

IN THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCM 2019/0190

BETWEEN:

CALDICOTT WORLDWIDE LTD

Claimant

-v-

[1] HECTOR FINANCE GROUP LIMITED

First Defendant

[2] SIONG BENG SENG

Second Defendant

[3] CHING HUI HUAT

Third Defendant

[4] SPRINGFIELD INVESTMENTS & NOMINEES PTE LTD

Fourth Defendant

Appearances:

Mr. Stephen Moverley Smith, QC, with him Mr. Justin Davis and Mr. Dhanshuklal Vekaria for the Claimant

Mr. Robert Nader, with him Ms. Sophie Christodoulou for the First Defendant

Mr. Timothy Collingwood, QC, with him Mr. Iain Tucker and Ms. Catherine O'Connell for the Second to Fourth Defendants

2020: July 7;
October 13.

JUDGMENT

[1] **Wallbank, J. (Ag.):** 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. The other 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. Whilst the end result of this judgment is that I have agreed partially with each side, I have largely preferred the submissions of the Claimant.

Introduction

- [2] On 30th December 2019, the Claimant ('Caldicott') issued a claim seeking declarations and orders pursuant to Section 184I of the **Business Companies Act 2004** (as amended) ('BCA') (the 'Claim'). It is the Claimant's case, *inter alia*, that the Second to Fourth Defendants have first caused the First Defendant ('the Company') improperly to withhold dividends ('the Dividends') from the Claimant and then secondly that they passed a resolution of the Company in an unfair and prejudicial manner ratifying the improper withholding of the Dividends. The Claimant claims that the other Defendants control the Company and have at all material times done so. I shall refer to the Second to Fourth Defendants for convenience only, and subject to potential issues as to their status as members of the Company, as: 'the Shareholder Defendants'. The Claimant seeks payment of the Dividends by the Company with interest and/or relief in the alternative including, but not limited to, an order that the Shareholder Defendants should buy out the Claimant's shareholding, that they compensate the Claimant, for the appointment of liquidators over the Company or an order as to the internal management of the Company. 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.
- [3] On 4th March 2020 the Company filed an application for an order staying the Claim in favour of arbitration (the 'Stay Application'). On 28th April 2020, the Stay Application was heard and allowed in part. The Court made an order staying the claims made and the relief sought by the Claimant against the Company in favour of arbitration (the 'Stay Order'). The claims made and the relief sought by the Claimant against the Shareholder Defendants in the Claim were not stayed. The Court directed that there should be a further hearing to determine the consequences of the stay. That hearing took place on 7th July 2020. This is the judgment of the Court in respect of the consequences of the stay upon these proceedings. I ruled in relation to the costs consequences at the hearing on 7th July 2020 by way of an oral judgment, so I will not address the issue of costs here.

The Claimant's submissions

- [4] In this part I will summarise out the Claimant's submissions and I will make no findings in this section. In the '**Discussion**' part, below, I will express my own views and judgment on the material aspects.
- [5] The Claimant submits that the correct approach to determining the effect of the Stay Order is to identify what claims are made against the Shareholder Defendants, what are the pleaded elements of those claims and what relief is sought against them. As the claims made and relief sought against the Shareholder Defendants have not been stayed, necessarily those claims, those elements and that relief must remain to be determined by the Court.
- [6] In any claim made under section 184I of the **BCA** the claimant is alleging that the delinquent shareholders who control the company have caused the company to act in an unfairly prejudicial way and that the company has been the instrument through which those defendants have prejudiced the claimant. Whilst orders may be sought against the company, those orders are only made to give effect to the remedy which the claimant is entitled to against the delinquent shareholders. That being the case, the factual basis for the relief sought against the company is invariably identical to the factual basis for the claim against the delinquent shareholders.
- [7] The present case follows this pattern, as can be seen from an analysis of the Statement of Claim ('SoC').
- [8] The first section of the SoC (paragraphs 1-6) describes the protagonists. The second section describes the factual background leading up to the events complained of (paragraphs 7-25).
- [9] The third section of the SoC deals with the claim. At paragraph 26 Caldicott's case is set out, namely that the Shareholder Defendants have caused the affairs of the Company to be conducted in a manner which is unfairly prejudicial to Caldicott's interests and oppressive to Caldicott as a minority shareholder. In particular, that the Shareholder Defendants have caused the directors of the Company to act in a manner which is unfairly prejudicial or discriminatory to Caldicott.
- [10] The conduct complained of is described in paragraphs 27 to 38 of the SoC. In summary, dividends were declared and/or paid on 19th August 2019, 1st October 2019 and 5th December

2019 but the Second to Fourth Defendants caused the Dividends improperly to be withheld from the Claimant (paragraphs 27-31; 38). The dividends would be paid to all the shareholders except for the Claimant. The Claimant complains that this was unfair.

[11] An extraordinary general meeting of the Company was held on 30th November 2019 ('the EGM') to ratify the improper withholding of the Dividends. This meeting was arranged after the Claimant had, through its legal counsel in this jurisdiction, written to the Defendants informing them that the Dividends had been improperly withheld and had demanded immediate payment of them. The EGM was improperly conducted (paragraphs 32-37). The SoC pleads that the Defendants convened the EGM on short notice and that it was conducted in a manner that was unfairly discriminatory to the Claimant. Specifically, it is alleged that the Second Defendant, as the Chairman of the EGM, refused permission for the Claimant's legal counsel to dial into the EGM as an observer, notwithstanding that he allowed a legal counsel to attend on behalf of the Company as an observer; further, that the Second Defendant disallowed any discussion sought by the Claimant's proxy on any of the resolutions which were to be voted on and that he forced a vote without providing any explanations of the reasons for the resolutions. The Shareholder Defendants then used their 52.35% collective majority to vote the resolutions through. The Claimant's proxy had queried several aspects of the proposed resolutions but the Second Defendant stifled all debate and refused to allow discussion of them. Then, when proposed minutes of the EGM were subsequently circulated, the Claimant's proxy sought to correct material inaccuracies and omissions and she proposed amendments, but the Second Defendant refused to allow them even though they reflected the audio recording of the meeting.

