

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0020

BETWEEN:

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

Appellants

and

CALDICOTT WORLDWIDE LTD

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Timothy Collingwood, QC with him Mr. Iain Tucker for the Appellants
Mr. Stephen Moverley Smith, QC with him Ms. Amelia Tan for the Respondent

2021: February 25;
June 1.

Interlocutory appeal — Principles governing appellate interference with exercise of discretion by court below — Application to set aside service of claim out of jurisdiction — Non-disclosure — Test of materiality of non-disclosure — Whether learned judge misapplied test of material non-disclosure and erred in finding that the non-disclosure was not material — Application for stay of proceedings in favour of arbitration — Whether learned judge erred in finding that the circumstances were not “rare and compelling” such as to justify a stay on case management grounds — Application to admit fresh evidence — Whether fresh

evidence would probably have an important influence on the result of the appeal if admitted
— Jurisdiction — *Whether appellants have submitted to jurisdiction of the BVI courts*

The parties are individual minority shareholders in Hector Finance Group Limited (“the Company”), a company incorporated in the Territory of the Virgin Islands (“BVI”). Caldicott Worldwide Ltd (“Caldicott” or “the respondent”) is the largest minority shareholder of the Company holding 39.51% of the issued shares. The three appellants together own a majority of the shares in the Company. Between August and December 2019, the directors of the Company approved and declared three dividend payments. The directors paid out the dividends to the other shareholders but did not pay any of the declared dividends to Caldicott, claiming the right to withhold payment because the Company had outstanding claims against Caldicott. Caldicott filed a claim against the appellants and the Company, alleging that the appellants have conducted the business of the Company in a manner that is discriminatory, prejudicial and oppressive towards it by improperly withholding the dividends that were declared and are due to it. Caldicott sought declaratory relief, the payment of the outstanding dividends, a buy-out order, the appointment of a liquidator over the Company, and other relief under section 184I **Business Companies Act, 2004** (“the Act”).

Caldicott applied *ex parte* for permission to serve the claim on the appellants outside the jurisdiction. The learned judge granted the application. Permission was not required to serve the Company because it was domiciled in the BVI. The Company applied for and was granted 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. The claim proceeded against the appellants.

The appellants applied to set aside the order permitting service of the claim on them outside the jurisdiction on the ground that the respondent was guilty of material non-disclosure on the hearing of the *ex parte* application for permission to serve out, and for an order staying the claim as against the appellants in favour of arbitration. The non-disclosure was based on the respondent’s failure to bring to the judge’s attention the arbitration agreement in the Company’s articles of association and the further failure to alert the judge to the consequences of the arbitration agreement. The learned judge dismissed the appellants’ application to set aside the order granting permission to serve the claim on the appellants outside the jurisdiction and for a stay of the claim in favour of arbitration.

The appellants appealed against the judge’s orders. The respondent contested the grounds of appeal and also submitted that the appellants’ jurisdiction appeal should be dismissed on the ground that they had submitted to the jurisdiction by filing a request for further information without reserving their position on jurisdiction. The appellants also sought permission to rely on fresh evidence in the appeal.

The Court considered the following issues in the appeal: (i) whether the judge erred in refusing the application to set aside the order for service of the claim outside the jurisdiction; (ii) whether the judge erred in refusing to grant a case management stay of the proceedings

in favour of arbitration; (iii) whether the fresh evidence should be admitted; and (iv) whether the appellants submitted to jurisdiction of the BVI courts.

Held: dismissing the appeal; ordering the appellants to pay the costs of the appeal assessed at no more than two-thirds of the costs assessed in the lower court, such costs to be assessed if not agreed within 21 days of the date of this order; and granting the fresh evidence application in the terms set out in paragraph 65 of the judgment, that:

1. On an *ex parte* application for permission to serve out, the applicant must make full and frank disclosure of all matters relevant to the decision whether or not to grant the application. The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application. In this case, the judge considered all the relevant circumstances, including the fact that there was an alternative gateway open to the respondent and the respondent would have been given permission to serve the appellants outside the jurisdiction in any event. As such, the matters not disclosed at the *ex parte* hearing were not material in the sense contemplated by the rule against failing to give full and frank disclosure of all material facts on an *ex parte* application. There is no basis to interfere with the judge's decision to refuse the appellants' application to set aside the order granting permission to the respondent to serve the appellants outside the jurisdiction and the finding that there was no material non-disclosure in the *ex parte* application.

Commercial Bank–Cameroun v Nixon Financial Group Limited [2011] ECSCJ No. 120, (delivered 6th June 2011) applied; **MRG (Japan) Ltd v Engelhard Metals Japan Ltd** [2003] EWHC 3418 (Comm) considered; **Dufour v Helenair Corporation Ltd and others** (1996) 52 WIR 188 followed.

2. The power to grant a stay of proceedings is discretionary and should only be exercised in rare and compelling circumstances. In this case the learned judge accepted that the claim could be amended to exclude the claims against the Company and found that it was appropriate for the claim to proceed ahead of or in tandem with the arbitration proceedings. Further, that there was no sufficient risk of inconsistent judgments. The judge did not make any errors of principle that would take his decision outside the ambit of reasonable disagreement and make it blatantly wrong. In any event, this was not a case with rare and compelling circumstances to justify the grant of a stay of proceedings. There is no basis for setting aside the learned judge's case management decision to dismiss the application for a stay of the proceedings.

Section 18(a) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap. 80 of the Revised Laws of the Virgin Islands 1991 applied; Rule 26.1 (2)(q) of the **Civil Procedure Rules 2000** applied; **Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 considered; **Amlin Corporate Member Ltd and others v Oriental Assurance Corporation** [2012] EWCA Civ 1341 considered; **Marinor Enterprises Limited and another v**

First Caribbean International Bank (Barbados) Ltd [2016] ECSCJ No. 46 (delivered 4th April 2016) applied; **Reichhold Norway ASA and another v Goldman Sachs International (a firm)** [1999] 1 All ER (Comm) 40 applied; **Dufour v Helenair Corporation Ltd and others** (1996) 52 WIR 188 followed.

