

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2020/0012

HECTOR FINANCE GROUP LIMITED

Appellant

and

CALDICOTT WORLDWIDE LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Mr. Robert Nader for the Appellant

Mr. Stephen Moverley Smith, QC with him Mr. Dhanshuklal Vekaria for
the Respondent

2021: February 26;
June 1.

Interlocutory appeal – Jurisdiction – Injunction – Whether the learned judge continued the ex parte injunction or granted a fresh injunction - Section 43 of Arbitration Act – Whether Court of Appeal has jurisdiction to hear appeal from an injunction granted under section 43 of the Arbitration Act

Caldicott Worldwide Limited (“Caldicott”) and the second to fourth defendants in the court below (“the Defendants”) are individual minority shareholders of the appellant, Hector Finance Group Limited (“the Company”). Between August and December 2019, the directors of the Company approved and declared dividend payments to the shareholders. The directors paid the declared dividends to the other shareholders of the Company except Caldicott, alleging that the Company had outstanding claims against Caldicott. Consequently, Caldicott filed a claim against the Company and the Defendants alleging that they conducted the business of the Company in a manner that was discriminatory, prejudicial and oppressive towards Caldicott by improperly withholding the dividends that were declared and not paid. On 4th March 2020, the Company applied for an order staying the claim against

it in favour of arbitration. The judge granted the stay on 28th April 2020. He did not stay the claim against the Defendants.

Caldicott applied *ex parte* for an injunction against the Company freezing its assets up to an amount of the value of the declared but unpaid dividends, and for disclosure. The learned judge granted the injunction. The Company applied to discharge the injunction and Caldicott applied to continue it. At the hearing on the return date on 20th May 2020 to continue the injunction, the Company challenged the court's jurisdiction to continue the injunction because the claim against the Company had been stayed and the only basis to grant interim relief would be under section 43 of the **Arbitration Act, 2013** ("the Arbitration Act"). The judge adjourned the continuation hearing to the 27th May 2020 when the discharge application was scheduled to be heard. On 22nd May 2020, Caldicott filed a second continuation application seeking an order to continue the injunction until further order of the Court or, alternatively, to grant a fresh injunction pursuant to the court's jurisdiction under section 43 of the Arbitration Act. The learned judge heard both applications and on 16th September 2020 he dismissed the Company's discharge application and found that the injunction should be continued or a fresh injunction be granted under section 43 of the Arbitration Act. The learned judge did not specify in his judgment which of the two alternatives he relied on to grant the new injunction.

The Company appealed against the judgment and order of the learned judge. The issues for consideration on the appeal are whether the Court of Appeal has jurisdiction to hear an appeal from an injunction order granted under section 43(10) of the Arbitration Act and whether the learned judge continued the *ex parte* injunction or granted a fresh injunction under section 43(10).

Held: dismissing the appeal; and awarding costs of the appeal to the respondent, such costs to be assessed at no more than one-half of the costs assessed in the lower court, that:

1. The Court of Appeal does not have jurisdiction to entertain an appeal from the lower court's decision to grant an interim remedy relating to arbitration proceedings under section 43(10) of the Arbitration Act. The wording of the order of the new injunction does not support the continuation of an injunction previously granted. The order of the court is more consistent with the court granting a fresh injunction under section 43(10). Accordingly, this Court does not have jurisdiction to hear the appeal from the injunction granted on 16th September 2020.

Section 43(10) of the **Arbitration Act, 2013**, Act No. 13 of 2013 applied.

2. Section 43(3) of the Arbitration Act provides that the powers under the section may be exercised whether or not similar powers may be exercised by an arbitral tribunal relating to the same dispute. Therefore, a judge making an injunction order under section 43 is not constrained to limit the duration of the order to the establishment of an effective arbitration tribunal. It follows that the learned judge did not err in limiting the duration of the injunction order in this matter to the trial of the claim or further order.

Franek Jan Sodzawiczny v Andrew Joseph Ruhan and others [2018] EWHC 1908 (Comm) distinguished.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the judgment and order of Wallbank J [Ag.] dated 16th September 2020 by which the learned judge continued an *ex parte* freezing injunction against the appellant granted on 23rd April 2020, or granted a fresh injunction against the appellant. The order also dismissed the appellant’s application to discharge the *ex parte* freezing injunction. One of the issues to be resolved in this appeal is whether the learned judge continued the *ex parte* injunction or granted a fresh injunction.