[12] The final section of the SoC (paragraphs 39-40) reiterates the claim made in paragraph 26 and seeks relief from the Court under s. 184I BCA.

[13] It will accordingly be seen that:

- (1) The entirety of the body of the SoC is required to set out the claim against the Shareholder Defendants;
- (2) there is no claim expressed to be made against the Company in that body.

[14] The prayer to the SoC seeks:

- (1) declaratory relief in relation to the ratifying resolution purportedly passed at the EGM;

- (2) a declaration that the Dividends are properly due and owing to Caldicott and should be paid by the Company within 7 days, with interest;
- (3) further or alternatively, an order that the Shareholder Defendants buy out Caldicott's interest in the Company;
- (4) further or alternatively, an order that the Shareholder Defendants pay Caldicott compensation;
- (5) further or alternatively, an order that the Shareholder Defendants sell their interests in the Company to Caldicott;
- (6) alternatively, the appointment of a liquidator over the Company;
- (7) alternatively, an order regulating the affairs of the Company;
- (8) such other order as the Court thinks fit under s. 184I of the **BCA**;
- (9) damages; and
- (10) costs.

[15] The Claimant accepts that, as a result of the Stay Order, (6) and (7) above should be deleted, as should the words "*should be paid by the Company within 7 days, with interest*" from (2). Those constitute relief against the Company. The SoC should also make clear that the remaining relief is only sought against the Shareholder Defendants. In addition, consequent upon the fact that no relief is sought against the Company, the Claimant proposes to amend the SoC by including a further prayer in the following terms (at a proposed new paragraph 4 of an Amended SoC): *'An order that the 2nd, 3rd and 4th Defendants do procure that the dividends declared and/or paid on 19 August 2019, 1 October 2019 and 5 December 2019 be paid by the Company to the Claimant within 7 days, with interest'*.

[16] The Claimant observes that it has been suggested by the Company that the declarations sought in (1) and (2) will bind the Company and therefore ought not to be pursued in the current proceedings. The Claimant argues that concerns that they will bind the Company would be addressed by a proposed amendment to the SoC and Claim Form, that would clarify that declaratory relief is only sought against the Shareholder Defendants. Thus, says the Claimant, this relief would not bind the Company.

- [17] In this regard, the Claimant proposes to include a paragraph in the body of the SoC (as a new paragraph 7) stating as follows:

“On 28 April 2020, Wallbank J. made an order *inter alia* that the claims made and the relief sought against the Company were stayed in favour of arbitration. This Amended Statement of Claim makes no claims and/or seeks no relief against the Company.”

- [18] The Claim also proposes to amend the introductory words to the prayer with the underlined additional words as follows:

“AND THE CLAIMANT CLAIMS AGAINST THE 2ND, 3RD AND 4TH DEFENDANTS”

- [19] The Claimant contends moreover that the declarations sought in (1) and (2) will inevitably be required on the way to deciding what kind of relief is appropriate against the Shareholder Defendants in satisfaction of the claim against them. The specific prayers in respect of these intended declarations are as follows. The parts that the Claimant proposes to add are underlined and those it proposes to remove are shown here as struck through.

“1. A declaration that the resolution passed on 30 November 2019 is unlawful and is void and of no effect;

2. Alternatively (i) a declaration that the resolution passed on 30 November 2019 is voidable and (ii) an order setting aside the said resolution.

3. A declaration that the dividends declared and/or paid on 19 August, 1 October 2019 and 5 December 2019 are properly due and owing to the Claimant ~~and should be paid by the Company within 7 days, with interest.~~”

- [20] The Claimant submits that the main question is whether the Claimant is entitled to ask for such declarations against the Shareholder Defendants and not against the Company. A subsidiary question is whether the Claimant is entitled to ask for the Court to make findings of fact and ultimately a declaration without including the Company. The Claimant submits that the answer is in the affirmative in both cases.

- [21] The Claimant observes that there can be no objection to the amendments it proposes because it is still within its liberty to amend its statements of case once without the permission of the Court, in accordance with Rule 20.1(1) of the Civil Procedure Rules 2000.

- [22] The Claimant submits that there is no obligation for the Company to be joined to the proceedings where no relief is sought against the Company. It is perfectly permissible, contends the Claimant, for it to seek relief against the Shareholder Defendants alone.

[23] The Claimant rejects any suggestion that it should be disallowed from pursuing claims against the Shareholder Defendants simply because the facts relate to the conduct of the Company. The Claimant submits that if that were to be correct, the Claimant would be left with no ability to bring proceedings at all against the Shareholder Defendants. That, submits the Claimant, is obviously nonsensical. In particular, there is relief that the Claimant seeks that it cannot seek in an arbitration against the Company, such as an order that the Shareholder Defendants buy out the Claimant's shareholding and an order that the Shareholder Defendants pay the Claimant compensation. It cannot be right that the Claimant should be precluded from seeking such relief.