3. In order for fresh evidence to be admitted on appeal it must be shown that: (i) the new evidence could not have been obtained with reasonable diligence for use in the lower court; (ii) the new evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive; and (iii) the evidence must be apparently credible though it need not be incontrovertible. In this case, the judgment of the lower court dated 13th October 2020 and the consequential order satisfy the test for admitting fresh evidence as they were useful, though not decisive, in considering the stay appeal. However, the First Affidavit of Robert Charles John Foote filed on 17th February 2021 with exhibits, and the request for information filed on 5th February 2021 are not admitted because they did not have an important or any influence on the result of the appeal.

Ladd v Marshall [1954] 3 All ER 745 applied.

4. The appellants' conduct in applying for further information is consistent with a waiver of the challenge to the jurisdiction of the court. The information that was requested relates to the proceedings in the lower court and the request was made without reserving the appellants' position on its challenge to the jurisdiction. The appellants' subsequent attempt to reserve the position and their explanation about why the request for further information was made do not assist in avoiding the inescapable conclusion that they submitted themselves to the jurisdiction of the courts of the BVI.

Alexander Katunin v JSC VTB Bank BVIHCMAP2015/0004 & BVIHCVAP2015/0007 (delivered 20th June 2016, unreported) applied.

JUDGMENT

- [1] **WEBSTER JA [AG]**: This is an appeal against the order of Wallbank J [Ag.] dated 24th September 2020 reflecting the decision of the learned judge contained in an oral judgment delivered on the same day. The order: (i) dismissed the appellants' application to set aside the learned judge's order granting leave to the respondent to serve the claim form and statement of claim on the appellants outside the jurisdiction; (ii) dismissed the appellants' application to stay the claim on case management grounds in favour of arbitration proceedings between Hector Finance Group Limited (the first defendant in the court below) and the respondent, Caldicott Worldwide Ltd; (iii) awarded

the costs of the set-aside and stay applications to the respondent; and (iv) gave the appellants permission to appeal against the order.

Background

- [2] The appellants (the second to the fourth defendants in the court below) and the respondent are individual minority shareholders in a company incorporated in the Territory of the Virgin Islands (“BVI”), Hector Finance Group Limited (“the Company”). Caldicott Worldwide Ltd (“the respondent”) is the largest minority shareholder holding 39.51% of the issued shares. However, the three appellants together own just over 50% or a majority of the shares in the Company.
- [3] The directors of the Company were Mr. Chan Chew Keak (“Mr. Chan”), a 50% shareholder of the respondent, his son Mr. Kenneth Chan, the first and second appellants Mr. Siong Beng Seng and Mr. Ching Hui Huat, and Mr. Keith Ah Khee Tay who controls the third appellant. Mr. Kenneth Chan and Mr. Chan were appointed on 28th June 2018 and removed as directors on 2nd November 2019 and 19th March 2020 respectively, leaving the appellants as the only directors of the Company.
- [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. The respondent’s cumulative share of the declared dividends is S\$9,943,978.00 (approximately US\$7,032,889.00). The directors paid out the dividends to the other shareholders but did not pay any of the declared dividends to the respondent, claiming the right to withhold payment on the ground that the Company had outstanding claims against the respondent. As a result, the respondent filed a claim in the Commercial Court on 30th December 2019 against the appellants and the Company under the provisions of section 184I of the **Business Companies Act, 2004**

(“the Act”),¹ alleging that the appellants have conducted the business of the Company in a manner that is discriminatory, prejudicial and oppressive towards the respondent, by improperly withholding the dividends that have been declared and are due to it (“the unfair prejudice claim”). The claim form as originally filed sought declaratory relief, the payment of the outstanding dividends, a buy-out order, the appointment of a liquidator over the Company, and other relief under section 184I.

- [6] On 2nd January 2020, the respondent applied *ex parte* for permission to serve the claim on the appellants outside the jurisdiction. The application was made under Part 7.3 of the **Civil Procedure Rules, 2000** (“the CPR”), sub-rules (2) and (7), details of which are set out below.² The dual limbs of the application were pointed out to the judge by counsel at the initial hearing on 23rd January 2020. Permission was not required to serve the Company, it being a BVI company within the jurisdiction. The judge granted the application on 30th January 2020 and the claim form and statement of claim were duly served on the appellants outside the jurisdiction. The order granting permission is a part of the subject matter of this appeal and will be considered below.
- [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. The Company applied for a stay of the unfair prejudice claim in favour of arbitration. On 28th April 2020, the learned judge granted the application for a stay of the BVI claim against the Company in favour of the arbitration and specifically did not stay the claim against the appellants. 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 appellants applied to set aside the order permitting service of the claim on the appellants out of the jurisdiction on the ground that the respondent was guilty of material non-disclosure on the hearing of the *ex parte* application for permission

¹ Act No. 16 of 2004.

² See paragraph 10.

to serve out, and for an order on case management grounds staying the claim as against the appellants in favour of arbitration. The application was heard by the judge on 24th September 2020 and he made the orders referred to in paragraph 1 above which are the subject of this appeal.

The Appeal

[9] The appellants appealed against the judge's order. The notice of appeal lists six grounds of appeal as follows:

- (a) The learned judge applied the wrong test of materiality of non-disclosure.
- (b) The learned judge misapplied the test of material non-disclosure and made an error of law in finding that the non-disclosure was not material.
- (c) The learned judge fell into error in taking into account an erroneous understanding that if he set aside the order for service out the claim would not be allowed to proceed.
- (d) In considering whether the threshold to grant a case management stay had been reached the learned judge erred in failing to take account of the effect on the proceedings of the stay against the Company and the difficulties caused thereby.
- (e) The learned judge erred in finding that there was not sufficient overlap between the liability of the Company and that of the appellants to justify a stay on case management grounds.
- (f) The learned judge erred in holding that the circumstances were not "rare and compelling" such as to justify a stay on case management grounds.

