

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**TERRITORY OF THE VIRGIN ISLANDS**

**BVIHCMAP2023/0009**

**BETWEEN:**

**CALDICOTT WORLDWIDE LTD**

Appellant

and

**[1] SIONG BENG SENG**

**[2] CHING HUI HUAT**

**[3] SPRINGFIELD INVESTMENT & NOMINEES PTE LTD**

Respondents

**Before:**

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Esco Henry

Justice of Appeal [Ag.]

The Hon. Mr. Robert Levy

Justice of Appeal [Ag.]

**Appearances:**

Mr. Stephen Moverley Smith KC for the Appellant

Mr. Timothy Collingwood KC, with him Mr. Iain Tucker for the Respondents

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2023: October 4

2024: September 18.

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*Commercial appeal – Section 184I of the Business Companies Act of the Territory of the Virgin Islands – Unfair prejudice - Arbitration agreement – Whether the learned judge erred in understanding the scope of the Second Appeal Judgment – Whether the learned judge erred in law in deciding that the issue in the proceedings of whether dividends were improperly withheld from Caldicott was required to be stayed*

In December 2019, Caldicott Worldwide Ltd (“Caldicott”) sought relief under section 184I of the Business Companies Act (“the Act”) for unfair prejudice against four defendants including the respondents to this appeal (or the “Shareholder Defendants”) and Hector Finance Group Limited (“Hector” or “the Company”). Caldicott, a minority shareholder in Hector alleged that the respondents to the proceedings had acted in an unfairly prejudicial or discriminatory manner, and/or oppressively towards it in its capacity as a shareholder by causing dividends from Hector, which had been declared and paid to all other shareholders, to be improperly withheld from it. Caldicott sought *Inter alia*, a declaration that Hector’s board resolution of 30<sup>th</sup> November 2019 (the “November

Resolution”), ratifying the withholding of dividends was unlawful, void and of no effect, alternatively voidable.

On 4<sup>th</sup> March 2020, Hector applied for a stay of the proceedings against it in favour of arbitration on the ground that its Articles of Association contained an arbitration agreement referring disputes between it and its members to arbitration. Wallbank J granted the stay on 28<sup>th</sup> April 2020 but did not stay the proceedings against the Shareholder Defendants. The consequential matters were heard at a further hearing and on 13<sup>th</sup> October 2020, Wallbank J ordered that the proceedings against the Shareholder Defendants be permitted to proceed notwithstanding the stay against Hector.

On 9<sup>th</sup> February 2021, Wallbank J ordered that the proceedings against the Shareholder Defendants be permitted to proceed notwithstanding the stay against Hector. He granted Caldicott leave to amend its statement of claim but ordered that certain heads of relief against Hector (for the payment of dividends, the appointment of liquidators, and an order regulating Hector’s affairs) be stayed for the duration of the stay if Caldicott did not delete them. In March 2021, Caldicott filed an amended statement of claim conforming to the permissions of the aforementioned order.

In May 2020, the Shareholder Defendants filed an application for an order setting aside an order permitting service of the claim form etc out of the jurisdiction or in the alternative, an order staying the proceedings against them on case management grounds. This application was dismissed by Wallbank J and the Shareholder Defendants’ appeal (the “First Appeal”) to this Court was dismissed by a judgment dated 1<sup>st</sup> June 2021 (the “First Appeal Judgment”).

On 15<sup>th</sup> March 2021, the Shareholder Defendants appealed against Wallbank J’s order dated 9<sup>th</sup> February 2021 seeking an order staying Caldicott’s claims against them until further order, or in the alternative, an order staying Caldicott’s claims for all or any of the declarations relating to the validity of the November Resolution.

In a judgment dated 22<sup>nd</sup> March 2023 (the “Second Appeal Judgment”), this Court allowed the appeal and set aside the order of Wallbank J permitting the seeking of a declaration that the November Resolution was unlawful, void and of no effect and stayed that head of relief. The Court also set aside the order of the learned judge permitting the seeking of a declaration that the dividends are properly due and owing and also stayed this head of relief. In other words, paragraphs 1 and 2 of the prayer in the amended statement of claim were stayed. The Court did not grant relief in the terms for an order staying Caldicott’s claims against the respondents until further order.

Whilst the Second Appeal Judgment was pending, the court ordered that there be a trial of the preliminary issue of whether Caldicott held its shares in Hector as a nominee for Mr. Chan Chew Keak; an issue raised in defence which asserts that if Hector was prima facie liable to pay the interim dividends, then there was no unfairness in withholding them as such withholding was justified by reason of the fact that Caldicott held its shares as a nominee for Mr. Chan or under his instruction. Following the delivery of the Second Appeal Judgment, the Shareholder Defendants applied for an order that the preliminary issue trial be vacated (the “Vacation Application”) and an earlier consent order for the directions for the hearing of the preliminary issue be stayed. In an *ex tempore* judgment, Wallbank J found inter alia that the nominee issue is a fundamental aspect of the

dispute between Hector and Caldicott, and therefore one which would fall within the arbitration agreement.

Dissatisfied with the decision of the learned judge, Caldicott appealed on the grounds that Wallbank J failed to recognise the scope of the Second Appeal Judgment and that the learned judge erred in law in deciding that the issue in the proceedings of whether dividends were improperly withheld from Caldicott was required to be stayed until further order on the basis that it touches and concerns Hector's conduct.

**Held:** dismissing the appeal that:

1. The issue before the court related to the preliminary issue concerning the nomineehip alleged in the defence which the learned judge described as a fundamental part of the dispute between the Company and Caldicott. However, the Second Appeal Judgment was clear. The Court allowed the appeal and set aside the order of Wallbank J permitting the seeking of a declaration that the November Resolution was unlawful, void and of no effect and stayed that head of relief. The Court also set aside the order of the learned judge permitting the seeking of a declaration that the dividends were properly due and owing, and stayed that head of relief. It is difficult to construe another conclusion other than that any heads of relief relating to the dividends (whether they relate to the resolution by which it was passed or whether they are owing) have been stayed by the Second Appeal Judgment and neither the appellant nor the respondents through their respective legal practitioners Mr. Moverley Smith KC and Mr. Collingwood KC have suggested that the Court is not bound by that decision.
2. The Shareholder Defendants' notice of appeal for the second appeal sought an order staying Caldicott's claim against them in their entirety, or in the alternative an order staying Caldicott's claims for declarations relating to the unlawfulness etc or voidability of the November Resolution, and that the dividends were properly due and owing to Caldicott. This is the relief that was granted in paragraph 143 of the Second Appeal Judgment. By order dated 28<sup>th</sup> April 2020, Wallbank J had stayed the proceedings against Hector in favour of arbitration and there was no appeal from that order. Thus, the argument that the Second Appeal Judgment did not make any orders to stay the heads of relief as against the Shareholder Defendants is unsustainable. The order set out in paragraph 143 of the Second Appeal Judgment plainly relates to the heads of relief sought against the Shareholder Defendants.
3. Section 11 of the Companies Act provides that the articles of association of a company are binding as between: (a) the company and each member of the company; and (b) each member of the company. Section 11(1)(b) does not have the effect that an arbitration agreement in a company's articles providing for the arbitration of differences between the company and its members requires that differences between members themselves, even those that may turn upon the acts of the company, are to be so determined.

Section 11 of the **Business Companies Act** No. 16 of 2004 amended by 26/2005, Laws of the Virgin Islands considered.

## JUDGMENT

### Introduction

- [1] **LEVY JA [AG.]**: These proceedings were commenced by a claim form issued in December 2019. By the statement of claim, as originally drafted, the claimant and appellant in this appeal, Caldicott Worldwide Ltd (“**Caldicott**”) sought relief under section 184I of the **Business Companies Act**<sup>1</sup> (the “**Act**” or the “**BCA**”) for unfair prejudice against, as originally cast, four defendants (“the Shareholder Defendants”), being the three respondents in this appeal, and the, Hector Finance Group Limited (“**Hector**” or “the Company”) – a BVI company. In short, Caldicott, a minority shareholder in Hector, alleged that the defendants to the proceedings (including Hector) had acted in an unfairly prejudicial or discriminatory manner, and/or oppressively towards it in its capacity as a shareholder by causing dividends from Hector, which had been declared and paid to all other shareholders, to be improperly withheld from it, in consequence of which Caldicott had suffered loss.<sup>2</sup>
- [2] By the prayer to the statement of claim, Caldicott sought, against all the then named defendants, a declaration that Hector’s board resolution of 30<sup>th</sup> November 2019 (the “**November Resolution**”), ratifying the withholding of dividends, (previously declared on 19<sup>th</sup> August and 1<sup>st</sup> October 2019) was invalid, void, and of no effect, or alternatively voidable. It also sought relief, against all the then defendants, that the dividends declared and paid were properly due and owing to Caldicott and should be paid, with interest, within seven days. Further or alternatively, in addition to compensation, Caldicott sought orders that the other shareholders, who together owned just over 52% of the shares in Hector, should buy its shares, or sell their shares to Caldicott. In the yet further alternative, orders for the appointment of liquidators or regulating Hector’s affairs were sought.

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<sup>1</sup> Act No. 16 of 2004 amended by 26/2005, Laws of the Virgin Islands.

<sup>2</sup> Paragraph 40 of the Statement of Claim.

[3] On 4<sup>th</sup> March 2020, Hector applied for a stay of the proceedings against it in favour of arbitration, on the ground that its articles of association contained an arbitration agreement referring disputes between it and its members to arbitration. By Order of 28<sup>th</sup> April 2020, the learned judge, Wallbank J, granted the stay but specifically did not stay the proceedings against the Shareholder Defendants. He reserved all consequential matters to a further hearing at which he would hear submissions on the consequences and effect of the stay upon the proceedings generally.

[4] That further hearing resulted in a judgment on 13<sup>th</sup> October 2020. By that judgment, Wallbank J dismissed an application by the Shareholder Defendants for a general stay of the proceedings. By his order of 9<sup>th</sup> February 2021, Wallbank J ordered that the proceedings against the Shareholder Defendants be permitted to proceed notwithstanding the stay against Hector:

“to the extent that [Caldicott] is able to pursue its claims against the Shareholder Defendants [i.e. the respondents in the current appeal] without requiring a difference between itself and the Company [Hector] to be resolved.”

He granted Caldicott leave to amend its statement of claim, but ordered that certain heads of relief against Hector (for the payment of the dividends, the appointment of liquidators, and an order regulating Hector’s affairs) be stayed for the duration of the stay if Caldicott did not delete them. Wallbank J also ordered that Caldicott could not, until further order, seek an order that the Shareholder Defendants procure that Hector pay the dividends to Caldicott. On the other hand, he ordered that Caldicott be permitted, until further order, to seek declarations that the resolution of 30<sup>th</sup> November was unlawful etc., and that the dividends were properly due and owing to it. Wallbank J ordered that Caldicott be permitted to seek relief, “in terms of such other order as the Court thinks fit under section 184I of the **Act**”.