[24] The Claimant submits that a better view is that it is only claims against the Company that have been stayed in favour of arbitration.

The Shareholder Defendants' submissions

[25] In this part I will summarise the Shareholder Defendants' submissions. I make no findings in this section. In the '**Discussion**' part, below, I will express my own views and judgment on the material aspects.

[26] The Shareholder Defendants submit that the Stay Order has a fundamental impact on the proceedings generally and (accordingly) on the Shareholder Defendants.

The Shareholder Defendants' primary position

[27] The Shareholder Defendants' primary argument is that the Claimant cannot amend his SoC because even by doing so he will be caught by the stay in favour of arbitration. That is so because 'any differences arising' between the Claimant and the Company are required to be referred to arbitration for determination. Any claims against the Shareholder Defendants based upon facts which disclose a difference between the Claimant and the Company need to be deferred until an arbitration tribunal has ruled on them.

[28] The Shareholder Defendants' rely upon this Court's judgment in **Zanotti v Interlog Finance Corp. and Ors.**¹ as support for that position. In **Zanotti** the Court was faced with an identical arbitration clause in proceedings where the claims included a disputed rights issue and an exclusion from management complaint (based on an allegation of a breakdown of trust and

¹ BVIHCV2009/0394 (unreported, delivered 8th February 2010).

confidence). The Court held in that case that this meant that the proceedings should be stayed 'insofar as they touch upon differences between the Claimant and the Company'.²

[29] The Shareholder Defendants' reference to 'any differences between the Claimant and the Company' is an allusion to clause 156 of the Articles of Association of the Company. This materially provides:

"Whenever any difference arises between the Company on the one hand and any of the members...on the other hand, ... touching any breach or otherwise relating to ... any of the affairs of the Company such difference shall...be referred to ... 2 arbitrators ... and the arbitrators shall before entering on (*sic*) the reference appoint an umpire."

[30] As recognised by the Court at the Company's stay application on 28th April 2020, it is not a straightforward process to separate differences between the Claimant and the Company from those arising between the Claimant and the Shareholder Defendants. It is particularly challenging as a result of the following factors:

- (1) The entire claim is premised upon the withholding of payment of dividends by the Company, such that a very substantial part of the claim touches upon the differences between the Claimant and the Company.
- (2) There is also a tension in that the Company is a necessary party to unfair prejudice proceedings. In England this is a procedural requirement both in the case of unfair prejudice proceedings specifically³ and actions under the Companies Act 2006 generally.⁴ A reason for that is that if the proceedings are successful then the Court may grant relief that affects the affairs or conduct of the Company.
- (3) There is a distinction between the principle that the Company is generally neutral (or a nominal party) in unfair prejudice proceedings and the assertion that the Company is unaffected by relief or that relief is not sought against it. It is difficult in the case of allegations of unpaid or withheld dividends to comprehend relief that does not affect the Company.

² *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [28] (Bannister J).

³ Company (Unfair Prejudice Applications) Proceedings Rules 2009 SI 2009/2469, paragraph 4(1).

⁴ English CPR PD49A, paragraph 7.

- (4) A company in unfair prejudice proceedings is entitled to incur costs and take an active role in various respects.⁵ Such circumstances may include attending judgment in order to make submissions with respect to relief.

The Shareholder Defendants' secondary position

- [31] The Shareholder Defendants have a secondary or fall-back position that all matters contained in the SoC giving rise to differences between the Claimant and the Company ought to be removed from any claim remaining against the Shareholder Defendants.

The Shareholder Defendants' tertiary position

- [32] The Shareholder Defendants have a further fall-back position that at the very least, a number of prayers for relief left in by the Claimant should be removed. Any relief sought which, properly construed, is against the Company, or which affects the affairs or conduct of the Company, should be removed. Only the buyout and compensation orders sought should be allowed to remain.

- [33] Thus, the following matters should be removed from the prayer as a minimum, in addition to the matters excised in the Claimant's proposed draft Amended Statement of Claim:

- (1) Declaratory relief as to the resolution passed by the Company on 30th November 2019 (paragraphs 1 and 2 of the prayer). Properly characterised this is relief against the Company. Indeed, such was one of the specific heads of relief identified as those to be referred to arbitration in **Zanotti**.⁶
- (2) Declaratory relief that the dividends declared on the relevant dates are properly due and owing to Claimant. This prayer demonstrates generally the ineffectiveness of the Claimant's proposed draft amendment. Deletion of the express relief that the Company pay does not change the nature of the claim for payment of the dividends (which can only be payable by the Company). That is clearly relief against the Company. The attempt to 'fix a different label over the tin' makes no difference.

⁵ Re a Company (no.001126 of 1992) [1994] 2 BCLC 146.

⁶ Zanotti v Interlog Finance Corp. and Ors. BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [15] (Bannister J).

- [34] The difficulty with the Claimant's flawed attempt to excise the Company from the claim is also exhibited in the fact that the Claimant cannot seek such relief under section 184I 'as the Court thinks fit', since it cannot include relief as against the Company (even though the Court might think it fit). It is insufficient simply to plead at the beginning that relief is sought against the Shareholder Defendants. This paragraph of the prayer (paragraph (8) above) must make clear that it can only be such relief as against the Shareholder Defendants as the Court might think fit. This is potentially prejudicial to the Shareholder Defendants, who (were the claim to succeed) might wish to persuade the Court that any relief is more appropriately made against the Company.