Grounds (a)-(c) deal with the application to set aside service of the claim on the appellants outside the jurisdiction (“the set-aside appeal”) and grounds (d)-(f) deal with the judge’s refusal to grant a case management stay of the proceedings in favour of arbitration (“the stay appeal”). I will deal with the grounds of appeal in these two broad categories.

Grounds 1 to 3 – the set aside appeal

- [10] As stated above, the respondent applied *ex parte* for permission to serve the appellants outside the jurisdiction. The rules for serving a defendant outside the jurisdiction are contained in Part 7 of the CPR. Part 7 lists nine gateways for getting permission to serve out. The respondent applied under sub-rules (2) and (7) of Part 7.3.

Sub-rule (2) provides that:

- “A claim form may be served out of the jurisdiction if a claim is made –
(a) against someone on whom the claim form has been or will be served,
and –
(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is necessary or proper party to claim.”

Sub-rule (7) deals with claims about companies and provides:

- “A claim form may be served out of the jurisdiction if the subject matter of the claim relates to –
(a) the constitution, administration, management or conduct of the affairs;
or
(b) the ownership or control of a company incorporated within the jurisdiction.”

- [11] The basis of an application under sub-rule (2) is that one defendant, usually referred to as the anchor defendant, is subject to the court’s jurisdiction and has been or will be served in the BVI without permission, and there is between the anchor defendant and an overseas defendant (the appellants in this case) a real issue that it is

reasonable for the court to try, and the applicant is desirous of serving the foreign defendant outside the jurisdiction as a necessary and proper party to the claim.

[12] The basis of the claim under sub-rule (7) in this case is that the subject matter of the respondent's unfair prejudice claim relates to the management or conduct of the affairs of the Company.

[13] To succeed on the application to serve out, the respondent had to satisfy the judge of three things:

- (i) there is a serious issue to be tried on the merits concerning the foreign defendants/appellants;
- (ii) there is a good arguable case that the claim falls within one or more of the classes of claims in Part 7.3 of the CPR; and
- (iii) in all the circumstances the BVI is clearly or distinctly the appropriate forum for the trial of the dispute, and in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.³

[14] When the application first came on the hearing on 23rd January 2020, the learned judge enquired of counsel for the respondent whether there was any alternative dispute resolution provision in the articles of association of the Company. Counsel was not in a position to answer the question and the hearing was adjourned to allow him to put the Company's articles of association before the court. At the resumed hearing, on 30th January 2020, counsel directed the court to article 156 of the articles

³ Adapted from Lord Collins' speech in *Nilon Limited and another v Royal Westminster Investments SA and others* [2015] UKPC 2 at paragraph 12. The three-pronged test has been applied repeatedly in the BVI e.g. *Amerinvest International Forestry Group Company Limited v Kwok Ka Yik* [2015] ECSCJ No. 39 (delivered 4th March 2015) at para. 7.

of association which contains an arbitration agreement between the Company and its members. Article 156 reads:

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

Learned counsel responded to the judge’s query by submitting that the arbitration agreement in clause 156 did not apply because the dispute in the case was not a dispute between the Company and its members, and that in any case the arbitration agreement was irrelevant. Learned counsel did not refer the court to the relevant law relating to how an arbitration agreement operates in the circumstances of the case.

- [15] Having heard counsel and considered the matter, the learned judge granted permission to serve the appellants outside the jurisdiction.
- [16] The appellants’ application to set aside the order granting permission to serve them outside the jurisdiction was based largely on the allegation that the respondent was guilty of material non-disclosure in making the application to serve out. The non-disclosure was based on the respondent’s failure to bring to the judge’s attention the arbitration agreement in the articles of association and the further failure to alert the judge to the consequences of the arbitration agreement. The first part of this submission is easily disposed of. Although counsel for the respondent did not include the arbitration agreement in the *ex parte* application, nonetheless, the agreement was brought to the judge’s attention, albeit at the court’s request, and the judge took account of the agreement when he considered the application. There was no non-disclosure of the existence of the arbitration agreement.

- [17] The more cogent part of the submission is that counsel did not direct the judge's attention to the legal effect of the arbitration clause and the relevant cases. The details of the non-disclosure are the failure to deal with section 18 of the **Arbitration Act, 2013** ("the Arbitration Act");⁴ the failure to deal with the cases of **Ennio Zanotti v Interlog Finance Corp. and others**⁵ and **Microsoft Mobile Oy (Ltd) v Sony Europe Ltd and others**;⁶ and the failure to deal with the effect of these matters on the appropriateness of granting permission to serve out of the jurisdiction. In dealing with the Act and the cases I will cover the effect on the appropriateness of granting the permission to serve out.
- [18] Section 18(1) of the Arbitration Act provides that where a court hearing a matter that is the subject of an arbitration agreement and one of the parties (to the arbitration agreement) requests that the matter be referred to arbitration the court shall refer the matter to arbitration. Sub-section 4 provides that where the court makes such a referral it shall make an order staying the legal proceedings in the action. Mr. Timothy Collingwood QC relied on this provision to say that counsel for the respondent at the *ex parte* hearing should have alerted the judge to the mandatory effect of section 18 which is that the claim does not disclose a real or any issue to be tried by the BVI court against the Company and therefore the court could not grant permission to the respondent under sub-rule (2) of part 7.3 of the CPR to serve the appellants outside the jurisdiction. In short, there is no proper claim against the anchor defendant.
- [19] The **Ennio Zanotti v Interlog Finance Corp. and others**⁷ was decided under the repealed 1974 Arbitration Act, but it is still good law in the BVI. In that case, the first respondent company's articles of association contained an arbitration agreement referring disputes between the company and its members to arbitration. Bannister J [Ag.] ruled that some aspects of the dispute between the shareholder and the company were caught by the arbitration agreement and must be referred to arbitration,

⁴ Act No. 13 of 2013.

⁵ [2010] ECSCJ No. 36 (delivered 8th February 2010).

⁶ [2017] EWHC 374 (Ch).

