

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0007

BETWEEN:

**[1] SIONG BENG SENG
[2] CHING HUI HUAT
[3] SPRINGFIELD INVESTMENTS & NOMINEES**
PTE LTD

Appellants

and

CALDICOTT WORLDWIDE LTD

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Dexter Theodore	Justice of Appeal [Ag.]

Appearances:

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

Mr. Stephen Moverley Smith, KC with him Mr. James Noble,
Mr. Dhanshuklal Vekaria and Ms. Amelia Tan for the Respondent

2021: October 5;
2023: March 22.

Commercial Appeal - Arbitration agreement - Stay of claim against Company in favour of arbitration - Preliminary issue - Whether appeal an abuse of process - Test for determining whether particular claims against appellants touch upon differences caught in the arbitration agreement warranting a stay - Ennio Zanotti v Interlog Finance Corp et al – Whether 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 they may proceed simultaneously -

Whether judge erred in failing to stay aspects of the respondent's claim which gave rise to differences between the company and respondent – Whether there needs to be a genuine dispute between the parties for matter to be referred to arbitration - Whether Judge erred in holding that certain claims could proceed pro tem subject to later review – Reasonably foreseeable defence test

The parties are all shareholders in Hector Finance Group Limited ("the Company"). The respondent is the largest minority shareholder. In the months of August, October and December 2019, the directors of the Company declared three dividend payments which were paid out to the shareholders, other than the respondent. On 30th November 2019 an extraordinary general meeting of the Company was held at which a resolution ("the November Resolution") was passed ratifying the decision to exclude the respondent.

On 30th December 2019, the respondent issued proceedings against the appellants and the Company in which the respondent alleged that the appellants had caused the affairs of the Company to be conducted in a manner which was unfairly prejudicial, oppressive or discriminatory towards it. In the claim, the respondent sought inter alia, certain declaratory relief, payment of dividends and the appointment of a liquidator. On 4th March 2020, the Company applied to stay the unfair prejudice claim against it on the basis that its Articles of Association contained a clause referring to arbitration, disputes arising between the Company and its members. By order dated 28th April 2020, the proceedings against the Company were stayed, but the court did not stay the proceedings against the appellants. On 7th July 2020, there was a hearing to determine the consequences of the stay of 28th April 2020 (the "Consequential Hearing"), at the end of which judgment was reserved. On 13th October 2020, the Judge delivered an *ex tempore* judgment on the Consequential Hearing ("the Judgment") followed by a written judgment and on 9th February 2021 held a hearing to settle the order consequent upon the Judgment ("the Order").

The appellants filed two appeals. The First Appeal was filed on 16th October 2020 against a decision of the learned judge dated 24th September 2020 wherein he dismissed an application by the appellants to set aside an order which granted leave to the respondent to serve the claim on the appellants outside the jurisdiction and to stay the claim against the appellants, on case management grounds, in favour of arbitration. This Court delivered its decision in the First Appeal on 1st June 2021 dismissing the appeal. The present appeal was filed on 15th March 2021 against the Judgment of 13th October 2021 on the Consequential Hearing.

The notice of appeal lists seven grounds of appeal which can be condensed 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.

At the hearing of the appeal on 5th October 2021, two preliminary issues arose to be decided. Firstly, whether the present appeal was a collateral attack on the First Appeal and secondly whether an application by the Appellants to adduce the notice of arbitration into evidence, should be granted. The latter application was however resolved when it was agreed for the Court to have sight of the Notice of Arbitration on a confidential basis.

Held: allowing the appeal, and making the orders set out at paragraph [143] of this judgment, that:

1. If a point that could have been taken in earlier proceedings is not taken then the point cannot be raised in subsequent proceedings unless there has, in the interim, been a significant and material change of circumstances or the party has become aware of facts of which he was unaware at the first hearing. However, the mere fact that a point could have been raised but was not, is not conclusive of the issue. The present appeal challenges the grant of the stay of the claim against the Company as did the First Appeal albeit on different grounds. The First Appeal questioned the exercise of the Judge's discretion to dismiss the appellants' 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 heads of relief would proceed to trial and which of those were caught by the arbitration clause. These matters were dealt with at the Consequential Hearing and could not have arisen in the First Appeal as the notice of appeal was filed before the Order settling the Judgment in the Consequential Hearing. Therefore, this appeal cannot be said to be an abuse of process.

Koza Ltd and another v Koza Altin Isletmeleri AS [2021] 1 WLR 170 applied; **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 applied.

2. The test for determining whether particular claims against the appellants were caught within the scope of the arbitration agreement and ought to be stayed is two staged. Firstly, the court must identify the matter which is the subject of the arbitration agreement. In identifying the 'matter', the court looks to substance and not form, adopting a practical common-sense approach. Secondly, the court must determine whether that matter is one that the parties have agreed can only be arbitrated. As to this second limb, the court must properly construe the arbitration agreement in question. The learned judge fell into error when he sought to adopt a test of determining 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, in order for the claim against the appellants to be stayed.

Virgin Islands Arbitration Act, 2013 No. 13 of 2013 of the Laws of the Virgin Islands considered; **Republic of Mozambique (acting through its Attorney General) v Credit Suisse International and others** [2021] EWCA Civ 329 applied; **Tomolugen Holdings Ltd and another v Silica Investors Ltd** [2016] 1 LRC 147 considered.

3. Notwithstanding the Judge's error in adopting an incorrect test, 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.

Lombard North Central plc and another v GATX Corporation [2012] 2 All ER (Comm) 1119 applied.

4. Under the BVI Arbitration Act, 2013 the court is not required to consider whether or not there was a genuine dispute on a matter before deciding whether the matter should be stayed in favour of arbitration. The court only need be satisfied that there is a dispute on a matter within the subject of the arbitration clause. On a proper construction of the arbitration clause in question, it is clear that differences had arisen between the respondent and the Company regarding the November Resolution and as to whether the Company had improperly withheld dividends from the respondent. Therefore, the Judge erred in his approach when he applied the 'was there in fact any dispute' test in determining whether these matters should be stayed and in finding that they should not.

