BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NOS.15 AND 21 OF 2003

BETWEEN:

THE ATTORNEY GENERAL

Appellant

and

[1] CONRAD SEGHERS
[2] KOMODO HOLDINGS

Respondents

Before:

The Hon. Mr. Adrian D. Saunders — Chief Justice [Ag.]

Appearances:

Ms. Candace Huggins for the Attorney General
Me. Terrance Neale for the Respondents

2004: June 9

JUDGMENT

[1] SAUNDERS, C.J. [AG.]: There are two extant applications before me. The factual background to the first is as follows. The Attorney General had obtained an order against Komodo Holdings and Mr. Seghers ("K & S") restraining them from removing their assets from the jurisdiction. That order was subsequently varied by d'Auvergne, J., without objection on the part of the Attorney General, so as to permit K & S to withdraw a sum of $70,000 to cover their reasonable legal expenses. Apparently, some time after this variation, new facts and circumstances came to the attention of the Attorney General. As a result, the Attorney General applied to vary the already varied Order so as to set aside any permission for K to withdraw any sum to cover legal expenses. The affidavit in support of the application alleged that K, a company, had not authorised anyone to act for it in

the matter of the application to vary the original restraining order. The clear suggestion was that a fraud had been perpetrated on K.

[2] The application to further vary was heard by Rawlins, J. It was dismissed because the Judge felt that "the application is actually seeking to impeach [the order originally made to vary] and is not really seeking a variation". A stay was however ordered. K & S have appealed the stay. The Attorney General seeks leave to file a Counter-Notice of appeal.

[3] The Attorney General's Counter-Notice should have been filed within 14 days of the date of service upon the Attorney General of the Notice of Appeal, ie by 7th December, 2003. In fact, it was not filed until 15th January, 2004. The more substantial issue however is whether in all the circumstances leave should be given. Mr. Neil, for K & S, opposes the application on the ground that there is no prospect of the appeal succeeding. Mr. Neil argues that if new evidence came to light establishing a fraud, the appropriate course for the Attorney General would have been to appeal the varied order and not apply for a further variation. The Attorney General's position is that because it is a restraining order that is in issue, it ought to be open to the Attorney General to seek a further variation.

[4] If the Attorney General has no real prospect of success before the Court of Appeal, there is no use granting him leave. Admittedly, the expression "real prospect of success" does not establish a high threshold. "Real" has to be regarded as being opposed to "fanciful". See: Swain v Hillman[1]. Moreover, I accept the learning in The White Book Civil Procedure 2003 that the threshold is even lower with respect to a cross-appeal since, logically, once a party has obtained permission to appeal, it may be inappropriate to require the other party to be bound by the terms of the original order if that party is aggrieved at one or more of those terms.

[1] (2001) 1 A.E.R. 91

[5] Notwithstanding the above, I can find no reason to grant permission. In alleging fraud or want of authority as a ground for the attempt to further vary the order, what was being attacked by the Attorney General was the substratum for the making of the order by d'Auvergne, J. The Attorney General's application to further vary was an attempt to impugn the order of d'Auvergne, J. and only an appellate Court had jurisdiction so to do. I think Rawlins, J. properly declined jurisdiction. The White Book Civil Procedure 2003[2] points out that "the Court of Appeal will refuse to entertain an application for permission to appeal (and will not list such an application for hearing) if it is obvious that the Court has no jurisdiction. See **Jolly v Jay** [2002] EWCA Civ 277 at [19] and **Bulled v Kayat** [2002] EWCA Civ 804 at [9]-[11]". I would respectfully rely on that authority.

[6] In the circumstances I would deny the Attorney General permission to appeal and award costs to K & S in the sum of $3,500.00.

[7] That is not the end of this matter. There is also outstanding the question of costs in Suit No. 15 of 2003 between the same parties, I don't propose to delve into all of the facts. Suffice it to say that Suit 15 of 2003 was discontinued by the Attorney General while an application to dismiss the same was pending. The general rule is that an unsuccessful party bears the costs of the successful party. K & S, the successful parties, are therefore prima facie entitled to costs.

[8] The Attorney General's position is that no costs should be awarded because the issue as to the *locus standi* of K & S has not been resolved, the proceedings are still at an interlocutory stage and even if an order for costs is made, it would be difficult to quantify such costs at this stage.

[9] I can see no or no sufficient reason why the general rule as to costs should be departed from in this case. Under the new Civil Procedure Rules we have done away with taxing Masters and we approach the issue of costs in a new way. The

[2] Para. 52.3.4

quantum of costs is usually easily ascertainable through the application of prescribed formulae. In my view K & S are entitled to their costs and in the circumstances I would order costs to them in the further sum of $3,500.00.

Adrian D. Saunders
Chief Justice [Ag.]