⁷ *Supra* footnote 5.

and the court will in all such cases grant a stay of any court proceedings brought in breach of the agreement. Applied to this case, the appellants' case is that the Company's failure to pay dividends was a dispute between the respondent and the Company and it must be stayed in favour arbitration. Therefore, there was no proper claim against the Company and no issue for the court to try within the meaning of rule 7.3(2) and the judge should not have granted permission to serve the appellants based on rule 7.3 (2).

[20] The other case that was not brought to the judge's attention is **Microsoft Mobile Oy (Ltd) v Sony Europe Ltd and others**⁸ which stands for the proposition that where there is an arbitration agreement it is assumed that the beneficiary of that agreement will in due course rely on it to stay the court proceedings.

[21] Mr. Collingwood QC who appeared for the appellants, submitted that the failure to bring the Arbitration Act and the two cases to the attention of the judge at the hearing of the *ex parte* application amounted to a material non-disclosure which by itself was sufficient for the judge not to grant the service out order.

[22] Mr. Stephen Moverley Smith QC who appeared for the respondent, submitted firstly that the failure to bring the Arbitration Act and the cases to the judge's attention was not a material non-disclosure, and even if it was, it was not sufficiently serious for the judge to set aside the permission that he had granted. On the issue of materiality of the matters that were not disclosed, Mr. Moverley Smith submitted further that in any event the claim falls squarely in the alternative gateway in sub-rule (7) in that it relates to the administration and management of the affairs of the Company and the judge was bound to order service out on that ground. That being the case, the issue of materiality was not made out.

⁸ [2017] EWHC 374.

[23] The principles relating to non-disclosure in the context of an application for permission to serve defendants outside the jurisdiction are not seriously in dispute between the parties and are helpfully set out in counsels' written submissions. The main principles that apply to this appeal are:

- (i) The applicant, on an *ex parte* application for permission to serve out, must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application.
- (ii) The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application.
- (iii) Materiality is decided by the court and not by the assessment of the applicant or his legal advisers.
- (iv) The duty of candour is a heavy one. It extends to additional facts that the applicant would have known had he made proper enquiries. The applicant is under a duty to present fairly the facts disclosed. Observance of the duty is essential to secure the integrity of the court process and to protect those potentially affected by whatever order the court is invited to make.
- (v) A balance must be maintained between marking the court's displeasure at the non-disclosure and doing justice between the parties.
- (vi) A distinction should be drawn between non-disclosure which amounts to an attempt to deceive the court, and a negligent failure to state certain facts which should have been stated.
- (vii) If there is a finding of material non-disclosure the court may discharge the order granted even though the applicant may be able to make another application that would succeed.

- (viii) In exercising its discretion the court should assess the degree and extent of any culpability on the part of the applicant. Whether the fact not disclosed is a sufficiently material to justify setting aside the order for service out will depend on the importance of the fact that the issues which were decided on the application. The decision to set aside is essentially one of degree and the judge's view should carry great weight.

[24] Mr. Moverley Smith also made the additional point that the duty of disclosure on an application for permission to serve outside the jurisdiction is different from the equivalent duty on an application for a freezing injunction. He referred to the case of **DSG Retail Ltd and another v MasterCard Incorporated and others**,⁹ a decision of the Competition Appeal Tribunal of England and Wales, where Roth J stated:

“The duty does not require disclosure to the same degree as on an application for a without notice injunction, such as a freezing order, where granting the application has immediately and potentially serious consequences for the defendant. The factors relevant to an application to serve out are only those which relate to the limited inquiry the Tribunal carries out in determining whether to grant such permission. Nonetheless, within the limited scope of that inquiry, if the claimant is aware of such factors as might cause a Tribunal to doubt whether permission should be granted, this should be clearly disclosed.”¹⁰

This means that the duty of full and frank disclosure on an application to serve out is to be assessed by reference to the enquiry to be undertaken on a service out application. However, this does not relieve the applicant for permission to serve out in any way of the duty to disclose all relevant material in making the application.

Test of materiality of non-disclosure

[25] In ground of appeal 1 of the notice of appeal, the appellants complained that the learned judge applied the wrong test for determining the materiality of the alleged non-disclosure. Mr. Collingwood submitted that the test of materiality is a two-stage test.

⁹ [2015] CAT 7.

¹⁰ Ibid at paragraph 44 citing with approval the judgment of Lawrence Collins J in *Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others* [2002] 1 WLR 1269, paras. 180-182.

Firstly, whether the matter not disclosed might reasonably be taken into account by the judge in deciding whether or not to grant the application. Secondly, if so, would the court have given permission if the full facts are known. He relied on paragraph 20(4) of the judgment of this Court (Bennett JA [Ag.]) in **Commercial Bank-Cameroun v Nixon Financial Group Limited**¹¹ in support of the two-stage test.

- [26] Mr. Moverley Smith did not agree that the **Commercial Bank-Cameroun** case established any such two-stage test, or that any such test exists. He submitted that the case, and in particular sub-paragraph 20(4), relied on by Mr. Collingwood, confirms that there is but one test, namely, whether the fact not disclosed is of sufficient materiality that ‘... if the full facts had been before the Court, would the Court have given permission?’ I agree with Mr. Moverley Smith that the test of materiality is not in two stages. Bennett JA [Ag.] set out the test in the clear terms in paragraph 17(2) when he said: ‘[t]he test of materiality is “... whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application’.
- Bennett JA referred the case of **MRG (Japan) Ltd v Engelhard Metals Japan Ltd**¹² in support of this finding. I am satisfied that the test of materiality of non-disclosure is as submitted by Mr. Moverley Smith following the dicta of Bennett JA in the **Commercial Bank-Cameroun** case. There is no need to parse the words used by Bennett JA in the **Commercial Bank-Cameroun** case to create a two-stage test as submitted by Mr. Collingwood.

The judge’s approach to materiality of non-disclosure

- [27] The learned judge dealt with the issue of material non-disclosure at internal pages 75 to 77 of the transcript of the oral decision on 24th September 2020 (“the Transcript”).¹³ He noted firstly that the claim was against the respondents who were not affected by the arbitration agreement and that he could not force them to participate in any arbitration proceedings even though they were invited to do so. Importantly, the judge

¹¹ [2011] ECSCJ No. 120, (delivered 6th June 2011).

