

BRITISH VIRGIN ISLANDS COURT OF APPEAL

BVIHCMAP2018/0005 – Renaissance Ventures Limited and Another -v- Comodo Holdings Limited – July 2018

APPLICATION TO SET ASIDE PERMISSION TO APPEAL DUE TO FAILURE TO SERVE NOTICE AND MATERIAL NON-DISCLOSURE - DISCLOSURE OF FINANCIAL INFORMATION HELD BY SUBSIDIARIES - DISCLOSURE RULE CPR 28.16

This was an appeal against an order of the Commercial Court refusing specific disclosure of certain documents to the defendants (the appellants in the Court of Appeal). The appellants obtained leave to appeal the decision of the single judge from a full panel of the Court of Appeal.

As a preliminary point, the respondent submitted that the appellants should have served the respondent with notice of their application for leave to appeal. It argued further that the appellants had not informed the Court of Appeal at the permission hearing that there was a freezing order in place against the respondent, and that their failure to do so constituted material non-disclosure, such that the permission should be set aside.

The Court of Appeal declined the respondent's application to set aside permission to appeal. In so doing, the Court reaffirmed the settled practice in this jurisdiction that a respondent who is dissatisfied with the grant of leave to appeal has the opportunity to ventilate his objection as part of the arguments at the hearing of the appeal. The Court held that the existence of the freezing order was not a material consideration.

With respect to the substance of the appeal, the appellants applied for such financial information as the respondent kept pursuant to Section 98 of the *BVI Business Companies Act, 2004* (as amended). The respondent filed evidence in opposition, stating that it kept such information within its subsidiaries and therefore the respondent itself had no such information to disclose. The Court of Appeal overturned the Judge's order and ordered disclosure of the financial information, ruling that where a holding company has access to and can view documents held by subsidiaries, these are within its control for the purposes of CPR 28.

The following useful points arose in respect of disclosure:

1. As stated in CPR 28.16, documents referred to in statements of case, affidavits or witness statements must be disclosed. The requesting party does not have to prove that the document is directly relevant to the case. However, *obiter*, the Court of Appeal stated that

disclosure might be withheld on other grounds such as lack of control or privilege.

2. Following *Rubin -v- Expandable* [2008] EWCA Civ 59, even a single reference to such documents is sufficient to render a document or documents disclosable. The Court of Appeal allowed the appeal in full on those, and other, grounds.

Mark Forte of Conyers appeared for the appellant lead by Paul Chaisty QC.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.