

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2019/0061

BETWEEN:

**[1] INTERNATIONAL TRADING HOLDING CO. LTD
[2] INTRACO U.A.E. LIMITED**

Claimants

and

MED TRADING COMPANY LIMITED

Defendant

Appearances:

Mr. Ryan Hocking for the Claimants
Mr. John Carrington, QC for the Defendant

2019: October 23;
December 19.

JUDGMENT

- [1] **WALLBANK, J. (Ag.):** This is the decision in relation to an application for summary judgment pursuant to rule 15.2, Civil Procedure Rules 2000 ('CPR'), and/or strike-out filed by the Claimants. For the reasons set out below, the application is dismissed. The Defendant shall have retrospective permission to file and serve an Amended Defence and Counterclaim, save that parts thereof purporting to plead a defence and counterclaim of estoppel are struck out.

Background

- [2] For the purposes of this application and without making any findings of fact, I shall assume the following factual background. All three parties are companies incorporated in the Territory of the Virgin Islands ('BVI'). The Second Claimant, Intraco U.A.E. Limited ('Intraco'), was incorporated in 1998. Since 1989 Intraco has been trading in Dubai. Until mid-2001, a Mr.

Trak was one of a number of shareholders in Intraco. A restructuring then took place. Basically, a company was interposed between the shareholders and Intraco. This was the First Claimant ('ITHC'). ITHC became the majority shareholder in Intraco, holding 80% of Intraco's shares. A majority of those who had historically been shareholders in Intraco became shareholders in ITHC. Mr Trak came to hold his interest in ITHC through the Defendant ('Med Trading'). Med Trading holds 25% of the shares in ITHC. Mr. Trak is the principal of Med Trading. Mr. Trak had been a director of Intraco and indeed its Managing Director until 2007, when he resigned in apparently acrimonious circumstances. So, in simple terms, the structure we are concerned with is as follows: Mr. Trak – Med Trading – ITHC – Intraco. Intraco has a branch registered in the United Arab Emirates ('U.A.E.') and a commercial license to trade there. It has assets and premises in Dubai. ITHC does not, but it did have a representative office license there between 2001 and 2014. In 2014 ITHC relinquished that license. Mr. Trak appears also to be based in Dubai.

- [3] Mr. Trak and Med Trading maintain that despite the corporate structure erected in 2001, Intraco adopted a practice of distributing profits directly to the shareholders of ITHC, Med Trading included, rather than paying these to ITHC and for ITHC then to distribute these to its shareholders.
- [4] Med Trading has brought legal proceedings against both the Claimants in Dubai. At risk of over-simplifying matters, there have been four such sets of legal proceedings. The first was begun in March 2013. The second in September 2016. The third and fourth in June 2017. The Claimants say only the third remains live. The subject matter of these proceedings, broadly stated, are claims that Med Trading is entitled to a share of profits from both ITHC and Intraco.
- [5] The first claim concerned an alleged share of profits for the period between 2005 and 2013. At first instance Med Trading obtained money judgments respectively against ITHC for about US\$3.75million and against Intraco for about US\$4.2million. Although ultimately the judgment was set aside as against Intraco on limitation grounds and as against ITHC on defective service grounds, the Claimants say that Dubai's highest court, the Court in Cassation, held in October 2018 that ITHC's shareholding in Intraco was sufficient to render Intraco liable to distribute profits directly to Med Trading. A close reading of an English version of the Court in Cassation's judgment indicates that it is an established principle of Dubai law that 'a Defendant

[such as Intraco] has a capacity [to be sued] when he is responsible directly **or indirectly** for the claimed right or shares responsibility for that right or the legal position required to be protected.’ (Emphasis and words supplied.) The Court in Cassation deferred to the lower court’s findings of fact, which the Court in Cassation would not interfere with ‘as long as its [the lower court’s] judgment is based on sound reasoning sourced on the papers and is sufficient to sustain the judgment in this concern.’ The Court in Cassation then ruled that the lower court’s conclusion as to ‘capacity’ was ‘sufficient to sustain the judgment’.

- [6] The Court in Cassation was constituted by the Chief Justice of Dubai and four other judges. No reference is made to BVI law. Nothing in the Court in Cassation’s judgment suggests that that court had failed to understand BVI law. The Court in Cassation was simply applying Dubai law principles. I note this, because the Claimants say they are inviting this Court to make a declaration that Med Trading has no cause of action against Intraco under BVI law ‘so that the Dubai Courts are not misled as to the state of BVI law into thinking that it is the same as Dubai law.’ There is no sign in the Court in Cassation’s judgment on these points that the judges of that court had any such misapprehension.
- [7] The third set of proceedings, which the Claimants say is still alive, appear to be a further attempt by Med Trading to obtain judgment for a share of the profits. Intraco is defending these proceedings, but, say the Claimants, ITHC has decided not to participate in them. The Claimants allege that Mr. Trak is seeking deliberately to vex ITHC and Intraco and that he is likely to continue doing so unless an anti-suit injunction is made against his company Med Trading.
- [8] On 3rd May 2018, that is, well after all four legal proceedings in Dubai had been commenced, the Articles of Association (‘Articles’) of ITHC were amended. This amendment was purportedly decided upon by way of resolutions of the directors and also of a majority of the shareholders. Med Trading did not sign the members’ resolution. Med Trading says it was not consulted prior to the other shareholders signing it.
- [9] The earlier version of the Articles, passed in 2001, included a provision at article 142 stipulating that any differences between the company and any of its members were to be referred to arbitration. The place for any such arbitration was not stipulated and thus left open. The May

2018 amendment deleted that clause and inserted a more detailed provision as article 24. This provided, controversially for present purposes, that the place of arbitration would be the BVI.

- [10] In the Claimants' affidavit in support of this application, it is explained that amendment of the Articles was 'thought to be necessary' because the earlier Articles were 'outdated' and it was 'necessary to amend them to reflect the fact that ITHC was no longer entitled to issue bearer shares' and further, that the directors 'considered that it was also in the best interests of the Company and its Shareholders that the dispute resolution provisions should be amended to bring them into line with the Arbitration Act 2013, to provide for the application of the rules of the BVI IAC.'
- [11] In their Statement of Claim the Claimants give a slightly different explanation. They say the amendment was made 'to ensure, insofar as was possible, that disputes between ITHC and its shareholders as to inter alia the payment of dividends were dealt with by arbitration in the BVI, where BVI company law would be understood.' This suggests that the Dubai courts have not 'understood' BVI law or are liable not to do so. It is not apparent to me that there has been any such misunderstanding of BVI law, because, so far as I can tell, the Dubai courts applied Dubai law. It also suggests that Dubai's courts and judges, including their Chief Justice and the four other judges who comprised the Court in Cassation, were and are incapable of understanding BVI law. That is a suggestion which does not commend itself.
- [12] Counsel for the Claimants submitted at the hearing that the amendment 'simply adds procedural clarity.' Med Trading says the addition of a stipulation for the place of arbitration does more than this. In this regard Med Trading is clearly right. I will return to this.
- [13] Med Trading alleges further that the amendment was made by ITHC's directors and other members deliberately to target Med Trading, to force Med Trading away from the Dubai courts and to force disputes between Med Trading, ITHC and Intraco to be arbitrated in the BVI.
- [14] On 26th April 2019 the Claimants filed a Claim Form and Statement of Claim. By way of relief the Claimants seek
- (1) a declaration in favour of ITHC that the arbitration provision in its 2018 amended Articles is binding upon Med Trading;