¹² [2003] EWHC 3418 (Comm) per Toulson J at para. 30.

¹³ See Tab 8 of the Core Bundle, electronic pgs. 76-78

also noted that the alternative gateway in sub-rule (7) was open to the respondent and had nothing to do with the arbitration agreement. The claim could proceed against the appellants using the gateway in sub-rule (7). He also referred in his decision at page 80 lines 11-18 of the Transcript to the very different situation where there was no alternative gateway and noted that in that situation where the applicant is relying on the anchor defendant in the face of an arbitration agreement, permission either would not be given or would be set aside if already given.¹⁴

[28] The learned judge concluded this issue at page 76 lines 5-8: 'Now, in the circumstances where the claim would proceed against those Defendants anyway, (the appellants in this appeal), it is rather difficult to see how failure to bring those aspects (the matters not disclosed) to the court's attention should be material.' He returned to the issue when dealing with the stay application when he said at page 84 lines 4-6 '[l]eave was going to be given to serve them out anyway. That means that there was no material failure to give full and frank disclosure'.¹⁵

[29] I find that the judge considered all the relevant circumstances, including the important fact that there was an alternative gateway open to the respondent, applied a one-stage test for determining materiality, and found that the fact that the respondent would have been given permission to serve the appellants outside the jurisdiction in any event means that the matters not disclosed at the *ex parte* hearing were not material in the sense contemplated by the rule against failing to give full and frank disclosure of all material facts on the *ex parte* application. There is no basis to interfere with the judge's decision that there was no material non-disclosure in the *ex parte* application.

[30] I would dismiss ground 1 of the notice of appeal.

¹⁴ See Tab 8 of the Core Bundle, electronic pg. 81.

¹⁵ See Tab 8 of the Core Bundle, electronic pg. 85.

Ground 2

- [31] The appellants complained in ground 2 of the notice of appeal that the learned judge made an error of law in concluding that the non-disclosure was not material. This ground is essentially an extension of the complaint in ground 1 and I have found in the preceding paragraphs that the judge correctly applied the test of materiality in the **Commercial Bank-Cameroun** case and found that the undoubted availability of the alternative gateway under sub-rule (7) means that consideration of the Arbitration Act and its effect, and the two cases relied on by the appellants, would not have been relevant in granting permission under sub-rule (7).
- [32] Wallbank J [Ag.] is an experienced judge of the Commercial Court who is very familiar with dealing with applications for permission to serve defendants outside the jurisdiction. He was obviously aware of the effect of an arbitration clause in the articles of association of BVI companies and he raised the issue at the *ex parte* hearing. The learned judge also stated in his oral judgment on 24th September 2020 that but for the alternative gateway available to the respondent in sub-rule (7) the permission to serve the appellants outside the jurisdiction would have been on a completely different footing.¹⁶
- [33] The judge did not make a specific finding on whether the non-disclosure was negligent or, even worse, meant to deceive the court. I see no basis for making a finding of deliberate non-disclosure. The respondent had an open gateway under sub-rule (7) and the failure to disclose the matters complained of appears to have been innocent or, at worst negligent, and would not have affected the judge's decision. A decision to set aside the service out order because of material non-disclosure would likely result in a fresh application under sub-rule (7) with a very high likelihood of success. This would not be a good use of the court's and the litigants' resources and for this additional reason I would not set aside the order for service out on the appellants.

¹⁶ See Tab 8 of the Core Bundle, pg. 81.

[34] Finally, on the issue of material non-disclosure, Mr. Collingwood submitted that even if the finding of no material non-disclosure is upheld, this Court should nonetheless set aside the service out order 'in all the circumstances' relying on the third element for granting service out of the jurisdiction in Lord Collins's judgment in **Nilon Limited and another v Royal Westminster Investments SA and others**.¹⁷ This is an unbridled attempt to challenge the exercise of the judge's discretion which has no prospect of succeeding and I reject it.

[35] I would dismiss ground 2 of the notice of appeal.

Ground 3

[36] The appellants' position in ground 3 is that the judge fell into error by taking into account an erroneous understanding that if he set aside the order for service out, the claim would not be allowed to proceed and the respondent would not have been able to bring a fresh application for service out. This is not how I understand the judge's decision. The appellants' case before the judge was that the service out order should be set aside and the claim struck out. This is the issue that the learned judge was addressing when he referred to public policy considerations underlying the principle of full and frank disclosure and the overriding objective of dealing with cases justly. The judge was addressing what he understood Mr. Collingwood's position to be that a strike out would mean that the respondent would not be able to pursue its claim. The judge then said at pages 77 to 79 of the Transcript:

"And he [Mr. Collingwood QC] suggested that I should set aside permission to serve out on the grounds that there is a strong public policy that a litigant should disclose all material facts fully and frankly. And what he is, in essence, saying is that I must overlook the fact that the claim might have been, and probably would have been, allowed to be served out anyway under the corporate affairs gateway, [he said] I have to overlook that. I have to look at the breach of public policy and penalise the Claimant by denying it the possibility of bringing its claim altogether because it broke that policy.

That might be a slightly different characterisation in the way Mr. Collingwood put it, but, in essence, that catches the gist of what he was saying.

¹⁷ [2015] UKPC 2 para. 13.

Now what this does is to make public policy trump the overriding objective of dealing with this case justly, and before I would allow the public policy to do that what I need to do, I think, is to balance of the harm of the breach of the public policy against the harm to the Claimant in the circumstances of the case.

...

On the other hand, if I was to deny the Claimants the right to bring the claim, that would mean that it's (sic) potentially very good an[d] arguable case, or even just simply arguable case, would not be allowed to proceed, and because the case is certainly arguable, I don't think that would be just. It would not do justice to the Claimant to deny it the possibility of bringing its claim against the Second to Fourth Defendants.

Balancing those things, I don't think any breach of the public policy warrants the draconian and disproportionate remedy of a strikeout."