[5] In March 2021, Caldicott filed an amended statement of claim conforming to the permissions etc. of the aforementioned Order. I refer to the relevant parts of the prayer in full:

- (a) By paragraph 1 it sought, “A declaration that the resolution passed on 30<sup>th</sup> November 2019 is unlawful, void, of no effect and/or voidable”.
- (b) Paragraph 2 sought, “A declaration that the dividends declared and/or paid on 19<sup>th</sup> August 2019 and 5<sup>th</sup> December 2019 are properly due and owing to the claimant”.
- (c) Paragraph 3 provided, “Further and/or in the alternative, an order that the [Shareholder Defendants] buy out the claimant’s interest in the Company without discount and at a value to be assessed by the Court”.
- (d) By paragraph 4 Caldicott sought an order for compensation against the Shareholder Defendants.
- (e) Paragraph 5 claimed, in the alternative, an order that the Shareholder Defendants sell their interests in Hector to Caldicott at a value to be assessed.
- (f) By paragraph 6, Caldicott sought “such other order as may be made pursuant to section 184I of the Business Companies Act 2004 as the Court thinks fit”.
- (g) The remaining heads of relief sought “Damages” (unparticularised) and costs.

[6] In the meantime, in May 2020, the Shareholder Defendants filed an application for an order setting aside the order permitting service of the claim form etc. out of the jurisdiction. This application sought, in the alternative, an order staying the proceedings against them on case management grounds. By a judgment of 24<sup>th</sup> September 2020, Wallbank J dismissed that application, and the Shareholder Defendants’ appeal to this Court (the “**First Appeal**”) was dismissed by a judgment of 1<sup>st</sup> June 2021 (the “**First Appeal Judgment**”). In his submissions Mr. Moverley Smith KC took the Court to paragraphs 49 and 50 of the First Appeal Judgment where Webster JA said:

“[49] I do not find the judge’s decision to approve the claim going forward in an amended form without claims against the Company to be unusual. Unfair prejudice claims are usually contested between the shareholders. The company is either not joined as a defendant, or if joined, only as a nominal defendant for purposes of disclosure or making sure the orders are binding on the company. In this case, the appellants are the persons who control the Company and it is their conduct that is allegedly prejudicial to the respondent. The learned judge said as much at pages 81 to 82 of the Transcript: ‘I must not lose sight of the fact that the real complaint is that it is the Second to Fourth Defendants who caused the Company to withhold dividends, because of course a company can only act through the agency of human beings’.

[50] This is an important statement by the learned judge of the legal position and it highlights the fact that the presence of the Company in the case is not essential to determine the real issues in dispute between the parties. As Mr. Moverley Smith submitted, if the respondent gets an order that the appellants managed the Company in a manner that was unfairly prejudicial to it, it may be able to use that order to enforce payment of the dividends in the arbitration proceedings or secure a buyout order in the unfair prejudice proceedings.”

I will return to this.

- [7] By a notice of appeal dated 15<sup>th</sup> March 2021, the Shareholder Defendants appealed against Wallbank J’s Order of 9<sup>th</sup> February 2021. By paragraph 35 of that notice of appeal they sought an order staying Caldicott’s claims against them until further order, or, in the alternative, an order staying Caldicott’s claims for all or any of the declarations relating to the validity of the November Resolution, and for a declaration that the dividends were due and owing to it.
- [8] That appeal was heard on 5<sup>th</sup> October 2021 and judgment delivered on 22<sup>nd</sup> March 2023 (the “**Second Appeal Judgment**”). In the context of these proceedings, it is an important judgment, and one that, when its effects were subsequently being considered by Wallbank J, caused him “a lot of concern” in the judgment currently under appeal. There was no attempt at a further appeal.

### **The Second Appeal Judgment**

- [9] The leading judgment was given by Theodore JA [Ag], with whom Blenman and Michel JJA concurred. It is necessary to consider this judgment in detail to determine what it did, and what it did not, decide.

[10] At paragraph 1, the Court noted that the appeal was against Wallbank J's judgment of 13<sup>th</sup> October 2020 and Order of 9<sup>th</sup> February 2021, "permitting unfair prejudice proceedings against the appellants to proceed after the court had earlier stayed proceedings against" Hector. Thereafter, Theodore JA set out a very brief summary of the claim and the proceedings.

[11] In a section headed "The Judgment and the Order", starting at paragraph 11, Theodore JA [Ag.] considered Wallbank J's judgment. At paragraph 21, he quoted Wallbank J (referring to Bannister J's judgment in **Ennio Zanotti v Interlog Finance Corp et al**<sup>3</sup>) saying:

"It is safe to conclude, I think, adopting Justice Bannister's construction of the arbitration agreement, that the Court must have regard to the substance and not just the form of what has been pleaded to see whether the Court is dealing with a difference which ought to be referred to arbitration."

Accordingly, this Court noted that Wallbank J went on to identify the issues before him as being whether the proceedings against the Shareholder Defendants should be allowed to proceed, and, if so, how much of Caldicott's pleaded case should survive for the claims that remained.

[12] Theodore JA [Ag.] noted Wallbank J's reasoning that if it was possible for claims between members to proceed to trial without requiring any issue of fact or law between Caldicott and Hector to be resolved, those issues could proceed to trial. He also noted Wallbank J's conclusion that where a single matrix of facts would support parallel causes of action against Hector and the Shareholder Defendants, then both sets of proceedings could proceed (in their respective fora).

[13] At paragraphs 27 and 28 of the Second Appeal Judgment, Theodore JA [Ag.] noted Wallbank J's rulings that:

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<sup>3</sup> BVIHCV2009/0394 (delivered 8<sup>th</sup> February 2010, unreported).

“it was not necessary for him to determine what the differences between the Claimant and the Shareholder Defendants were, considering that the ideal point at which this should be done would be at the case management conference...the proceedings against the Shareholder Defendants could continue, despite the stay against Hector, but only to the extent that Caldicott is able to pursue its claims “without requiring a difference between itself and [Hector] to be resolved.”

- [14] Theodore JA [Ag.] noted, at paragraph 29, that Wallbank J declared that there was no need for all matters contained in the statement of claim giving rise to differences between Caldicott and Hector to be removed from any claim remaining against the Shareholder Defendants, with the result that claims between Caldicott and those defendants could proceed in parallel with claims against Hector whenever issues of fact or law between Caldicott and Hector did not need to be determined before the claim against the Shareholder Defendants is ruled upon. He continued by explaining that Wallbank J noted that because no claims had been expressly pleaded by Caldicott against Hector, and that no defence had been filed by the Shareholder Defendants, it was permissible for Caldicott's claims against those defendants to proceed, at least until a viable defence was filed.
- [15] In paragraphs 31 onwards of Theodore JA [Ag.]'s judgment, he noted that the parties had agreed that Wallbank J ruled that the heads of relief for Hector to pay, or the Defendant Shareholders to procure Hector to pay the dividends, for the appointment of a liquidator, for an order setting aside the November Resolution, and for an order regulating the company's affairs would be stayed. Theodore JA [Ag.] continued by noting the claims that the judge allowed to proceed.
- [16] At paragraph 38 onwards of Theodore JA [Ag.]'s judgment he referred to the First Appeal Judgment, noting, in paragraph 41, that the First Appeal “concerned the refusal of the judge to grant a case management stay of the proceedings in favour of arbitration.” He did not set out the passage from Webster JA's judgment cited above.

[17] Paragraph 43 of Theodore JA [Ag.]’s judgment set out a precis of the grounds of appeal before the Court as follows:

“...(i) the judge applied the wrong test when determining whether particular claims ought to be stayed against the appellants; (ii) the judge erred in holding that where a single matrix of facts giving rise to differences between the respondent and the Company might support parallel claims against the Company those claims may proceed simultaneously; (iii) the judge mischaracterised the respondent’s claim which was in essence based upon the Company’s improper withholding of dividends from the respondent and was thus a matter giving rise to a difference between the respondent and the Company; (iv) the judge erred in not regarding the claims for declarations that (a) the Company’s November Resolution was void or voidable and (b) the withheld dividends are properly due and owing to the respondent, as illustrative of differences between the respondent and the Company; (v) the judge erred in finding that the claim for a declaration that the dividends are properly due was not required to be stayed when a stay had been ordered of the proceedings against the Company; and (vi) once the Company had disputed the claims for declaratory relief regarding the resolution and the dividends, a difference arose and the judge erred in allowing those claims to continue pro tem subject to later review.”

[18] Theodore JA [Ag.] returned to the grounds of appeal in paragraph 86 and following, where he set out counsels’ respective submissions. His consideration of those submissions starts at paragraph 84 of the judgment. In that section of his judgment, Theodore JA [Ag.] set out section 18 of the **BVI Arbitration Act**<sup>4</sup> (which gave effect to Article 8 of the UNCITRAL Model Law and thereby gave effect to what is known as the “mandatory stay” in favour of arbitration), and went on to consider the English Court of Appeal’s decision in **Republic of Mozambique (acting through its Attorney General) v Credit Suisse International & Ors**<sup>5</sup> where the courts were considering section 9 the English Arbitration Act 1996. He referred to paragraph 72 of Carr LJ’s judgment in the Court of Appeal, where she held that the test for a stay in favour of arbitration was a two-fold test, namely “...first to identify the matter and secondly to decide if that matter is one that the parties have agreed can only be arbitrated.”

[19] I pause here to note that in the **Mozambique** case the courts, at all levels, proceeded on the assumption that the arbitration agreement in question was

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<sup>4</sup> No. 13 of 2013 of the Laws of the Virgin Islands.

<sup>5</sup> [2021] EWCA Civ 329.

operative between the parties to the litigation – see the speech of Lord Hodge DPSC at paragraphs 9, 13 and 104 of the Privy Council’s decision in that matter.<sup>6</sup> Accordingly, and this was not expressly noted by Theodore JA [Ag.] in his judgment, there was no issue in the **Mozambique** case as to whether the parties were bound by an arbitration agreement; the question was whether the claims in question (relating to bribery, conspiracy to injure, and dishonest assistance) were “matters” covered by the arbitration agreements (that were assumed to be binding between the parties to the litigation).

[20] Before returning to Theodore JA [Ag.]’s judgment I should, for the sake of completeness, refer to the Privy Council’s decision in **FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation**,<sup>7</sup> a further decision of the Privy Council dealing with the court’s approach to what matters should, if the parties are subject to a valid arbitration agreement, be referred to arbitration under the stay provisions of relevant arbitration legislation. In paragraph 1 of his speech in that case, Lord Hodge expressed the issue in the appeal as being “whether an agreement to settle disputes arising out of a shareholders’ agreement by arbitration may prevent a party to that agreement from pursuing a petition to wind up the company whose management is the focus of those disputes.” Both the shareholder parties to those proceedings were parties to a shareholders’ agreement containing an arbitration clause. FamilyMart China Holding Co Ltd (“**FMCH**”), presented a petition to wind up China CVS (Cayman Islands) Holding Corp (“**CVS**”) which is the company that was subject to the winding up proceedings. Ting Chuan (Cayman Islands) Holding Corporation (“**Ting Chuan**”) was the majority shareholder in CVS.