Disclosure

- [35] A particular issue concerning the Company (as identified by the Court at the hearing on 28th April 2020) is the issue of disclosure. The Company is ordinarily entitled (and expected) to be active in unfair prejudice proceedings for the purpose of disclosure. In the present case the disclosure that would (ordinarily) be sought from the Company is the documentation bearing on the allegations concerning the payment (and withholding) of the dividends. As a result of the stay as against the Company, it is submitted that there cannot, alternatively should not, be any disclosure obligation on the Company. Part of the purpose of the stay is to free the Company from the need to participate in proceedings in this jurisdiction, since it has an entitlement to refer the matter to arbitration.

The Company's submissions

- [36] The Company's views are that the claim should not be pursued at all. The Company's learned Counsel submitted that there is a total overlap of matters between the claims asserted against the Company, which are properly to be decided by an arbitration tribunal, and the claims asserted against the Shareholder Defendants. If the claims against the Shareholder Defendants should be allowed to proceed in these proceedings there is a risk of two inconsistent decisions. There is also the prospect of a massive wastage of costs. The Company's learned Counsel asks rhetorically that if the relief sought is not to be binding on the Company why is it being sought at all.

Discussion

- [37] There is an agreement to arbitrate between the Claimant and the Company, but not between the Claimant and other members, that is, the Shareholder Defendants. The Court has already ordered the claims and relief sought against the Company are to be stayed in favour of arbitration.
- [38] The Shareholder Defendants urge that the proceedings against them ought also to be deferred, following **Zanotti v Interlog Finance Corp. and Ors.**,⁷ on the basis that the proceedings should be stayed 'insofar as they touch upon differences between the Claimant and the Company'⁸ and the Claimant cannot get around this by amending its SoC to say that it is pursuing claims only against the other defendants.
- [39] The impression thus given by the Shareholder Defendants is that where the matters pleaded so much as 'touch upon' differences between the Claimant and the Company, then those matters should be expunged from the Claimant's statement of case against the other Defendants, or the Claimant should not be allowed to rely upon them. In my respectful judgment that is too broad, and an over-ambitious interpretation of **Zanotti** and I reject this argument. **Zanotti** adopts a more substantial test for what qualifies as a 'difference' warranting a stay in favour of arbitration.
- [40] 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.
- [41] It is instructive to read in full the passage from which the Shareholder Defendants select their quotation. Justice Bannister stated:

"[28] I shall therefore stay these proceedings against the Company pursuant to section 6(2) of the Ordinance, but only insofar as they touch upon differences between the Claimant and the Company. The Claimant will accordingly be precluded in these proceedings from making any complaint against the Company in respect of any of the

⁷ **Zanotti v Interlog Finance Corp. and Ors.** BVIHCV2009/0394 (unreported, delivered 8th February 2010).

⁸ **Zanotti v Interlog Finance Corp. and Ors.** BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [28] (Bannister J).

pleaded matters, nor will he be entitled to seek any relief against the Company.”
(Emphasis added.)

- [42] The first point that emerges from this passage, and indeed when the judgment in **Zanotti** is read as a whole, is that the Court was *not* staying the proceedings against the other defendants.
- [43] The issue for determination was whether the Court should give effect to the arbitration agreement by staying the claim against the company where claims against the company were ‘inextricably interwoven’⁹ with claims against defendants to whom the arbitration clause did not apply. The Court found that it should. It is important to note that the alternative was to give no effect to the arbitration agreement but to allow the claims against all the defendants, including the company, to progress to trial before this Court. The essential context of **Zanotti** was that the Court had to decide which of these two alternatives the Court should there apply, in respect of claims against the Company only.
- [44] The finding and reasoning in **Zanotti** clearly supported the Company’s application for a stay in these proceedings, but **Zanotti** does not address questions which the Court needs to address now. Our issues come down to what should be done in respect of claims against the Shareholder Defendants who are not subject to the arbitration agreement. In **Zanotti** Justice Bannister gave effect to the arbitration agreement in respect of claims against the company but recognised that the ‘result is messy and inconvenient’.¹⁰ That is as far as the Court there went in terms of pronouncing upon the effect of the stay on the proceedings as a whole.
- [45] The reason why the result would be ‘messy and inconvenient’ is because the claims against the company were ‘interwoven’, as Justice Bannister put it, with the claims against the other defendants.¹¹ They were interwoven with the claims against the other defendants because, as Justice Bannister observed, the company can only act through human agency.¹² The claims against the other defendants would not necessarily fall neatly in line behind the arbitration to

⁹ *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [16] (Bannister J).

¹⁰ *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [29] (Bannister J).

¹¹ *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraphs [12] and [16] (Bannister J).

¹² *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [16] (Bannister J).

await its conclusion, nor would they necessarily stop. There would be an obvious risk of inconsistent judgments and duplication of effort and thus expense, as well as other difficult questions and complications. It is notable that Justice Bannister did not shy away from such a result but was prepared to let it to happen.

[46] 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 submission 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.

[47] Justice Bannister considered the question of when a difference arises between the Company and a member, such as the Claimant.¹³ It is significant to note that the arbitration agreement there was identical to that which concerns us here, as is common ground. Justice Bannister approached the question mindful of arguments (and, it appears, some degree of authority) that if claims against the company could not be separated from the claims against the other defendants then there could be grounds for refusing to apply the arbitration agreement. So, he asked himself whether:

“...it is possible to identify complaints which the Claimant makes against the Company directly and which can be said to be discrete from complaints made against the second or third Defendants.”¹⁴

[48] To answer this question Justice Bannister considered the pleadings as well as the evidence in support of the application for a stay.¹⁵ He construed these from the perspective of the ordinary meaning of the words used.¹⁶ He identified what he considered to be plain instances of differences arising directly between the claimant and the company, indicated by the relief

¹³ *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [15] (Bannister J).

