

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0002

BETWEEN:

[1] INTERNATIONAL TRADING HOLDING CO. LIMITED
[2] INTRACO UAE LIMITED

Appellants

and

MED TRADING LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Paul Webster
[Ag.]
The Hon. Mr. Gerard St. C. Farara, QC
[Ag.]

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Andrew Willins for the Appellants
Mr. John Carrington, QC for the Respondent

2020: November 27;
2021: February 11.

Interlocutory appeal — Summary judgment — Refusal of application for summary judgment — Test of summary judgment — Realistic prospect of defending claim — Whether learned judge erred in refusing application for summary judgment — Whether learned judge misapplied the test of summary judgment — Permission to file amended defence and counterclaim — Whether learned judge erred in exercise of discretion in granting permission to file amended defence and counterclaim — Validity of shareholder

resolution amending articles of association — Interpretation of arbitration clause in articles of association — Whether judge erred in concluding that there were questions of law and fact better suited for determination at trial

The appellants, (“ITHC” and “Intraco”), and the respondent, (“Med Trading”), are companies incorporated under the laws of the Territory of the Virgin Islands (“BVI”), which are involved in a series of interconnected court proceedings in Dubai, started by Med Trading in 2013. ITHC is the majority shareholder of Intraco. Med Trading is one of four shareholders in ITHC.

At the time of its incorporation in 2001, ITHC’s articles of association contained an arbitration agreement that provided for the resolution, by arbitration, of all disputes between ITHC and its shareholders regarding the declaration and payment of dividends. However, in 2018, ITHC purported to adopt a new amended and restated memorandum and articles of association, including a stipulation for disputes between ITHC and its shareholders to be dealt with in accordance with the BVI IAC Arbitration Rules (“the 2018 ITHC Arbitration Agreement”). These amendments were purportedly effected by two written resolutions, one of which was signed by three out of ITHC’s four shareholders. As to the fourth shareholder, Med Trading, the execution section of the resolution records the words ‘not available to sign’.

In 2019, ITHC and Intraco filed a claim in the Commercial Division of the High Court of Justice against Med Trading seeking, *inter alia*, in the ITHC claim, a declaration that the 2018 ITHC Arbitration Agreement is binding on the Med Trading and, in the Intraco claim, a declaration that as Med Trading is not a shareholder of Intraco it has no right to or entitlement to receive dividends from Intraco; and an anti-suit injunction restraining Med Trading from commencing or pursuing any further claims or proceedings against ITHC in respect of any dispute falling within the articles other than by arbitration in accordance with the BVI IAC Arbitration Rules, as required by the 2018 ITHC Arbitration Agreement and, in the case of Intraco, an anti-suit injunction restraining it from commencing or pursuing any further claims and/or proceedings which are inconsistent with the terms of the declaration. Med Trading filed a defence to the claims, and the appellants applied for summary judgment against Med Trading pursuant to rule 15.2 of the Civil Procedure Rules 2000, seeking the same declaratory and injunctive reliefs sought in their respective claims, on the basis that Med Trading’s defence disclosed no reasonable grounds for defending ITHC and Intraco’s claim, and that Med Trading had taken a number of ‘abusive proceedings’ against them in Dubai which are inconsistent with BVI law and the 2018 ITHC Arbitration Agreement.

Subsequently, and without permission of the court, Med Trading filed an amended defence and counterclaim by which it challenged the validity of the 2018 shareholders’ resolution on several grounds including, in relation to the claim by ITHC, that the 2018 shareholders’ resolution was not circulated to Med Trading, that Med Trading was not given sufficient notice of the resolution, and that the 2018 amendments to the articles were oppressive and made for an improper purpose. By its amended defence, Med Trading also relied on an unparticularised defence of estoppel in relation to the claim by Intraco.

The application for summary judgment was refused by a judge of the Commercial Division of the High Court, who concluded that there were factual and legal issues, raised by both sides, which were not suited for determination on a summary judgment application. The learned judge also granted permission retrospectively to Med Trading to file its amended defence and counterclaim, and struck out Med Trading's estoppel defence in relation to the Intraco claim.

The appellants appealed the decision of the learned judge refusing to enter summary judgment and granting the respondent retrospective permission to file its amended defence and counterclaim.

The Court considered: (1) whether the learned judge erred in the exercise of his discretion by granting Med Trading retrospective permission to amend its defence and in deeming the amended defence and counterclaim filed without the permission of the court duly filed; (2) whether the learned judge, having struck out Med Trading's estoppel defence to Intraco's claim ought to have granted summary judgment in favour of Intraco for the declaratory and anti-suit injunctive relief it sought against Med Trading; (3) whether the learned judge erred in concluding that the validity of the 2018 shareholders' resolution and the legal effect of the 2018 Arbitration Agreement ought not be determined on summary judgment; (4) whether the learned judge wrongly held that Med Trading had a realistic prospect of establishing at trial that there was some improper purpose or oppression in relation to the 2018 amendment of ITHC's articles of association; and (5) whether the learned judge adopted an overly cautious approach to issues of construction and law on the summary judgment application and/or misapplied the test applicable to summary judgment applications.