[21] The petition was based on an alleged loss of trust and confidence between the shareholders and an irretrievable breakdown in the relationship, such that it was just and equitable that CVS be wound up. As Lord Hodge noted in paragraph 8 of his speech, the real aim of the petition was not the winding up of CVS but rather that Ting Chuan should be required to sell its majority stake in CVS to

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<sup>6</sup> [2023] UKSC 32.

<sup>7</sup> [2023] UKPC 33.

FMCH. He also noted, at paragraph 13, that the parties were agreed that the dispute fell within the scope of the arbitration agreement, and that the central issue on the appeal to the Privy Council was “whether FMCH’s petition .... for the winding up of [CVS] has made the matters raised in that petition not susceptible to arbitration.”

[22] At first instance, Kawaley J granted Ting Chuan’s application to stay the proceedings under the stay provisions of the Cayman Islands’ legislation. He attached no significance to the fact that neither the company nor the majority directors were parties to the shareholders’ agreement because the genuine dispute was between the minority shareholder and the majority shareholder (see paragraph 67 of the first instance judgment). He granted a mandatory stay of the winding up petition under the relevant legislation. The Court of Appeal reversed Kawaley J’s decision, holding that because the court had exclusive jurisdiction to determine whether to wind up a company on the just and equitable basis, the underlying issues (between the shareholders) were not susceptible to arbitration despite falling within the scope of the arbitration provision in the shareholders’ agreement.

[23] In section 5 of his speech, Lord Hodge set out the respective parties’ positions on the appeal. At paragraph 22 he noted Ting Chuan’s submission that the Court of Appeal erred in failing to grant a stay because, “(i) it and FMCH are parties to an arbitration agreement, (ii) FMCH has commenced legal proceedings against it, (iii) those legal proceedings are in respect of matters agreed to be referred to arbitration, and (iv) therefore it is entitled to a mandatory stay unless the Board is satisfied that the relevant matters are non-arbitrable.” In the following paragraph Lord Hodge set out the five matters that were live in the proceedings, and that four of them should be determined by arbitration. Those four issues were: (1) loss of trust and confidence; (2) irretrievable breakdown in trust and confidence; (3) whether it was just and equitable that CVS be wound up; and (4) whether FMCH should be granted alternative relief (i.e. an order that Ting Chuan sell its shares to FMCH). The one issue that FMCH did not assert was susceptible to determination in arbitration was whether, if alternative relief was not appropriate, CVS should be wound up. In

the alternative, FCMH argued that the loss of trust and confidence, and breakdown issues were arbitrable and that the proceedings should be stayed pending their arbitration.

[24] I now move on to paragraph 57 of Lord Hodge's speech. Having reviewed the jurisprudence on how courts had identified "matters" that are susceptible to arbitration, he said:

"From this brief review of international authorities the Board considers that there is now a general consensus among leading arbitration jurisdictions in the common law world that the domestic courts of countries that are signatories of the New York Convention respect and give priority to the autonomy of the parties to arbitration agreements. The statutory provisions of those countries provide for a mandatory stay of legal proceedings at the request of a party to an arbitration agreement when a matter in those proceedings is referable to arbitration. There is also a broad consensus on how to approach the determination of matters which must be referred to arbitration."

[25] At paragraph 78 of his speech, Lord Hodge agreed, as a general proposition, with dicta of Foster J in an Australian case, **WDR Delaware Corporation v Hydrox Holdings Pty Ltd**,<sup>8</sup> and approved an:

"approach to discrete matters which involve inter partes disputes in the context of a winding up application. Matters, such as whether one party has breached its obligations under a shareholders' agreement or whether equitable rights arising out of the relationship between the parties have been flouted, are arbitrable in the context of an application to wind up a company on the just and equitable ground and the arbitration agreement is not inoperative because the arbitral tribunal cannot make a winding up order."

[26] In his consideration of the application of the Cayman Islands' legislation to the facts of the case, Lord Hodge agreed that an arbitral tribunal did not have jurisdiction to make a winding up order. He further held, in paragraph 81, that in deciding whether to make a winding up order on the just and equitable ground, the Court would conduct an enquiry as at the date of the hearing, and that an arbitral tribunal's decision on whether it was just and equitable to do so, at, necessarily, an earlier date, could not determine the issue the Court has to decide at the hearing of the petition; as an arbitral tribunal did not have power

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<sup>8</sup> [2016] FCA 1164.

to rule on that it would not be competent for such a tribunal to rule on whether a share buy-out should be granted.

- [27] As to the remaining issues, namely the loss of trust and confidence, and the breakdown in the relationship between the shareholders, Lord Hodge noted that Kawaley J had ordered that the petition be treated as inter partes between FMCH and Ting Chuan and that a finding by the arbitral tribunal on those issues, would, under the relevant arbitration rules, be binding on them as parties to the arbitration. At paragraph 96 he held that those matters:

“..... are controversies relating to legal or equitable rights which are of substance. They are matters which lie at the heart of the legal proceedings in the Cayman Islands for an order under section 95 of the Companies Act. A declaration, for example, that Ting Chuan had breached FMCH's equitable rights and that their relationship had irretrievably broken down would be highly relevant to FMCH's application for a just and equitable winding up of the Company or in the alternative a share buy-out. They are also matters which the parties accept fall within the scope of the arbitration agreement.”

Accordingly, he held that those matters were “matters” within the meaning of the arbitration legislation for which a stay pro tanto of the winding up proceedings was mandated.

- [28] Section 10 of Lord Hodge's speech addressed the application for a discretionary case management stay of the winding up proceedings in so far as they were formally directed to parties other than Ting Chuan itself. Having found that jurisdiction to grant such a stay existed, he explained, at paragraph 99 that:

“As the winding up process is intended to be conducted with expedition, the court will, as a general rule, rarely wish to grant a stay of such proceedings. But a stay for arbitration is a special case. Where the shareholders of a company are engaged in an inter partes dispute which is within the scope of a binding arbitration agreement and an essential precursor to the determination of a winding up petition on the just and equitable ground, there are strong grounds for granting such a stay.”

- [29] He then went on to consider a number of authorities concerning stays of petitions where some of the issues that would call for arbitration, explaining, at paragraph 102, *obiter* that the Board:

“..... questions the proposition that a discretionary case management stay of winding up proceedings on the just and equitable ground where a substantial part of the dispute between the parties or some of the parties to the petition falls within the scope of a binding arbitration agreement should be granted only in rare and compelling circumstances. Such a conclusion appears to be inconsistent with the support which the courts give to arbitration and the trend of case law internationally.”

As the determination of the issues of the alleged loss of trust and confidence, and the breakdown in the relationship between the shareholders were essential precursors to the Court’s determination of whether it would be just and equitable to wind CVS up, which was the threshold for granting any remedy under the relevant Cayman Islands’ law, the Board was satisfied that it was appropriate to grant a stay.

[30] I shall consider the significance of **FamilyMart** in due course, but now return to Theodore JA [Ag.]’s judgment, and note that in paragraph 94, having considered **Mozambique** (in the Cayman Islands Court of Appeal), the learned Justice of Appeal held, at paragraph 94, that it was perfectly permissible for Wallbank J to have allowed the court proceedings to continue whilst staying matters which were the subject of the arbitration agreement between Caldicott and Hector. I agree entirely with that conclusion.

[31] Theodore JA [Ag.] was not critical of Wallbank J’s analysis of the “matters” before him, and also held, at paragraph 96, that Wallbank J “correctly appreciated that it would have been necessary for him to decide how much of the pleaded case and relief sought should be allowed to proceed and that this required him to construe the arbitration agreement” and continued that that agreement did not require the differences of members *inter se* to be determined in arbitration. However, he continued in paragraph 98 by suggesting that by adopting that approach Wallbank J was not paying sufficient regard to “the presumption in favour of arbitration of all differences established in” **Fiona Trust & Holding Corporation and others v Privalov and others**<sup>9</sup> that “the

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<sup>9</sup> [2007] 4 All ER 951.

construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.” He went on to refer to Lord Neuberger PSC’s dicta in paragraph 15 of **Arnold v Britton**<sup>10</sup> about how the Court should go about interpreting a written contract. Thus far, I have no difficulty with Theodore JA’s analysis, provided of course that proper regard is had to the words “the parties”. That is because arbitration agreements are contractual in nature and bind the parties thereto. However, an arbitration agreement between two parties would not, typically, be binding on a third party.

- [32] Next, at paragraph 100, Theodore JA [Ag.] alighted on paragraph 65 of Wallbank J’s judgment in which he said:

“[i]f it is possible for the claims between the members to proceed to a substantive determination without requiring any difference between the claimant and the Company to be resolved, then there is nothing stopping the claimant from pursuing those claims before this Court. If however, the claims between the claimant and the Shareholder Defendants require an issue of fact or law arising between the claimant and the Company to be resolved before a finding of fact or law can be made between the claimant and the Shareholder Defendants, or before a certain form of relief can be granted to the claimant, then the Claim between the Claimant and the Shareholder Defendants, or a part of that claim, will need to be deferred until the outcome of arbitration proceedings on such differences between the Claimant and the Company.”

I agree with this statement by Wallbank J.

- [33] Theodore JA [Ag.] then referred to the fact that in **Mozambique** the English Court of Appeal cited with approval Popplewell J in **Sodzawiczny v Ruham**<sup>11</sup> in which Popplewell J explained (at paragraph 43 (3), that:

“if the Court proceedings will involve resolution of any issue which falls within ***the scope of the arbitration agreement between the parties***, the court must stay the proceedings to that extent.” (emphasis added)

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<sup>10</sup> [2015] AC 1619.

<sup>11</sup> [2018] EWHC 1908 (Comm).

An important point must be made here; in **Sodzawiczny** the stay of the proceedings was sought by parties to the arbitration agreement (as regards non-parties to the relevant arbitration agreement, there was some discussion concerning the Contracts (Rights of Third Parties) Act 1999)). It occurs to me that the highlighted words are a statement of the obvious, namely that typically arbitration agreements bind the parties who have agreed to refer their differences to arbitration.

- [34] Paragraphs 102 and 103 of Theodore JA [Ag.]’s judgment are very significant. He says there:

“102 The test therefore is a simple one: whether any issue before the court falls within the scope of the arbitration agreement and not whether the claims between the respondent and the appellants required an issue of fact or law arising between the respondent and the Company to be first resolved.

103 The arbitration agreement under review here required all differences between the Company and its members relating to any of the affairs of the Company to be referred to arbitration.

104 In my view, therefore the learned judge erred by not applying the correct test.”

- [35] Paragraphs 102 and 103 are, of course, correct. Hector and its shareholders are bound by the arbitration provision in its articles of association. If either sues the other in relation to a “matter” that falls within the ambit of the arbitration provision then the defendant would have the right to seek a stay which would, in all probability be granted. However, none of the authorities cited to the Court lead to the conclusion that where one shareholder sues another the defendant may seek a stay of the proceedings. The arbitration provision in article 156 of Hector’s articles of association provides:

“Whenever any difference arises between the Company on the one hand and any of the members ... on the other hand, touching the true intent and construction or the incidence or consequences of these Articles or of the Act, touching anything done or executed, omitted or suffered in pursuance of the Act or touching any breach or alleged breach or otherwise relating to the premises or to these Articles, or to any Act or Ordinance affecting the Company or to any of the affairs of the Company such difference shall, unless the parties agree to refer the same to a single arbitrator, be referred to 2 arbitrators one to be chosen

by each of the parties to the difference and the arbitrators shall before entering on the reference appoint an umpire.”