- (2) an interim and/or final injunction restraining Med Trading from commencing or pursuing any further claims or proceedings against ITHC other than by arbitration in the BVI;
- (3) a declaration that Med Trading is not a shareholder of Intraco and that Med Trading has no right or entitlement to receive dividends from Intraco; and
- (4) an interim and/or final injunction restraining Med Trading from commencing or pursuing any further claims or proceedings against ITHC whether in the U.A.E. or elsewhere inconsistent with such declaration;
- (5) costs.

[15] The Claimants plead the existence of the earlier arbitration provision at article 142 of ITHC's Articles prior to their amendment. The Claimants do so by way of background. The Claimants do not include relief in their prayer that Med Trading would be caught by the original provision if the new provision at article 24 does not apply. The Claimants' prayer is very specific and delimited. It does not include a "catch-all" prayer, commonly deployed, to seek such other relief the Court deems fit. The absence of a prayer linked to article 142 merits observation because the Claimants argue in their current application that Med Trading would be caught by article 142 if article 24 were to be struck down. This argument, in this application, is flawed because it strays beyond the Claimants' pleadings as currently drafted. If this Court were to accede to that argument, then the Court would be granting summary judgment for a case that has not been pleaded. That would be blatantly wrong. I will also return to this later.

[16] The Claim Form and Statement of Claim procedure adopted by the Claimants is that for legal proceedings to obtain final relief through a plenary process. That the Claimants include a prayer for interim relief therefore catches the eye. The Claimants have not applied separately for an interim anti-suit injunction pending the determination of this claim. This manner of proceeding suggests that the Claimants have always intended this matter to proceed rapidly to a conclusion by confining the issues for determination to narrow limits and to apply for summary judgment at the very first opportunity. That is precisely what they now seek to do.

[17] Med Trading filed a Defence on 27th May 2019. This is a short document. Med Trading pleads that Intraco has made various past and current payments to shareholders and directors of ITHC. Med Trading says that by reason of this practice it should not be precluded from claiming dividends from Intraco and is entitled to receive such dividends. Med Trading denies that it commenced proceeding in Dubai in breach of the arbitration provisions in ITHC's

Articles. Med Trading asserts that the amendments to ITHC's Articles had not been made with Med Trading's knowledge or consent. It says that it had never been invited to participate, vote or approve the 2018 amendments, notwithstanding that Med Trading is ITHC's second largest shareholder. Med Trading further asserts that any resolution so made was not passed with the requisite authority. Med Trading says that the arbitration provisions in the 2018 amendment to the Articles are not binding on it and consequently there is no legal basis for the Court to grant declarations or injunctions as sought by the Claimants.

[18] A month later, on 27th June 2019, the Claimants filed their application for summary judgment, alternatively an order striking out those paragraphs of the Defence that fail to disclose any reasonable grounds for defending the claim. The grounds for the application were briefly stated, that the Defence discloses no reasonable grounds for defending the claim and there is no other reason why these proceedings should be determined at trial. A further ground given is that the Defendant has taken a series of abusive proceedings against the Claimants asserting claims which purport to arise out of its position as a shareholder in ITHC which are inconsistent with BVI law and what the Claimants call the contractual agreement to arbitrate.

[19] On 30th July 2019 the Claimants filed their skeleton argument. In this they submit, with respect to ITHC that

"Med Trading's arguments in relation to the 2018 Arbitration Agreement are lacking in any merit when assessed against the relevant provisions of ITHC's Articles of Association. In any event, Med Trading has not even made a bare denial that it was bound by the 2001 Arbitration Agreement. Indeed, it is difficult to see how any such denial could be sustainable. Med Trading has no prospect of successfully defending the allegations that it is bound by the 2018 Arbitration Agreement, or alternatively the 2001 Arbitration Agreement."

[20] The Claimants then submit that, with respect to Intraco, that the

"directors of Intraco are under no obligation to declare a dividend at all, and have no power to declare a distribution to any non-members of the company (as Med Trading alleges ought to occur). Med Trading has no real prospect of successfully defending the allegation that it [Intraco] is not entitled to the declaration or payment of any dividend from Intraco."

[21] The Claimants say that the claim for injunctive relief follows from the declarations sought. In addition to the well-settled proposition that the court has power to grant injunctions in all cases in which it appears just or convenient to do so, they refer to the Privy Council case of **Société**

Nationale Industrielle Aerospatiale v Lee Kui Jak.¹ In that case Lord Goff explained² that the jurisdiction to grant an injunction to restrain foreign proceedings is a jurisdiction which is to be exercised when the ends of justice require it and that since such an order indirectly affects the foreign court, the jurisdiction is one which is to be exercised with caution. They also rely upon reasoning of Lord Goff,³ submitting that a two-stage test is to be applied:

- (1) the court granting the injunction must conclude that it provides the natural forum for the trial of the action, to whose jurisdiction the parties are amenable (applying the principles in **Spiliada Maritime Corporation v Cansulex Ltd.**⁴); and
- (2) the court will only restrain a party from pursuing proceedings in a foreign court if such pursuit would be vexatious or oppressive.

[22] The Claimants submit the second stage of the test is satisfied where it is proven that it would be unconscionable for the respondent to continue with foreign proceedings and the applicant for an injunction need not prove that continuation of foreign proceedings would be vexatious, per **Cadre S.A. v Astra Asigurari S.A.**⁵ The Claimants submit that there is no exhaustive definition of 'unconscionable conduct', but where foreign proceedings are frivolous or bound to fail, the court may grant an injunction to restrain them, following **British Airways Board v Laker Airways Ltd.**⁶

[23] The Claimants submit further that where a binding arbitration agreement exists, and the foreign proceedings are brought in breach of that agreement, the burden is on the respondent to show strong reasons why an injunction should not be granted, rather than the burden being on the applicant to show that justice requires that an injunction be granted (following **Donohue v Armco Inc.**⁷).

¹ [1987] AC 871.

² At page 892.

³ At page 896.

⁴ [1987] AC 460.