Virgin Islands Arbitration Act, 2013 No. 13 of 2013 of the Laws of the Virgin Islands applied; **Halki Shipping Corporation v Sopex Oils Ltd** [1998] 1 WLR 726 considered.

5. When identifying which issues may fall within the scope of the arbitration agreement, once an actual or a reasonably foreseeable defence is identified, the second stage is to determine whether such defence is sufficiently connected to the arbitration agreement. The learned judge admitted that it was not clear on what grounds the Company and the appellants disputed the claim and allowed certain of the respondent's claims against the appellants to proceed *pro tem* subject to later review. However, the Judge abdicated his function and erred in law when he adopted this 'wait and see' approach rather than firstly applying the reasonably foreseeable defence test and then determining whether there was an identified or reasonably foreseeable defence that was sufficiently connected to the arbitration agreement.

Republic of Mozambique (acting through its Attorney General) v Credit Suisse International and others [2021] EWCA Civ 329 applied.

JUDGMENT

Introduction

- [1] **THEODORE JA [AG]:** This is an appeal against the judgment of the learned trial judge (“the Judge” or “the learned judge”) delivered on 13th October 2020 (“the Judgment”)¹ and the order dated 9th February 2021 (“the Order”) permitting unfair prejudice proceedings against the appellants to proceed after the court had earlier stayed proceedings against Hector Finance Group Limited (“the Company”), in which the appellants are all shareholders.

Background

- [2] The respondent is the largest minority shareholder of the Company. The three appellants together own a majority of the shares in the Company. In the months of August, October and December 2019, the directors of the Company declared three dividend payments which were paid out to the shareholders, other than the respondent. It was alleged that the Company had outstanding claims against the respondent, hence the reason for its exclusion. On 30th November 2019 an extraordinary general meeting of the Company was held at which a resolution (“the November Resolution”) was passed ratifying the decision to exclude the respondent.
- [3] On 30th December 2019, the respondent issued proceedings against the appellants and the Company in which the respondent alleged that the appellants had caused the affairs of the Company to be conducted in a manner which was unfairly prejudicial, oppressive or discriminatory towards it. In the claim the respondent sought, inter alia, certain declaratory relief, payment of dividends and the appointment of a liquidator.

¹ BVIHCM2019/0190 Caldicott Worldwide Ltd v Hector Finance Group Limited et al (delivered 13th October 2020, unreported).

- [4] On 2nd January 2020, the respondent applied for leave to serve the claim on the appellants outside of the jurisdiction and the application was granted on 30th January 2020.
- [5] On 4th March 2020, the Company applied to stay the unfair prejudice claim against it on the basis that its Articles of Association contained a clause referring to arbitration disputes arising between the Company and its members.
- [6] The clause in question, No. 156 of the Company's Articles, provided as follows:
- “Whenever any difference arises between the Company on the one hand and any of the members or their executors, administrators or assigns on the other hand, ... touching any breach or alleged breach or otherwise relating to ... any of the affairs of the Company such difference shall [be referred to arbitration].”²
- [7] By order dated 28th April 2020, the proceedings against the Company were stayed, but the court did not stay the proceedings against the appellants.
- [8] On 8th May 2020, the appellants applied to set aside the order granting leave to serve the appellants outside of the jurisdiction and for an order, on case management grounds, to stay the claim against the appellants in favour of arbitration.
- [9] There was a hearing on 7th July 2020 to determine the consequences of the stay of 28th April 2020 (the “Consequential Hearing”), at the end of which judgment was reserved.

² Appellant's Hearing Bundle, Exhibit MH-1, pdf page 256.

- [10] On 24th September 2020, the Judge delivered an *ex tempore* judgment on the appellants' application of 8th May 2020 ("the Set aside and Stay order"), in which he refused to set aside the order granting leave for service out and dismissed the application to stay the claim against the appellants.

The Judgment and the Order

- [11] On 13th October 2020, the Judge delivered an *ex tempore* judgment on the Consequential Hearing followed by a written judgment.
- [12] At paragraph [38] of the Judgment the Judge outlined the argument of the Shareholder defendants (now appellants) which was that on the authority of **Ennio Zanotti v Interlog Finance Corp. et al**³ the proceedings against them should be stayed since the entire proceedings touched upon differences between the claimant (now respondent) and the Company.
- [13] At paragraph [39], the Judge rejected this submission as an overly broad and 'over-ambitious interpretation of **Zanotti**' and ruled that **Zanotti** had adopted a more substantial test for what qualified as a difference warranting a stay.
- [14] At paragraph [40] of the Judgment the Judge stated:
- "The Shareholder Defendants misread **Zanotti** in two main respects. In **Zanotti**, the Court was not staying the proceedings merely because they 'touched upon' differences between the claimant and the company. Nor were the proceedings as a whole, against other defendants, stayed. Only the claims against the company were stayed."
- [15] The Judge pointed out at paragraph [44] that **Zanotti** did not address the question of what course should be adopted in respect

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

of claims against the Shareholder defendants who were not subject to the arbitration agreement.

[16] At paragraph [46] of the Judgment the Judge continued:

"A second point that emerges from **Zanotti** is that the test for a stay is not whether differences between the claimant and the company are 'touched upon'. The way the Shareholder Defendants put their submissions suggests that if any of the facts which ground the Claimant's cause of action against the Defendants other than the Company so much as touch upon anything which can be said to be a difference between the Claimant and the Company then reliance upon any such facts must be excluded. A closer reading of other passages in Justice Bannister's judgment shows that he had no such hair-trigger exclusion test in mind."

[17] The Judge then noted that in **Zanotti** the court considered the question of when differences arose between a company and a member and that the arbitration agreement was in identical terms to the one at bar.