Background

- [2] The second to the fourth defendants in the court below and the respondent, Caldicott Worldwide Limited (“Caldicott”), are individual minority shareholders of the appellant, Hector Finance Group Limited (“the Company”). The Company and Caldicott are companies incorporated in the Territory of the Virgin Islands (the “BVI”).
- [3] The directors of the Company were Mr. Chan Chew Keak, a 50% shareholder of Caldicott, his son Mr. Kenneth Chan, the second and third defendants in the court below; Mr. Siong Beng Seng (“Mr. Siong”) and Mr. Ching Hui Huat (“Mr. Ching”), and Mr. Keith Ah Khee Tay who controls the third defendant in the court below (“Mr. Tay”). Mr. Chan and Mr. Kenneth Chan were removed as directors on 19th March 2020 and 2nd November 2019, respectively, leaving Messrs. Siong, Ching and Tay as the only directors of the Company since March 2020.
- [4] The Company is a holding company for a group of companies engaged in the production of paper products and container packaging in the People’s Republic of China and Southeast Asia.

- [5] Between August and December 2019, the directors of the Company approved and declared three dividend payments. Caldicott's cumulative share of the declared dividends is S\$9,943,978.00 (approximately US\$7,032,889.00). The directors paid out the declared dividends to the other shareholders but did not pay any of the dividends to Caldicott, claiming the right to withhold payment because the Company had outstanding claims against Caldicott. As a result, Caldicott filed a claim in the Commercial Court on 30th December 2019 against the Company and the second to fourth defendants in the court below, alleging that they conducted the business of the Company in a manner that was discriminatory, prejudicial and oppressive towards Caldicott by improperly withholding the dividends that were declared and are due to it. I will refer in this judgment to the second to fourth defendants in the court below as "the Defendants".
- [6] On 30th January 2020, Caldicott was granted leave to serve the Defendants outside the jurisdiction. The claim form and statement of claim were duly served on the Company (without leave) and the Defendants.
- [7] On 4th March 2020, the Company applied for a stay of the claim against it on the ground that its articles of association contained an arbitration agreement referring disputes between the Company and its members to arbitration. On 28th April 2020, the learned judge granted the application for a stay of the BVI claim against the Company in favour of arbitration. The judge did not stay the claim against the Defendants. The judge conducted a further hearing on 7th July 2020, to deal with consequential matters following the stay against the Company.
- [8] On 8th May 2020, the Defendants applied to set aside the order permitting service of the claim outside the jurisdiction on them on the ground that Caldicott was guilty of material non-disclosure in making the *ex parte* application for permission to serve out, and for an order on case management grounds staying the claim as against the Defendants in favour of arbitration. The applications were heard by the judge on 24th September 2020 and he dismissed both applications. The Defendants appealed the

judge's order dismissing the applications. The appeal was heard on 25th February 2021. The Court of Appeal reserved its judgment.

- [9] On 9th April 2020, Caldicott applied *ex parte*, on an urgent basis, for an injunction against the Company freezing its assets up to a value of S\$9,943,978.00, being the amount of the declared but unpaid dividends, and for disclosure. The application was heard on 23rd April 2020 and the injunction was granted on the terms sought ("the Injunction"). On 1st May 2020, the Company filed and served an application to discharge the Injunction. The discharge application was listed for hearing on 27th May 2020.
- [10] On 14th May 2020, Caldicott applied to continue the Injunction. At a hearing on 20th May 2020, being the return date for the Injunction, the Company raised the issue of the Court's jurisdiction to continue the Injunction because the claim against the Company had been stayed and the only basis to grant interim relief would be under section 43 of the **Arbitration Act, 2013** ("the Arbitration Act").¹ The learned judge did not have sufficient time on that occasion to deal with those issues and decided to allow the parties time to prepare full submissions relating to the section 43 issue. The judge adjourned the hearing until 27th May 2020 (when the discharge application was scheduled to be heard), with the Injunction remaining in place in the meantime.
- [11] On 22nd May 2020, Caldicott filed a second continuation application asking the court to continue the Injunction until further order of the court pursuant to the court's jurisdiction under section 24 (1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** (the "Supreme Court Act"),² or alternatively, to grant a fresh injunction in the terms of the injunction appended to the application as schedule 1, pursuant to the court's jurisdiction under section 43 of the Arbitration Act.

¹ Act No. 13 of 2013.

² Cap. 80 of the Revised Laws of the Virgin Islands 1991.

- [12] The discharge application and the continuation application were heard on 27th May 2020. At the conclusion of the hearing the judge ordered the parties to file written submissions by 15th June 2020. He delivered his written judgment and order on 16th September 2020 by which he dismissed the discharge application and continued the Injunction or granted a fresh injunction. The interpretation of the order that he made is a central part of the dispute between the parties in this appeal.