⁵ [2005] EWHC 2626 Comm at paragraph [6] (Morison J).

⁶ [1985] AC 58 at 86 (Diplock LJ).

⁷ [2001] UKHL 64 at paragraphs 24 – 25 (Lord Bingham).

- [24] The Claimants also say a relevant consideration is whether the applicant for an injunction has acted promptly.
- [25] The Claimants urge that they amply satisfy all the necessary criteria for the grant of the relief they seek.
- [26] Med Trading reacted to the Claimants' application and skeleton in two ways. First, on 18th October 2019, it filed an Amended Defence, adding to it a Counterclaim. Med Trading sought to rely upon its right to amend its statement of case once without the Court's permission prior to the first case management conference pursuant to CPR 20.1(1). This provides:
- “A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.”
- [27] Then, on 22nd October 2019, Med Trading filed submissions in response to the Claimants' application.
- [28] The Claimants, however, cried foul, on two grounds.
- [29] The first ground is that a counterclaim is a form of ancillary claim, which the Claimants contend must be filed together with the defence, upon a proper interpretation of CPR 18.4(1)(a).
- [30] If a counterclaim is not filed with the original defence, the Claimants say CPR 18.4(1) does not apply and the ancillary claim may only be made if the Court gives permission, in accordance with CPR 18.4(2).
- [31] The Claimants say this provision overrides CPR 20.1, upon which the Defendant relies.
- [32] By way of their second objection, the Claimants argue that once the Court is seised of an application to strike out a statement of case, documents may only be filed and amendments to a statement of case made with the permission of the Court, following **Outlook Asset Management and others v Capstone Corporate Limited and others**.⁸ I shall refer to this as the rule in **Outlook**.

⁸(Unreported) BVIHCMAP2018/0016 at [26].

- [33] The Defendant had not sought the prior permission of the Court. The Claimants say the Court should therefore not allow the Amended Defence and Counterclaim to stand. It does not appear to be in issue that the Defendant's purported amendments to its statement of case were made prior to the first case management conference. Indeed, so far as I can tell, no such first case management conference has yet taken place.

The Amended Defence and Counterclaim

- [34] In the Amended Defence Med pleads that Intraco has adopted the practice in the past of making distributions directly to the shareholders of ITHC, including Med Trading. Med Trading then says that by reason of this practice and in reliance upon it, Med Trading has acted to its detriment in seeking from Intraco accounts for and payment of distributions due to it as shareholder of ITHC. Consequently, says Med Trading, Intraco is estopped from denying the right of Med to seek the payment of distributions from Intraco to Med Trading.
- [35] With regard to ITHC, Med Trading states that neither ITHC nor Intraco invoked article 142 in any of the proceedings before the Dubai courts. Moreover, they failed to rely at all, or successfully rely, upon the existence of the arbitration clause in any of those proceedings.
- [36] In relation to the purported amendment in 2018 requiring disputes to be referred to arbitration in the BVI, Med Trading says that it was not consulted by the other members before they purportedly passed a written resolution to make the change. Med Trading says it should have been given notice pursuant to the requirements of the company's Articles, but Med Trading had received none. That renders the members' resolution invalid, says Med Trading.
- [37] Med Trading then says that in so far as the amendment was purportedly made by a resolution of directors, it was made for an improper purpose, namely to create difficulty for Med Trading in pursuing its legitimate claims for its entitlement to a share of profits in the jurisdiction in which the operations of the group and Med Trading are most closely connected. Med Trading claims that both the members' resolution and the directors' resolution were made for an improper purpose.

- [38] Med Trading asserts that the Claimants are not entitled to an injunction because of delay in seeking such relief.
- [39] Med Trading counterclaims for a declaration that the purported amendment to article 24 of ITHC's Articles was not made in accordance with the Articles and/or the Business Companies Act 2004 ('BCA') and is void and of no effect. Med Trading seeks a consequential injunction to prevent its enforcement. Med Trading alternatively seeks an order under section 184H of the BCA restraining ITHC from pursuing this claim on grounds that the amendment to article 24 is oppressive.
- [40] As against Intraco, Med Trading counterclaims for a declaration that Intraco is estopped from denying the right of the Defendant to seek an account for and recover directly from Intraco any distributions due to Med Trading as shareholder in ITHC.
- [41] A few days after filing its Amended Defence and Counterclaim, on 22nd October 2019, Med Trading filed its written submissions in response to the Claimants' application for summary judgment and strike out.
- [42] One of the first substantive points Med Trading made was that the resolution of ITHC's members amending article 24 states that Med was 'unavailable to sign' it, without further explanation. This, says Med Trading, corroborates its case that it was not provided with notice of this intended resolution.
- [43] Med Trading further points out that it is not pleaded in the Claimants' Statement of Claim that the Dubai proceedings have been vexatious and abusive, and that they do not state whether Intraco brought evidence of BVI law before the Dubai courts, and if so whether this was rejected by those courts. Med Trading remarks further that the Claimants have not disclosed that the single set of live proceedings in Dubai have been brought primarily for the appointment of experts to review the financial statements of Intraco and not for the payment of dividends. Med Trading says that such proceedings do not fall within the definition of an arbitral dispute under the purported article 24.
- [44] Med Trading reminds the Court that CPR 15.2 gives the Court the discretion to grant summary judgment on a claim or issue if the defendant has no real prospect of successfully defending

the claim or issue. Med Trading relies upon *dicta* of the Court of Appeal in **St Lucia Motor & General Insurance Co Ltd v Modeste**⁹ that ‘Summary judgment should only be granted in cases where it is clear a [defence] on its face cannot be sustained or in some other way is an abuse of the process of the court.’

[45] Med Trading additionally relies upon *dicta* of the English Court of Appeal in **Doncaster Pharmaceutical Group Ltd and others v Bolton Pharmaceutical Co 100 Ltd**¹⁰ for the following propositions, in summary form:

- (1) The summary disposal of ‘rubbishy’ defence is in the interests of justice. The court should be alert to the defendant who seeks to avoid summary judgment by making a case look more complicated or difficult than it really is;
- (2) The court also has to guard against the ‘cocky’ claimant who confidently presents the factual and legal issues as simpler and easier than they really are;
- (3) Considerations of procedural justice must be kept in proper perspective to avoid a serious risk of injustice;
- (4) The court should exercise caution in granting summary judgment in certain kinds of cases, such as where there are conflicts of fact. A mini-trial on the facts without normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice;
- (5) “(...) the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.”

[46] Relying upon **Celador Productions Ltd v Melville Boone**,¹¹ Med Trading submits that the onus lies squarely on the applicants to prove on a balance of probabilities that the Defence is ‘rubbishy’, in the sense of having no real prospect of success,

⁹ (Unreported) SLUHCVP2009/008 at paragraph [21].