[18] The Judge proceeded to scrutinise Justice Bannister's approach in **Zanotti** observing that Justice Bannister considered the pleadings along with the evidence in support of the application for the stay in their natural and ordinary meaning, and identified the following differences between the claimant and the company, in that case, indicated by the relief sought: (1) the request for an order that the company purchase the claimant's shares; (2) the request for resolutions of the company to be set aside; (3) the rectification of the company's statutory records; and (4) the prayer seeking that the company pay compensation.

[19] The Judge identified Justice Bannister's methodology as being firstly to determine, from the relief being sought, whether the company was being accused of wrongdoing. Secondly, the Judge

reasoned that in **Zanotti** the court accepted that a difference warranting a stay could arise even though there is no specific relief sought in respect of such difference. The third point that the Judge garnered from **Zanotti** was that the court was not prepared to stay the claim in anticipation of a difference in the absence of a pleading of deficiency or wrongdoing on the part of the company.

[20] For his part the Judge accepted that it was possible to contemplate scenarios where differences could arise where claims are made in the pleadings against defendants other than the company, but which claims from a common sense or commercial perspective, also give rise to a difference between the claimant and the company.

[21] The Judge concluded at paragraph [52] of the Judgment:
“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.”

[22] The Judge proceeded to identify the issue before him as being whether the proceedings against the defendants other than the Company should be allowed to proceed and if so, how much of the Claimant’s pleaded case and relief sought should survive for the claims that remained. Noting that those issues had not been addressed in **Zanotti** and absent other authority, the Judge then considered the matter from first principles.

[23] The Judge reasoned at paragraph [65] that if it were possible for claims between members to proceed to trial without requiring any

issue of fact or law between the claimant and the Company to be resolved, those claims could be proceeded with.

- [24] At paragraph [66] the Judge concluded that where a single matrix of facts would support parallel causes of action by the claimant against the Company and against the Shareholder defendants they could both proceed at the same time in their respective fora.
- [25] The Judge declared at paragraph [67] that where a legal consequence of a finding of fact flowed inexorably from that finding the court should not shy away from making the pronouncement and applying that consequence, whether it affected the Company or not. The Judge reasoned that such an inevitable or inescapable legal consequence could not be regarded as giving rise to a difference warranting a stay because the Company would be bound as a matter of law to accept it.
- [26] The Judge was thus of the view that it was only if 'there could be reasonable argument by the Company that the legal consequence should not apply, then that would give rise to a difference that would have to be referred to arbitration'.⁴
- [27] The Judge then ruled at paragraph [68] that 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 case management after the pleadings had closed.
- [28] The court ruled at paragraph [69] that the proceedings against the Shareholder defendants should be permitted to proceed despite the stay of the claims against the Company, but only to the extent that

⁴ Supra n. 1, paragraph 67.

the claimant is able to pursue its claims against the Shareholder defendants without requiring a difference between itself and the Company to be resolved.

[29] At paragraph [70] the Judge declared that there was no need for all matters contained in the statement of claim giving rise to differences between the claimant and the Company to be removed from any claim remaining against the Shareholder defendants. The result was that claims between the claimant and the Shareholder defendants could proceed in parallel with the claims against the Company whenever issues of fact or law between the claimant and the Company do not require to be determined before the claim against the Shareholder defendants is ruled upon.

[30] At paragraphs [72] and [73] the Judge, after noting that no claims had been expressly pleaded against the Company, and that no defence had yet been filed by the Shareholder defendants (it was uncertain that they had a defence), it was therefore permissible for the claimant's claims against the Shareholder defendants to proceed at least until a viable defence was filed.

[31] However, the parties were agreed and the Judge ruled that the heads of relief for the Company to pay, or for the Shareholder defendants to procure the Company to pay, the dividends within 7 days, 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 for the duration of the stay or until further order.

[32] The Judge ruled at paragraph [80] that the head of relief for a declaration that the November Resolution was unlawful, void and of

no effect, should be allowed to proceed because the mere fact that the relief can be characterised as being against the Company does not automatically mean that there is an underlying difference between the claimant and the Company sufficient to prevent the claim against the Shareholder defendants from going forward. The Judge's reason was that such a declaration involved a conclusion of law as to the effect of someone else's conduct and if the Company was unable to dispute that legal effect no differences arise in reality between the claimant and the Company on the point. The Shareholder defendants would be permitted to dispute whether such a conclusion of law ineluctably followed that finding whereupon the court may 'stay issues pending arbitration'.⁵

[33] The Judge ruled at paragraphs [81] – [84] that the head of relief for a declaration that the resolution was voidable could also proceed, but that if the claimant intended for all issues to be dealt with at a single trial then that head of relief would have to be stayed. The Judge explained that this was so since to determine whether something was voidable called for a consideration of the entire legal and factual matrix and was therefore something on which the Company was entitled to have a say as it might wish to bring circumstances to the court's attention that could affect the exercise of the court's discretion. Since the claim against the Company had been stayed, the Company could not participate in the proceedings to have that say, so this would have to be dealt with at the arbitration.

[34] The claimant was however permitted⁶ to proceed with its head of relief for a declaration that the dividends were properly due and

⁵ Supra n. 1, paragraph 80.

⁶ Supra n. 1, paragraph 86.

owing. The Judge was not convinced by the submission of the Shareholder defendants, that the dividends were payable by the Company, making this head of relief a claim against the Company. The Judge reasoned that the answer to the issue as to whether dividends were due and owing could be nothing but the legal consequence of wrongful action by the Shareholder defendants. If such a consequence was irresistible there could be no objection to the declaration sought. The Judge stated at paragraph [86]:

“It may be that during the life of the proceedings this view of the Claimant’s case will transpire to be too simplistic. Should that occur, the Court can consider a stay further. For the present, however, I am satisfied that this prayer for declaratory relief can go forward.”

[35] In relation to the prayer for such other order as the court thinks fit under section 184I of the **BVI Business Companies Act, 2004**,⁷ the Shareholder defendants had contended that such relief should not be permitted since in the event of a finding against them they might be prejudiced if they wished to persuade the court to make those findings instead against the Company. They had also argued that such relief was not obtainable as the claimant was not entitled to relief against the Company even if the court thought it fit to do so.