Held: dismissing the appeal; affirming the order of the learned judge dismissing the appellants' application for summary judgment and permitting the respondent to file its amended defence and counterclaim; ordering costs to Med Trading to be assessed at no more than two-thirds of its costs in the court below, that:

1. While there may have been some basis for complaint as to the lateness of the amended pleading filed by Med Trading, it was within the judge's power and discretion to permit Med Trading to file its amended pleading retrospectively, Med Trading having sought such permission during the hearing of the application for summary judgment. In accordance with the well-settled principles upon which an appellate court can review a judge's exercise of discretion, there is no basis upon which this Court ought to disturb or set aside the judge's order granting permission to amend, the exercise of which discretion was within the generous ambit of disagreement.

Dufour et al v Helenair Corporation Ltd et al (1996) 52 WIR 188 applied.

2. Where a claimant has established the right or interest upon which a declaration sought is based, it is wrong in principle to refuse to grant the declaration unless the claimant has done something or there exist special considerations which would disentitle him to the declaration, or some good reason why the court ought to

exercise its discretion not to grant the declaration sought. In this case, the appellants have effectively delayed since the first action was brought by Med Trading before the courts in Dubai in 2013, in commencing any claim and in seeking declaratory or anti-suit injunctive relief against the respondent in the BVI; and is only seeking, at this stage, to obtain an order of this Court for the declared purpose of using it in the on-going (or any future) proceedings brought against the appellants by Med Trading in Dubai. Given the delay and the appellants' declared purpose, the declaration sought by Intraco is arguably academic as there exists currently no on-going proceedings before the courts in Dubai in which Intraco is a defendant, the claim against it in case 351/2020 having been dismissed on limitation grounds. The learned judge was therefore correct in declining to grant the declaration sought at this stage.

Zamir & Woolf – The Declaratory Judgment 4th Edition, Sweet & Maxwell (2011) at 4-17, 4-30 and 4-31 applied.

3. The anti-suit injunction sought by Intraco depended on the grant of the declaratory relief which it sought. Accordingly, if it was not proper for the court to grant summary judgment for the declaratory relief sought by Intraco, then equally so, it would not have been correct, as a matter of principle, for the court to grant summary judgment for the anti-suit injunction. In any event, the court will only grant an anti-suit injunction where the proceedings in a foreign court, if pursued, would be vexatious or oppressive. Contrary to the appellants' argument, there was nothing unconscionable in Med Trading's pursuit of its claims before the courts in Dubai in circumstances where the laws of Dubai permit such a claim to be brought against ITHC and Intraco. The learned judge's refusal to grant summary judgment on Intraco's claim was therefore not plainly wrong and was, in any event, correct.

Societe Nationale Industrielle Aerospatiale v Lee Kui Jak and another [1987] AC 871 applied.

4. A resolution to amend ITHC's articles of association, must be passed by an 'absolute majority' of ITHC's shareholders, that is, by a majority of the total number of ITHC's shareholders entitled to vote, irrespective of the number of members who actually vote on the resolution. It is clear that the 2018 shareholders' resolution to amend ITHC's articles was signed by an absolute majority of the shareholders, as required by the articles. In the circumstances, however, the judge did not err in concluding that the question of the validity of the shareholders' resolution was one which was not suited for disposal on a summary judgment application. It is more than merely arguable that there is a requirement under the articles of association for a proposed written resolution to be circulated to all shareholders for their consideration and signature. Furthermore, the issues, both legal and factual, raised by Med Trading's defence, including whether there was a requirement under the articles to give prior notice to it, as one of the shareholders of ITHC, of the proposed written resolution; and the correctness or legitimacy of the note 'not available to sign' recorded on the signature block of the resolution

next to Med Trading, are matters which were not addressed in the appellants' statement of claim or their evidence in support of the summary judgment application, and therefore require fuller investigation at trial.

Charrandas Persaud v Compton Herbert Reid and Other [2019] CCJ 10 (AJ) applied; Section 13 of the **BVI Business Companies Act, 2004** Act No. 16 of 2004 considered; **Browne v La Trinidad** (1887) 37 ChD 110 distinguished.

5. There is nothing inherently wrong with the shareholders of a company amending the company's articles of association to stipulate that disputes concerning the affairs of the company are to be determined by arbitration. As foreshadowed, the questions of improper purpose and oppression raised in relation to 2018 amendments (which are related to the purpose and validity of the directors' and shareholders' resolutions), are not as simple, straightforward or unanswerable as the appellants contend, so as to give rise to summary judgment on ITHC's claim. On a summary judgment application, and at this stage of the proceedings, before the usual pre-trial procedures have been embarked upon, the learned judge was simply not required to weigh the relative strengths or merits of each party's case on these issues, which are usually fact sensitive.