The Appeal

- [13] The Company filed its notice of appeal on 2nd December 2020 against the judgment and order of the learned judge, listing two grounds of appeal. Ground 1 is that the learned judge erred in concluding that there was a real risk of dissipation in respect of the Company's assets that warranted the continuation of the Injunction. Ground 2 is that the judge erred in concluding that Caldicott had discharged its duty of full and frank disclosure at the *ex parte* hearing for the Injunction.
- [14] The Company filed its written submissions in support of the appeal on 2nd December 2020; Caldicott filed its reply submissions opposing the appeal on 17th December 2020; and the Company filed reply submissions to Caldicott's reply on 4th January, 2021. The submissions, up to this point, either challenged the judge's decision to continue the injunction (the Company's) or supported the decision (Caldicott's). On 4th February 2021, Caldicott, without getting permission to do so from the Court, filed the "Respondent's Supplemental Submissions Interlocutory Appeal" raising a point that goes to the Court's jurisdiction, namely, that the Court granted the Injunction on the alternative ground under section 43 of the Arbitration Act, and not under section 24(1) of the Supreme Court Act or the court's inherent jurisdiction. As the Injunction was granted pursuant to section 43 of the Arbitration Act, no appeal lies to the Court of Appeal ("the jurisdiction ground").
- [15] Mr. Robert Nader who appeared for the Company objected to the jurisdiction ground being raised in the appeal because Caldicott did not follow the correct procedure in the **Civil Procedure Rules 2000** ("the CPR") for filing skeleton arguments and its use

of the supplemental skeleton argument for raising the jurisdiction ground. Mr. Nader submitted that it should have been raised in Caldicott's first skeleton argument in reply to the appeal. The Court heard the objection and decided to allow Mr. Stephen Moverley Smith QC, who appeared for Caldicott, to argue the jurisdiction ground in the appeal; because it raised a threshold issue of the Court's jurisdiction. As a general rule, the Court of Appeal will not hear an appeal unless it is satisfied that it has jurisdiction to do so. Mr. Nader could have applied for an adjournment and consequential orders, but he did not. This is not surprising because the Company's supplemental submissions raising the jurisdiction ground was filed on 4th February 2021 and Mr. Nader was able to file reply submissions on 11th February 2021. Further, the jurisdiction ground was fully argued in the lower court.

Interpretation of the judge's order

- [16] The issue of whether the judge's order continued the Injunction under the Supreme Court Act or granted a fresh injunction under the Arbitration Act turns primarily on the proper interpretation of the judge's order. If it was made under the Supreme Court Act, there is a right of appeal to the Court of Appeal and the appeal is properly before the Court. This is true of all injunctions unless the right of appeal has been excluded by statute. Section 43 of the Arbitration Act is an example of where the right of appeal has been excluded. Section 43 gives the court the power to grant interim measures relating to arbitration proceedings which have been or are to be commenced in or outside the BVI, and sub-section (10) of section 43 provides very simply that '[a] decision, order or direction made or issued by the Court under this section is not subject to appeal'. It is not disputed that if the order, properly interpreted, granted a fresh injunction under section 43 there would be no right of appeal against the Injunction.
- [17] Mr. Nader submitted that, on a plain reading of the order, the learned judge continued the Injunction exercising his powers under the Supreme Court Act or the court's inherent jurisdiction, and there is nothing in the order that suggests that the court was granting a fresh injunction under the provisions of the Arbitration Act. Mr. Nader

referred to Caldicott's application filed on 14th May 2020 which was to continue the Injunction until further order of the Court following the hearing scheduled for 27th May 2020. The second continuation application that was filed on 22nd May 2020 was also for a continuation of the injunction granted in the form of the Injunction that was granted on 23rd April 2020, a copy of which was appended to the second application. The difference with the second application is that it also applied on the alternative ground for a fresh injunction under section 43 of the Arbitration Act. Mr. Nader then took us to the terms of the order that the judge made on 16th September 2020 and reminded the Court that the minute of the order was prepared by Caldicott's lawyers, Carey Olsen. He pointed out that the recitals of the order referred to the first continuation application that was filed on 14th May 2020 which sought a continuation only of the injunction order (and not a fresh injunction), and that there are two other recitals in the September 2020 order that refer to the continuation of the Injunction (and not the grant of a fresh injunction).