¹⁰ [2006] EWCA 661 Civ paragraphs 10-12, 17-18 (Mummery LJ).

¹¹ [2004] EWHC 2362 (Ch) at paragraph 7 (Sir Andrew Morritt V-C).

[47] Med Trading submits its defences are not 'rubbishy'. It reminds the Court that Med Trading has no obligation under CPR 15.5(2) to file evidence in support of its Defence. If the Defence on its face raises real issues that are suitable for trial after fuller investigation of the facts, summary judgment should not be granted. Med Trading submits further that it is not a function of the BVI court to make declarations of rights to guide foreign courts. The presumption must be that the foreign court acts on evidence and the Claimants are entitled to lead evidence of BVI law in foreign courts if so advised.

Discussion

[48] In my view this application turns on

- (1) Whether permission can and should in this case be granted to the Defendant to file and serve its Amended Statement of Claim and Counterclaim; and
- (2) Whether the Defendant has no real prospect of successfully defending the claim or failed to disclose any reasonable grounds for defending the claim in its defence pleadings.

Permission to file documents following application to strike out

[49] I will deal first with the issue that the Defendant had filed an Amended Defence and a Counterclaim without the Court's prior permission. Although these pleadings were contained in a single document, and the Counterclaim relies upon the Amended Defence, it is appropriate to deal with these separately, as different considerations apply to each.

[50] At the hearing, learned Queen's Counsel for the Defendant orally sought the Court's retrospective permission, if so required, for the Amended Defence and Counterclaim to have been filed. Counsel for the Claimants had raised the argument, based on the rule in **Outlook**, that the Defendant had been required to obtain prior permission to file these documents but had not done so. Thus, submitted Counsel for the Claimants, the Court should not allow these pleadings to stand.

[51] The Defendant's primary position was that the Claimants' reliance upon *dicta* in **Outlook** is flawed, because this is primarily a summary judgment application and **Outlook** concerned a

strike-out application. In my respectful judgment the Defendant is correct up to a point, but not in the circumstances as pleaded in this case.

[52] In **Outlook** at [26] the Court of Appeal held that

“Once the court is seised of an application, documents may only be filed in those proceedings with leave of the court. Where the court is adjudicating on a document, a proposed substitute statement of claim may only be filed in draft for the approval of the court.”¹²

[53] It is clear from the context of that case that the Court of Appeal was speaking about an application for strike-out, not any type of application.

[54] The CPR context of this proposition was an application by a defendant to strike out a claimant’s statement of case pursuant to CPR 26.3(1)(b).¹³ That part provides:

“In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

...

b. the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim.”

[55] In **Outlook**, the claim was alleged to be defective in that it failed to make a key allegation. The defendant argued that the claimant’s statement of case disclosed no reasonable ground for bringing the claim.

[56] In the present case, the application is brought primarily for summary judgment, pursuant to CPR 15.2. That part provides

“The court may give summary judgment on the claim or on a particular issue if it considers that the –

- a. claimant has no real prospect of succeeding on the claim or the issue; or
- b. defendant has no real prospect of successfully defending the claim or the issue.

- Rule 26.3 gives the court power to strike out the whole or part of a statement of case if it discloses no reasonable ground for bringing or defending the claim.”

¹² (Unreported) BVIHCMAP2018/0016.

¹³ See Outlook at paragraph [24].

- [57] The note to CPR 15.2 referring to CPR 26.3 indicates that the power to strike out and to grant summary judgment are closely related, albeit there are different criteria applying to each.
- [58] In **Outlook** the claimant filed an amended statement of claim to cure the omission of the key element after the defendant's strike-out application had been heard at a contested hearing. The learned judge had reserved his decision and a month later circulated a draft judgment. Before the judgment was delivered in final form and the court's order made, the Claimant purported to file its amended statement of claim. As the Court of Appeal observed at paragraph [25], the overriding objective in CPR 1.1 to deal with cases justly and expeditiously would be frustrated if a claimant could circumvent and render otiose a strike-out decision by filing an amended statement of claim.¹⁴ The defendant could then file a fresh application to strike out the amended statement of claim. The Court of Appeal did not say this, but it is clear that if the process is allowed to be repeated unchecked, costs would be duplicated and the parties would stay in litigation longer, contrary to the well-settled public policy principle that there should be an end to litigation.
- [59] The Court of Appeal laid down a common law procedural rule to guide the proper application of the CPR, to further the overriding objective. The rule in **Outlook** is thus subsidiary to the CPR overriding objective and does not supersede it.
- [60] The rule in **Outlook** is not therefore to be treated as a mechanical rule of rigid application in the context of any strike-out application, such that if no prior application for permission to amend has been made the Court is bound to strike out the purported amendment without further inquiry or the possibility of granting permission retrospectively. That would ignore the overriding objective. The whole thrust of the rule in **Outlook** is to ensure that the overriding objective is not frustrated.¹⁵ The Court retains all the wide powers of case management provided for in CPR 26.1(2)(w) to take any step, or give any direction, or make any other order for the purpose of managing the case and furthering the overriding objective.
- [61] The Court of Appeal in **Outlook** gave further guidance. It recognized, at paragraph [39], that

¹⁴ Outlook at paragraph [25].

¹⁵ Outlook at paragraph [25].

“before delivery of the judgment (...) where an application to amend the statement of claim is made, the court has a wide discretion to permit amendment in the interests of justice. The court will often grant an opportunity to save the action by amendment of the pleadings.”

- [62] In light of these principles, how should this Court view the fact that the Defendant did not apply for permission to amend its Defence and file a Counterclaim, and the Defendant's oral application for retrospective permission if so required?
- [63] In my judgment the Court should apply the rule in **Outlook** – that is, not to treat the Amended Defence and Counterclaim as properly filed - unless the circumstances of the case warrant use of the Court's case management powers to further the overriding objective by granting permission retrospectively.
- [64] The rule in **Outlook** can (and should), in principle also apply to applications for summary judgment, but not automatically. It must depend upon the circumstances. Summary judgment can be granted where a party has no reasonable prospect of succeeding on his case. This can be because, as a matter of law or factual evidence, his case is weak. Or it could be that he has no reasonable prospect of succeeding on his case because his statements of case do not disclose any reasonable grounds for prosecuting or defending the claim. In the latter event, this overlaps with the jurisdiction to strike out. In such a case it seems logical that the rule in **Outlook** should apply to an application for summary judgment. Here, the essence of the Claimants' case is that the Defendant has no good defence to the claim because his pleadings do not disclose any reasonable grounds for defending the claim and so it is bound to fail. The jurisdictions to give summary judgment and/or strike out overlap here. I shall therefore treat the rule in **Outlook** as applying to both the summary judgment and strike-out parts of the application.
- [65] The question then becomes whether it is appropriate for this Court to exercise its discretion to grant permission for the Amended Defence and Counterclaim to have been filed.
- [66] It was not disputed that this Court has power to grant permission retrospectively. Without reference to other authorities, this appears to me to be abundantly clear from CPR 26.1(2)(w) and CPR 42.8. This latter provision provides that

“A judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date.”