¹⁴ *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [15] (Bannister J).

¹⁵ *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [15] (Bannister J).

¹⁶ *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [15] (Bannister J).

sought pursuant to the disputed allegations. This included a share buy-out order in which the claimant asked for the company to purchase his shares, the setting aside of resolutions of the company both in general meeting and at board level, the rectification of the company's statutory records and an order requiring the company to pay compensation. He also identified an instance where no difference could be said to have arisen between the claimant and the company. That concerned removal of the claimant from the board of the company. Justice Bannister noted that the claimant had not pleaded that that removal had been defective or unlawful, although that narrative disclosed a factual background evincing a breakdown of confidence and trust. We can observe that the removal would affect the company but Justice Bannister did not see that factor as giving rise to a difference between the claimant and the company of the sort that the arbitration agreement envisaged should be referred to an arbitration tribunal.

[49] Justice Bannister's approach was first to see if the company was being accused of something. The nature of the relief sought against the company could confirm the existence of such a difference that ought to go to arbitration, but Justice Bannister did not treat this as a necessary condition or factor.

[50] He was, secondly, alive to the possibility that a difference warranting a stay can arise without relief being sought. That much is clear from his example in which removal of the claimant from the board was not pleaded as having been defective or wrongful. Had that been pleaded, it is reasonable to posit that such an allegation, even without attendant relief sought in respect of it, could amount to a 'difference' in respect of which an arbitration tribunal might make findings.

[51] Without a pleading of deficiency or wrongfulness on the part of the company, however, Justice Bannister was not prepared to stay the claim against the company on the strength of a possibility that some dispute warranting referral to arbitration might arise later. Put differently, where a difference warranting the reference to arbitration had not yet arisen on the face of the pleadings, a stay in anticipation of such an eventuality would not be appropriate.

[52] Justice Bannister mentioned these examples from opposing ends of a spectrum. There might be more difficult cases to discern, somewhere in the middle. Such cases could be where the language of the pleading expresses claims as being made specifically against other defendants and not the company, but in respect of which, when considered from a common sense or commercial perspective, they also give rise to a difference between the claimant and the

company. 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.

- [53] The question is whether the proceedings against the other Defendants should be allowed to proceed pending the outcome of the arbitration, and if so, how much of the Claimant's pleaded case and relief sought should survive for the claims that remain before this Court. I will answer the first question in the affirmative, and I will endeavour to enunciate principles that might profitably guide us in answering the second, before seeking to apply them.
- [54] The Court in **Zanotti** was not required to address these questions, because the other defendants had not yet been served.¹⁷ The Court in **Zanotti** did not pronounce upon the fate of the claim against the other defendants, save to recognise, by implication, that they could in principle continue in some shape or form, albeit in a way that would be 'messy and inconvenient'.
- [55] It can be seen that **Zanotti** is not authority for requiring the claims against the defendants other than the company also to be stayed or deferred, which appears to be the Company's and the Shareholder Defendants' primary position. Indeed, it is authority that there is no such requirement. In this respect **Zanotti** does not assist the Shareholder Defendants.
- [56] To answer the questions now before the Court, we therefore have to look elsewhere than to **Zanotti** for guidance. Absent authority, we need to go back to first principles. We need to ask ourselves first what, if anything, the shareholders of the Company had agreed between themselves. Just as Justice Bannister did in **Zanotti**, we need to construe the arbitration agreement.
- [57] The arbitration agreement is a clause in the Company's Articles of Association. It is trite that when shareholders subscribe to a share in a company's issued share capital, they enter into a form of contract between themselves as members associating with each other. In short, the arbitration agreement is part of a wider binding and enforceable agreement between the members.

¹⁷ *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [6] (Bannister J).

- [58] So, we have to consider what it is that they materially agreed upon. We know already that differences arising between the Company and a member are to be referred to arbitration. The members agreed that as between the Company and a member, arbitration would be the way for such differences to be determined.
- [59] Next, we need to consider what the members did not agree to do. Two matters stand out.
- [60] First, the members did not agree to refer differences between themselves to arbitration.
- [61] Secondly, the members did not agree that they would not pursue proceedings between themselves whilst claims were being pursued against the Company.
- [62] They left it open for disputes between themselves to be resolved in legal proceedings before a court of law without waiting upon the arbitration. Without an alternative dispute resolution agreement, court proceedings are the ordinary means of obtaining justice. Indeed, all things being equal, and absent a legally enforceable agreement otherwise, potential litigants are entitled to have recourse to the often greater legal and factual rigour, the generally greater scope for appellate review, as well as to the greater procedural and substantive integrity, at less cost, that proceedings in a court of law can provide over arbitration. That right should not be negated nor removed lightly.
- [63] There was no agreement between the members that arbitration proceedings would be treated as a privileged means of resolving differences between them.
- [64] It merits observing here that there is no innate superiority of arbitration over court proceedings. The primary reason courts treat arbitration proceedings with deference is because courts respect the legally binding agreements of parties. It is not arbitration that is treated as sacrosanct, but the free will of the parties to an arbitration contract. The parties are free to waive compliance with an arbitration agreement, but where one party insists upon its application the Court will respect that and enforce its terms.
- [65] What this state of affairs entails for the present case is this. If 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 of 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. Therein, in my respectful judgment, lies the crux of the matter.