[18] Mr. Nader submitted that the Court should not refer to the judgment that was delivered on 16th September 2020 because the appeal is against the order and not the judgment. He referred the Court to the judgment of Leggatt J in **Iraqi Civilians v Ministry of Defence**³ where the learned judge opined that an appeal is against the order of the court and not against the reasons contained in the judgment for making the order.

[19] Mr. Moverley Smith QC, while not referring specifically to the **Iraqi Civilians** case, submitted that this is not an appeal against the reasons in the judgment of the learned judge. He said that the order granted a fresh injunction under the Arbitration Act and this is apparent from the wording of the judgment. He accepted that the order, as drafted and settled, does not refer to the second continuation application which includes the alternative ground that the Injunction was a fresh injunction that was granted pursuant to the Arbitration Act. He conceded that the order was badly drafted

³ [2018] EWHC 690 (QB).

and does not properly reflect the decision of the judge. This is not a case where Caldicott is seeking to appeal against the reasons in the judgment. Caldicott is appealing against the decision contained in the judgment as reflected in the poorly drafted order.

[20] Mr. Moverley Smith QC further submitted that on a careful reading of the order it granted a fresh injunction and it is not a continuation of the *ex parte* injunction. He referred to the draft order that was made following the hearing on the return date on 20th May 2020 continuing the Injunction until the scheduled hearing date on 27th May 2020.⁴ That order states, "[t]he Injunction Order appended hereto at Schedule 1 shall continue until the hearing of the Respondent's application on 27 May 2020 or further order of the Court." This, Mr. Moverley Smith QC said, is how an order continuing an injunction is usually drafted.

[21] Referring to the order being appealed he referred to paragraph 1 of the order which reads, '[t]he Respondent be restrained by a freezing order in the form set out in Schedule 1 hereto until after the trial of the Claim or further order of the Court', and submitted that this is a grant of a fresh injunction and not a continuation of the *ex parte* Injunction. If it were a continuation of the Injunction order it would have said so (as in the order made on 20th May 2020). It should be construed as the Court granting a fresh injunction under the Arbitration Act. Further, this is the part of the order that is important. The recitals, like the terms of the judgment, can be used in the interpretive process; but it is the wording of the order that is decisive and is being appealed by the Company.

[22] Mr. Moverley Smith QC referred to various passages in the judgment which, properly interpreted, show that the learned judge had in mind to grant a fresh injunction under the Arbitration Act. He referred to paragraphs 2, 121 and 123 of the judgment. In summary, he submitted that the learned judge intended to, and did grant a fresh

⁴ Record of Appeal, Volume 2, electronic pg. 145.

injunction by the terms of the order of 16th September 2020 and the judgment supported that conclusion. This is not an appeal against the judge's reasons, but against his conclusion as articulated in the judgment but not as clearly in the order.

Analysis

[23] It is common ground that the judge intended to injunct the Company from dealing with the undistributed dividends until the trial of the action. The judgment purported to do this by finding that the Injunction should be continued or a fresh injunction be granted under the section 43 of the Arbitration Act. The learned judge did not specify, in his judgment, which of the two alternatives he relied on to grant the new injunction. The passages in the judgment that this Court was referred show the judge's intention to maintain the injunction on alternative bases. They are as follows:

- (a) In paragraph 2 the judge said, '[f]or the reasons set out below, I am persuaded that the injunction should be maintained or re-granted pursuant to the powers of the Court, in particular section 43 of the Virgin Islands Arbitration Act 2013...'.
- (b) In setting out in summary form his reasons for maintaining the injunction, he referred to the Court's general jurisdiction to grant an injunction and continued at paragraph 2(2), '[i]n the alternative, the Court has jurisdiction, which should be exercised in this case, to grant an injunction pursuant to section 43 of the Arbitration Act'.
- (c) In paragraph 2(3) he again referred to the alternative situation of continuing the injunction or granting a new injunction 'pursuant to section 43 of the Arbitration Act'.
- (d) In paragraph 32, he referred to Caldicott's second application that was framed in the alternative. I note that the drafter did not include this application in the recitals as he should have.
- (e) He concluded at paragraph 122 as follows:

“For the reasons set out above, the injunction should be continued, or, in the alternative, a fresh injunction granted in identical terms under section 43 of the Arbitration Act, with costs to the Applicant (Caldicott). The Discharge Application will accordingly be dismissed with costs awarded to the Applicant against the Respondent (the Company).”