Enka Insaat Sanayi A.S. v OOO "Insurance Company Chubb" and Others [2020] EWCA 574 considered; **O'Neill and Another v Phillips and Others** [1999] 1 WLR 1092 distinguished.

6. The learned judge did not adopt an overly cautious approach to deciding issues of construction or issues of pure law. In all the circumstances, it is clear that the judge did not misapply the test and principles applicable to the grant of summary judgment, and that he correctly decided that there were issues of fact and questions of law which require fuller investigation and consideration at trial and, accordingly, that this was not a proper case upon which to grant summary judgment for the declarations and anti-suit injunctions sought by ITHC and Intraco in their respective claims.

Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste [2010] ECSCJ No.8, delivered 11th January 2010 applied; **Doncaster Pharmaceutical Group Ltd and Ors v Bolton Pharmaceutical Company 100 Ltd** [2006] EWCA 661 Civ applied.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an interlocutory appeal against the order dated 19th December 2019 ("the Order") and the written judgment delivered on 4th February 2020 ("the Judgment") of a judge of the Commercial Court, by which the learned

judge refused an application by the appellants to strike out the respondent's defence and/or enter summary judgment in favour of the respondent, and permitted the respondent to retrospectively amend its defence. The respondent resists the appeal and has filed a counternotice of appeal, asserting two additional grounds upon which it contends that the Order and Judgment ought to be upheld.

Background

- [2] The relevant factual background, much of which is not in dispute, was carefully set out by the learned judge in the Judgment, which I gratefully acknowledge. It is therefore only necessary for the purposes of this judgment to allude to certain salient features of the factual background. For consistency and convenience, I shall refer to the first appellant as ("ITHC"), to the second appellant as ("Intraco"), and to the respondent as ("Med Trading").
- [3] The starting point is that all three companies were incorporated under the laws of the Territory of the Virgin Islands (the "BVI"). Mr. Michael Joseph Trak ("Mr. Trak") is the principal of Med Trading. He was one of several shareholders of Intraco. As a result of a restructuring in mid-2001, ITHC was incorporated and interposed between the shareholders and Intraco. The 2001 restructuring resulted in ITHC holding 80% of the shares in Intraco. ITHC is therefore the majority shareholder of Intraco. Also, as a result of the 2001 restructuring, a majority of those who were shareholders in Intraco became shareholders in ITHC and ceased to be shareholders of Intraco. On 28th June 2001, Med Trading, Mr. Trak's company, acquired 4,000 shares or 25% of the issued shares in ITHC, and he ceased to be a shareholder in Intraco. Med Trading's shares in ITHC are voting shares. Med Trading is not and never was a shareholder of Intraco. The majority shareholder in ITHC is another Intraco company (not the second appellant).
- [4] Intraco is in the business of trading products from the Intraco Group in a number of Middle Eastern countries, purchased from the Intraco Corporation. Intraco has a branch in the United Arab Emirates (the "UAE") and a commercial license

permitting it to trade there. Intraco also has assets and premises in the UAE. On the other hand, ITHC, the majority shareholder of Intraco, had a representative office license in the UAE, which it held from 2001 to 2014. Mr. Trak was an executive director of both ITHC and Intraco until 2007 when he was suspended. He subsequently resigned under acrimonious circumstances.

ITHC's 2001 Arbitration Agreement – Regulation 142

- [5] At the time of its incorporation on 28th June 2001, ITHC's articles of association contained an arbitration agreement at regulation 142 ("the 2001 ITHC Arbitration Agreement"). It is the appellants' case that this provision clearly provided for the resolution of all disputes between ITHC and its shareholders regarding the declaration and payment of dividends to be decided by arbitration. It states:

"ARBITRATION

142. Whenever any difference arises between the Company on the one hand and any of their members, their executors, administrators or assigns on the other hand touching the true intent and construction or the incidence or consequences of these presents or of the Act touching anything then or thereafter 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 presents or to any Act or Ordinance affecting the Company or in 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 two 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."

ITHC's 2018 Arbitration Agreement – Regulation 24

- [6] Effective 3rd May 2018, some 5 years after the first set of proceedings had been brought in 2013 by Med Trading, in Dubai, for the appointment of an accounting expert and for the payment of such profits, ITHC, purported to adopt a new amended and restated memorandum and articles of association of the company. This new constitutional document provided at regulation 24 for disputes between ITHC and its shareholders to be dealt with in accordance with the **BVI IAC Arbitration Rules**¹ ("the 2018 ITHC Arbitration Agreement"). These amendments

¹ Made on 16th November 2016, pursuant to section 107 of the Arbitration Act 2013, Act No. 13 of 2013.