- [67] As a general proposition this has also been accepted in England, even in cases where there is a statutory requirement for prior permission to be obtained, such as with derivative actions.¹⁶
- [68] The question is whether such retrospective permission should be granted here.
- [69] The originally filed Defence foreshadowed the Defendant’s case that the 2018 amendments to ITHC’s Articles had been made without notice to the Defendant and without its knowledge or consent. It also foreshadowed what became the Defendant’s estoppel argument, by stating that because Intraco had made various direct payments to shareholders of ITHC, the Defendant should not be precluded from claiming dividends from Intraco.
- [70] These matters as originally pleaded would not have been enough for a trial court to understand the Defendant’s case. At this point, where the matter is still prior to the first case management conference prescribed by CPR 27.3(1), and before witness statements have been filed, it would be wrong to presume and treat the original Defence as the Defendant’s definitive statement of case. Moreover, the Claimants have not argued that they did not understand the Defendant’s statement of case contained in its original Defence. Nor did they say that it was unclear such that the Claimants were incapable of pleading a Reply to it. The Claimants have not served a request for further and better particulars. They have moved straight to summary judgment and/or strikeout, as appears to have been their strategy and intention from the outset.
- [71] The Amended Defence seeks to flesh out the points raised in the Defence. This, of itself, cannot be objectionable, as a first amendment prior to the first case management conference, even though the effect inevitably is to introduce and articulate issues of fact and law that might make a trial desirable and thus tend to defeat a summary judgment application.
- [72] The original Defence did not foreshadow the Defendant’s case that the 2018 amendment to ITHC’s Articles was effected for an improper purpose and oppressive. That was a new addition in the Amended Defence.

¹⁶ See for example *Wilton UK Limited v Shuttleworth et al.* [2017] EWHC 2195 (Ch) at paragraph 79 (HHJ Davis-White QC).

- [73] Counsel for the Claimants argued that the 2018 amendment to ITHC's Articles simply introduced procedural clarity to their dispute resolution provisions and consequently they could not have been for an improper purpose, nor oppressive. He also argued that the members' resolution had been made with the approval of shareholders of ITHC who have no history of opposition to Med Trading and Mr. Trak, yet they have not been made parties to the Defendant's allegation of oppression. They too would have had to have been parties to the putative oppressive conduct and alleged improper purpose. Counsel for the Claimants thus argues that the Defendant's allegations of improper purpose and oppression are so implausible as to be baseless.
- [74] As a matter of procedure, before considering the substantive aspects, I need to consider whether the Amended Defence and Counterclaim should be permitted to stand.
- [75] The circumstances of this case are not on all fours with those in **Outlook**. Unlike in **Outlook**, the Amended Defence and Counterclaim here were filed before the application was heard. Unlike in **Outlook**, the Amended Defence and Counterclaim could be and were considered at the hearing of the application. In my respectful judgment this is a crucial consideration. It is one thing for a party to wait until an application has been heard, with full submissions delivered on both sides, and a draft judgment circulated, before filing an amended statement of case, as in **Outlook**. It is quite another where an amended statement of case is made available for consideration at the hearing and the subject of rival arguments.
- [76] The Amended Defence was filed four clear calendar days including a weekend before the hearing and served on short notice, but the Claimants showed themselves not significantly prejudiced thereby. They were capable of addressing its substantive and procedural aspects and did so articulately and persuasively both orally and in a written Speaking Note prepared for the hearing. Or, if there was some prejudice, in terms of some extra effort required on the part of the Claimants, no prejudice occurred that could not be compensated for in costs.
- [77] The Amended Defence and the Counterclaim could be – and were – considered at the hearing of the application with no risk of the decision on the application being rendered otiose. That was the mischief the rule in **Outlook** expressly sought to prevent. This is the determinative factor here, in my view.

[78] Whilst this does not absolve a party from seeking prior permission in accordance with the rule in **Outlook**, it is an appropriate use of the Court's discretion pursuant to CPR 26.1(2)(w) to grant the Defendant retrospective permission to amend its Defence, and (subject to what is further said below) the Counterclaim as the Defendant requested orally at the hearing. In light of the circumstances I have described, I will grant that permission.

[79] In considering whether I should allow these amendments to the Defence, I have also had regard to a proposition stated by the Court of Appeal in **Outlook** at paragraph [56]. The Court of Appeal adverted to the 'true ratio' of **Kim v Park**,¹⁷ that 'the judge is required to give the party who has a defective pleading an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right.'

[80] There is a separate issue whether this Court should permit all of the Amended Defence and Counterclaim to stand, or whether parts should be struck out. I will address this below, for convenience in conjunction with the Counterclaim.

Permission to file the Counterclaim

[81] Apart from permission required under the rule in **Outlook**, the Counterclaim requires a further permission. I accept the Claimants' submission that a counterclaim is a form of ancillary claim and that where a counterclaim is filed otherwise than with a defendant's original defence the Court's permission is required pursuant to CPR 18.4(1). This provides:

"18.4 (1) A defendant may make an ancillary claim (other than a claim falling within rule 18.3) without the court's permission if in –

- (a) the case of a counterclaim – it is filed with the defence; or
- (b) any other case – the ancillary claim form is filed before the case management conference."

[82] CPR 18.4(2) provides that:

"Where paragraph (1) does not apply an ancillary claim may be made only if the court gives permission."

[83] The Defendant argued that the words 'the defence' in CPR 18.4(1)(a) includes a party's amended defence. The Claimants argued that the word 'the' made the reference specific to the

¹⁷ [2011] EWHC 1781 (QB).

first filed version of the defence. As the parties did not refer to authority, I shall endeavour to analyse this issue from first principles.