[37] Mr. Collingwood submitted, with utmost courtesy and respect, that the learned judge misunderstood his submission. That may or may not be so, but I cannot resolve the misunderstanding (if any). What is clear is that the judge was not making a finding that the respondent would be shut out completely from bringing its claim, or that he was making his decision based on the theory that the respondent was shut out for all time. He was responding to what he understood to be the appellants' submission that the claim should be struck out for material non-disclosure. The sentence underlined in the extract from the transcript set out above may suggest a certain finality to the consequences of a strikeout, but I do not think it should be understood in that way in the context of the entire decision, delivered orally the same day as the hearing. The judge's decision was simply that there was an open gateway under sub-rule (7) available to the respondent and there was no material non-disclosure.

[38] There is no merit in this ground of appeal.

Exercise of discretion

[39] The judge's decision to grant the order to serve the appellants outside the jurisdiction and to dismiss their application to set aside the service out order are decisions that were made in the exercise of the judge's discretion. The appellants have not satisfied

this Court that the judge erred in principle either by failing to take into account relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations, and that as a result his decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be plainly wrong.¹⁸ There is no basis to interfere with the judge's decision to refuse the appellant's application to set aside the order granting permission to the respondent to serve the appellants outside the jurisdiction.

- [40] Mr. Collingwood also submitted that even if the court does not set aside the judges' service out order, the set-aside application was necessitated by the respondent's ill-conceived reliance on sub-rule (2) and its failure to make full and frank disclosure on the *ex parte* application, and the court should therefore order the respondent to pay the costs of the set-aside application. The learned judge considered this request and found that it was not necessarily the appropriate remedy and did not make a costs order against the respondent. This decision was well within the ambit of the judge's discretion and there is no basis to interfere with it.

The stay application - grounds 3 to 6

- [41] The application filed by the appellants on 8th May 2020 included an application for a stay of the proceedings in favour of arbitration. At the time, an arbitration notice had not been issued. The arbitration notice was issued by the respondent on 26th November 2020. The learned judge refused the application and ordered the proceedings to continue against the appellants. The grounds of appeal against the judge's order in relation to the stay application are set out in paragraph 9 above. Before considering the grounds I will make some preliminary observations.
- [42] The legislative basis for granting a stay of proceedings in the Virgin Islands is section 18(a) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**,¹⁹ and CPR 26.1 (2)(q). The court also has an inherent jurisdiction to grant a stay of proceedings

¹⁸ *Dufour v Helenair Corporation Ltd and others* (1996) 52 WIR 188 per Sir Vincent Floissac CJ.

¹⁹ Cap. 80 of the Revised Laws of the Virgin Islands 1991.

(**Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited**).²⁰ The power should only be exercised in rare and compelling circumstances (**Amlin Corporate Member Ltd and others v Oriental Assurance Corporation**).²¹

[43] The power to grant a stay is discretionary and the principles relating to how an appellate court treats with challenges to the exercise of discretion by a trial judge that I referred to in paragraph 39 above (the **Dufour v Helenair** principle) apply to the decision to grant or refuse a stay of proceedings.

[44] Finally, the power to grant or refuse a stay of proceedings is a case management decision and is subject to even greater scrutiny by an appellate court. To illustrate this Mr. Moverley Smith relied on the case of **Marinor Enterprises Limited and another v First Caribbean International Bank (Barbados) Ltd**²² and the following dictum of Baptiste JA:

“Be that as it may, in so far as the interlocutory orders in issue arise from discretionary case management decisions, they are manifestly the preserve of the case management judge. It would therefore be inappropriate for an appellate court to reverse or otherwise interfere with them unless they were plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. The appeal court does not exercise the discretion for itself and would be cognizant of the jurisprudence that such decisions are not to be lightly interfered with. An appeal court should not interfere with a case management decision of a judge who has applied the correct principles and taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.”

[45] These principles were not disputed by Mr. Collingwood and I agree with Mr. Moverley Smith that the appellants have to satisfy this Court that the learned judge erred in principle in refusing the stay in the sense contemplated by the test in **Dufour v**

²⁰ [2009] UKPC 46.

²¹ [2012] EWCA Civ 1341.

²² [2016] ECSCJ No. 46 (delivered 4th April 2016) at para. 30.

Helenair as applied in the context of a case management decision, and that as a result his decision was outside the ambit of reasonable disagreement and blatantly wrong. Further, that there are rare and compelling circumstances in this case to warrant the grant of a stay of the proceedings.

[46] Turning now to the grounds of appeal, the appellants complained in grounds 4 and 5 of the notice of appeal that in considering whether the threshold to grant a case management stay has been reached the learned judge erred in failing to take account of the effect of the proceedings of the stay against the Company and the overlap of issues between the claim and the arbitration proceedings. Ground 6 deals with the judge's failure to find that there were rare and compelling circumstances justifying a stay of the case on case management grounds.

[47] Mr. Collingwood submitted that the essence of the respondent's claim is for unpaid dividends, which is a claim against the Company and the entire claim should be dealt with in the arbitration proceedings. As such, the arbitration should go first and only if the unpaid dividends are found to be payable to the respondent should the unfair prejudice claim be allowed to proceed. If the unfair prejudice claim is not stayed there will be parallel proceedings with the attendant complications of duplication, overlapping issues, and the sequence of resolving issues that are common to both claims.

[48] Mr. Moverley Smith's response in a nutshell is that the claim against the appellants is a different cause of action from the claim against the Company. The claim against the Company has been stayed and will be pursued in the arbitration proceedings. The claims against the appellants which remain after the stay against the Company, is that they, as the persons who controlled the Company, conducted the affairs of the Company in a manner that was unfairly prejudicial to the respondent. The claim against the Company has been hived off to the arbitration proceedings and the judge has dealt with the effect of the resulting change in the unfair prejudice claim. Mr. Moverley Smith conceded that this may be 'messy and inconvenient' but it is a

situation that was brought about by the appellants by causing the Company to apply to stay the proceedings against it in favour arbitration. The respondent continues to pursue its unfair prejudice claim which includes a buy-out order against the appellants.

