC") seeks a declaration that the Respondent , the Attorney General acted wrongfully when he:

a) agreed voluntarily to disclose and/or did thereafter disclose documents pertaining to this action ("the restraint materials") to parties who were not parties to this action ("the Civil Defendants") and

b) failed to object to the use by the Civil Defendants of the restraint materials for purposes other than for the purpose of enabling the Civil Defendants to consider and (if so advised) mount an application to intervene in this action.

[2] In addition, IPOC seeks an order that the Attorney General do forthwith retrieve the restraint materials together with any copies thereof from the Civil Defendants.

The Virgin Islands Constitutional Order 2007

[3] Prior to 15 June 2007, the Office of the Director of Public Prosecutions fell under the aegis of the Attorney General. The Virgin Islands Constitutional Order 2007 came into force on 15 June 2007. Section 59 establishes the Director of Public Prosecutions as a separate public office who has the sole responsibility for criminal proceedings. Therefore, any reference to the Attorney General in relation to events after 15 June 2007 in this application will be interpreted as the Director of Public Prosecutions and the Attorney General should now be interpreted as the Director of Public Prosecutions.[1]

The background to the restraint application

[4] IPOC has been a party to protracted, highly contentious and expensive litigation in the BVI against, inter alia, LV Finance Group Limited ("LFVG") and OAO CT-Mobile ("CTM") ("the Civil Proceedings"). Pursuant to orders of the Court of Appeal made in the Civil Proceedings, IPOC deposited US$40 million with the Court by way of security for costs and to fortify a cross-undertaking in damages which it gave at an early stage in those proceedings. Together with interest, the deposit now stands in excess of US$43 million.

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[1] See CPR 19. 2 (5) which states: "The court may order a new party to be substituted for an existing one if -
(a) the existing party's interest or liability has passed to the new party; or
(b) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party."

[5] The Civil Proceedings were finally dismissed more than a year ago. None of the Respondents in the Civil Proceedings ("the Civil Defendants") including LFVG and CTM has sought to enforce the cross-undertaking in damages given by IPOC. Instead, they have alleged and continue to allege that IPOC's assets, including the US$43 million represent the proceeds of crime. On that basis, the Civil Defendants are loath to take any part of that money in satisfaction of their costs claims.

[6] The allegations of money laundering are currently being investigated by the Royal Virgin Islands Police Force and the Financial Investigation Agency. Criminal proceedings are contemplated by the Crown but have not yet commenced.

[7] On 30 March 2007, IPOC issued an application for an order that US$33 million of the monies held in Court be forthwith released to IPOC or be paid in accordance with its directions. This application was listed for hearing on 27 April 2007.

[8] On 26 April 2007, the Attorney General commenced these proceedings against IPOC and others, by way of an application for an Order pursuant to section 17 of the Proceeds of Criminal Conduct Act 1997. He sought a restraint order over all assets held by IPOC. This application was also listed for hearing on 27 April 2007.

[9] At 3.00 p.m. on 26 April 2007, the Attorney General purported to serve IPOC with copies of the restraint application and evidence in support by delivering them at the offices of IPOC's BVI solicitors, Maples and Calder. The other Respondents in the restraint application have not been served. The Attorney General alleges that they are creatures of IPOC and/or closely associated with IPOC and in any event, the restraint application is solely against IPOC's funds.

The 27 April 2007 hearing and subsequent events

[10] It is clear that as a result of the restraint application, IPOC withdrew its application for payment of the US$33 million on 27 April 2007 at an inter partes hearing at which the Civil Defendants were present. Consequent upon the withdrawal, Counsel for the Civil

Defendants sought details of the proceedings which had led to the stance taken by IPOC on the basis that they have an interest in the monies and needed to decide whether to apply to intervene in the restraint proceedings. The Court requested that the DPP provide a courtesy copy of the restraint materials to the Civil Defendants so long as that would not cause prejudice to the Attorney General and the investigation.

[11] Learned Counsel for IPOC, Mr. Allison submitted that the Learned Trial Judge did not order the DPP to provide copies of the restraint materials to the Civil Defendants. Instead, what the Learned Judge did was to inquire whether, as a matter of courtesy, the DPP was prepared to provide the documents thereby short-cutting the necessity for those Defendants to apply to the Court to inspect the file.[2] Mr. Malek QC appearing for the Attorney General conceded that the Learned Judge did not order the DPP to provide copies of the restraint materials.

[12] At first blush, it appears that the 27 April 2007 Order was at the heart of the dispute but this is no longer the case as it is now common ground that the DPP was not ordered to provide the restraint materials. He was requested by the Court to provide a courtesy copy, which he did since he was of the view that it would not prejudice the investigation, particularly as the allegations of money laundering were familiar to the Civil Defendants as they themselves had raised those allegations in the first place.