were purportedly effected by two written resolutions, one of the directors dated 15th April 2018 signed by all seven directors of the company, and the other by a majority of the shareholders pursuant to section 88 of the **BVI Business Companies Act, 2004**² and regulation 72 of the articles of association of the company. The written resolution of the shareholders was signed by 3 out of the 4 shareholders and dated individually, 16th April 2018. It was registered at the Companies Registry on 3rd May 2018. As to the fourth shareholder, Med Trading, the execution section records the words ‘not available to sign’. There was no evidence adduced before the court below to establish that there had been any attempts to contact either Mr. Trak or Med Trading itself prior to the execution of this 2018 shareholders’ resolution by the other three shareholders of ITHC. In its amended defence and counterclaim, Med Trading challenges the validity of the 2018 shareholders’ resolution on several grounds. These grounds were vigorously contested by the appellants in this appeal as being wholly unsustainable in law and in fact.

- [7] The 2018 arbitration agreement at regulation 24 of the amended and restated articles of ITHC, is set out in full at paragraph 15 of the statement of claim and does not necessitate full reproduction here. The salient provision is at clause 24.1 which states:

“24.1 Whenever any Arbitral Dispute arises between (1) the Company on the one hand and any of its shareholders, executors, administrators or assigns on the other hand or (ii) between the shareholders of the Company or their executors, administrators or assigns (either or both of (i) and (ii) being the Arbitration Parties) then any such Arbitral Dispute shall be settled by arbitration in accordance with the BVI IAC Arbitration rules.”

The Dubai Proceedings

- [8] During the period March 2013 to June 2017, Med Trading commenced a number of proceedings before the courts of Dubai against ITHC and Intraco. By these proceedings, Med Trading claimed an accounting of and entitlement to profits and dividends from ITHC and Intraco. The decisions rendered by the courts of Dubai

² Act No. 16 of 2004.

in certain of these proceedings were appealed. The record before the court below in the summary judgment application relating to the various proceedings, appeals and decisions is somewhat muddled. Those matters were helpfully catalogued in the appellants' updated chronology filed in this appeal and are to some extent summarised in the Judgment of the learned judge. I do not propose to list them all here and will address, in brief, the proceedings most pertinent to this appeal.

- [9] All claims brought by Med Trading before the courts in Dubai against ITHC and Intraco for an accounting and payment of profits, except case 351/2020, were commenced prior to the claim in this matter.

(i) Case 385/2013

- [10] The first of the Dubai proceedings is case 385/2013, commenced on 3rd March 2013, some 6 years before the claim in this matter. It was brought by Med Trading against Intraco and ITHC for a share of profits in the sum of approximately USD \$26 million for the period 2005 to 2013 and for the appointment of an accounting expert. The expert report concluded that Med Trading was entitled to payment of profits by ITHC in the sum of USD \$3,748,455.00 and to payment from Intraco of the sum of USD \$4,199,180.00. At first instance, Med Trading obtained judgment for these sums against, respectively, ITHC and Intraco, plus interest at 9% from the date of the claim until full payment, case expenses and advocacy fees. As to the claim for payment of profits due for the year 2007, the court instructed that a separate case be filed as the expert report did not take this into account due to the unavailability of the financial statements.
- [11] On 31st January 2018, the Dubai Court of Appeal set aside the judgment against Intraco in case 385/2013 on limitation grounds and on the basis that the proceedings had never been validly served on Intraco; and against ITHC on the ground that the claims for the periods before 2008 were time barred.

[12] On 28th October 2018 the Court of Cassation, Dubai's highest court, dismissed appeals brought by Intraco and ITHC, holding that ITHC's shareholding in Intraco was sufficient under Dubai law to render Intraco liable to distribute profits directly to Med Trading. As the learned judge pointed out at paragraph 5 of the Judgment, a reading of this judgment reveals that it is an established principle of Dubai law that 'a Defendant [such as Intraco] has a capacity [to be sued] when he is responsible directly or indirectly for the claimed right or shares responsibility for that right or the legal position required to be protected'. It is also apparent from the judgment of the Court of Cassation (as the learned judge also emphasised at paragraph 5 of the Judgment), that it would not interfere with findings of fact of the lower court 'as long as [the lower court's] judgment is based on sound reasoning sourced on the papers and is sufficient to sustain the judgment in this concern'. Accordingly, the Court of Cassation held that the lower court's conclusion as to 'capacity' was 'sufficient to sustain the judgment'.

[13] This judgment of the Court of Cassation, and the principles of Dubai law pronounced in its decision as to capacity to be sued and the basis upon which an appellate court will review findings of fact of a lower court, are important matters to be weighed when considering the correctness of the approach by the learned judge to the summary judgment application, and whether the appellants had a real prospect of successfully defending the claims in this matter, and whether the appellant had met the standard necessary to obtain summary judgment on the claim. Moreover, there is nothing in the judgment of the Court of Cessation which serves to indicate either that ITHC relied on the 2001 Arbitration Agreement by way of defence to Med Trading's claim to a share of profits, or that Intraco sought to put before the court principles of BVI law to the effect that only members of a BVI company are entitled to a share in profit distributions.