[36] The Judge ruled at paragraph [89] that even with the stay in place the court could make such order as it saw fit within the ambit of its powers. The Judge also ruled that it was necessary for the court to evaluate the relief proposed by the Shareholder defendants and could not rule at so early a stage upon the inclusion or exclusion of that head of relief.

[37] At a hearing on 9th February 2021 to settle the Order consequent upon the Judgment, the Judge ordered as follows:

⁷ No 16 of 2004 of the Laws of the Virgin Islands.

“

1. The proceedings against the Shareholder Defendants shall be permitted to proceed, notwithstanding the Stay in favour of arbitration, to the extent that the Claimant is able to pursue its claim against the Shareholder Defendants without requiring a difference between itself and the Company to be resolved.
2. To the extent necessary, the Claimant is given leave to amend the Claim Form and Statement of Claim in the form appended to this order.
3. The following heads of relief sought by the Claimant against the Company shall be stayed for the duration of the Stay or further order, if the Claimant does not delete them:
 - a. an order that the Company pay the Dividends within 7 days, with interest;
 - b. an order for the appointment of a liquidator over the Company; and
 - c. an order regulating the affairs of the Company.
4. The Claimant shall not be permitted to seek an order that the Shareholder Defendants procure the Company to pay the dividends to the Claimant, for the duration of the Stay or further order.
5. The Claimant shall be permitted, until further order, to seek a declaration that the resolution passed on 30 November 2019 is unlawful, void, of no effect, alternatively that it is voidable.
6. The Claimant shall be permitted, until further notice, to seek a declaration that the Dividends are properly due and owing to the Claimant.
7. The Claimant shall be permitted to seek relief in terms of such other order as the Court thinks fit under section 184I of the BCA.
8. The head of relief sought by the Claimant by which the Claimant seeks an order for the resolution passed on 30 November 2019 to be set aside shall be stayed for the duration of the Stay or further order if the Claimant does not delete it.
9. The head of relief sought by the Claimant that the Dividends be paid by the Company within 7 days, with interest, shall be stayed for the duration of the Stay or further order if the Claimant does not delete it.
10. All the parties shall have liberty to apply for further directions concerning the procedural consequences of the stay.

...”

The appeal against the Set aside and Stay order

- [38] On 16th October 2020, the appellants filed an interlocutory appeal (“the First Appeal”) against the decision of 24th September 2020, contending that the Judge: (1) applied the wrong test of materiality of non-disclosure; (2) misapplied the test of material non-disclosure and was wrong in law to hold that the non-disclosure was not material; (3) took into account an erroneous understanding that if he set aside the order for service out the claim would not be allowed to proceed; (4) failed to take into account the effect on the proceedings of the stay against the Company and the difficulties caused thereby; (5) erred in finding that there was not sufficient overlap between the liability of the Company and that of the appellants to justify a stay on case management grounds; and (6) erred in holding that the circumstances were not ‘rare and compelling’ enough to warrant the granting of a stay.

The Judgment in the First Appeal

- [39] On 1st June 2021, this Court dismissed the First Appeal⁸ holding, as to the first two grounds of appeal, that the test for materiality was whether the matter might reasonably be taken into account by the Judge in deciding whether or not to grant the application. Further, the Judge had correctly identified and applied that test and in an exercise of discretion found that there was no material non-disclosure, in respect of which the Judge had not been shown to be clearly wrong.
- [40] This Court further ruled that ground 3 of the First Appeal failed because all the Judge had done was to state that there was an

⁸ See BVIHCMAP2020/0020 Siong Beng Seng et al and Caldicott Worldwide Ltd (delivered 1st June 2021, unreported).

open gateway available for service out under sub-rule (7) of rule 7.3 of the **Civil Procedure Rules, 2000** (“CPR”) and the Judge was not saying that if he set aside the order for service out the claim would not be allowed to proceed.

[41] Grounds (4) to (6) in the First Appeal concerned the refusal of the Judge to grant a case management stay of the proceedings in favour of arbitration. The criticism of the Judge was that in considering whether the threshold to grant a case management stay had been reached he failed to take into account the effect that the stay against the Company would have on the proceedings. This Court held that the Judge’s decision to refuse the stay was one made in the exercise of his case management powers and this Court had not been persuaded that the Judge was so plainly wrong that his decision was outside the generous ambit within which reasonable disagreement was possible.

[42] Although it was not the subject of any specific ground of appeal in the First Appeal, the parties addressed the issue of the possibility of inconsistent judgments and this Court dealt with the matter as an extension of ground 5 (overlapping liabilities between the unfair prejudice and the arbitration proceedings).⁹ This Court was of the view that the Judge had indirectly considered the possibility when he concluded that there was no sufficiently close overlap. It was only if there was a serious risk of inconsistent judgments that a stay would have been warranted. The Judge’s decision not to grant the stay against the appellants was one made in the exercise of his discretion and this Court found no reason to interfere.

Present appeal - grounds of appeal

⁹ Supra n.6, paragraphs 53-54.

[43] In the present appeal, the appellants have filed seven grounds of appeal which may be condensed 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.

Preliminary issues on appeal

[44] There were two preliminary issues which arose on the hearing of the appeal. In the first place, the respondent contended that the appeal was a collateral attack on the First Appeal.

[45] The appellants responded by filing an application to adduce into evidence the notice of arbitration in an effort to rebut the contention

that the issues raised in the appeal had been resolved by the First Appeal.

Application to adduce fresh evidence

- [46] The application to adduce evidence was eventually resolved when Mr. Smith KC agreed for the Court to have sight of the notice of arbitration on a confidential basis.