[13] On 30 April 2007, the DPP supplied the restraint materials to the Civil Defendants. The materials were provided on the strict undertaking to the Court that the Civil Defendants would use them to decide whether or not to intervene in the restraint proceedings.

[14] On 2 May 2007, one of the Civil Defendants, namely CTM issued an application for permission to disclose the restraint materials to the Commercial Court in Bermuda. The following day, LVFG, another of the Civil Defendant issued a similar application for permission to disclose the restraint materials to the Commercial Court in Bermuda as well as to the arbitration proceedings taking place in Switzerland.

[2] See pages 25 and 27.

[15] On 4 May 2007, Mr. Richard Evans of Conyers Dill & Pearman (BVI) wrote to the DPP seeking permission from the DPP to disclose the restraint application and supporting affidavit of Christilyn M. Benjamin and the draft restraint order to (1) The Bermuda Supreme Court in the context of a petition for winding up of IPOC brought by the Ministry of Finance on public interest grounds and (2) the International Arbitration Court of the International Chamber of Commerce in Geneva and (3) The Zurich Ad hoc Arbitration Tribunal in which IPOC has indicated an intention to bring further claims.

[16] On 8 May 2007, the DPP wrote to LVFG solicitors in the BVI in the following terms:

> "We have no direct objection to our Application and Supporting Affidavit of Christilyn M. Benjamin along with our Draft Restraint Order being disclosed provided that an undertaking is secured from you that the Attorney General [the DPP] is not a party to your proceedings and that the Deponent will not be called upon in any way to give any evidence in these matters."

[17] This letter received a somewhat protracted response from IPOC. On 1 June 2007, Maples and Calder, the solicitors for IPOC, wrote to the DPP elaborating the reasons why he should not have indicated that he was prepared to provide copies of the restraint materials to the Civil Defendants. The letter is telling. It requested that the DPP confirms that he is prepared to take action to obtain the return of the restraint materials or confirms that the restraint materials should not have been provided. Broadly speaking, this letter is the prologue of the application before the Court.

[18] On 5 June 2007, Maples and Calder again wrote to the DPP. The gist of that letter is the renewal of IPOC's request for the DPP to confirm by no later than 7 June 2007 that he has notified the Civil Defendants of the withdrawal of his consent to the collateral use of the restraint materials in other proceedings and that he has taken steps to secure the return of the said materials from those defendants.

[19] On 7 June 2007, the DPP wrote to Maples and Calder wherein he alleges that the Crown was requested to supply a copy of the restraint materials to the Civil Defendants on the basis of their application and on the strict undertaking limiting their use to the question of

whether they can properly intervene in the present proceedings. The letter further states that the DPP does not object to the use of the restraint materials for any other purpose but it is for the Court to give permission to the Civil Defendants to use the materials for any such purpose.

[20] In the penultimate paragraph of the letter, the DPP wrote: *"It is not appropriate for the Crown to be required to demand the return of the copies of the restraint order materials from the defendants to the civil proceedings. If the Court decides that they should be returned then of course the Crown will take all necessary steps to ensure the compliance with any such court order."*

[21] Unquestionably, IPOC was not happy with the response and as a consequence, issued the present application. In the intervening period leading to the hearing of this application, more letters passed between the parties. They are not pertinent to the present application.

The present application

[22] Mr. Malek QC appearing for the DPP helpfully identified the four issues which have arisen for determination in the application before me. They are as follows:

1. Did the DPP act wrongfully in providing the restraint materials to the Civil Defendants?

2. Did the DPP act wrongfully in not objecting to the use of the restraint materials, for purposes other than of enabling the Civil Defendants to consider whether or not to intervene in the restraint application?

3. Should the DPP be ordered to inform the Civil Defendants that he objects to the use of the restraint materials for any purpose other than to enable the Civil Defendants to consider whether or not to intervene in the action?

4. Should the DPP be ordered forthwith to seek to retrieve the restraint materials?

Did the DPP act wrongly in providing the restraint materials?

[23] Mr. Allison appearing as Learned Counsel for IPOC contended that the DPP acted improperly in providing copies of the restraint materials to the Civil Defendants since those proceedings are confidential to the immediate parties and are not normally in the public domain until the matters have come to an end. Mr. Allison submitted that this confidentiality should be preserved by the Court unless and until a successful application has been made by a third party to examine the Court file.

[24] Counsel alluded to the case of Alfa Telecom Turkey Limited v Cukurova Finance International Limited et al[3] where the court held that the need for a third party to get an order to inspect the court file is premised on the underlying notion that access to documents filed in court is generally restricted. According to him, if the Civil Defendants had applied to inspect the file, they would have had to satisfy the Court of three matters, paramount among them being that they must demonstrate a good and legitimate reason for inspecting the materials which must include being able to identify the document or class of documents in which they are interested. Thereafter, the discretion of the Court must be exercised in accordance with the overriding objective.