Article 156 does not, on its face, apply to proceedings between shareholders themselves.

- [36] In paragraphs 105 onwards, Theodore JA [Ag.] considered grounds 3, 4 and 6 of the appeal. It is not necessary to deal with that part of the judgment, where the learned Justice of Appeal found that Wallbank J erred in not confining himself to the proper construction of the arbitration clause in question, and that had he done so, he would have concluded that differences had arisen between Caldicott and Hector regarding the November resolution and the matter whether the Company had improperly withheld dividends.
- [37] Ground 6 of the appeal concerned whether Wallbank J erred in allowing those claims to continue pro tem subject to a subsequent review. Theodore JA [Ag.]’s analysis, starting at paragraph 137 of his judgment, referred to the Court of Appeal’s decision in **Mozambique** to the effect that once an actual or reasonably foreseeable defence is identified, the Court needs to determine whether such defence is sufficiently connected to the arbitration agreement. He held that the judge erred in adopting a “wait and see” approach. That analysis was correct, and remains correct following the Privy Council’s decision in **Mozambique** (see paragraphs 72 to 75 of Lord Hodge’s speech).
- [38] I now turn to the Theodore JA [Ag.]’s conclusions. These have to be considered in light of the notice and grounds of appeal then before the Court. By paragraph 35.1 of the notice of appeal, the appellants (the Shareholder Defendants) sought, “an order staying [Caldicott’s] claims against the appellants until further order.” In the alternative, paragraph 35.2 sought orders staying all, or any of the claims for declaratory relief regarding the unlawfulness etc. or voidability of the November Resolution, and the assertion that the dividends were due and owing to Caldicott.

[39] The relief granted by the Court of Appeal is expressed at paragraph 143 of Theodore JA [Ag.]’s judgment. The appeal was allowed and (relevantly) provided that:

“The order by the learned judge permitting the seeking of a declaration that the resolution passed on 30th November 2019 is unlawful, void and of no effect or alternatively voidable is set aside and this head of relief shall be stayed for the duration of the stay or until further order.

The order by the learned judge permitting the seeking of a declaration that the dividends are properly due and owing is set aside and this head of relief shall be stayed for the duration of the stay or until further order.”

[40] Accordingly, this Court did not grant relief in the form prayed in paragraph 35.1 of the notice of appeal, “an order staying [Caldicott’s] claims against the appellants until further order”; rather, it limited the relief to that sought in paragraph 35.2. There was no appeal from that order.

[41] So, returning to the prayer to the amended statement of claim as it stood following the Second Appeal Judgment (see paragraph 5 above), the reliefs sought in paragraphs 1 and 2 were stayed. That left, as a matter of form at least, proceedings against the Shareholder Defendants for one of more of the following reliefs; a buyout of Caldicott’s interest, compensation, a buyout by Caldicott of the Shareholder Defendants’ interests, “such other order under s184I” of the **Act**, and damages.

### **The Preliminary Issue Application**

[42] Whilst the Second Appeal Judgment was outstanding, on 19<sup>th</sup> December 2022, the Court ordered that there be a trial of a preliminary issues, which trial was scheduled to take place over four days from 19<sup>th</sup> June 2023, (the parties having agreed, on 24<sup>th</sup> February 2023, a Consent Order for directions leading up to that preliminary issues hearing). The issue for determination was whether Caldicott held its shares in Hector as a nominee for a Mr. Chan Chew Keak. That issue was raised in paragraph 80 of the defence which asserts that if Hector was *prima facie* liable to pay the interim dividends, then there was no unfairness in withholding them as such withholding was justified by reason of the fact that Caldicott held its shares as a nominee for Mr. Chan or under his instruction. It

alleged that Mr. Chan had breached his duties to Hector (and other companies in the Hector group) and caused substantial loss, for which he had not compensated them. Paragraph 80.7 of the defence alleged an unlawful means conspiracy between Mr. Chan and Caldicott to injure (amongst others) Hector. These allegations were denied in the Reply.

[43] However, on 8<sup>th</sup> April 2023, i.e. shortly after the judgment in the second appeal referred to above had been delivered, the Shareholder Defendants applied for an order that the preliminary issue trial be vacated, and the Consent Order be stayed (the “**Vacation Application**”). That application was heard over two days, with the learned judge, Wallbank J giving a short *ex tempore* judgment at the conclusion of the second session of the hearing on 11<sup>th</sup> May 2023, which resulted in an Order dated 22<sup>nd</sup> May 2023 by which he (materially) ordered the vacation of the preliminary issue trial, the staying of the Consent Order for directions therefor, and that, “the issue in the proceedings of whether dividends were improperly withheld from the Claimant be stayed until further order.” I will return to the judgment in a while, but before doing so turn to the submissions made before the learned judge.

[44] In the “Summary” section of their written submissions for the Vacation Application, the Shareholder Defendants submitted: (1) that they had succeeded in the Second Appeal; (2) that the Second Appeal Judgment “holds that the proper test for the consequences of the stay order against [Caldicott] is whether any issue before the Court falls within the scope of the arbitration agreement”; (3) that the “Second Appeal Judgment holds that the issue of whether [Caldicott] improperly withheld the dividends is an issue caught by the arbitration agreement”, and that in consequence; and (4) the prosecution of that issue in the proceedings is now stayed.

[45] In paragraph 25 of their written submissions, the Shareholder Defendants referred to paragraph 102 to 104, and 129 of Theodore JA [Ag.]’s judgment, and submitted that the Court of Appeal held that: (1) the test for the application of the stay is whether any issue before the Court falls within the terms of the arbitration agreement; (2) the arbitration agreement in the instant case requires

all differences between Hector and its members relating to Hector's affairs to be referred to arbitration; (3) on the proper construction of the arbitration provision, a difference had arisen between Caldicott and Hector as to whether the dividend had been improperly withheld; and (4) the issue whether Hector had improperly withheld dividends is therefore stayed. From this it was suggested that Caldicott's case concerning the improper withholding of dividends had been stayed pending determination of that issue in the arbitration, because "that is a difference that has arisen between Caldicott and [Hector]."

[46] In section J of their written submissions before Wallbank J, the Shareholder Defendants asserted that the Second Appeal Judgment determined which matters fell within the scope of the arbitration clause and that it was, "not ...limited to excising a limited number of heads of relief. It is just that certain heads of relief are thereby entirely excised." They asserted that the issue of the improper withholding of dividends is a matter falling within the scope of the arbitration clause and that it followed that Caldicott could not proceed with its case on that issue pending resolution in the arbitration. They conceded that what they called the "general heads of relief" (purchase order, compensation, sale order, and "such other order under s184I", and damages) were not expressly ordered to be stayed and that they could be pursued, provided that, that was not on the basis of the unfair prejudice based on the withholding of dividends.

[47] Turning now to Caldicott's written submissions before Wallbank J on the Vacation Application, Caldicott asserted (at paragraph 2) that: (1) vacating the preliminary issue trial would be inconsistent with the First Appeal Judgment; (2) the Second Appeal Judgment was concerned only with the limited question of relief, i.e. which heads of relief would proceed to trial and which of those were caught by the arbitration clause; (3) the only issue in the preliminary issue trial was the relationship between Mr. Chan and the Company and does not give rise to any difference that would be caught by the arbitration clause; and (4) vacating the preliminary issue trial would be inconsistent with the overriding objective.

[48] Caldicott's written submissions cited Webster JA's judgment in the First Appeal at length, emphasising paragraph 49 thereof (see paragraph 6 above), and

submitted, amongst other things, that the Court of Appeal, “rejected any argument by the Shareholder Defendants” that the proceedings against them should be stayed in favour of arbitration”, that the Court of Appeal upheld Wallbank J’s finding that the unfair prejudice claim was a separate cause of action from that in the arbitration, and that there was no sufficient overlap between the liability of Hector and the Shareholder Defendants to warrant a stay. It asserted that the Court of Appeal recognised that the real complaint was that the Shareholder Defendants caused Hector to withhold the dividends and that there was no sufficient overlap to warrant a stay. They said that the Court of Appeal recognised that the real complaint is that the Shareholder Defendants caused Hector to withhold the dividend and that their conduct needed to be investigated.

[49] In section D of those submissions, they asserted that the Second Appeal Judgment “was only concerned with the issue of relief and does not have the effect of staying the unfair prejudice claim against the Shareholder Defendants”, and that that appeal “was only concerned with the question of which heads of relief would proceed to trial and which of those were caught by the arbitration clause”. Caldicott sought to support that by reference to the Headnote of the Second Appeal Judgment and various passages in Theodore JA [Ag.]’s judgment (paragraphs 60 to 62). Whilst acknowledging that Theodore JA [Ag.] found that Wallbank J had failed to apply the correct test in determining whether particular claims against the Shareholder Defendants were caught within the scope of the arbitration agreement (and should be stayed), the Court of Appeal recognised (at paragraph 94 of the Second Appeal Judgment) “it was perfectly permissible in principle for the judge to have decided to allow the court proceedings to continue while staying the matters which were the subject of the arbitration agreement between the respondent and the Company” and that it was in that context that Wallbank J had applied the wrong test in determining what relief could continue to be pursued. Caldicott notes that the order following the Second Appeal did not stay all the grounds of relief.

[50] Section E of Caldicott’s submissions before Wallbank J pointed out that the “limited” issue for determination in the preliminary issue trial was the relationship

between Mr. Chan and Caldicott, which, so Caldicott said, self-evidently does not touch upon any difference between Hector and Caldicott; therefore there was no basis to vacate the preliminary issue trial.

- [51] The balance of Caldicott's submissions related to whether vacating the preliminary issue trial would be contrary to the overriding objection.

### **The judgment below**

- [52] Wallbank J delivered an *ex tempore* judgment. He explained that the matter had exercised him considerably and that whilst he saw merit on both sides of the argument, albeit with some concern, he was compelled to reach the conclusion that the Shareholder Defendants were correct. His reasoning appears to be as follows (references being to the transcript of the hearing on 11<sup>th</sup> May 2023):

- (1) The nominee issue was not before the Court of Appeal and not known to the Court of Appeal when it made either of its rulings.<sup>12</sup>
- (2) That issue is a fundamental aspect of the dispute between Hector and Caldicott, and therefore one which would fall within the arbitration agreement.
- (3) Paragraph 102 of the Court of Appeal's judgment explained that "the test therefore is a simple one: Whether any issue before the court falls within the scope of the arbitration agreement ..." and accordingly "it is clear that the nominee issue goes to the point whether ... Hector was right or wrong to withhold dividends. So, it falls within the arbitration agreement".<sup>13</sup>
- (4) Whilst he was "disconcerted" by the Second Appeal judgment ruling in relation to claims for declarations (that he had allowed to go forward), the Court of Appeal had not stayed the unfair prejudice claim, even though it knew that that claim was based on the wrongful withholding of

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<sup>12</sup> Transcript of proceedings page 58 lines 13 to 19.