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

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

[51] The learned judge did not grant a stay of the proceedings. He decided that the unfair prejudice claim is a separate cause of action from the claim in the arbitration proceedings, and that there was no sufficiently close overlap between the liability of the Company and the liability of the appellants to warrant a stay; he recognised the fact that the real complaint in the claim is that the appellants caused the Company to withhold the dividends and that the conduct of the appellants needs to be investigated; that conduct involves an investigation into the factual background and the unfair prejudice claim is the appropriate medium to conduct that investigation. The learned

judge was alive to the fact that there was no arbitration agreement between the respondent and the appellants and that the claim could continue against them. He accepted that the claim could be amended to exclude the claims against the Company and found that it was appropriate for the claim to proceed ahead of or in tandem with the arbitration proceedings.

- [52] These are findings made by the learned judge, exercising his case management powers to refuse the application for a stay of the proceedings in favour of arbitration. The essence of his decision is captured at page 84-85 of the Transcript when he referred to the fact that there was no material non-disclosure and Mr. Collingwood's position that arbitration proceedings should go first, and then continued:

"Logically, I think, the claim against the Second to Fourth Defendants should go first, so for that reason I'm not minded to stay the proceedings in favour of an outcome in the arbitration between the Claimant and the Company. That's my primary reason. The secondary reason is that I don't think that there is sufficiently close overlap between the liability of the Company and the liability of the Second to Fourth Defendants to warrant such a stay. The claim against the Second to Fourth Defendants will have a life of its own. It's its own cause of action. It's the same matrix of fact. It is a different cause of action, and a different set of relief would apply."²³

This part of the decision, and the decision as a whole, is, in my opinion, a quintessential example of a case management judge who is familiar with the claim in deciding how he thinks the case should proceed. I am not satisfied that the judge made any errors of principle which would take his decision outside the ambit of reasonable disagreement and was blatantly wrong, and this was not a case with rare and compelling circumstances that would cause me to set aside the decision of the learned judge refusing to grant a stay of the proceedings.

Inconsistent judgments

- [53] Before leaving the issue of the stay application, I note that there were written and oral submissions on the risk of inconsistent judgments between the unfair prejudice claim

²³ See Tab 8 of the Core Bundle, electronic pg. 85.

and the arbitration proceedings. This is not contained in any of the grounds of appeal but it could be regarded as an extension of ground 5 which deals with the overlapping liabilities between the two claims and the issue was addressed by both counsel in their written and oral submissions. The learned judge did not make a finding on inconsistent judgments in the strict sense, but he dealt with the possibility of overlapping liabilities and found that there was not a sufficient overlap.²⁴ This finding by the learned judge is sufficient to deal with the risk of inconsistent judgments. He did not use the expression ‘inconsistent judgments’ but there can be very little difference between that expression and the judge’s finding that he did not find a sufficiently close overlap in liabilities. Further, it is not every inconsistency that will lead to a stay. A litigant should not be driven from the judgment seat except for a serious risk of inconsistent judgments. In the words of Moore-Bick J in **Reichhold Norway ASA and another v Goldman Sachs International (a firm)**:²⁵

“I accept, however, that such a step [a stay] should only be taken if there are very strong reasons for doing so and the benefits which are likely to result from doing so clearly outweigh any advantage to the plaintiff. Ultimately, however, it must be a matter for the court to consider the circumstances of the case before it and come to its own conclusion.”

[54] The judge was satisfied that there was no sufficient risk of inconsistent judgments and no strong reasons for granting a stay. This was a matter that was entirely within his wide discretion and, even if this Court were to be of a different view, this does not justify interfering with the learned judge’s exercise of discretion to refuse the application for a stay.

[55] I would dismiss grounds 4-6 of the notice of appeal.

The fresh evidence application

[56] The background to the fresh evidence application is that on 7th July 2020 the learned judge conducted a hearing to deal with consequential matters following the stay of the proceedings against the Company, ordered on 20th April 2020. On 13th October 2020,

²⁴ Internal page 84 of the Transcript.

²⁵ [1999] 1 All ER (Comm) 40, at 48 a-d.

the judge delivered a reasoned judgment following the consequential matters hearing (“the October 2020 Judgment”). The parties did not agree the terms of the order from the October 2020 Judgment and it was not immediately settled and sealed.

[57] On 28th January 2021, the appellants’ legal advisers issued a request for further information to the respondent’s legal advisers seeking information about various matters in the unfair prejudice claim. The request for information sought information about:

- (a) the legal basis on which it is alleged that the respondent is entitled to a declaration that the shareholders’ resolution passed on 30th November 2019 is unlawful, void, and of no effect, or is voidable;
- (b) details of factual matters and/or factual allegations relied on in support of the respondent’s entitlement to a declaration that the resolution passed on 30th November 2019 is unlawful, void and of no effect, or is voidable;
- (c) the particular actions of the respondent which it is alleged are (in themselves) unfairly prejudicial, unfairly discriminatory or oppressive to the respondent as a shareholder of the Company (as distinct from the manner in which it is alleged that the appellants caused the affairs of the Company to have been conducted in an unfairly prejudicial, unfairly discriminatory or oppressive manner).

[58] In the absence of a response from the respondent the appellants issued the application for further information on 5th February 2021. Paragraph 7 of the application states that:

“On 20th January 2021, in order to better understand the Proceedings and mindful of the Appeal and the need to settle the terms of the Final Order at the Hearing, the Shareholder Defendants served the request for information pursuant to rule 34.1 of the CPR giving the claimant until 4 February 2021 to respond.”

The reference to “the Hearing” is to a hearing scheduled for 9th February 2021 to settle the terms of the consequential order arising out of the October 2020 Judgment (“the Consequential Order”).

[59] The appellants did not reserve their challenge to the jurisdiction in issuing the application for further information.