[14] Following this decision by the Court of Cassation, Med Trading brought claim 891/2014 on 15th February 2014 demanding payment of the profits. By case 256/2017 commenced on 3rd June 2017, Med Trading instituted proceedings

against ITHC and Intraco for the appointment of an accounting expert to report on its entitlement to a share of profits. The expert was appointed by the court. His report, delivered on 18th February 2018, found that Med Trading was entitled to a share of dividends for the period 2013 to 2017.

- [15] Case 1745/2018 was commenced by Med Trading on 29th July 2018 against Intraco and ITHC following delivery of the expert accounting report in case 256/2017. In 1745/2018, Med Trading claimed payment of dividends in respect of the periods 2013 to 2017. An accounting report was filed on 3rd July 2019. On 7th August 2019, Med Trading informed the court that it did not agree with the expert accounting report. The expert was subsequently asked to reconsider his report. He resubmitted his report on 27th December 2019. The expert was again asked by Med Trading to reconsider his report on 26th February 2020. Following a hearing on 24th November 2020, this case was adjourned to 23rd December 2020 to await the expert's reconsideration of his report.

(ii) Case 351/2020 – 14th October 2020 Judgment

- [16] On 14th October 2020, the Dubai Preliminary Court rendered judgment in case no. 351/2020 ("the 14th October 2020 Judgment"). The 14th October 2020 Judgment was not before the learned judge as it was rendered some 8 months after the learned judge delivered the Judgment in this matter. By consent, the 14th October 2020 Judgment was admitted as fresh evidence before this Court. The judgment in this case is the latest judgment in Dubai proceedings and is of some importance to the determination of this appeal.
- [17] Case 351/2020 was commenced on 27th February 2020 by Med Trading against ITHC and Intraco before the Dubai Preliminary Courts claiming USD \$3,748,455.00 profits due for the years 2005 and 2006 plus 9% interest from date of the claim, and profit for the year 2007, plus fees, expenses, and advocacy fees. The claim was made on the basis that Med Trading owns 25% of the shares in ITHC and ITHC owns 80% of the shares in Intraco, accordingly, (it is extrapolated)

Med Trading owns (indirectly) the equivalent of 20% of Intraco. The unanimous written judgment of the Dubai Preliminary Court was delivered on 14th October 2020.

[18] The 14th October 2020 Judgment records that Med Trading had previously brought case 385/2013 requesting the appointment of an accounting expert to investigate the profits of both ITHC and Intraco for the years 2005 and 2006, and that thereafter Med Trading filed case 891/2014 demanding payment of these profits. It is also recorded in the judgment that the report of the accounting expert had concluded that Med Trading was entitled to the sum of USD \$3,748,455.00 in profits from ITHC and USD \$4,199,180.00 in profits from Intraco. However, the judgment in case 891/2014 was for ITHC to pay USD \$3,748,455.00 and for Intraco to pay USD \$4,199,180.00 in profits to Med Trading, plus legal interest at the rate of 9% per annum from the date of the claim in full settlement, and case expenses, fees and advocacy fees of 1,000 UAE Dirham.

[19] The 14th October Judgment also records that ITHC and Intraco appealed the decision and award in case 891/2014. The record of the various appeal cases and their outcome is, to say the least, somewhat muddled. Suffice it to be said that, from the 14th October 2020 Judgment, some of the appeals were allowed and some were not.

[20] Of some significance, is that the judges of the Dubai Preliminary Court recorded in their judgment that:

“On 9/05/2020 the attorney for [ITHC] submitted an electronically achieved memo contesting that the court has no competency to look into the dispute as the authority rests with the discretion of [the] Virgin Islands courts. And also, for rejection of the case due to the existence of the arbitration terms and forfeiture of the right to file the case which has elapsed.... On 31/05/2020 [ITHC's] attorney submitted a memo adhering to what was stated in his claim sheet.”

[21] This was the first time ITHC had raised in the various Dubai proceedings, the arbitration clause in its articles of association as a bar to the Dubai court accepting

or having the jurisdiction to determine Med Trading's claim to a share of the profits in ITHC. Before ruling on these preliminary points, the court appointed another accounting expert. In his report, he concluded that the cumulative profits of ITHC for the year 2007 are USD \$12,220,134.00, and Med Trading's share is USD \$3,055,330.00.

- [22] In the 14th October 2020 Judgment the court, after examining the applicable law in Dubai, rejected the challenge to its jurisdiction over Med Trading's claim to profits, in these terms:

"This being the case and since [Med Trading] owns 25% of the shares in [ITHC's] capital and [ITHC] owns 80% of [Intraco's] capital [Med Trading] therefore owns ¼ of [ITHC's] capital in [Intraco] equivalent to 20% and [Intraco's] location as per its license is UAE which makes Dubai court the body with the power to look into the case according to the previous provisions. The court thus sees that the plea is invalid as the principles of jurisdiction prevail and hence the court dismisses the plea as stated in the pronouncement."