[66] Consequently, where a single matrix of facts would support parallel causes of action by the Claimant against the Company and against the Shareholder Defendants, there is no reason why both cannot proceed at the same time, at their own pace, in their respective *fora*.

[67] It follows also that where a legal consequence of a finding of fact in the claim against the Shareholder Defendants inevitably flows from such a finding, then there is no reason why the Court should hold back from pronouncing and applying that consequence, even though it might affect the Company. An inevitable or inescapable legal consequence cannot give rise to a difference between the Company and a member requiring the Court to defer pronouncing upon it, because the Company would be bound as a matter of law to accept it. If, however, 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. What I have in mind here is this. If, for example, the conduct of one or more of the Shareholder Defendants at a general meeting of the Company was such as to attract an inevitable legal consequence that the resolution procured thereby was void for illegality, nothing should prevent the Court from making a declaration to that effect.

[68] The upshot is that it is not necessary for the Court now, once and for all, to determine what, if any, the differences between the Claimant and the Company are for the purposes of the Claimant's claims against the Shareholder Defendants. If it is not clear that there are any such differences between the Claimant and the Company that require to be determined before the claims against the Shareholder Defendants can be determined, then the Court can and should allow them to proceed at this stage, but stay them later should it become apparent during the progress of the proceedings that such a matter reasonably requires to be determined as between the Claimant and the Company. The ideal point at which a better regard can be had in respect of these matters is after the pleadings have closed at a Case Management Conference.

- [69] I conclude that the Shareholder Defendants' primary and secondary positions are therefore unsustainable. The Company's position falls with them. In respect of the Shareholder Defendants' primary position, 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, the Claimant may do so. The Claimant can amend his SoC within these parameters without necessarily being caught by a stay in favour of arbitration.
- [70] In respect of the Shareholder Defendants' secondary position, there is no requirement for all matters contained in the SoC giving rise to differences between the Claimant and the Company to be removed from any claim remaining against the Shareholder Defendants: claims between the Claimant and the Shareholder Defendants can proceed in parallel with the claims against the Company where issues of fact or law arising between the Claimant and the Company do not require to be determined before the claim against the Shareholder Defendants is ruled upon.
- [71] This takes us to the Shareholder Defendants' tertiary position. The Shareholder Defendants contend that at the very least, a number of prayers for relief left in by the Claimant should be removed. Any relief which, properly construed, is sought against the Company, or which affects the affairs or conduct of the Company, should be removed, they urge; only the buyout and compensation orders sought should be allowed to remain.
- [72] Let us analyse this. This tertiary position assumes that the Claimant is indeed permitted to rely upon the same matrix of facts for its claims against the Shareholder Defendants as for those against the Company. It also acknowledges that in the manner the body of the SoC was pleaded, no claims against the Company were expressly pleaded. I agree in both respects.
- [73] I would go further and say that upon the face of the body of the SoC there appears to me to be no difference between the Claimant and the Company that requires to be resolved before a determination of fact is made in relation to the allegations made in respect of the claims between the Claimant and the Shareholder Defendants. This might of course change if the Shareholder Defendants file a viable Defence. They have thus far been extremely coy about what their defence, if any, to the Claimant's allegations might be and they have refused to be drawn on it. That is of course their right. But as matters stand it is by no means clear that the Shareholder Defendants have any defence at all. It is thus also in the interests of justice, in my respectful judgment, for the Claimant's claims against the Shareholder Defendants to proceed,

at least until a viable Defence is served which raises a reasonable argument that one or more matters pertaining thereto require prior resolution in arbitration between the Claimant and the Company.

- [74] In their tertiary position the Shareholder Defendants focus upon the relief sought by the Claimant in its SoC.
- [75] The Shareholder Defendants contend that heads of relief should be removed which are in substance, properly construed, against the Company.
- [76] The Claimant acknowledges that the relief it sought against the Company cannot proceed. Therefore, the Claimant proposes to delete its prayer for (i) an order that the Company pay the Dividends within 7 days, with interest, (ii) for the appointment of a liquidator over the Company and (iii) an order regulating the affairs of the Company. There is no dispute about this. Those heads of relief cannot be granted whilst the claims against the Company remain stayed. There is in principle no need for the Claimant to amend its SoC to remove those heads, because the claims against the Company upon which they depend have been stayed anyway. If, though, the Claimant wishes to amend its SoC to make it clear that it is not pursuing claims against the Company in these proceedings, the Claimant is within its right to do so without the permission of the Court.
- [77] There is however a dispute whether other heads are to be construed as being relief sought against the Company.
- [78] The first two heads seek a declaration that the resolution passed on 30th November 2019 at the EGM is unlawful, void, of no effect; alternatively, that it is voidable, and an order setting it aside.
- [79] The Shareholder Defendants argue that properly characterized this is relief against the Company. They refer to the treatment in **Zanotti**¹⁸ of relief seeking to set aside a resolution as referring to a difference with the company that was there referred to arbitration.
- [80] The flaw in this argument is that merely because relief can be characterized as being sought against the Company does not automatically mean that there is an underlying difference between the Claimant and the Company which prevents the claims against the Shareholder

¹⁸ *Zanotti v Interlog Finance Corp. and Ors.* BVIHCV2009/0394 (unreported, delivered 8th February 2010) at paragraph [15] (Bannister J).