Collateral attack

- [47] The respondent raised the issue that this appeal was nothing more than a collateral attack on this Court's judgment in the First Appeal and was therefore an abuse of process.
- [48] Mr. Collingwood KC for the appellants submitted in reply that the issues in the First Appeal revolved around the exercise of the Judge's discretion to grant, or not grant, a stay whereas this appeal concerned issues of law as to whether the correct legal test had been applied when deciding what issues were caught by the stay against the Company and should be the subject of arbitration and what issues could proceed in the High Court of the Territory of the Virgin Islands ("BVI").
- [49] Mr. Collingwood KC conceded that in the judgment delivered in the First Appeal certain remarks were made regarding the Judge's decision to allow the claim to proceed in an amended form after the excision of any claims against the Company ahead of, or in tandem with, the arbitration proceedings. However, he submitted that the parties made no submissions on, and there was no analysis in the Court of Appeal's judgment of, the extent of the exclusion because the parties had explained to the Court that this would have been the subject of a later appeal.

- [50] Mr. Collingwood KC argued that in any event, this Court had expressed no definitive views on that matter and the remarks were not necessarily part of the decision and were, in effect, obiter dicta. He submitted that no part of the judgment of the Court of Appeal made any findings as to what issues the respondent was permitted to proceed with and that, accordingly, none of the issues raised in the present grounds of appeal were resolved by the First Appeal.
- [51] Mr. Smith KC contended that this appeal was an abuse of process because the arguments being made on this appeal should logically have been made at the First Appeal. He argued further that it was difficult to see how the appellants could be allowed to say on the one hand that they accept this Court's ruling in the First Appeal that the proceedings will continue against the appellants, while on the other hand say that the proceedings should be stayed because of certain legal principles.
- [52] It is, of course, well established that if a point that could have been taken in earlier proceedings is not taken then the point cannot be raised subsequently unless there has, in the interim, been a significant and material change of circumstances, or the party has become aware of facts of which he was unaware at the first hearing.¹⁰
- [53] The English Court of Appeal made it clear in **Koza Ltd and another v Koza Altin İşletmeleri AS**¹¹ that this principle also applied to interlocutory hearings.

¹⁰ Koza Ltd and another v Koza Altin İşletmeleri AS [2021] 1 WLR 170, paragraph 42.

¹¹ [2021] 1 WLR 170.

[54] However, the mere fact that a point could have been raised but was not, is not conclusive of the issue. In **Johnson v Gore Wood & Co (a firm)**¹² Lord Bingham famously stated:

“It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.”¹³

[55] Further, as was stated in **Koza Ltd**:

“... because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings.”¹⁴

¹² [2002] 2 AC 1.

¹³ Ibid at 31.

¹⁴ Supra n.9 at 194.

[56] When the First Appeal was filed on 16th October 2020, the Judge had just 3 days earlier rendered his *ex tempore* judgment in the Consequentials Hearing and his written reasons on that matter came a further two weeks later. In the Judgment the Judge ordered that:

“[t]he proceedings against the Shareholder Defendants shall be permitted to proceed despite the stay of the claims against the Company, to the extent that the Claimant is able to pursue its claims against the Shareholder Defendants without requiring a difference between itself and the Company to be resolved”.¹⁵ (Underlining mine)

[57] In his earlier ruling on the stay application of 28th April 2020, the Judge had ordered that:

“(1) The Application succeeds insofar as the claims made and relief sought against the First Defendant are stayed in favour of arbitration.

(2) The claims made and relief sought against the Second and Fourth Defendants are not stayed.

(3) All consequential matters are reserved to a further hearing at which all parties shall be entitled to address the Court on the consequences of and the effect upon the proceedings of the above orders;

...”

[58] It is undoubtedly the case that Mr. Smith KC is right that this appeal, as did the first, challenges the grant of the stay, albeit on different grounds. It is however also the case that to a degree the Consequentials Hearing with its focus on the consequences and effect of the stay necessarily involved, however obliquely, a re-examination of the stay.

[59] The First Appeal was filed in October 2020, a few months before the Order was settled in February 2021. It was therefore, in my view, not unlikely that the Consequentials Hearing would have

¹⁵BVIHCM2019/0190 *supra* n.2, paragraph 101.

given rise to certain stay-related issues which might not have been dealt with in the First Appeal. I agree with Mr. Smith KC that perhaps the parties might, on hindsight, have applied for a stay of the First Appeal to allow this one to be heard together with it.

[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.

[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 Consequentials Hearing the court then sought to determine which of the heads of relief would proceed to trial.

[62] All seven grounds of appeal challenge the test applied by the Judge at the Consequentials Hearing in deciding which claims fell to be stayed. I believe that these grounds of appeal did not and could not have arisen in the First Appeal because the notice of appeal was filed before the Order which settled the Judgment in the Consequentials Hearing.

[63] In a nutshell, the appellants contend that **Zanotti** is authority for the proposition that when a stay in favour of arbitration is ordered, every claim/head of relief which touches upon a difference between the Company and other Shareholder defendants ought to be stayed and that the Judge wrongfully rejected this test. The appellants argue that the Judge sought to draw extremely fine distinctions as to the circumstances in which a difference arose or did not arise between a shareholder and the Company instead of looking at the matter more holistically.

[64] The appellants have thus indicated that the present appeal explores the issue whether the correct legal test had 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.

[65] I agree. In my view, the First Appeal questioned the exercise of the Judge's discretion to dismiss the appellants' 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.

[66] I am therefore satisfied that this appeal is not an abuse of the process of the court.

Grounds 1 and 2

- (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 then they may proceed simultaneously.

Submissions of Counsel

Ground 1

[67] Mr. Collingwood KC for the appellants relied on the case of **Zanotti** which, he submitted, stood as authority for the submission that there is a distinction between two types of disputes: (1) a dispute which is in substance between a minority shareholder and the company (for example a claim to set aside a resolution of the company removing a director, which a claimant is not permitted to pursue pending the arbitration) which touches upon a dispute between the member and the company; and (2) a dispute which is in substance between the minority shareholder and the other members (for example the removal of a director, evidencing the breakdown in trust and confidence). Mr. Collingwood KC conceded that, in **Zanotti**, unlike the case at bar, the claim had not yet been served on the majority and the court did not address the issue of the consequences for the remainder of the claim after the granting of the stay, save that the removal complaint does remain. An analysis, he says, of paragraph [29] reveals that a blanket ban was contemplated. Mr. Collingwood KC submitted that the court ought not to permit a progression of claims which in substance constitute a claim between the minority shareholder and the Company which are based upon, or touch upon, such a dispute. This is so because the parties agreed in the arbitration agreement that whenever a difference arose between the Company and a member it would be referred to arbitration. It would defeat the entire object of the

arbitration agreement if shareholders were to be allowed, under the guise of unfair prejudice, to pursue substantially the same claim against the majority as they were pursuing against the Company. If a claim is in substance a claim against the Company, it is caught by the arbitration agreement even if it is part of the claim against the majority shareholders.