<sup>13</sup> Transcript of proceedings page 58 line 20 to page 59 line 4.

dividends. He explained “that has really caused me a lot of concern” and that “frankly, I am not sure that I understand why the Court of Appeal didn’t do that”, and continued, “I rather think that the Court of Appeal did think that separate causes of action as between shareholders should be allowed to proceed”.<sup>14</sup>

(5) The question was whether an unfair prejudice claim based on the unlawful and improper withholding of dividends should be allowed to proceed, and it would have been helpful for the Court of Appeal to have given an indication on that, but it did not. That caused him some concern and caused him to doubt whether or not his decision to prefer the Shareholder Defendants’ submissions was actually correct.<sup>15</sup>

(6) He was concerned by paragraphs 97 and 98 of Second Appeal judgment. Pausing here, these read:

“[97] The consideration of the second limb of the test calls for the proper construction of the arbitration agreement in question. The Judge, after noting that the arbitration agreement did not call for arbitration in respect of members’ differences inter se, stated that, absent an agreement to the contrary, the right of recourse of potential litigants to a court of law in preference to arbitration should not be negated or lightly removed.

[98] By the adoption of that approach the Judge was not giving sufficient regard to the presumption in favour of arbitration of all differences established in **Fiona Trust & Holding Corporation and others v Privalov and others**.<sup>16</sup> In **Fiona Trust** the court found that:

“... the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.”

(7) He acknowledged that the First Appeal Judgment drew a clear distinction between separate causes of action between a company and

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<sup>14</sup> Transcript of proceedings page 59 lines 5 to 18.

<sup>15</sup> Transcript of proceedings page 59 line 19 to page 60 line 2.

<sup>16</sup> [2007] 4 All ER 951.

its shareholders and between shareholders, which was anchored on an arbitration agreement that referred disputes between a company and shareholders to arbitration but not disputes between shareholders.<sup>17</sup>

(8) However, the Second Appeal Judgment did not mention that distinction “and it kind of runs together, the members and the Company, thereby blurring the distinction between a cause of action or a dispute between the shareholders and the Company and the cause of action and a dispute between the shareholders themselves”.<sup>18</sup>

(9) The learned judge found it difficult to understand “how the independent cause of action of shareholders between themselves is respected by an understanding that they should somehow be deemed to defer to arbitration between a member and a company, which is a separate legal entity”.<sup>19</sup>

(10) “But for the simple test which the Court of Appeal has recognised, paragraph 102 [of Theodore JA’s judgment], I would have been quite comfortable going with Mr. Movereley Smith’s entire case on this preliminary issue point”.<sup>20</sup>

(11) That (i.e. Mr. Movereley Smith’s case) was “somewhat more understandable” if one approaches the problem from the aspect of respecting rights of action as between shareholders as being separate from causes of action disputes [sic] between shareholders and the Company. But I do understand that the Court of Appeal in its second Judgment said that that’s the wrong approach and, obviously, I have to follow that”.<sup>21</sup>

(12) Logically, where there is an issue concerning nomineehip in a dispute between a company and a member as to whether dividends were

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<sup>17</sup> Transcript of proceedings page 60.

<sup>18</sup> Transcript of proceedings page 61 lines 3 to 7.

<sup>19</sup> Transcript of proceedings page 61 lines 13 to 19.

<sup>20</sup> Transcript of proceedings page 62 lines 1 to 4.

<sup>21</sup> Transcript of proceedings page 62 lines 5 to 12.

payable, then that is part of the dispute and has to be stayed in favour of arbitration.<sup>22</sup>

(13) He ended by explaining that it was all rather complicated and was not fully comfortable with the result, particularly in view of the Court of Appeal's order (which only "knocked out" the declarations and did not touch anything else).

[53] It is unsurprising that the learned judge granted leave to appeal.

### **The Notice of Appeal**

[54] By its notice of appeal, Caldicott asserts that:

(1) Wallbank J erred by failing to recognise the limited scope of the Second Appeal Judgment "which only concluded that the Judge had been incorrect in deciding not to stay relief that had been sought against the Company, namely the Resolution Declaration and the Dividend Declaration, but to wait and see whether the Company contested that relief." It says that "in determining that those claims against the Company should have been stayed at the outset, the Court of Appeal on the Second Appeal was making no finding as to whether, as against the Shareholder Defendants, the appellant could continue to litigate the issue of whether the Shareholder Defendants and wrongfully caused the Company to withhold dividends"; and

(2) Wallbank J erred in law in deciding that the issue in the proceedings of whether dividends were improperly withheld from Caldicott was required to be stayed until further order on the basis that it touches and concerns Hector's conduct.

[55] Under ground 1 of its appeal, Caldicott suggests that the learned judge erred in not recognising the limited scope of the Second Appeal because that appeal concluded that Wallbank J had been wrong not to stay the relief that had been

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<sup>22</sup> Transcript of proceedings page 62 lines 13 to 19.

sought against Hector. It says that “In determining that the Second Appeal Judgment required him to stay the issue in the proceedings of whether the dividends were improperly withheld from the appellant the judge failed to recognise that the First Appeal Judgment expressly recognised that proceedings against the Shareholder Defendants claiming that they had caused the Company to withhold dividends improperly could proceed notwithstanding that claims against the Company should be stayed.” Caldicott continues that, “The order made by the Court of Appeal consequent on the Second Appeal Judgement is expressly limited in scope and is confined to staying the relief sought against the Company, namely the Resolution Declaration and the Dividend Declaration” and that “the Second Appeal Judgment did not seek to modify, qualify or otherwise restrict the meaning and effect of the First Appeal Judgment.”

[56] Caldicott then asserts that the learned judge ought to have held there was no basis for a stay of the issue whether the dividends were improperly withheld from it. That is because, as this Court acknowledged in the First Appeal Judgment, Caldicott’s “real complaint” is that the Shareholder Defendants who caused Hector to withhold dividends, because Hector can only act through human agents, and the presence of the Company is not essential to determine the real issue in dispute between the parties. It says that because there is no arbitration agreement between Caldicott and the Shareholder Defendants, causes of action between it and them should continue “ahead of or in tandem” with the arbitration agreement. Reliance is placed on paragraph 51 of the First Appeal Judgment.

[57] Caldicott continues by suggesting that the Second Appeal Judgment only concluded that Wallbank J had been incorrect in deciding not to stay the relief that had been sought against Hector in light of Hector’s successful application to stay the unfair prejudice claim against it. It refers to paragraph 61 of the Second Appeal Judgment. It says that the Second Appeal Judgment expressly noted that it was permissible for the learned judge to decide to allow the Court proceedings to continue whilst staying the matters that were the subject of the arbitration agreement between Hector and Caldicott, and notes that the

Shareholder Defendants had sought an order in the Second Appeal staying all claims against them until further order, and that this Court had not granted them that relief.

[58] Caldicott's second ground of appeal is that Wallbank J erred in law in deciding that the issue in the proceedings of whether dividends were improperly withheld should be stayed until further order. It says that in doing so, Wallbank J has "effectively overruled the First Appeal Judgment and impermissibly extended the scope of the arbitration agreement." It suggests that such a decision would mean that all unfair prejudice claims under section 184I of the Act would fall to be stayed in favour of arbitration, because such claims "inevitably touch on the conduct of a company" if, as is commonly the case in the BVI, there is an arbitration clause in the Memorandum and Articles of Association of the relevant company.

[59] The relief sought in the notice of appeal is "an order setting aside the stay of the issue in the proceedings of whether the dividends were improperly withheld from" Caldicott and that the proceedings be remitted to Wallbank J for directions.

[60] Turning to the parties' written submissions, under ground 1 of the appeal, Caldicott urged the Court to understand that the context of the Second Appeal was an appeal of the Order of 9<sup>th</sup> February 2021, "the sole purpose of which was to determine matters arising as a consequence of the stay that had already been granted against [Hector]." In support of this, Caldicott refers to various passages of Theodore JA [Ag.]'s judgment, including the following (emphasis as per Caldicott's appeal submissions):

**"[60] Because it was only at the Consequentials Hearing that the court delved with more specificity into the heads of relief that were, or were not, caught by the stay order of 28th April 2020, I do not believe that it would be fair to the appellants to deprive them of the opportunity to argue points of law which arose during the Consequentials Hearing and which were not decided in the First Appeal (emphasis added)**

[61] It is therefore necessary to examine the grounds of the present appeal to determine whether they raise issues which were, or could have been, taken in the First Appeal. **It is useful to recapitulate here that what was**

**before the court below was an application by the Company to stay an unfair prejudice claim against it, which resulted in the stay being granted as prayed, but only in relation to the Company so that the claim continued as against the appellants. At the Consequential Hearing the court then sought to determine which of the heads of relief would proceed to trial. (emphasis added)"**

[61] The argument is developed by Caldicott suggesting that the Second Appeal Judgment decided that that the heads of relief sought against Hector, namely the declaration that the resolution of 30<sup>th</sup> November 2019 was unlawful etc. and the declaration that the dividends are properly due and owing to Caldicott ought to have been stayed at the outset and that Wallbank J erred in allowing them to go to trial. Caldicott says "what the Second Appeal Judgment did not do was to make any orders to stay the heads of relief as against the Shareholder Defendants."

[62] Pausing here, I am not sure I can accept that argument. As noted above, the Shareholder Defendants' notice of appeal for the Second Appeal sought an order staying Caldicott's claims against them in their entirety, or, in the alternative an order staying Caldicott's claims for declarations relating to the unlawfulness etc or voidability of the November Resolution, and that the dividends were properly due and owing to Caldicott. That is the relief that was granted in paragraph 143 of the Second Appeal Judgment. By Order of 28<sup>th</sup> April 2020, Wallbank J had stayed the proceedings against Hector in favour of arbitration and there was no appeal from that Order. From that time on, so it seems having perused the bundles in the instant appeal, Hector's name was removed from the title of the proceedings with each of the Shareholder Defendants, who had previously been the second to fourth defendants, moving up a number.

[63] Accordingly, I find it difficult to follow the argument that "what the Second Appeal Judgment did not do was to make any orders to stay the heads of relief as against the Shareholder Defendants." That argument runs contrary to the way the appeal was framed in the notice of appeal on the Second Appeal and Hector was not a party to that appeal. Whether or not there was any confusion on the part of any of the parties, and the case is procedurally tricky, it seems to me that

when Theodore JA [Ag.] granted the relief set out in paragraph 143 of his judgment, that relief could only have been effective “as against the Shareholder Defendants”; there was no claim left against Hector.

[64] Caldicott’s written submissions seek to make good the argument that the Second Appeal Judgment did not make any orders staying heads of relief as against the Shareholder Defendants by reference to various paragraphs of that judgment, which I set out below:

“[115] The judge had ruled at paragraph [80] of the Judgment that the mere fact that relief is being sought against the Company does not automatically mean that there is an underlying difference between the Company and the minority shareholders which prevents the claim against the majority from proceeding.