[24] The essence of the judgment is that the learned judge maintained the injunctive relief on alternative bases – pursuant to section 24 of the Supreme Court Act or the court’s inherent jurisdiction OR section 43 of the Arbitration Act. But it is important to decide which of the two bases applies in this case because the difference has an important impact on the ability of the Court of Appeal to hear the appeal. If the Injunction was continued pursuant to the Court’s powers under the Supreme Court Act and/or its inherent jurisdiction, the Court has jurisdiction to hear the appeal. If a fresh injunction was granted under the Arbitration Act there is no appeal from that decision and this Court does not have jurisdiction to hear the appeal. It must be dismissed.⁵ The place to have resolved this issue was in the injunction order. The decision of the court is in paragraphs 1 to 5 of the order, not the reasons for the decision in the judgment. Reasons for a decision and recitals in an order are not a part of the order and are not enforceable or appealable. It is the orders of the court as contained in paragraphs 1 to 5 of the Injunction order that are enforceable and appealable and requires this Court’s interpretation.

[25] Paragraph 1 of the order contains the all-important part of the order that grants the Injunction. Paragraph 1 is set out above,⁶ but I repeat it because of its central role in the appeal. Paragraph 1 states, ‘[t]he Respondent be restrained by a freezing order in the form set out in Schedule 1 hereto until after the trial of the Claim or further order of the Court’. This wording does not support the continuation of an injunction previously granted. If that was the intention wording similar to that contained in the 20th May 2020 order would have been more appropriate.⁷ The wording of the

⁵ See paragraph 16 above.

⁶ Paragraph 21.

⁷ The wording of the 20th May 2020 order is set out in paragraph 20 of this judgment.

paragraph is more consistent with the court granting a fresh injunction, not continuing an existing injunction, and I so find. This finding means that this Court does not have jurisdiction to hear the appeal from the injunction order.

- [26] Another way to look at the matter is that the learned judge intended to grant the injunction on alternative bases, one of them being section 43 of the Arbitration Act. The result is that even if this Court were to entertain the appeal under section 24 of the Supreme Court Act or the court's inherent jurisdiction, the injunction granted on the alternate basis under the Arbitration Act remains, free from appellate intervention per section 43(10) of the Arbitration Act. For all practical purposes, the injunction would remain in place.

Additional submissions

- [27] Mr. Nader submitted that if a fresh injunction was granted from which there is no appeal (which is not his case) the Court should still hear the appeal on the alternative basis that the injunction was granted under the Supreme Court Act or the court's inherent jurisdiction. If the Company is successful in the appeal, by showing that Wallbank J [Ag.] erred in granting a fresh injunction or continuing the *ex parte* injunction, the Company could then take that order back to the Commercial Court and try to persuade a judge of that Court to vary or discharge the September 2020 decision to grant a fresh injunction. I do not accept this invitation from Mr. Nader because it would result in an order of this Court being used to effectively appeal against Wallbank J's decision to grant a fresh injunction under the Arbitration Act, or as a collateral attack on Wallbank J's order. This would not be an acceptable use of the court's process.
- [28] Mr. Nader also submitted that the Injunction could not have been granted pursuant to the Arbitration Act, because an injunction granted under section 43 can only be granted on an interim basis until a properly constituted arbitration tribunal is constituted. He relied on the English case of **Franek Jan Sodzawiczny v Andrew**

Joseph Ruhan and others.⁸ This case was decided under section 44 of the 1996 UK Arbitration Act which limits the duration of interim orders made under the section to when an effective tribunal is in place to deal with interim matters. Section 43 of the BVI Arbitration Act does not contain such a limitation and the court's powers when granting an interim order under section 43 are wider than in England. Section 43(3) of the Arbitration Act states that the powers under the section may be exercised whether or not similar powers may be exercised by an arbitral tribunal relating to the same dispute. Armed with this wider power, a BVI judge making an injunction order under section 43 is not constrained to limit the duration of the order to the establishment of an effective arbitration tribunal. It follows that the learned judge did not err in limiting the duration of the injunction order in this matter to 'trial of the [c]laim or further order'.

Conclusion

- [29] The injunction ordered by the learned judge on 16th September 2020 granting a freezing injunction against the Company was granted under section 43 of the Arbitration Act of the BVI. As such, the Court of Appeal does not have jurisdiction to entertain an appeal from that decision. In the circumstances, the Court must dismiss the appeal against the learned judge's order. I would award the costs of the appeal to the successful party, Caldicott, but the award should reflect the delay in raising the jurisdiction ground. As such, Caldicott's costs are to be assessed at no more than one-half of the costs assessed in the lower court, if not agreed within 21 days of the date of this order.

⁸ [2018] EWHC 1908 (Comm).

[30] This decision makes it unnecessary to hear and determine the appeal on the merits.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

By the Court

Chief Registrar