Defendants going forward. A declaration that a resolution is unlawful, void or of no effect involves a conclusion of law as to the effect of someone else's conduct. 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 well follow irresistibly as a matter of law. If the Company simply cannot dispute such a legal effect, then, as I have explained above, no difference arises in reality between the Claimant and the Company on the point. The Claimant is entitled to ask for such relief in its claims against the Shareholder Defendants. It can however be contested during the proceedings between the Claimant and the Shareholder Defendants whether such a conclusion of law does indeed necessarily follow. Should that occur, which is uncertain right now, then, depending upon what the Court finds, it can and might need to stay issues arising pending arbitration. I will therefore allow this head of relief – the first declaration sought – to go forward.

- [81] In respect of the second head of relief, which is for a declaration that the resolution is voidable, the same reasoning applies. The second declaration sought can also go forward at this stage.
- [82] However, concerning the order sought, where something is voidable (as opposed to void), this calls for a consideration whether or not, in the factual and legal circumstances as a whole, it ought either to be set aside or maintained. The Company should be entitled to have a say on this question, because it might wish to bring circumstances to the attention of the Court that could affect the exercise of the Court's discretion. But since the claims against the Company have already been stayed, the Court cannot hear the Company whilst the stay remains in place.
- [83] Put differently, this is in principle an example of a difference arising between the Claimant and the Company which requires to be determined through arbitration before part of the claim can proceed against the Shareholder Defendants.
- [84] The way the Claimant's claims against the Shareholder Defendants are advanced in its SoC and proposed Amended SoC, the Claimant evinces an intention that all issues be dealt with at a single trial, rather than for preliminary issues to be determined separately. If that is how the Claimant envisages the structure of the proceedings, then this would give me no choice but to

disallow the prayer for an order setting aside a voidable resolution from going forward until such time as this has been referred to arbitration between the Claimant and the Company or until such time as the current stay is lifted. That would be the only way in which the Company could formally have a say on the matter. I am open to hearing further submissions from the parties how best this aspect can be dealt with. This is simply one of the 'messy and inconvenient' results that flow from the application of this arbitration agreement.

[85] The next head of relief over which the parties disagree is the request for a declaration that the Dividends are properly due and owing to the Claimant. The Claimant concedes that its original relief sought, which included a provision that the Dividends be paid by the Company within 7 days, with interest, went too far in that it amounted to relief against the Company. The Claimant says that if that specific provision is deleted, then the declaration becomes unobjectionable. The Shareholder Defendants disagree, on the basis that dividends are payable by the Company, and nobody else. This makes it a claim against the Company, they say.

[86] The flaw in the Shareholder Defendants' argument here is that the answer to the issue whether the Dividends are properly due and owing to the Claimant could be no more than the legal consequence of the Shareholder Defendants' allegedly wrongful actions. If such a legal consequence is irresistible, the declaration sought is unobjectionable. 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.

[87] The Claimant includes a prayer for relief in terms of 'such other order as the Court thinks fit under section 184I BCA'. The Shareholder Defendants say the Claimant cannot obtain such relief because it cannot include relief against the Company even though the Court might think it fit. Moreover, the Shareholder Defendants complain that allowing this head to go forward without the Court being able to make orders in respect of the Company is potentially prejudicial to the Shareholder Defendants, who (were the claim to succeed) might wish to persuade the Court that any relief is more appropriately made against the Company. The Shareholder Defendants thus submit that this head of relief should be excluded.

- [88] Both objections are misconceived. First, even with the stay in place, the Court can make such orders as the Court thinks fit within the ambit of its powers. It is true that the stay has narrowed the scope of the Court's jurisdiction, but within it the Court's powers remain unfettered.
- [89] In relation to the Shareholder Defendants' second objection, they speculate on an eventuality. Such a mere possibility is an insufficient reason for excluding that head of relief now. Also, as I have explained, it is not every order pertaining to the Company that must be excluded. It would be necessary for the Court to evaluate the relief that the Shareholder Defendants would propose before ruling upon whether it falls to be excluded or stayed, or not, as the case may be.
- [90] The last proposed form of relief over which there is a dispute is the proposed new paragraph 4 of an Amended SOC. This would seek an order that the Shareholder Defendants procure the Company pay the Dividends within seven days, with interest.
- [91] The problem with this proposed relief is that it presupposes that the Company can have no good grounds for withholding payment. It is one thing seeking a finding as a matter of law that the Claimant is entitled to the Dividends. As explained above, such a conclusion need not involve the Company at all and it can follow irresistibly by operation of law. It is quite another requiring the Company, through its agents, to pay the money. That is because the Company might have a set-off or counterclaim against the Claimant. Whether or not the Company should pay the Claimant a positive sum of money is an issue which, if disputed on more than fanciful or hopeless grounds, would squarely raise a difference between the Company and the Claimant that would need to be stayed in favour of arbitration. The difficulty is that it cannot be tested in the proceedings now whether the Company does dispute this, because the proceedings have already been stayed against the Company. That would have to be an issue for the arbitration. In my respectful judgment therefore, the Court should not allow this proposed head of relief to go forward.
- [92] The Shareholder Defendants point to difficulties concerning what should be done about disclosure as a reason for not allowing the claims against them to go ahead. I reject this. Whatever the legal or procedural position in the United Kingdom might be for requiring a company to be joined in an unfair prejudice action, I do not see that there is any such requirement here. Section 184 of the **BCA** is instructive in this regard. Section 184C(4) specifically provides that an application for permission to bring derivative proceedings on behalf

of a company must be served on the company and the company is entitled to appear and be heard at the hearing of the application. By contrast, in relation to unfair prejudice proceedings, section 184I(3) provides:

“No order may be made against the company or any other person under this section unless the company or that person is a party to the proceedings in which the application is made.”