[116] The judge stated that it was possible for the respondent to establish that the 1<sup>st</sup> named appellant’s conduct was wrongful without the need for any difference between the respondent and the Company to be resolved in arbitration. This was so, the Judge stated, since the declarations sought involved a conclusion of law as to the effect of someone else’s conduct - in this case the 1st named appellant’s. If his conduct was indeed found to be wrongful, the legal consequence may well be a ruling that the resolution was void, unless the Company disputed that legal effect, thereby giving rise to a difference.

[117] The judge was of the view that it was only when there was a contest as to whether a certain conclusion of law that affects the Company inevitably follows a certain finding of fact that the matter ought to be stayed pending arbitration.

[126] At paragraph [80] of the judgment the judge in the case at bar stated:

“Here the conduct complained of is of the Shareholder Defendants and in particular of the second defendant. The claimant can in principle establish and obtain a finding of fact that that conduct was wrongful without the need for any difference between the claimant and the Company to be resolved in arbitration. If the conduct was wrongful, then in principle a finding that this caused the resolution to be unlawful, void and of no effect might follow irresistibly as a matter of law. If the Company simply cannot dispute such a legal effect no difference arises in reality between the Claimant and the Company on this point.”

[127] The judge was, in the last sentence, seeking to apply the ‘was there in fact any dispute’ test which had become inapplicable by virtue of the omission from the current BVI Arbitration Act of the underlined words in paragraph [122] above.

[128] To that extent the judge was plainly wrong.

[129] Had the judge confined himself to the proper construction of the arbitration clause it seems clear to me that he would have found that differences had arisen between the respondent and the Company regarding the November Resolution and the matter as to whether the Company had improperly withheld dividends from the respondent.”

- [65] No matter how one might try and parse these passages upon which Caldicott places reliance, I do not see how they support Caldicott’s proposition, which, I repeat, is that “what the Second Appeal Judgment did not do was to make any orders to stay the heads of relief as against the Shareholder Defendants.” Wallbank J opened his judgment of 13<sup>th</sup> October 2020 by saying:

“This judgment concerns the consequences of an order that part of the proceedings be stayed in favour of arbitration, in respect of claims against the First Defendant [Hector]. The other defendants [i.e. the Shareholder Defendants] seek orders which would essentially also stay, or stop, the proceedings from continuing against them, or which would eviscerate the claimant’s statement of claim such that it would be difficult to see how the remaining claims could proceed to trial. Alternatively, the other defendants are prepared to accept that a very narrow set of reliefs can proceed. The claimant, predictably, argues for a much broader ability to pursue its claims against the other defendants.”

At paragraph 3 of that judgment, Wallbank J noted that in April 2020, he had made an order staying the claims made and the relief sought by Caldicott against Hector in favour of arbitration. Paragraph 1 of Theodore JA [Ag.]’s judgment in the Second Appeal noted that, “this is an appeal against the judgment of the learned trial judge.... delivered on 13<sup>th</sup> October 2020 ..... and the order dated 9<sup>th</sup> February 2021.” The notice of appeal on the Second Appeal was filed by the Shareholder Defendants alone; it seems that Hector took no further part in the proceedings.

- [66] Thus, it seems to me plain that whatever Theodore JA [Ag.] was addressing in the passages set out above, it cannot be said that he was considering what claims could be proceeded with in the BVI litigation against Hector; that had been stayed. It follows that Caldicott’s submissions that the Second Appeal Judgment did not make any orders staying heads of relief against the Shareholder Defendants is unsustainable.

[67] Further, it seems to me that Caldicott is inviting the Court to read far too much into the passages of the Second Appeal Judgment that it relies upon. Those passages appear in Theodore JA [Ag.]’s analysis of the third, fourth, and sixth grounds of appeal that were before the Court, as set out below:

“Ground 3: the learned judge fell into error in finding that all of the claims for relief against the appellants did not fall to be stayed when a stay had been ordered of the proceedings as against the Company in favour of arbitration in accordance with the arbitration agreement.

Ground 4: the learned judge fell into error in finding that the claim for declaratory relief that the resolution passed on 30<sup>th</sup> November 2019 is unlawful, void and of no effect was not required to be stayed when a stay had been ordered of the proceedings as against the Company in accordance with the arbitration agreement.

Ground 6: the learned judge fell into error in finding that the claim for declaratory relief that the dividends are properly due and owing to the respondent was not required to be stayed when a stay had been ordered of the proceedings as against the Company in accordance with the arbitration agreement.”

[68] Those grounds plainly went to whether heads of relief against the Shareholder Defendants should be stayed, and the passages from Theodore JA [Ag.]’s judgment upon which Caldicott relies are part of his reasoning in concluding that Wallbank J had erred.

[69] Caldicott’s skeleton argument on this appeal argues that the principal relief the Shareholder Defendants had sought before Wallbank J was a stay of all of Caldicott’s claims against them and that this relief was rejected on appeal. That is correct. But what is not correct is the statement in paragraph 20 of the skeleton argument that “the appeal was allowed only to the extent of staying the prayers against the Company for the Resolution Declaration and Dividend Declaration.” The order in paragraph 143 of Theodore JA [Ag.]’s judgment can only apply to the reliefs sought against the Shareholder Defendants.

[70] But even if all this is wrong, it is clear that the order pursuant to the Second Appeal Judgment can only be viewed through the lens of the notice of appeal therein. The Shareholder Defendants appealed Wallbank J’s Order of 9<sup>th</sup>

February 2021 and this Court's judgment on that, and in particular, the order as set out in paragraph 143 of that Judgment, says what they say. There was no appeal. The order plainly relates to heads of relief sought against the Shareholder Defendant shareholders. I fully understand the concerns expressed by Wallbank J in his *ex tempore* judgment, however in my opinion he correctly understood the Second Appeal Judgment. Whether it was right or wrong was nothing to the point; indeed it is nothing to the point whether this Court as currently composed would likely have reached the same conclusion.

[71] Turning now to Caldicott's second ground of appeal, that is that, "the judge erred in law by deciding that the issue in the proceedings of whether dividends were improperly withheld from [Caldicott] ought to be stayed until further order." It is suggested that Wallbank J acted wholly inconsistently with the First Appeal Judgment, and impermissibly extended the scope of the arbitration agreement." It is said that that could not have been the intention of the Second Appeal Judgment. Caldicott says that the First Appeal Judgment rightly pointed out that unfair prejudice claims are usually contested between the shareholders and that the real complain is that the Shareholder Defendants caused Hector to withhold the dividends. It notes that the presence of the company in unfair prejudice proceedings is not essential to determine the real issue in dispute. Caldicott particularly relies on paragraphs 49 to 51 of the First Appeal Judgment.

[72] Caldicott further argues that, "for the Judge to have decided the way he did would mean that even though there is no arbitration agreement as between the shareholders of a company, all unfair prejudice claims under section 184I of the **BCA**, which invariably touch on the conduct of a company, would have to be stayed in their entirety in favour of arbitration if (as is commonly the case in the BVI) there is an arbitration clause solely between the company and its shareholders in the Memorandum and Articles of Association."

[73] I now consider the Shareholder Defendants skeleton argument in opposition to the appeal. In relation to ground 1 of Caldicott's appeal, they make the point that the First Appeal concerned the application of the Shareholder Defendants for a stay purely on case management grounds. Pausing here, so much is clear

from the First Appeal Judgment (see paragraphs 1, 8, 42 to 46, and 52). They therefore make the point that the Shareholder Defendants lost that appeal purely on the grounds of case management (a point with which Theodore JA [Ag.] expressly agreed in paragraph 65 of the Second Appeal Judgment). They go on to say that in the Second Appeal Judgment the Court acknowledged Webster JA's remarks concerning Wallbank J's decision to allow the claim to proceed, those remarks did not bind the parties as to which of the matters within the proceedings fell within the scope of the arbitration agreement and, so they say, fell to be stayed.

[74] On this issue, the Shareholder Defendants asserted that the distinction is between: (i) staying the entire proceedings as a matter of case management; and (ii) staying the determination of particular issues or matters which are caught by the terms of the arbitration provision. They say that the question of which matters fell within the arbitration agreement was the subject of the Second Appeal and was not addressed in the first.

[75] In relation to the Second Appeal, the Shareholder Defendants suggest that the Court of Appeal allowed the appeal on all grounds. I am not sure this is correct. As noted above, whilst paragraph 143 of its judgment allowed the appeal, it did not grant the full relief prayed in the notice of appeal.

[76] They refer to paragraphs 97 and 98 of Theodore JA [Ag.]'s judgment and highlight that he considered that Wallbank J had fallen into error when he stated that absent an agreement to the contrary the right of recourse of a litigant to a court should not be lightly removed such that Wallbank "was not giving sufficient regard to the presumption in favour of arbitration of all differences." They refer to paragraphs 102 to 104 of Theodore JA [Ag.]'s judgment (set out at paragraph 34 above). I have already noted that I have some difficulty with those paragraphs.

[77] The Shareholder Defendants assert that in the Second Appeal the Court held that the test for the application of a stay is whether any issue before the court in the proceedings falls within the scope of an arbitration agreement; that the

relevant agreement in the instant case required all difference between Hector and its members relating to the affairs of the Company to be referred to arbitration; that a difference had arisen between Hector and Caldicott regarding as to whether Hector had improperly withheld dividends and therefore that issue is stayed. From this it follows that Caldicott's case concerning the improper withholding of dividends has been stayed pending resolution in arbitration and it would be a breach of the stay, or an abuse of process for Caldicott to seek to progress that issue in the current proceedings.

- [78] In paragraph 52 of their skeleton argument, the Shareholder Defendants suggest that the Second Appeal “was not concerned only with heads of relief or with excising a limited number of heads of relief.” They say it was concerned with “issues” and “matters” much more broadly. I cannot agree with that. Whilst Mr. Collingwood KC sought to refer to passages from the Second Appeal Judgment, he cannot get away from the fact that his clients’ notice of appeal sought an order staying all “claims” against his clients, and in the alternative “an order staying [Caldicott’s] claim for all, alternatively any, of the following relief .....” (see paragraph 38 above). They continue by saying “while it is correct that certain heads of relief were entirely excised in the Second Appeal Judgment, the decision is not so limited”, and support this assertion by reference to two extracts from Theodore JA’s judgment, namely (emphasis as per the skeleton argument):

“[64] [The Shareholder Defendants] have thus indicated that the present appeal explores the issue of whether the correct legal test has been applied when **deciding what issues were caught by the stay against the Company**. Mr. Collingwood KC contrasted this with the focus of the First Appeal which was a challenge to the Judge’s exercise of his case management power to grant the stay (emphasis added).”

[65] **I agree**. In my view, the First Appeal questioned the exercise of the judge’s discretion to dismiss [the Shareholder Defendants’] application for a case management stay of the proceedings in favour of arbitration whereas **this appeal questions the test applied by the Judge in determining which of the matters in the proceedings fell within the scope of the arbitration clause** (emphasis added).”