- [84] Those drafting CPR 18.4(1)(a) could have stated that a counterclaim may be filed without permission when it is filed with 'a' defence. That would have been broad enough to include an amended defence. But they did not. They stipulated 'the' Defence. Words mean something.
- [85] At a superficial, nomenclature level, a party's first statement of case in defence of a claim is entitled 'Defence'. If he amends it, it is entitled 'Amended Defence'. If he amends it again, it is entitled 'Re-Amended Defence' and so on. Only the first document is entitled 'Defence'.
- [86] The drafters must have envisaged that no permission would be required if a counterclaim is brought with the first defence filed. That much is clear. They must also have had in mind that parties can be brought into proceedings after the claim has been commenced and the initial claimant(s) and defendant(s) have filed their own statements of case. Parties joining the proceedings may also do so at different times and different types of ancillary claims may be brought in the same proceedings. Such cases require close case management to prevent procedural chaos and to move the matter towards a reasonably prompt trial despite the multiplicity of interests and procedural stages various parties may find themselves at. For instance, CPR 26.1(2)(h) empowers the court to direct that part of any proceedings (such as a counterclaim) can be dealt with as separate proceedings. It should then not be surprising for the drafters to have left all cases apart from filing a counterclaim with the initial defence to the court's discretion.
- [87] The requirement for permission is not framed in such a way as to make it particularly onerous. CPR 18.4(3) provides that an application for permission may be made without notice unless the court directs otherwise. CPR 18.4(4) provides that the applicant must attach a draft of his ancillary claim to the application. CPR 18.4(5) provides that the court may give permission at the case management conference of a matter. CPR 18.4(6) provides that the court may not give permission after the first case management conference to a person who was a party at the time of that conference unless it is satisfied that there has been a significant change in circumstances which became known after the case management conference. Presumably the Court can also entertain an application for permission under CPR 18.4 before the case

management conference, since it is after the case management conference that the restriction under CPR 18.4(6) takes effect.

[88] It should also be clear that permission should normally be granted reasonably readily where the counterclaimant seeks to bring his counterclaim before the first case management conference. Although CPR 18.4(1)(b) does not apply because a counterclaim is not (usually) brought by filing an ancillary claim form, it provides that no permission is required where an ancillary claimant files an ancillary claim form prior to the first case management conference. This reflects the scheme of the CPR to give latitude towards filings of statements of case prior to the first case management conference. But where a party such as a defendant has already availed himself of a first opportunity to put his case, the court is required to consider whether procedural and substantive fairness, and the overriding objective of the CPR, will be furthered by permitting that party a further opportunity to put his case, this time by way of a counterclaim. This provides a check and balance to such latitude.

[89] An important reason why permission should normally be granted reasonably readily has to do with the effect of the CPR upon litigation. As was widely commented upon at the time the English equivalent of the CPR was introduced, a claimant is now required to prepare his case with very considerable care prior to filing his claim. 'Frontloaded preparation' was the way it was referred to. This contrasts with the approach under the previous Rules of the Supreme Court, which permitted a claimant to commence proceedings by issuing and serving a writ, and then he could supply omissions at some leisure afterwards, often over a length of time that would now be considered inordinate. Monumental exchanges of Requests for Further and Better Particulars were a feature of the litigation landscape as a result. Since the CPR their incidence has greatly reduced, reflecting the greater particularity with which statements of case must now be pleaded.

[90] Under the CPR, the drafters thought it desirable to state that dealing with cases justly includes ensuring, so far as is practicable, that the parties are on an equal footing.¹⁸ It would not be fair for a claimant to have months to prepare his statement of case before filing his claim form, while a counterclaiming defendant would have to rush his own counterclaim to fit it within the time for filing his defence. Such a defendant would then be pressed to do two things within a

¹⁸ CPR 1.1(2)(1).

tight deadline: file his defence and mount his counterclaim to the same standard of preparation as the claim. To expect that is often unrealistic, particularly in relatively high value or complex commercial matters.

[91] Permission is not automatic though. The court has to apply the usual criteria for the exercise of its discretion. These can broadly be described as considering the justice and convenience of allowing the filing, including balancing any prejudice another party may suffer. There is also another consideration. The fact that the party seeking permission has to supply the court with a draft of his intended ancillary claim means that the court must be able to refuse permission in whole or part once it has considered the content of the document. This is no more than an analogous reflection of the court's case management power pursuant to CPR 26.3 to strike out a statement of case in whole or part if it discloses no reasonable ground for bringing or defending a claim, or is an abuse of process, or is prolix or otherwise fails to comply with material parts of the CPR.

[92] I point this out, because the Defendant submitted that the Claimants have not brought an application for summary judgment or strike-out in respect of the Counterclaim. Formally, at least, it remains unchallenged (although the Claimants argued against the Counterclaim at the hearing). On that logic, the Defendant suggests that the Court should not interfere with it. But that ignores the Court's powers and duty to manage cases proactively in furtherance of the overriding objective of the CPR.

[93] Indeed, in circumstances where the Defendant seeks retrospective permission to file the Counterclaim, the Court's powers to strike out that statement of case in whole or part pursuant to CPR 26.3 are directly engaged.

Elements of the Counterclaim

(1) Estoppel

[94] Turning to the individual elements of the Counterclaim, I note that the Counterclaim repeats the factual parts of the Defence as set out earlier in the same document. The first element pleaded by the Defendant is that Intraco is estopped from denying the Defendant's right to seek payment of distributions from Intraco, due to Intraco's past practice of making distributions directly to shareholders of ITHC, including the Defendant. The Defendant pleads that it has

acted to its detriment in seeking from Intraco accounts for and payments of distributions due to it as shareholder of ITHC.

[95] The Claimants argued at the hearing that the Defendant has not properly pleaded its case of estoppel, because it fails to specify the species of estoppel relied upon, and it has not pleaded with any particularity the factual allegation of distributions made. The Claimants also assert that neither an estoppel by convention nor a promissory estoppel (if such is being alleged) is capable of creating a cause of action. The alleged estoppel cannot grant the Defendant an enforceable right to declaration and payment of a dividend by Intraco. The Claimants assert that the Defendant's case on detrimental reliance is hopeless, in that requesting a payment to which one is not entitled does not constitute detrimental reliance. Finally, the Claimants submit that the Defendant has set out no circumstances making it unjust or unconscionable for Intraco not to declare or pay a dividend to the Defendant, with no such circumstances existing.

[96] The Defendant's main response to this is that the type of estoppel they rely upon is estoppel by conduct. There was then argument before me whether such an estoppel is recognized at all in law or equity.

[97] The Claimants' arguments were in part flawed. They pointedly fail to mention that the Defendant claims it has relied not just upon seeking payment, but also upon seeking accounts, as reliance to its detriment. Clearly the Defendant has expended time and money seeking such accounts, which, it is reasonable to suppose, the Defendant would not have done had Intraco not adopted a practice of making direct payments. The claimants' contention that the alleged direct payments have not been pleaded with particularity is not a strong argument. The Defendant could supply details even at the witness statement stage. Either Intraco did make direct payments or it did not. The Amended Defence places this in issue. The Claimants' argument that the alleged estoppel cannot give rise to a cause of action is at best debatable. With certain types of estoppel, the estoppel can be used as the basis for a claim (in the case of proprietary estoppel) or to support a cause of action (in the case of estoppel by representation and promissory estoppel). This is one reason why the Defendant should have identified in its statement of case the type of estoppel relied upon.