[68] Learned counsel for the appellants submitted that it was a question of law, as distinct from a case management discretion, as to whether a particular difference or dispute is caught by the arbitration agreement. Learned King's Counsel submitted that at paragraphs [39], [46], [55] and [69] of the Judgment, the Judge rejected the submission that the test was whether the claim touched upon differences between the respondent and the Company. According to Mr. Collingwood KC, the Judge substituted his own test which was whether the claims between the appellants and the respondent require an issue of fact or law arising between the Company and the respondent to be resolved before a finding of fact or law can be made between the appellants and the respondent or before certain relief can be granted to the respondent.

[69] Mr. Collingwood KC submitted that the test of whether a claim touches upon a difference was one extrapolated from **Zanotti**, but was in any event the test to be applied as a matter of principle and that it was altogether a more practical test than the Judge's test which, it was submitted, was unworkable in the present case.

[70] Mr. Collingwood KC further contended that the test applied by the Judge sought to draw fine distinctions as to whether a difference with a company does, or does not, arise.

- [71] Learned counsel pointed to the Judge's distinction between setting aside a resolution (which concerned a difference between the Company and a member) and a declaration that such a resolution was void or voidable (which the Judge considered did not necessarily involve a difference).
- [72] The Judge's test, learned King's Counsel argued, also necessitated the rolling review to ascertain whether differences subsequently arose.
- [73] Mr. Collingwood KC submitted, in effect, that such a rolling review is avoided if the 'touch and concern' test is applied.
- [74] According to Mr. Collingwood KC, there are two aspects to the Judge's test. The first is that it is permissible to have differences between the Company and its members left in the claim. Secondly, if certain legal consequences follow inexorably from any findings that he makes in the claim between the shareholders, the Judge intends to apply those consequences whether or not they affect the Company.
- [75] Learned King's Counsel saw this as nothing less than the resolution of a difference between the Company and one of its members. He submitted that it was difficult to understand how facts in dispute which supposedly did not give rise to a difference with the Company can give rise to a legal result which does.
- [76] It was Mr. Collingwood KC's contention that in those circumstances there can be no other conclusion reached than that the Company

has an interest in, and there is a difference between, the Company and the member.

[77] Learned counsel also found curious the Judge's ruling to the effect that it was only if the Company could argue that the legal consequences should not apply that a difference will arise involving the Company, with the effect that such difference will be required to go to arbitration.

[78] Mr. Smith KC submitted that the Judge had not applied a wrong test but had adopted a sensible and coherent test. He submitted that the **Zanotti** test for a stay was not whether differences between the respondent and the Company were merely 'touched upon' in the sense that once a fact which grounds the respondent's cause of action against the appellants touches upon a difference between the respondent and the Company then reliance upon such fact must be excluded.

Ground 2

[79] Mr. Collingwood KC submitted that this ground was an aspect of the misapplication by the Judge of the test in **Zanotti**.

[80] Mr. Collingwood KC submitted that any claim which affects the Company gives rise to a difference with the Company and ought to be stayed under an application of the proper test.

[81] The Company having disputed the claim in its entirety in its acknowledgment of service, it was not permissible, the appellants urged, for the respondent to proceed with claims where the legal consequences affecting the Company inevitably flow from findings of fact against the appellants.

[82] This would allow the respondent to circumvent the arbitration agreement by pursuing relief which is substantively against the Company but pursuing it against the appellants and later converting it to relief against the Company at some later point in time when the legal consequences that flow from a finding of fact inevitably affect the Company.

[83] Mr. Smith KC submitted that this ground of appeal was entirely inconsistent with the judgment of this Court in the First Appeal. He argued that the appellants should not be allowed to argue on the one hand that the First Appeal had correctly decided that matters can proceed in parallel and for them to now argue in effect that the First Appeal was entirely wrong because of the appellants' interpretation of the decision in **Zanotti**.

Discussion

What is the correct test?

[84] The **Virgin Islands Arbitration Act, 2013** ("the BVI Arbitration Act")¹⁶ provides as follows:

"A court before which an action is brought in a matter which is the _____ subject _____ of an arbitration agreement shall, if a party so requests not later than _____ when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."¹⁷ (Underlining mine)

[85] It is now established that the test is a two-stage one. In **Republic of Mozambique (acting through its Attorney General) v Credit**

¹⁶ No. 13 of 2013 of the Laws of the Virgin Islands.

¹⁷ Ibid. Section 18(1).

Suisse International and others¹⁸ the English Court of Appeal was considering section 9 of the English Arbitration Act 1996 which provided as follows:

“(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter...”¹⁹ (Underlining mine)

[86] Car LJ accepted that the test was a two-stage one in which the court is required: ‘...first to identify the matter and secondly to decide if that matter is one that the parties have agreed can only be arbitrated’.²⁰

[87] The Singaporean Court of Appeal in **Tomolugen Holdings Ltd and another v Silica Investors Ltd**²¹ was considering section 6 of the Singaporean Arbitration Act which provided as follows:

“6.—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration

¹⁸ [2021] EWCA Civ 329.

¹⁹ [2021] EWCA Civ 329, paragraph 61.

²⁰ Ibid. Paragraph 72.