- [79] This leads the Shareholder Defendants to submit that the issue of whether dividends were improperly withheld from Caldicott is a matter falling within the

scope of the arbitration agreement, and that Theodore JA [Ag.] so held, in terms. Accordingly, they submit that Caldicott cannot continue with its case based on that issue pending the resolution of the arbitration.

- [80] The Shareholder Defendants then submit that the general heads of relief in the amended statement of claim are not so limited as those expressly ordered to be stayed by the Court of Appeal. They suggest that those heads of relief “are potentially based upon grounds not stayed by reason of the stay of the issue concerning the withholding of dividends, for example the discriminatory conduct at the November EGM.” Thus, they suggest that although the general heads of relief are allowed to remain, they cannot be pursued upon a ground of unfair prejudice based upon the withholding of dividends, because that is an issue caught by the arbitration agreement, which has been stayed.
- [81] As to ground 2 of Caldicott’s appeal, the Shareholder Defendants submit that the learned judge correctly applied the Second Appeal Judgment. They submit that whilst Caldicott refers to various passages in the First Appeal Judgment (in particular, paragraphs 49 to 51) in support of its contention that the proceedings may continue to determine the issue of the improper withholding of dividends, Caldicott relied upon those same passages in its submissions on the Second Appeal in support of its argument that the Second Appeal was a collateral attack on the First Appeal. They note that those submissions were rejected by Theodore JA (see paragraphs 47 to 66 of the Second Appeal Judgment). The Shareholder Defendants go on to repeat that the First Appeal was limited to a consideration of a case management stay and that the remarks therein as to what claims could proceed did not express any definitive view and were *obiter dicta*.
- [82] At paragraph 66 of their skeleton argument, the Shareholder Defendants say “There is an arbitration agreement between the shareholders of the Company and Caldicott falls into error in asserting otherwise. It is in the statutory contract constituted by the Articles. The Shareholder Defendants are party to that agreement.” They continue by suggesting that the correct application of the arbitration agreement, as set out in the Second Appeal Judgment, does not

undermine the purpose of section 184I of the Act, because the parties have consensually made themselves parties to such an agreement and are entitled to its performance, and it would be “perverse” if a party was able to subvert the terms of that agreement by bringing a claim in unfair prejudice instead of having it resolved by arbitration “as agreed”.

[83] Finally, the Shareholder Defendants say that the reference to arbitration does not apply in all circumstances; it only applies where the issue is within the ambit of the arbitration clause. In support of this they rely upon Bannister J’s decision in **Ennio Zanotti v Interlog Finance Corporation and others**<sup>23</sup> which, they submit, applies a distinction between a dispute that is in substance between the minority shareholder and the company (such as a claim to set aside Hector’s November resolution), and a dispute between the minority shareholder and other members (such as the removal of a director which evidenced a breakdown in trust and confidence, as opposed to being the subject of a claim to set aside the resolution). They submit that the former example touches upon differences between the member and the company and is caught by the arbitration provision, whereas the latter does not.

[84] I pause here to consider **Zanotti** in a little detail. In that case, Bannister J was dealing with an application by the first defendant company (Interlog) under 6 of the Arbitration Ordinance, seeking a stay, as against it, of proceedings brought against it (and others) for relief under section 184I of the **Act**. The original members of Interlog were two brothers, Ennio (the claimant) and Enzo (the second defendant). Ennio alleged a long-standing business relationship between him and his brother, during which they formed a Panamian company (“**ESKO**”). His pleaded case was that some years later it was decided to form Interlog to hold the shares in ESKO (and that this was done), with Ennio and Enzo holding the non-voting shares equally, with Enzo’s son, Franco, holding the voting shares. Ennio pleaded a relationship of trust and confidence, that he was to remain on Interlog’s board and have day-to-day management, all major decisions would be taken equally, and that profits would be distributed equally.

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<sup>23</sup> BVIHCV2009/0394 (delivered 8<sup>th</sup> February 2010, unreported).

- [85] Subsequently, Enzo transferred his shares to another company (Sefta).
- [86] The pleadings alleged a breakdown in the relationship of trust and confidence, and, amongst other things, that Enzo (after the transfer of his shares, and therefore whilst not a member of Interlog) caused a members' resolution to be passed removing Ennio from Interlog's board, and that thereafter the remaining members of the board caused him to be removed from various company positions. Simultaneously, Sefta transferred the share Enzo originally held to the third defendant. All this was followed by an increase in Interlog's shares, and Enzo was invited to subscribe for new shares within a month. Enzo did not take up the offer (saying, amongst other things that his request for information regarding the terms of the offer was rejected by Interlog).
- [87] In November 2009, Enzo issued the claim form and served it on Interlog. It sought a declaration that Interlog's affairs had been conducted in an unfairly prejudicial manner, that one or more of the defendants should buy Enzo's shares, alternatively that the resolutions removing him as a director should be set aside, compensation, and accounting. By the time of Bannister J's judgment, the other defendants had not been served. However, Interlog applied to strike out or dismiss the claims. It was argued under s 6 of the Arbitration Ordinance alone, which was in play in view of an arbitration provision in Interlog's Articles of Association.
- [88] In paragraph 12 of his Judgment, Bannister J said:
- “It will be observed that Article 143, which otherwise is in the broadest of terms, is expressed to apply to any difference between the Company “on the one hand” and any of its members or their assigns, etc. “on the other hand”. Only such a difference is required by Article 143 to be referred to arbitration. There is no doubt that the pleadings raised complaints directly against the Company, but they also raise complaints against the second and (possibly) third Defendants. It will be seen from the summary I have given above that the complaints against the Company are interwoven with those made against the second (and Third) Defendants. It is clear that differences of the latter character are not caught by Article 143.”

[89] Bannister J went on to frame the issue he had to determine as whether, “if it is possible to say that a difference within the meaning of article 143 has arisen between the claimant and the Company, the article requires that that difference be hived off and sent to arbitration; or whether the fact that the difference between the claimant and the Company is part only of the nexus of pleaded complaints involving not only the Company, but its members, means that article 143 has no application, because it applies only to situations where the Company is in dispute with a member or members without further complication.” Pausing here, it is clear that Bannister J was not deciding whether any issues between the members, that were bound up with the issues between Enzo and Interlog, should be stayed for arbitration. The other defendants had not even been served by that time.

[90] In paragraphs 15 and 16 of his judgment, Bannister J held that it was possible to identify complaints Enzo made against Interlog “directly and which can be said to be discrete from complaints made against” the other defendants. He observed that “it may be said that there is no “difference” between the claimant and the Company about his removal from the board, since it is not pleaded that that removal was defective or unlawful, but merely ..... that it evidences a breakdown of trust and confidence between the claimant and the Second Defendant.” However, Bannister J formed a different view about the rights issue, because this had caused a difference, directly, between Enzo and Interlog. He also held that in seeking a share buyout, and the setting aside of resolutions, both at board and general meeting level, rectification of records, compensation, demonstrated that differences had arisen, directly, between Enzo and Interlog. Whilst those differences gave rise to connected, inextricably interwoven, differences between Enzo, Ennio, and Nautilus, as Interlog could only act through human agency, Bannister J concluded that that did not mean that the arbitration provision could not apply, and that the disputes he had identified must go to arbitration (unless the arbitration provision was null and void etc. within the meaning of the Ordinance).

[91] Bannister J went on to consider whether the arbitration provision, insofar as it may preclude a member from prosecuting an action against a company, could

be contrary to public policy, and concluded that it was not. His conclusion was that he would stay the proceedings against Interlog, “but only insofar as they touch upon difference between the Claimant and the Company”. He held that:

“The Claimant will accordingly be precluded in these proceedings from making any complaint against the Company in respect of any of the pleaded matters, nor will he be entitled to seek any relief against the Company.”

He recognised that the result was “messy and inconvenient”, however that was the inevitable consequence of the drafting of article 143 coupled with the mandatory effect of the stay legislation. He ended with a salutary warning that:

“Those acting for actual or proposed defendants in litigation of this sort might, however, do well to bear in mind that if in reliance upon arbitration agreements of the type with which I have been concerned in the present case they take steps which succeed in frustrating or limiting the prosecution of section 184I proceedings against those who would otherwise properly be party to them and if, in consequence, aggrieved members are driven to resort to applying on just and equitable grounds for the appointment of liquidators, they should not be surprised if the resulting non-availability of the alternative remedy means that companies have to be wound up rather than allowed to continue in existence following resolution of the internal domestic difficulties under section 184I of the BCA.”

### **Caldicott’s Oral Submissions before the Court**

- [92] In his oral submissions, Mr. Moverley Smith KC emphasised, by reference to the First Appeal Judgment, that it is perfectly normal in proceedings under section 184I of the **Act** alleging unfair prejudice “not to make the company a party, and indeed it only needs to be made a party if the claim is being made against it” (such as for a share buyout order by the company of the minority shareholder’s shares). He referred to section 184I itself which provides that no order may be granted against the company or any other person under that section unless it/they are party to the proceedings. He submitted that the corollary is that if a claimant does not want an order against the company, then it need not be a party to the proceedings, and went on to submit, correctly, that every case under section 184I concerns the affairs of the company, “but that doesn’t force the claimant to litigate against the company as well as the shareholders.” Mr. Moverley Smith acknowledged that in the instant case, the position had been

complicated by the fact that the claim as originally drafted, was against both Hector and the Shareholder Defendants.

[93] I pause here to note that that strikes me as a potentially significant factor. Caldicott commenced these proceedings not merely so that Hector would be bound by any decision, but rather because it actively sought relief against Hector (see paragraph 2 above), presumably because it wanted that relief against Hector. That had various consequences (which would have been avoided had Caldicott not chosen to join Hector and seek relief against it); the first was Hector's application for a stay; the second was the commencement of an arbitration, and the third was to work out what, in view of these matters, should properly be left in the proceedings. Had Caldicott not issued and served on Hector then there is no telling what would have happened, but it strikes me as highly probable that the proceedings would have progressed in the usual way. That is subject to one issue, to which I will return, namely the Shareholder Defendants' submission that they themselves can enforce the arbitration agreement.

[94] Returning to Mr. Moverley Smith KC's submissions, he referred to paragraph 102 of Theodore JA's judgment, where he held that "the test ... is a simple one: whether any issue before the court falls within the scope of the arbitration agreement and not whether the claims between the respondent and the appellants required an issue of fact or law arising between the respondent and the Company to be first resolved." Mr. Moverley Smith KC conceded that "that accords with the authorities he [Theodore JA] referred to" but submitted that, applying that test, any issue between the shareholders *inter se* is not an issue that falls within the scope of the arbitration agreement because that does not extend to disputes between shareholders. From that, he said, it follows that Caldicott is not prevented from litigating an issue against the Shareholder Defendants even if the same issue could also be arbitrated against Hector. He said that the case management issue was disposed of in the First Appeal Judgment.