- [98] The Claimants do however have a number of good points. In particular, the Defendant's pleading does not disclose what type of estoppel it is relying upon so as to enable the Claimants' to plead properly to this allegation.
- [99] Also, the Defendant does not address why it would be unconscionable or unjust as a matter of BVI law for Intraco to start paying dividends (should its directors decide to do so) only to the legally correct parties. This constitutes a fatal flaw to this part of the Defendant's statement of case.
- [100] Then there is a question how the claim for a declaration sought by the Defendant is to be construed. Is it purely as a matter of BVI law, or does the Defendant seek to prevent Intraco from denying a right of the Defendant to seek an account for and recover payment from Intraco under Dubai law? The Defendant does not plead any foreign law, so I must assume that the Defendant frames its concerns purely as a matter of BVI law. It would require a clear case of estoppel to displace the usual legal scheme under BVI company law which typically holds that only a member of a company is entitled to claim a share in a distribution or dividend, and then typically only if the company's directors in their discretion declare one. Such a clear case is not pleaded here.
- [101] It may be possible for the Defendant to save this part of its case by a further amendment, but for present purposes I am persuaded that the correct course is for the Court to strike out this part of the Defendant's Amended Defence and Counterclaim as disclosing no reasonable ground for defending the claim or bringing the counterclaim.
- [102] Consequently the following paragraphs of the Amended Defence and Counterclaim are to be struck out:
- (1) Paragraph 2.d;
 - (2) The second paragraph of the Prayer to the Counterclaim, that is, the relief counterclaimed against the Second Claimant Intraco.
- [103] The Claimants argue that the allegation of estoppel is the only ground of opposition to the claim and/or application made by Intraco. Thus, contend the Claimants, once this ground is disposed of, Intraco 'must succeed'. This begs the question, succeed with what? The relief sought by Intraco is, first, for a declaration that as the Defendant is not a shareholder of Intraco, the

Defendant has no right nor entitlement to receive dividends from Intraco. Secondly, Intraco seeks an interim and/or final injunction restraining the Defendant from commencing or pursuing any further claims and/or proceedings against ITHC, whether in the U.A.E. or elsewhere, against Intraco, which are inconsistent with the terms of the above declaration.

[104] The Defendant argued that it forms no part of this Court's function to make declarations of BVI law for eventual use in proceedings overseas by litigants. Foreign courts must be presumed to reach decisions based on evidence of foreign law. A declaration of this Court, without more, does not constitute such evidence. Such a declaration would furthermore have no utility if the foreign court were to adjudicate a claim before it entirely on the basis of its own law, without reference to, nor reliance upon, BVI law. A declaration from this Court would then be merely academic and this Court does not make merely academic pronouncements. So, it is not automatic that this Court would make a declaration even if the Claimants establish the facts of their case.

[105] In relation to the injunctive relief sought, again it is not automatic that this Court would grant an injunction. The Defendant pleads that the Claimants are not entitled to injunctive relief due to alleged delay on the Claimants' part in seeking such relief. The onus continues to lie on the Claimants to satisfy the Court that their conduct and all the factual and legal circumstances of the case render it just and convenient for the injunctive relief sought to be granted. This is particularly the case with a possible injunction in favour of Intraco, as there is no exclusive jurisdiction or arbitration agreement between Intraco and Med Trading.

(2) The ITHC 2001 Memorandum and Articles/Pre-2018 Regime

[106] At paragraphs 5 to 8 of the Counterclaim the Defendant pleads its case in respect of legal proceedings it has brought in Dubai. This part culminates in a factual assertion that in none of the Dubai proceedings which the Defendant has described did the Claimants raise the issue of the arbitration clause contained in article 142 of ITHC's Articles as a defence to those proceedings. It also contains an assertion of mixed law and fact that the Defendant's 2014 claims in Dubai were not commenced in breach of this arbitration provision.

[107] These paragraphs are framed as part of the Amended Defence. No relief sought in the Counterclaim flows directly from them. They are repeated as part of the Counterclaim, where

they form background issues of fact and law. As such, they are in my judgment unobjectionable.

(3) The 2018 Amendment to ITHC's Articles of Association

[108] At paragraphs 9 and 10 the Defendant sets out its case that the amended article 24 of ITHC's Articles was not validly passed, on grounds that the Defendant, as a member of ITHC, did not receive notice of the resolution of members intended by other members to effect the change. The Defendant pleads an alternative case that even if validly made, the members' resolution was oppressive as it was made for an improper purpose. The allegedly improper purpose is that of causing the Defendant difficulty in pursuing its legitimate claims for its entitlement to a share of profits in the jurisdiction in which the operations of the group and the Defendant are most closely connected. This last sentence is loaded with a number of different concepts. These include the key notions that Dubai law recognizes the Defendant's direct claim against Intraco for a share of Intraco's profits and that Dubai is (as the Defendant submits) the appropriate forum for determinations of such claims. As the Defendant highlighted at the hearing, its allegation is that it had been singled out and specifically targeted with this corporate act. Considering the material thus far presented on both sides, this interpretation appears to be cogent.

[109] Similarly, the Defendant pleads that in so far as the amendment was made by a resolution of directors, it was made for the same improper purpose, and thus oppressive within the meaning of the BCA, section 184.

[110] The Claimants argue that these points are wholly without merit. They argue first that even if the amendments to ITHC's Articles in 2014 were not valid for any reason, the Defendant would still be bound by the 2001 arbitration provision. That may be so, but the Claimants have not yet pleaded this and their claim does not yet seek relief to this effect.

[111] The Claimants argue that it is not oppressive to require parties to abide by an arbitration clause, and that such a contention can never possibly succeed. This argument ignores the Defendant's allegation that if the arbitration clause which the Claimants wish to enforce had been imposed invalidly and/or oppressively, such an arbitration clause should not be allowed to stand.

[112] The Claimants contend further that the amendment does not create an obligation to arbitrate, it simply adds procedural clarity. This argument is wrong. Whilst it is correct that the amendment does not create a new obligation to arbitrate (as the original Articles contained an arbitration clause), it introduces a requirement for arbitration to be conducted in the BVI. That goes beyond simply adding procedural clarity. It has concrete practical and legal consequences, and, on the materials presently before the Court, it appears likely that these were actively willed by those behind the amendment. There is of course nothing inherently wrong with a company amending its constitution to stipulate for arbitration in the BVI, but if the purpose is to oppress a member, such an amendment is liable to be set aside and to attract other relief designed to remedy oppression.

[113] Further, the Claimants argue that no prior notice was required to be given to all members of ITHC, both as a matter of statute (section 88 of the BCA) and article 72 of ITHC's original Articles. Section 88(1) provides:

“Subject to the memorandum or articles of a company, an action that may be taken by members of the company at a meeting of members may also be taken by a resolution of members consented to in writing or by telex, telegram, cable or other written electronic communication, without the need for any notice.”