- [23] With regard to ITHC's defence based upon the arbitration clause, the Dubai Preliminary Court recognised, under the laws of the UAE., the binding nature of an agreement to settle disputes by arbitration. It also recognised that where one of the parties to the arbitration agreement did not object to legal proceedings brought:

"...the case should be looked into and the arbitration term considered null and void. This means that the party adhering to the arbitration terms must take a positive stand and object in the first session to his opponent referral to court. If this does not happen, the case has to be looked into but if an objection was raised at the first session the court has to rule for dismissal of the case due to the arbitration term."

- [24] The court ruled on ITHC's arbitration challenge in these terms:

"This being the case and it is proven that [ITHC] did not submit what confirms the arbitration item in the current dispute between two parties and it is established that the arbitration term presented in the docket of [ITHC] in item 142 was limited to the shareholder in [ITHC] only without [Intraco] who is a party in the current dispute renders this pleading invalid and the court dismisses it as pronounced."

- [25] With regard to the *res judicata* defence based upon the court's decision in case 891/2014, the judge opined that this prior ruling 'does not have the final say in the consequent case unless the opponents, the subject and the cause are united in the two cases'. After considering what is meant by 'unity of cause', recognising that the judge had not before made any ruling regarding profits of the fiscal year 2007 and had stipulated that a separate case be filed claiming profits for that year, and having reviewed the decisions in the previous cases, the judges concluded – 'This means that the pleading did not correspond with the actual facts and the law. Therefore, the court rules for its dismissal as stated in the verdict.'
- [26] In the 14th October 2020 Judgment, the Dubai Preliminary Court: (i) dismissed the challenge to the court's jurisdiction made by ITHC; (ii) dismissed ITHC's plea that the court should not hear the case based upon the arbitration clause in the articles of ITHC; (iii) dismissed the claim against Intraco on the basis that it was statute barred; (iv) dismissed the plea based on *res judicata*; (iv) gave judgment against and ordered ITHC to pay to Med Trading USD \$3,748,455.00 profits due for the period 2005 and 2006 and USD \$3,055,033.00 profits due for 2007, and simple interest of 9% annually from the date of the claim on 27th March 2020 until settlement in full, plus expenses and 100 UAE Dirham for advocacy fees; and (v) rejected all additional claims. It is apparent from the appellants' updated chronology that this judgment has been appealed by ITHC.

The Statements of Case

(i) The Claim and Statement of Claim

- [27] The claim in these proceedings was commenced after the four sets of Dubai proceedings had been commenced by Med Trading against ITHC and Intraco and had progressed or had been, in some instances, fully determined by the courts in Dubai.

[28] By the claim commenced on 26th April 2019, the appellants sought separately against Med Trading declaratory relief and an anti-suit injunction in the following terms:

“[ITHC] claims:

- (1) a declaration that the 2018 ITHC Arbitration Agreement contained in ITHC’s articles of association as amended on 3rd May 2018 is binding on the [respondent]; and
- (2) an interim and/or final injunction restraining the [respondent] from commencing or pursuing any further claims and/or proceedings against ITHC in respect of any Arbitral Dispute (as defined in ITHC’s Articles of Association as amended on 3rd May 2018) other than by arbitration in accordance with the BVI IAC Arbitration Rules as prescribed by the 2018 ITHC Arbitration Agreement.

[Intraco] claims:

- (1) a declaration that as the [respondent] is not a shareholder of Intraco, the [respondent] has no right or entitlement to receive dividends from Intraco; and
- (2) an interim and/or final injunction restraining the [respondent] from commencing or pursuing any further claims and/or proceedings against Intraco, whether in the U.A.E. or elsewhere, which are inconsistent with the terms of the above declaration.

And [ITHC and Intraco] claim:

- (1) Costs.”

[29] At paragraph 12 of the statement of claim, the appellants aver that Med Trading breached the terms of the 2001 ITHC Arbitration Agreement when it ‘issued proceedings against ITHC in the Dubai Courts claiming USD \$14,993,820 from ITHC purportedly representing 25% of ITHC’s profits from 2005 and 2007’. It is also pleaded that since 2014 Med Trading has issued three further sets of proceedings against ITHC in Dubai seeking the same relief.³ However, having

³ Paragraph 13 of the statement of claim.

gone on to plead the 2018 amendments to the memorandum and articles of association of ITHC, including the new arbitration clause at regulation 24 providing for arbitration seated in Road Town in Tortola, BVI and in accordance with the **BVI IAC Arbitration Rules**, there is no pleading of a breach of the 2018 Arbitration Agreement by Med Trading bringing other proceedings before the courts in Dubai against ITHC for a share of its profits.