[60] On 17th February 2021, the appellants applied for permission to rely on fresh evidence in the appeal in the form of the request for further information contained in the First Affidavit Robert Charles John Foote filed in the appeal on 17th February 2021 and the exhibit to the affidavit. The application also included the documents contained in a supplementary bundle consisting of documents filed in court since the notice of appeal was filed. The application also asked that the confidential notice of arbitration served by the respondent on the Company in November 2020 be admitted, if the respondent consented. The respondent has not consented and no further consideration of the admissibility of the arbitration notice is necessary.

[61] At the commencement of the hearing of the appeal on 25th February 2021, both counsel agreed that the Court could look at the documents referred to in the fresh evidence application and make a ruling on their admissibility when delivering judgment on the appeal. The Court accepted that this was an appropriate way to proceed in this case.

[62] The test for admitting fresh evidence on appeal is well-known and uncontroversial. The three elements of the test derived from the decision of **Ladd v Marshall**²⁶ are that: (i) it must be shown that the new evidence could not have been obtained with reasonable diligence for use at the in the lower court; (ii) the evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive; and (iii) the evidence must be apparently credible

²⁶ [1954] 3 All ER 745.

though it need not be incontrovertible. An additional consideration is that the rules are applied less rigorously in interlocutory appeals, as in this case.

[63] Mr. Moverley Smith did not object to the admission of the October 2020 Judgment and the Consequential Order on the ground that these are court documents and permission is not required to admit them. He objected to the documents contained in and associated with the request for further information filed on 17th February 2021. The stated reason for seeking to admit these documents is to better understand the proceedings (in the court below), being ‘mindful of the appeal’, and the need to settle the terms of the Consequential Order.²⁷

[64] Mr. Moverley Smith rested his objection to the admissibility of the fresh evidence contained in Mr. Foote’s First Affidavit on the second limb of the **Ladd and Marshall** test, namely, that these documents will not have an important influence on the Court’s consideration of the appeal. Mr. Collingwood submitted that all the documents are relevant and should be considered in both the set-aside appeal and the stay appeal.

[65] Having reviewed the documents and counsel’s submission and considered the matter I would make the following orders with brief reasons:

- (1) The October 2020 Judgment and the Consequential Order, to which Mr. Moverley Smith, QC did not object, and the draft amended claim form and statement of claim that are a part of the Supplemental Bundle at pages 32-47 are admitted. These documents were useful, though not decisive, in considering the stay appeal.
- (2) The First Affidavit of Robert Charles John Foote filed on 17th February 2021 with the documents exhibited as “RCJF-1”, and the request for information filed on 5th February 2021 are not admitted – they did not have an important or any influence on the result of the appeal.

²⁷ Ground 7 of the fresh evidence application – see paragraph 58 above.

Submission to the jurisdiction

- [66] Following the appellants' application for further information, filed on 5th February 2021, the respondent filed supplemental submissions in opposition to the appeal. These submissions are in substance an application to dismiss the set-aside appeal on the ground that the appellants had submitted to the jurisdiction by filing the request for further information, without reserving their position on jurisdiction. The appellants objected to the application being made in this way and submitted that it should have been made by way of a notice of application. There is merit in the objection but, as the matter relates to jurisdiction and the court heard submissions from both sides I would exercise my discretion by considering the challenge.
- [67] I should also add that the dismissal of the appeal against the service out order means that there is no longer an issue as to submission to the jurisdiction - the effect of the finding is that the appellants are subject to the court's jurisdiction. Nevertheless, I will address the issue briefly.
- [68] Mr. Moverley Smith submitted that the conduct of the appellants in requesting further information and then issuing an application for further information is entirely inconsistent with the jurisdiction challenge contained in the set-aside appeal. By so doing the appellants have submitted to the jurisdiction of the court and the set-aside appeal is now otiose and should be dismissed on this additional ground.
- [69] Mr. Collingwood disagreed. He submitted that the requested information is relevant to and necessary for both the lower court and appellate court proceedings. In particular, the Consequential Order and October 2020 Judgment have their origins in the same issues, namely, the challenge to the service out order and the refusal of the stay application. By requesting the information the appellants did not waive their challenge to the jurisdiction which they have continued to assert and pursue. He said that the requested information was needed for the current appeal and any appeal arising from the Consequential Order.

[70] The tformattest for waiver on submission to the jurisdiction is not in dispute. It was settled in this Court by Thom JA in the case of **Alexander Katunin v JSC VTB Bank**²⁸ as follows: 'The conduct that is said to amount to submission to jurisdiction must be wholly unequivocal. The conduct must not simply be consistent with submission to jurisdiction, but there must be no other explanation for it.' The submission must be judged objectively and not by what the person taking the step thinks it means.

[71] The appellant's reason for issuing the request for further information application is set out in of the application and in paragraph 57 above. Viewed objectively and in the context of the state of the proceedings when the application was made in January 2021, I am satisfied that the stated purpose of the application was in connection with the conduct of the proceedings in the lower court. The reason was, as stated, 'to better understand the proceedings'. The appeal is mentioned but without explanation. The information that was requested relates to matters that are pending in the proceedings in the lower court such as the basis for the shareholders' resolution passed on 30th November 2019 and details about the alleged unfairly prejudicial, discriminatory and oppressive conduct of the appellants. These are matters that are relevant to the unfair prejudice proceedings in the lower court. In my opinion, the appellants' conduct is consistent with, and only with, a waiver of the challenge to the jurisdiction of the court over them. The conduct was made without reserving the appellants' position on its challenge to the jurisdiction and any subsequent attempt to reserve the position or any explanation from the appellants as to why the request for further information was made does not assist in avoiding the inescapable conclusion that the appellants submitted themselves to the jurisdiction of the courts of the BVI.

[72] This is an additional reason why the set-aside appeal must be dismissed.

²⁸ BVIHCMAP2015/0004 & BVIHCVAP2015/0007 (delivered 20th June 2016, unreported) at para. 18.

Disposal

- [73] For all of the above reasons, I would dismiss the appeal and order the appellants to pay the costs of the appeal assessed at no more than two-thirds of the costs assessed in the lower court. Such costs to be assessed if not agreed within 21 days of the date of this order. I would grant the fresh evidence application to the extent shown in paragraph 65 above.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

By the Court

Chief Registrar