[25] Mr. Allison elaborated that to date, the DPP has not commenced the criminal proceedings against IPOC and it is therefore most inappropriate and contrary to the overriding objective of the Rules that the restraint materials should be provided to third parties.

[26] Mr. Allison concluded that the DPP was plainly acting under a mistake of fact when he handed over the restraint materials to the Civil Defendants.

[27] Mr. Malek QC submitted that, pursuant to a direction of the Court, the DPP provided the restraint materials to Counsel in the Civil Proceedings and that IPOC made no challenge to the Order. The first challenge was by letter dated 1 June 2007 whereby IPOC alleged that the DPP acted improperly in providing the restraint materials to the Civil Defendants and

[3] Claim Nos. BVIHCV2007/0072 and BVIHCV2007/0073 –Unreported Judgment of Joseph-Olivetti J. delivered on 12 July 2007.

that the DPP must seek its return. By letter dated 7 June 2007, the DPP responded that he acted in accordance with a directive of the Court and as such, it is inappropriate for the Crown to demand the return of the restraint materials.

[28] Learned Queen's Counsel took the Court through various portions of the transcript of proceedings before Joseph-Olivetti J and in summary, he submitted:

1. It is not wrongful for the DPP to provide the restraint materials to third parties. The case of Alfa spoke to non-parties to litigation and is inapplicable.

2. The restraint materials were provided at the request of the Court against suitable undertaking limiting such use.

3. The restraint materials were provided to the Civil Defendants who are totally familiar with the allegations of money laundering.

4. In providing the restraint materials, the DPP was acting in good faith, being a neutral party to any other civil proceedings between the parties.

5. It is entirely reasonable for the Court to request that the restraint materials be provided to the Civil Defendants so that they could decide whether or not to intervene in the restraint application.

6. The current application is clearly a response to the application by the Civil Defendants to use the restraint materials in other proceedings. In other words, it is satellite litigation.

[29] Before I address the issue of whether the DPP acted wrongfully in providing the restraint materials to the Civil Defendants, it is perhaps worthwhile to add that much was made as to whether the Court "ordered", "directed" or "requested" the DPP to provide a courtesy copy of the relevant materials to the Civil Defendants. For my part, it is somewhat unfortunate that such a straightforward matter should occupy so much judicial time. As I

see it, it is neither here nor there whether it was an order, request or directive. All parties were represented by experienced lawyers who were fully cognizant of what the Judge was attempting to achieve when she engaged herself in that conversation with the DPP.

[30] Now, to the issue. It is necessary that I narrate what took place at the hearing on 27 April 2007. On that day, the DPP was asked by the Court whether he would be prepared to provide a courtesy copy of the restraint materials so long as it would not be prejudicial to the Attorney General or the investigation. The DPP took the view that it would not prejudice the application.

[31] As appears from the transcript, Counsel for both sides in the Civil Proceedings were given an opportunity to canvass the point before the Judge. The Civil Defendants argued that they should be given access to the materials so they could decide whether or not to intervene in the proceedings brought by the Attorney General. On the other hand, Counsel for IPOC, Mr. Hacker QC argued that the Civil Defendants had alleged that the monies were the proceeds of crime and hence they disclaimed any interest in being paid out of those allegedly corrupted funds. Mr. Hacker raised a concern as to what use the Civil Defendants might make of the restraint materials. The Learned Judge was not prepared to prophesy whether any improper use was going to be made of the restraint materials. At the end of the day, she articulated the following to the DPP:

> "So, Mr. DPP, as a matter of courtesy, I would ask that you facilitate these people and give them a copy of your application."

[32] The DPP replied "I will do that." Mr. Hacker raised some more concerns. Finally, the Learned Judge said at pages 13-14 of the transcript:

> "…So having regard to IPOC's concerns, what I am going to say, I will ask you to give a copy of your application to the various Respondents here in this matter and they are to use this, this is only to inform them of the reason why this application was withdrawn and to enable them to determine whether they can properly intervene in the matter or not. If there is any other use that anybody feels that they are entitled by law to use it for, then they will have to come and say to the Court that we want to use it for X, Y and Z…."

[33] Nothing can be clearer than what actually transpired in court. In my judgment, the DPP was requested to provide a courtesy copy of the restraint materials to the Civil Defendants so long as that would cause no prejudice to the Attorney General and the investigation. The DPP took the view that it would not prejudice the application and consequently, he supplied the restraint materials..

[34] Had the DPP not provided the restraint materials to the Civil Defendants, he might have been in contempt of the Judge's request. Succinctly put, the DPP complied with a request of the Court. It is implausible that the DPP could be said to have acted wrongfully in supplying the restraint materials to the Civil Defendants.