[93] On my reading of this section, this does not require the company to be a party to all claims under section 184I, only those where claims are made against the company. The purpose of this section appears to be to ensure that the person or entity against which an order may be made has an opportunity to make representations at each stage. Where an order is not sought against such a person or entity, he or it need not be made a party. Learned Queen’s Counsel for the Claimant submitted that this was so, and I accept this submission.

[94] Moreover, the wording of section 184I(3) speaks of a case where an order may not be made ‘against the company’. This is narrower than an order ‘affecting’ the company. The Shareholder Defendants submitted that the Company should be a party to proceedings where orders might be made that could ‘affect’ it. That is not what section 184I(3) says. That is too wide and ill-defined a purported requirement.

[95] The Company is and remains a party to these proceedings, albeit that the claims against it have been stayed. The Shareholder Defendants urge that there cannot, alternatively should not, be any disclosure obligation on the Company. Whether that is right is, in my view, a question for another day. The Court was not given the benefit of detailed argument on the point. Whether or not the Court can or should make orders for disclosure against the Company is not necessarily a straight-forward question to answer. I note that the stay does not remove the Company as a party to the proceedings. The amendments to its SoC proposed by the Claimant would have the effect of making the Company a non-cause of action Defendant. The stay does not entirely remove the Company from the Court’s jurisdiction over it. Disclosure by the Company may prove to be a non-issue, however, depending upon the positions the parties, including the Company, may wish to take at the disclosure stage in the proceedings. By wishing to amend its SoC to clarify that it makes no claims and seeks no relief against the Company, the Claimant implies that it is prepared, and indeed wishes, to proceed with its claims as if the Company were not a party. The Claimant may be content to forego disclosure

from the Company. If that is right, the Shareholder Defendants will find themselves in agreement with the Claimant that no disclosure from the Company will be required.

- [96] It is appropriate in my view to wait and see how the disclosure issues will play out without attempting to grapple with them now in the abstract. I do not see potential difficulties or issues with disclosure as sufficient reason for halting the claims against the Shareholder Defendants. They are simply part of the messy and inconvenient result of a stay in favour of arbitration and will have to be worked through.
- [97] The Shareholder Defendants also argue that a company in respect of which unfair prejudice proceedings have been brought is entitled to take part in the proceedings in various aspects. Since it can no longer take part, their argument goes, I should not allow the proceedings to proceed. I do not accept this argument. If it is that the Company is no longer able to take part by reason of the stay, that is a difficulty for the Company of its own making. It was the Company who insisted upon a stay in favour of arbitration. Choices have consequences.
- [98] Beyond heads of relief sought against the Company, the Shareholder Defendants contend that any relief sought which affects the affairs or conduct of the Company, should also be removed. That is also too broad a view in my respectful opinion. As I have endeavoured to explain above, a form of relief which reflects an inevitable conclusion of law deriving from a finding of fact is unobjectionable, even if it might affect the affairs or conduct of the Company.
- [99] Lastly, the Company asks rhetorically that if the relief sought by the Claimant is not binding upon the Company, why should they ask for it at all. The short and sufficient answer is that the Claimant is looking to the Shareholder Defendants to make them whole following the latter's allegedly wrongful acts and to buy out their shareholding. That relief does not need to bind the Company in order to be effective.
- [100] There is another, ancillary, potential benefit. Rulings of this Court, particularly in relation to matters of BVI law, may assist the arbitration tribunal without interfering in that process. Such rulings may serve as a timely reminder of how legal principles of the laws of the Territory of the Virgin Islands are to be applied with proper rectitude, and may serve to rein in potential tendencies in an arbitration to circumvent fundamental legal principles, such as those pertaining to separate corporate legal personality, in favour of subjective and/or arbitrary findings under the guise of a 'commercial' determination.

Disposition

[101] I will therefore order and direct the following:

- (1) The proceedings against the Shareholder Defendants shall be permitted to proceed despite the stay of the claims against the Company in favour of arbitration, 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;
- (2) The Claimant shall be permitted to amend its Claim Form and Statement of Claim within the parameters set in subparagraph (1) above;
- (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:
(i) an order that the Company pay the Dividends within 7 days, with interest, (ii) an order for the appointment of a liquidator over the Company and (iii) an order regulating the affairs of the Company;
- (4) The Claimant shall be permitted on an interim basis to seek a declaration that the resolution passed on 30th November 2019 is unlawful, void, of no effect, alternatively, that it is voidable, subject to eventual further review by the Court;
- (5) The head of relief sought by the Claimant by which the Claimant seeks an order for the resolution passed on 30th 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;
- (6) The Claimant shall be permitted to seek a declaration that the Dividends are properly due and owing to the Claimant;
- (7) 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;
- (8) 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**;

- (9) 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 of the claims against the Company or further order;
- (10) All the parties shall have liberty to apply for further directions concerning the procedural consequences of the stay;
- (11) The Court shall hear the parties further in relation to
 - i. Settlement of terms for an order upon this judgment;
 - ii. Any further permission to amend the Claimant's Claim Form and Statement of Claim as the Claimant may submit ought to be allowed;
 - iii. Costs.

[102] Since there is to be a further hearing at which it is intended that an order upon this judgment shall be settled, the time for appeal from this written judgment and such order upon judgment, and for making any applications relating thereto, will run from the date such order upon judgment is sealed and entered.

[103] I take this opportunity to thank all parties' learned Counsel for their assistance during this matter.

Gerhard Wallbank

High Court Judge

By the Court

Registrar