(ii) The Original Defence

[30] Med Trading filed its original defence on 26th May 2019. It admitted that it is not ‘a direct member of Intraco’. It also pleaded that it is the second largest shareholder in ITHC ‘which in turn is the owner of Intraco, making [Med Trading] one of the largest indirect owners of Intraco’.⁴ At paragraph 7, Med Trading denies that the Dubai claims were commenced by it in breach of the ‘alleged arbitration agreement’; and by paragraph 8 it pleads that ‘the amendments to the Arbitration Agreement were not made with the knowledge and or consent of [Med Trading]’. It is also pleaded that it is not bound by the 2018 ITHC Arbitration Agreement and there is no legal basis upon which the court can grant the declarations to this effect or the injunctions claimed.⁵ At paragraph 14, Med Trading states – ‘The Defendant further states that the Defendant as indirect shareholder of Intraco and based on the manner of the historical distribution of dividends is entitled to receive its dividends.’

[31] On 27th June 2019, the appellant filed their application for summary judgment pursuant to rule 15.2 of the **Civil Procedure Rules 2000** (the “CPR”) seeking essentially the same relief in the claim form and statement of claim.

(iii) The Amended Defence and Counterclaim

[32] The appellants’ application for summary judgment seems to have prompted the respondent into action. On 18th October 2019, Med Trading filed, without the

⁴ Paragraph 3 of the defence.

⁵ Paragraph 13 of the defence.

permission of the court, an amended defence and counterclaim making substantial changes to its defence and adding a counterclaim. With regard to its previously pleaded allegation of an alleged adopted practice by Intraco of paying distributions of profits directly to the shareholders of ITHC, including Med Trading, it pleaded that, in reliance on this practice, that it has 'acted to its detriment in seeking from Intraco accounts for and payment of distributions due to it as a shareholder of ITHC'; and that Intraco 'is therefore estopped from denying the right of [Med Trading] to seek payment of distributions directly from Intraco to [Med Trading]'.⁶ Med Trading, in its amended defence, also pleaded that it had received shareholder payments directly from ITHC from 2002 to 2006.

[33] Regarding the 2001 ITHC Arbitration Agreement, Med Trading pleaded that it never received a copy of the articles of association and was never made aware of the terms of regulation 142.⁷ As to the 2018 amendment to the articles of ITHC and the 2018 ITHC Arbitration Agreement, Med Trading referred to the suits filed by it in the Dubai courts prior thereto (since 2012) against ITHC and Intraco 'in which [the appellants] have actively participated and been represented by Counsel', that they had never invoked regulation 142 in any of the said proceedings before the courts of Dubai and 'failed to rely at all or successfully rely on the existence of the arbitration clause in any of these proceedings'.⁸ The correctness of this pleading has been disputed by the appellants.

[34] Med Trading pleaded in the amended defence the four sets of proceedings which it brought in courts in Dubai ("collectively the Dubai court proceedings"). It averred that in none of these proceedings did the appellant raise the arbitration agreement at clause 142 of the 2001 ITHC articles as a defence to the claims in the Dubai court proceedings. Specifically, Med Trading pleaded at paragraph 6 of the amended defence:

⁶ Paragraphs 2.c and 2.d of the amended defence and counterclaim.

⁷ Paragraph 5 of the amended defence and counterclaim.

⁸ Paragraphs 6.a and 6.b of the amended defence and counterclaim.

- (i) suit No. 256/2017 commenced in the Dispute Settlement Court against ITHC and Intraco seeking the appointment of an accounting expert to determine the share of profits due to Med Trading from the appellants for the year 2007; the report of the appointed expert concluding that profits were due;
- (ii) the subsequent filing of claim 1745/2017 before the Court of First Instance pursuant to the findings in the said report;
- (iii) suit 891/2014 filed in the Dispute Settlement Court by which it claimed against the appellants profits over the years 2005 to 2007. It pleaded that in suit 891 of 2014 the court ordered ITHC to pay to Med Trading USD3,748,455 or its equivalent in UAE Dirham and ordered Intraco to pay to it USD4,199,180 or its equivalent in UAE Dirham, plus interest at 9% from the date of the claim until the date of its satisfaction. They also aver that the court determined that Med Trading should bring a separate claim for unpaid profits for the years 2007 to 2013; and
- (iv) suit 385/2013 commenced before the Dispute Settlement Centre of Dubai on 3rd March 2013 seeking the appointment of an accounting expert to determine the share of profit due to it from ITHC and Intraco.

[35] As to the 2018 amendment to the articles of ITHC, Med Trading pleaded at paragraph 9 of the amended defence its denial that the amendment was validly passed, that as a member of ITHC it did not receive notice of any meeting of members of the company or a written document pursuant to regulation 8.21. It also pleaded that in so far as the amendment purports to have been validly made, it 'is oppressive for the reasons stated hereunder'. They then go on to plead that the amendment was made for an improper purpose and was oppressive. At

paragraph 9.d it is pleaded that in so far as the amendment purports to have been made by a resolution of the directors:

“...it was made for an improper purpose namely to create difficulty for [Med Trading] in pursuing its legitimate claims for its entitlement to a share of profits in the jurisdiction in which the operations of the group and [Med Trading] are most closely connected”

At paragraph 9.e, it is pleaded that the 2018 amendment was oppressive.