Use of the restraint materials for other purposes

[35] For convenience, issue (2) and (3) can be dealt with together. In his letter dated 8 May 2007, the DPP wrote: "***We have no direct objection*** to our Application and Supporting Affidavit of Christilyn M. Benjamin along with our Draft Restraint Order being disclosed…."

[36] It is alleged by IPOC that these bold italicised words meant that the DPP has consented to the proposed collateral deployment of the relevant materials in proceedings pending before the Bermuda Court and in arbitration proceedings pending in Switzerland.

[37] Mr. Allison submitted that the DPP should not have provided his consent to the relief now sought by the Civil Defendants. Consequently, he has acted wrongfully in not objecting to the use of the restraint materials for other purposes and as such, he should be ordered to inform the Civil Defendants that he objects to the use of the restraint materials for any other purpose.

[38] In my considered opinion, the words "we have no direct objection" cannot mean "we consent". I am taken aback that Mr. Allison, so well-schooled in the English Language holds a contrary view. I agree with Mr. Malek that the DPP was not consenting to the use of the restraint materials in other proceedings when he uttered those words. It is immaterial whether the DPP consents or not since it is a matter for the Court. It was an undertaking

given to the Court and the Court will ultimately have to decide whether or not to permit use of such materials in other proceedings.

[39] As to whether or not the restraint materials should be used for any purpose other than the decision to intervene or not in the restraint application is a matter pending before the Bermuda Court on the application made by two of the Civil Defendants. Mr. Malek QC submitted that what IPOC is essentially seeking to do is to coerce the DPP to take a position in those proceedings and to object to the application. This, he submitted, is an inappropriate form of satellite litigation aimed at improving IPOC's position at a hearing in which the Civil Defendants are not present, for the purposes of strengthening its opposition to the application of those defendants.

[40] Learned Queen's Counsel also contended that it is inappropriate for IPOC to seek an order of this Court to compel the DPP to take a position against the Civil Defendants' application when he crystallized his role as one of neutrality. Indeed, this seems to be the correct approach of the DPP and he should not be censured for taking an impartial role.

[41] If the Civil Defendants are using the restraint materials for any other purpose than the decision of whether or not to intervene in the restraint proceedings without the permission of the Court, they may be in breach of a Court Order having given an express undertaking not to do so. However, it seems to me that this is not the case as two Civil Defendants have applied to the Bermuda Court seeking permission. IPOC should await the outcome of those proceedings instead of making this application.

Should the Attorney General seek to retrieve the restraint materials?

[42] Mr. Allison submitted that the Civil Defendants are not parties to the restraint application and the conduct of the DPP in providing copies of the restraint application to them is contrary to the overriding objective of CPR 2000 and also, in ensuring that the confidentiality in the criminal proceedings are preserved in matters which should normally not be in the public domain. He seeks an Order that the DPP forthwith retrieve the restraint materials together with any copies thereof from the Civil Defendants.

[43] Mr. Malek QC is of the view that this application is totally misconceived. In essence, he submitted that IPOC is seeking to frustrate the application of the Civil Defendants in advance. He next submitted that there is no evidence to suggest that the Civil Defendants have breached the undertaking given by the Court and what IPOC is seeking is the retrieval of the restraint materials from those Defendants ahead of the hearing of the application by them for permission to use the materials in other proceedings. Further, those defendants have not yet informed the DPP as to whether or not they would wish to seek to intervene in the restraint application.

[44] It goes without saying that it is a serious matter if a defendant breaches an undertaking by the Court. So far, there is no evidence to indicate that the Civil Defendants have breached the undertaking given by the Court. All that they have done is apply to the Court to use the materials in other proceedings. Unless and until such permission is given, they cannot use the materials in those other proceedings.

[45] If IPOC is of the view that the restraint materials should be returned, then it should make such application to the Court since it was the Court that requested the DPP to give them to the Civil Defendants. If IPOC believes and can assertively prove that those defendants are making improper use of the materials, then it should apply to the Court for its retrieval rather than coercing the DPP to seek their return.

Conclusion

[46] The present application is frivolous and vexatious. It is wrong for IPOC to suggest that the DPP should not have supplied the restraint materials to the Civil Defendants. The Court made a request on very cogent grounds. It was a short-cut to an application which the Civil Defendants could and perhaps, would have made. Distinguished Queen's Counsel for IPOC was present. He did not object. The transcript revealed that he emphatically objected to other issues including the anticipated improper use to be made of the documents.

[47] In my judgment, the application is utterly misconceived and must be dismissed with costs of US$20,000.00 to the DPP.

Indra Hariprashad-Charles
High Court Judge