²¹ [2016] 1 LRC 147.

agreement is null and void, inoperative or incapable of being performed ...”²² (Underlining mine)

[88] Although the provisions under consideration in **Tomolugen** and in **Republic of Mozambique** speak to ‘matters’ in proceedings whereas the current BVI Arbitration Act refers to ‘a matter’ in ‘an action’, the test in the BVI is, in my view, quintessentially the same.

[89] In other words, the court must first identify the matter which is the subject of the arbitration agreement and then determine whether that matter is one that the parties have agreed can only be arbitrated.

[90] In **Republic of Mozambique**, Carr LJ cautioned that in identifying the matters in the proceedings:

“... the court looks to substance and not form, adopting a practical and common-sense approach. It should guard against placing undue weight on what may be nuanced emphases or artificial characterisations adopted for tactical or other purposes. This is of course not to say that the parties’ pleaded position is to be ignored, but rather to emphasise that the search is for the reality of the dispute”²³

[91] In **Tomolugen** the court at paragraph 122 considered that a ‘matter’ should not be construed in either an overly broad or an unduly narrow way.

[92] In **Republic of Mozambique** the court cited with approval the judgment in **Sodzawiczny v Ruhan and others**²⁴ where Popplewell J stated:

“The court should stay the proceedings to the extent of any issue which falls within the scope of an arbitration agreement. The search is not for the main issue or issues, or what are the

²² Ibid at 163.

²³ Supra n.16, paragraph 72.

²⁴ [2018] Bus LR 2419.

most substantial issues, but for any and all issues which may be the subject matter of an arbitration agreement.”²⁵

- [93] Popplewell J had himself cited with approval the judgment in **Lombard North Central plc and another v GATX Corporation**²⁶ to the following effect at paragraphs 16 and 17:

“16. This might lead to legal proceedings in which a referred matter is in issue being stayed while that matter, or issue, is referred to an arbitral tribunal, and then resuming when it has been resolved in accordance with the parties' agreement. This might be inconvenient and result in additional costs and some delay, but that is the price of respecting the parties' agreement and a risk that they are taken to have chosen to take...

17. It does not follow that, wherever legal proceedings involve dispute about a referred matter, the defendant will necessarily be able to have them stayed however peripheral the referred matter might be to the proceedings as a whole. It might be that, while the referred matter is stayed for determination in arbitration, the proceedings could otherwise proceed.”

- [94] Accordingly, 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.
- [95] Although the Judge did not expressly advert to the two-stage test in the Judgment he did correctly see the issue before him as identifying which of the matters before him, having regard to their substance and not just their form, embodied differences which ought to be referred to arbitration.²⁷
- [96] The Judge also correctly appreciated that it would have been necessary for him to decide how much of the pleaded case and

²⁵ Supra n.16, paragraph 65.

²⁶ [2012] 2 All ER (Comm) 1119.

²⁷ Supra n.1, paragraph 52.

relief sought should be allowed to proceed²⁸ and that this required him to construe the arbitration agreement.

[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**.²⁹ 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.”³⁰

[99] Further, arbitration agreements being contractual in nature, fall to be construed in accordance with the principles espoused by Lord Neuberger in **Arnold v Britton**³¹

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this

²⁸ Supra n.1, paragraph 53.

²⁹ [2007] 4 All ER 951.

³⁰ Ibid. Paragraph 13.

³¹ [2015] AC 1619.

case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

[100] At paragraph 65, the Judge stated that:

"[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."

[101] In **Republic of Mozambique** the court cited with approval Popplewell J in **Sodzawiczny v Ruhan and others** where he stated: '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'.³²

[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.

³² [2018] Bus LR 2419, paragraph 43(3).

[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.

Grounds 3, 4 and 6

[105] For the sake of convenience, grounds 3, 4 and 6 are being considered together.

Submissions of Counsel

[106] Learned counsel for the appellants, Mr. Collingwood KC, submitted that the claims all derived from a difference between the respondent and the Company regarding the non-payment of dividends and therefore ought to be stayed under the arbitration agreement.

[107] Mr. Collingwood KC urged that this is clear from the fact that if dividends were not due or were properly withheld, the respondent's claim would fall away.

[108] Mr. Collingwood KC further submitted that the Judge at paragraph [50] of the Judgment cited **Zanotti** with approval to the effect that once a difference is pleaded even if no relief is claimed in respect of it this is a difference which ought to be referred to arbitration.

[109] Learned counsel for the appellants submitted that what he was alluding to when he contended that the Judge had mischaracterised the claim was the Judge's ruling that the claim that the resolution

was void or voidable does not give rise to a difference between the Company and the members in circumstances where the Company disputes that the resolution is void or voidable.

[110] Mr. Collingwood KC submitted that the Judge drew an arbitrary distinction when holding that a claim that the resolution be set aside was illustrative of a difference between a member and the Company, whereas a claim that the resolution was void or voidable was not.

[111] Mr. Collingwood KC referred to paragraph [80] of the Judgment which dealt with the question of whether the head of relief to declare the November Resolution void or voidable was a relief being claimed against the Company.

[112] On the pleadings, the parties had joined issue on the question of the Company's right to withhold dividends. Mr. Collingwood KC submitted that that was indicative of a difference between a member and the Company which was caught by the arbitration agreement.

[113] Learned King's Counsel submitted that the resolution of factual and legal issues regarding the Company's liability and the propriety of its withholding dividends ought to take place at the arbitration.

[114] Mr. Smith KC submitted that ground 3 was nothing more than a re-statement of the second ground and in relation to grounds 4 and 6, Mr. Smith KC's succinct rejoinder was that any declarations that the court might make would be simply made for the purpose of giving effect to the factual findings which the court was entitled to make after hearing the matter.

Discussion

[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 1st 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.

[118] In **Halki Shipping Corporation v Sopex Oils Ltd**³³ the English Court of Appeal ruled that if a plaintiff makes a claim there is a dispute until the defendant admits that a sum is due and payable whether there is an answer to the claim in fact or in law.

³³ [1998] 1 WLR 726.