Article 72 tracks this wording. The Claimants argued that this entitled the members to produce a resolution of members without seeking the Defendant's views at all. The Defendant resisted that submission. It contended that its status as a member vested in it a bundle of rights, one of which is an entitlement to vote on all matters that are for the members to decide. Neither side referred to authority to support their respective arguments.

[114] The Claimants further argued that since the members' resolution was passed by around 70% of the members' votes, those members were within their rights to have proceeded without canvassing the Defendant's views. The Claimants referred in this regard to article 2 of ITHC's original Articles, which provides that an “absolute majority” of members' votes suffices for the members to pass a written resolution by consent. The Defendant contended that it would be a most unsatisfactory state of corporate governance affairs if a majority should simply proceed without seeking the views of a minority, with the minority's only remedy being to bring legal proceedings to challenge the propriety of the majority's decisions. The Defendant also urged that what is here meant by an ‘absolute’ majority is an issue of fact and law for trial. The

Claimants, on the other hand, submitted that an 'absolute' majority, in the context of these Articles, means no more than a simple majority of the members' votes entitled to be cast at a members' meeting. The Claimants countenanced no possibility of an alternative interpretation. According to them, the meaning of this term is this and no other. The Claimants may well be right on this, but once again, neither side referred to authority to support its contentions and determination of this application is not an appropriate forum for considering the entire factual context of this particular provision in relation to this particular company.

- [115] There is a further, factual, consideration, which supports the Defendant's position. This is that the members' resolution was endorsed by a remark that the Defendant had not been available to sign it. This suggests that those members or persons behind the resolution understood that some attempt was required to seek and obtain the Defendant's consent, irrespective of the Claimants' legal submissions that this was not necessary. An objective requirement or otherwise to consult members would need to be determined, having regard to all the factual circumstances and fuller argument, assisted, if possible, by authority. It is not possible to do this upon this application.
- [116] The Defendant's case on notice appears further to be that this remark had not been appended in good faith, as there is no evidence that the persons or members behind the resolution so much as tried to contact the Defendant. If indeed the remark proves to have been mendacious, that would support the Defendant's case on improper purpose and oppression.
- [117] In my judgment therefore, it cannot be said that the Defendant has no reasonable ground for defending the claim or for pursuing its counterclaim on the issues of validity and oppression, within the context of CPR 26.3(1)(b). None of the other grounds for striking out a claim in that part appear to be engaged.
- [118] The remaining parts of the main body to the Amended Defence and Counterclaim are essentially formalistic. As such, they are unobjectionable.
- [119] In sum, therefore, I shall order and direct that the Defendant has permission retrospectively to file and serve its Amended Defence and Counterclaim, save for those parts relating to estoppel that I have identified above. Those are to be struck out.

[120] There is a small discrete issue in respect of which the Defendant has also orally sought permission to amend. At paragraph 9(b) of its Amended Defence the Defendant pleads that it did not receive notice of any meeting of members or a written document, pursuant to article 8.21 of ITHC's Articles. The Defendant explained that it meant article 72 of ITHC's original Articles. The Claimants urged that this Court should not lightly entertain an oral request for what they say is a fundamental amendment. However, the reference to article 8.21 must have been an error, because that is a provision in the amended Articles. At the time the failure to consult the Defendant allegedly took place, ITHC's Articles had not yet been amended. The allegedly applicable provision must have been article 72. Not to allow this change to the Defendant's statement of case would leave it unnecessarily and obviously nonsensical. I find this was a mere slip. The Defendant will be granted this permission.

Summary judgment and/or strike out of Defence

[121] The Claimants have asserted that the Defence discloses no reasonable grounds for defending the claim and there is no other reason why these proceedings should be determined at trial. A further ground given is that the Defendant has taken a series of abusive proceedings against the Claimants asserting claims which purport to arise out of its position as a shareholder in ITHC which are inconsistent with BVI law and what the Claimants call the contractual agreement to arbitrate.

[122] Taking these in turn, in my respectful judgment the Defence as amended does disclose reasonable grounds for defending the claim. The issue is whether ITHC's Articles were validly amended and whether the manner in which that amendment was purportedly done was oppressive of the Defendant's rights as a member. This issue involves a complex inquiry of law and fact which requires determination at trial. I have described some of the intricacies of this matter earlier in this judgment in the context of permission for the Defendant to amend its pleadings.

[123] The Claimants' second ground also comes back to the issue whether or not ITHC's Articles had been validly or properly amended. If they had not been validly amended the Defendant's legal proceedings in Dubai would not inherently have been abusive under BVI law. It is not possible to determine as part of this application whether or not the Claimants should have the anti-suit injunction and declaration they seek.

[124] Whether they were abusive under U.A.E. law is not something I can presently determine, but it seems to me that the courts of that jurisdiction would be the competent authority to police its own procedures. From the material I have seen, there appears to be no sign of the U.A.E. courts treating the proceedings there as abusive. Moreover, proceedings here or overseas in breach of an arbitration provision are not necessarily abusive – parties can and often do choose not to enforce arbitration provisions for legal, procedural or commercial reasons. ITHC has decided not to take part in at least some of the Dubai proceedings. That is of course a matter for ITHC. But if it now comes to this Court to seek to enforce the arbitration provisions contained in its amended Articles, it must be prepared to face a challenge to that document.

[125] In my assessment of the Defendant's defence, assessed in the context of the parties' statements of case filed thus far and the Claimants' evidence, the Defendant has a real prospect of successfully defending the claim. Not only are there questions of law and fact which call for further inquiry, testing and argument at a trial, but the Defendant has, in my view, a reasonable prospect of establishing that the amendment to ITHC's articles was invalid and/or oppressive.

[126] In these circumstances, the application fails. The issue of the incidence and quantum of costs is adjourned for determination following further argument.

Disposition

[127] The order upon judgment is therefore as follows:

It is ordered and directed that:

- (1) The Claimants' Application filed on 27th June 2019 is dismissed.
- (2) The Defendant has permission to file and serve its Amended Defence and Counterclaim dated 18th October 2019, such permission to be effective from and including 18th October 2019.
- (3) The following paragraphs of the Amended Defence and Counterclaim are struck out:
 - (a) Paragraph 2.d;
 - (b) The second paragraph of the Prayer to the Counterclaim, that is, the relief counterclaimed against the Second Claimant.

- (4) The Defendant has permission to amend the reference in paragraph 9(b) of its Amended Defence to article 8.21 of the First Claimant's Articles of Association to article 72.
- (5) The issue of the incidence and quantum of costs is adjourned for determination following further argument.

[128] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court