- [95] Mr. Moverley Smith KC submitted that in the Second Appeal, the only error the Court identified in paragraph 80 of Wallbank J's judgment was his statement that "if the company simply cannot dispute such a legal effect [that the shareholder defendants' conduct was wrongful], and was, in fact confirming that Caldicott could, in principle, establish and obtain a finding of fact that the conduct was wrongful without the need for any difference between Caldicott and Hector to be resolved in arbitration".
- [96] Caldicott's submissions on Theodore JA's proposed order, in paragraph 143 of the Second Appeal Judgment, were that he did not stay the unfair prejudice proceedings against the Shareholder Defendants, which was the principal allegation made in the proceedings. Pausing here, I note that the amended statement of claim does not make a "claim" for unfair prejudice as such; rather it relies, as is usual on allegedly unfairly prejudicial conduct as the basis for particular claims to relief. What is quite clear, as it seems to me, is that paragraph 143 of the Second Appeal Judgment did stay particular heads of relief as prayed in the amended statement of claim, namely the relief sought in prayers 1 and 2 (the claims to declarations that the November 2019 Resolution was void or voidable, and that the dividends were due and owing). Whether that was right or wrong, as a matter of law, is nothing to the point. Those heads of relief were stayed. Yet the issues arising under those heads of relief formed the very basis for Caldicott's claim to unfair prejudice.
- [97] When pressed on what was left of the proceedings following the Second Appeal Judgment, Mr. Moverley Smith KC said "what's live and what's crucial to the unfair prejudice proceedings is paragraph (3) [of the Prayer] which is the buyout order which is the usual remedy for unfair prejudice proceedings." He continued by submitting that "the declarations, to be absolutely honest, are by the by. There's no reason to have declarations, and indeed if you'd started again without the Company involved you probably wouldn't have sought declarations in any event, because all you want in fact is for your shares to be bought out." That may or may not be correct, but the undeniable fact is that Caldicott did "start again" with the amended statement of claim' it named Hector as the First Defendant, but expressly noted at paragraph 7 that Wallbank J had stayed the

claims made and relief sought against Hector and that no claims were made, and no relief was sought, against Hector in the proceedings. So, whilst Caldicott submitted at the appeal that absent Hector it probably would not have sought declaratory relief, that is not what it did when it repleaded its case following the stay against Hector.

- [98] In answer to my proposition regarding paragraph 143 of Theodore JA's judgment, namely that relief in relation to "everything to do with dividends, apart from the consequences as to whether there should be a buyout by reason of conduct in relation to those dividends, ..... is not off to arbitration", Mr. Moverley Smith said that was not the case. He submitted that what had been stayed for arbitration was the dispute between Caldicott and Hector was the claim for payment of the dividend and the declarations (against Hector), but that what was left was whether there should be a buyout of Caldicott's shares. It was pointed out to him that such an enquiry would involve all the evidence that and submissions that would have been part of Caldicott's case had there been no arbitration (i.e. had there been no stay), Mr. Moverley Smith KC accepted that to be the case, but said that the Court of Appeal had been asked to stay the entire proceedings and had not done so.

#### **The Shareholder Defendants' Oral Submissions before the Court**

- [99] For the Shareholder Defendants, Mr. Collingwood KC submitted that, in light of paragraph 94 of the Second Appeal Judgment, the:

"proceedings in principle continue but the matters which are the subject of the arbitration agreement have to be stayed and they can't be continued as against the Shareholder Defendants, ..... They could continue but the matters, you have to stay the matters which are the subject of the arbitration agreement between the Respondent and the Company, has between Caldicott and the Company."

- [100] When pressed, with reference to paragraph 94 of the Second Appeal Judgment, he explained that when Theodore JA spoke of "while staying the matters which were the subject of the arbitration agreement between the Respondent and the Company", "that issue, that matter, the withholding of dividends, has to be stayed and the proceedings, these proceedings can only continue if those matters are stayed." He went on to submit that "the Second Appeal resolves the

issue of the matters in the proceedings which are caught by the arbitration agreement, and those matters include the issue, the matter of whether dividends were properly withheld..." He was asked why, in his view, Theodore JA did not stay all of the heads of relief sought in the proceedings. Mr. Collingwood's response was, "that's partly because of the way matters developed in argument and the fact that we didn't have a consequential hearing to argue what the consequential matters were on the decision that he made in the judgment he just says the appeal is allowed and addresses those specific case [sic]. He doesn't anywhere say that as to whether or not it would have been appropriate to stay the entire proceedings or anything in between."

[101] Mr. Collingwood KC suggested that there were issues in the proceedings that could continue to trial that were not impacted by the allegation of the unfair withholding of dividends. He referred to an allegation in the amended statement of claim concerning a refusal to allow someone to dial in to the meeting, although he accepted that that allegation was something of a backwater in the case. Mr. Collingwood KC accepted that the appellants would be unlikely to wish to continue to trial based on the allegations that he, Mr. Collingwood, submitted were left following his analysis of the consequences of Theodore JA's judgment.

[102] A reasonable summary of Mr. Collingwood KC's submissions, can be taken from the transcript of the hearing where he said "when it is said that the proceedings can continue against me so long as the matters that are caught by the arbitration agreement are stayed, I say what that means is that the matter is caught and therefore it's stayed. It doesn't matter, sorry, it's of no consequence whether it's against the Company or against the majority shareholders. The matter is caught and therefore, however you try and dress it up in terms of against the Company or against us, the substance is that the allegation is the same, which is it's the Company that it has improperly withheld the dividends." He was asked what his position would have been had the proceedings simply been brought against the Shareholder Defendants for causing the company not to pay dividends. His answer was that because the defence would be that the dividends were not improperly withheld, there was no loss. However he did say that the issue of

withholding of dividends would be caught by the arbitration agreement and accordingly those proceedings would have to be staged pending an arbitration.

### **Discussion and conclusion**

- [103] This is a difficult case and has exercised me greatly, as it did Wallbank J. On the one hand there is Webster JA's clear, and undoubtedly correct statement of practice and principle in the First Appeal Judgment (see paragraph 6 above) concerning the common role of companies in unfair prejudice claims. On the other hand, one has the Second Appeal Judgment that remains a judgment of this Court and is binding on me, whether or not I would necessarily have reached the same conclusions as it reached or am in agreement with the underlying analysis .
- [104] For my part, I find the analysis in the Second Appeal Judgment somewhat difficult in so far as it concerns the impact of the arbitration agreement on claims between shareholders. It seems to me that an arbitration agreement is classically binding between the parties to it; it is something of a stretch to suggest the arbitration agreement in the articles of association has the effect that actions between shareholders are subject to that provision.
- [105] I do not consider that section 11 of the **Act** has the effect of turning the arbitration agreement in the articles of association into an arbitration agreement between the members themselves. Section 11 provides that the articles of association of a company are binding as between: (a) the company and each member of the company; and (b) each member of the company. We were referred to no authority to the effect that an arbitration agreement in a company's articles providing for the arbitration of differences between the company and its members somehow requires differences between members themselves, even those which may turn upon the acts of the company, to be so determined. Section 11(1)(b) does not, to my mind, have that effect. It may be that a member could prevent another member from suing the company in breach of that agreement, to my mind, that would be as far as it goes.

- [106] It follows that in my view that references to the decisions in **Fiona Trust** and **Oral Submissions before the Court** and **Arnold v Britton**, whilst relevant to determining the scope of the disputes that fall within the arbitration agreement, are not relevant to determining who, as a matter of construction, are subject to the arbitration agreement.
- [107] Likewise, I am not convinced that the decisions in **Republic of Mozambique** and **FamilyMart** were, or are, assistance in determining whether the issues as between the appellant and the Shareholder Defendants were the subject of the arbitration agreement. As the analysis above shows, the parties in those proceedings were bound by arbitration agreements. The ratio of those cases do not, in my view, assist in determining the rights inter se of the parties in the instant proceedings. It would assist in determining what falls within the scope of the agreement and the process by which that issue should be decided.
- [108] Further, with reference to the Second Appeal Judgment, I note Mr. Collingwood KC's acknowledgment that the parties did not seek what he called a hearing to determine the consequences of the Second Appeal Judgment.
- [109] Returning to the judgment under appeal, the issue before the Court related to the preliminary issue concerning the nominee ship alleged in the Defence. The judge described that issue as "a fundamental part of the dispute between the Company" and Caldicott. I can see full well why he then referred to paragraph 102 of the Second Appeal Judgment which says "the test therefore is a simple one: whether any issue before the court falls within the scope of the arbitration agreement and not whether the claims between the respondents and the appellants required an issue of fact or law arising between the respondent and the Company to be first resolved." Wallbank J was "disconcerted" by the fact that the Second Appeal Judgment stayed Wallbank J's order permitting the seeking of a declaration that November Resolution was unlawful etc and his order permitting the seeking of declaratory relief as to whether the dividends were payable.

[110] Like the learned judge, I too am concerned by paragraphs 97 and 98 of the Second Appeal judgment. The issue is not before this Court and was not argued, however, for the reasons set out above, I would take some persuasion that **Fiona Trust** had any bearing on who was bound by the arbitration agreement (as opposed to the scope of differences that fell to be determined by it). This led Wallbank J to note that whereas in the First Appeal Judgment the Court drew a distinction between separate causes of action between companies and their shareholders, the Second Appeal Judgment did not deal with that distinction. The judge considered that it blurred the distinction between causes of action/disputes between the Company and its shareholders and causes of action/disputes between the shareholders themselves.

[111] However, the Second Appeal Judgment says what it says. At the hearing neither Mr. Moverley Smith nor Mr. Collingwood suggested that this Court was not bound by that decision. It is not open us to ignore it or pretend that it does not exist, or say what it says. The “Conclusion” of that judgment is clear. It allowed the appeal and provided that:

“(2) The order by the learned judge permitting the seeking of a declaration that the resolution passed on 30th November 2019 is unlawful, void and of no effect or alternatively voidable is set aside and this head of relief shall be stayed for the duration of the stay or until further order.

(3) The order by the learned judge permitting the seeking of a declaration that the dividends are properly due and owing is set aside and this head of relief shall be stayed for the duration of the stay or until further order.”

No consequential relief was sought and there was no appeal from that judgment.

[112] I find it difficult to “construe” my way out of the conclusion that any heads of relief relating to the dividends (whether they relate to the resolution by which it was passed or whether they are owing) have been stayed by the Second Appeal Judgment; it says what it says. I am far from convinced that I would have reached the same conclusion on the Second Appeal. For the reasons I have touched upon above, it seems to me that the correct approach would have been

to identify who was obliged by the arbitration agreement in the articles of association (and why) and then go on to determine the issues between the parties so obliged so that those which fell to be determined by arbitration were hived off. Had that approach been adopted then I am far from certain that the result of the Second Appeal would have been the same. However, I did not hear the Second Appeal, and of course I could be wrong.

### **Disposition**

[113] It follows that whilst have expressed reservations about how I would have decided the Second Appeal, I am obliged to dismiss this appeal. I share the learned judge's concerns and anxieties, and acknowledge that this is an unfortunate result.

[114] The appellant should pay the respondents costs of this appeal, such costs to be assessed by the court below if not agreed within 30 days of the delivery of this judgment.

I concur.  
**Gertel Thom**  
Justice of Appeal

I concur.  
**Esco Henry**  
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**