[119] In that case the court was considering section 9 of the English Arbitration Act 1996 which had replaced section 1 of the English Arbitration Act 1975 which provided:

“If any party to an arbitration agreement to which this section applies ... commences any legal proceedings in any court against any other party to the agreement ... in respect of any matter agreed to be referred, any party to the proceedings may ... apply to the court to stay the proceedings; and the court, unless satisfied ... that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.”
(Underlining mine)

[120] The underlined words had resulted in a line of authorities in England to the effect that before there can be a dispute which was capable of being referred to arbitration there must in fact be a dispute between the parties to the claim. In **Halki**, Swinton LJ considered that:

“The important distinction between section 9 of the Act of 1996 and section 1(1) of the Act of 1975 is the omission of the words “that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.” Accordingly the court no longer has to consider whether there is in fact any dispute between the parties but only where there is a dispute within the arbitration clause of the agreement, and the cases which turn on that distinction are now irrelevant.”³⁴

[121] The arbitration clause in the case at bar provides as follows:

“Whenever any difference arises between the Company on the one hand and any of the members or their executors, administrators or assigns on the other hand, ... touching any breach or alleged breach or otherwise relating 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.”

³⁴ [1998] 1 WLR 726 at 762.

[122] When **Zanotti** was decided in 2010, the Court was then considering section 6(2) of the **Arbitration Ordinance**³⁵ which provided as follows:

“If any party to an arbitration agreement, other than a domestic arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.”
(Underlining mine)

[123] Had the underlined words not been omitted from the current BVI Arbitration Act the Judge would have been correct to have considered whether or not there was a genuine dispute on a matter before ordering that matter to be stayed.

[124] In **Zanotti**, which concerned an identical arbitration clause, the court was clearly of the view that there were genuine differences between the claimant and the company which resulted in the claimant seeking to set aside resolutions of the company in a general meeting and at board level, rectification of statutory records and an order requiring the company to pay compensation to the claimant when the company had denied any such liability in its acknowledgment of service.

[125] In **Zanotti** the court had no doubt that: ‘... there are differences between the Claimant and the Company arising out of the conduct

³⁵ Cap 6 of the Revised Laws of the Virgin Islands, 1991.

by the Company of the rights issue and concerning the state of its statutory books and records'.³⁶

[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.

[130] Mr. Collingwood KC submitted, and it was not denied, that the respondent’s entitlement to such relief was disputed in the Company’s filed acknowledgment of service. It has certainly not

³⁶ Supra n. 3, paragraph 16.

been suggested at any time by anyone that the Company has admitted that the dividends are properly due and owing.

Ground 5

Did the Judge err in allowing those claims to continue *pro tem* subject to later review?

[131] At paragraph [68] of the Judgment, the Judge ruled that it was premature to attempt to determine what differences existed between the respondent and the Company that were required to be determined before the claims against the majority were determined and that the ideal point at which this should be done was after the pleadings had closed at a case management conference.

[132] The Judge considered that in those circumstances it would be best to allow those proceedings to proceed and the court would later determine any difference if it became apparent that it was reasonably required to be determined as between the respondent and the Company.

Submissions of Counsel

[133] Mr. Collingwood KC submitted that this wait and see approach lends itself to confusion and effective breaches of the order. He submitted moreover that the Company having, in the acknowledgment of service, disputed the claim in its entirety, that gave rise to a difference between the Company and the members. Therefore, the wait-and-see approach was highly artificial.

[134] The Company applied for a stay and has therefore not filed a defence.

[135] Mr. Collingwood KC relies on the approach adopted in **Zanotti** where the court turned to the acknowledgement of service to determine what issues were disputed.

[136] Mr. Smith KC's submission was that the wait-and-see approach adopted by the Judge was one taken after an examination of the factual matrix and being a case management decision should not be lightly interfered with.

Discussion

[137] In **Republic of Mozambique** the English Court of Appeal explained that the search under the Arbitration Act 'is for the substantial issues to which the claim gives rise including identified or reasonably foreseeable defences'.³⁷ The English Court of Appeal also cited with approval the judgment of Popplewell J in **Sodzawiczny v Ruhan**³⁸ to the following effect:

"(1) The court should treat as a "matter" in respect of which the proceedings are brought any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement.

(2) Where the issues have been identified at the time the court is making the inquiry, there is no difficulty in conducting that exercise. Where the issues are not fully identified or developed at that stage, the court should seek to identify the issues which it is reasonably foreseeable may arise."

[138] In **Republic of Mozambique** the trial judge was considered to have erred when he failed to consider foreseeable defences when identifying the scope of matters for the purpose of section 9 of the English Arbitration Act.

³⁷ Supra n.18, paragraph 95.

³⁸ Supra n.24, paragraphs 43(1) and (2).

[139] Although the Judge admitted to having some difficulty discerning the precise nature of the defence of the Company and the appellants, it was clear to him that the claims were disputed. At paragraph [2] of the Judgment the Judge stated: 'The Company and the Shareholder Defendants dispute the claims, but it is not clear on what grounds. The Defendants suggest that the Company might have a counterclaim. Again, it is not clear on what grounds, if any'.

[140] In the First Appeal this Court was made to understand that the reason advanced for the non-payment to the respondent of the declared dividends was that the Company had had outstanding claims against the respondent.

[141] In **Republic of Mozambique** it was stated that once an actual or a reasonably foreseeable defence is identified, the second stage is to determine whether such defence is sufficiently connected to the arbitration agreement.³⁹

[142] Thus, the Judge ought in law to have applied the reasonably foreseeable defence test (if the 'outstanding claim' defence had not yet been made known to him) rather than to adopt a wait-and-see approach. It was for the Judge to decide whether the identified or reasonably foreseeable defence was sufficiently connected to the arbitration agreement or whether it was not. Having failed to do so the Judge abdicated his function and erred in law.

Conclusion

[143] For the reasons given above, I would make the following orders:

(1) The appeal is allowed.

³⁹ Supra n.24, paragraph 99.

(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.

(4) Costs to be assessed by a judge of the Commercial Court, if not agreed within 21 days of the date of this judgment.

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal



By the Court

Chief Registrar