[36] Specifically, as to the claim brought by Intraco, Med Trading admits that it is not a shareholder of Intraco but denies that it has no cause of action (presumably before the courts of Dubai) against it.⁹ They go on to deny the entitlement of both ITHC and Intraco to the separate reliefs claimed by each of them.

[37] Med Trading counterclaimed against ITHC for a declaration that the purported amendment to article 24 of the articles of association of ITHC was not made in accordance with the said articles of the company and/or the **BVI Business Companies Act, 2004**; alternatively, for relief pursuant to section 184B of the **BVI Business Companies Act, 2004** restraining ITHC from seeking to enforce the said amendment to article 24; and in the further alternative, for relief under section 184H of the **BVI Business Companies, Act 2004** in terms of an order restraining ITHC from pursuing its claim on the ground that the purported amendment to article 24 was oppressive. Med Trading counterclaimed against Intraco for a declaration that Intraco is estopped from denying the right of Med Trading to seek an account for and recover directly from Intraco any distributions due to Med Trading as a shareholder in ITHC.

The Summary Judgment Application

[38] By notice of application filed on 27th June 2019, the appellants jointly applied for summary judgment against Med Trading on their respective claims pursuant to CPR 15.2 (“the summary judgment application”) essentially for the same

⁹ Paragraphs 12 and 13 of the defence.

declaratory and injunctive relief sought in the claim. The grounds upon which the appellants applied for summary judgment were that– (i) the defence discloses no reasonable grounds for defending the claims by ITHC and Intraco; and (ii) the respondent had taken a number of ‘abusive proceedings’ against them arising from its position as a shareholder of ITHC which are ‘inconsistent with BVI law and the contractual agreement to arbitrate’.

[39] They relied, in support of the summary judgment application, on the First Affidavit of Frazer Mitchell filed on 27th June 2019. The summary judgment application was opposed by the respondent which filed the affidavit of Reisa Singh. By the Reisa Singh affidavit, they contended, in the main, that the appellants as applicants in the court below, were by the said application seeking to abuse the process of the BVI court and Dubai courts by using the said procedure to block what they believe will be an unfavourable outcome in case 351/2020.

[40] It is to be noted (as did the learned judge at paragraph 15 of the Judgment) that while the appellants did plead in the statement of claim the 2001 Arbitration Agreement at regulation 142 of the articles of ITHC, in the prayer and in the summary judgment application, they relied specifically on the 2018 ITHC Arbitration Agreement at regulation 24 of the amended articles of association.

The Learned Judge’s Judgment

[41] After a hearing on 23rd October 2019, the learned judge, in a very carefully reasoned judgment dismissed the appellants’ summary judgment application; granted permission to the respondent to file and serve its amended defence and counterclaim, with such permission to be effective from and including 18th October 2019; and struck out paragraph 2.d and the second paragraph of the prayer to the counterclaim seeking relief against the Intraco based on the doctrine of estoppel. By paragraph 4 of the Order, Med Trading was also granted permission to amend the incorrect reference at paragraph 9(b) of its amended defence to regulation 8.21 of the first appellant’s articles of association to article 72. The learned judge

also adjourned the incidence and quantum of costs for determination following further argument from the parties.

[42] At paragraph 48 of the Judgment, the learned judge considered that the application for summary judgment turns on (i) whether permission can and should in this case be granted to Med Trading to file and serve its amended statement of claim and counterclaim; and (ii) whether Med Trading had a real prospect of successfully defending the claim or failed to disclose any reasonable grounds for defending the claim in its defence pleadings.

[43] On the question of whether Med Trading's oral application at the hearing to amend its defence and for permission, retrospectively, to file its amended defence and counterclaim, the learned judge dealt with permission to amend the defence separately from permission to file the counterclaim, on the basis that 'different considerations apply to each.'¹⁰ In determining whether to grant permission to amend Med Trading's statement of case, the learned judge was guided by the provisions of CPR 20.1(1) and 15.2 and the decision of this Court in **Outlook Asset Management LP et al v Capstone Corporate Limited**.¹¹ At paragraph 26 of that judgment, this Court held:

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

[44] The learned judge considered that **Outlook** 'laid down a common law procedural rule to guide the proper application of the CPR, to further the overriding objective'¹² and concluded that where no prior application for permission to amend had been made, the court was not bound to strike out the purported amendment without further inquiry.¹³ The learned judge also took guidance from

¹⁰ Paragraph 49 of the Judgment.

¹¹ [2019] ECSCJ No. 44, delivered 11th February 2019.

¹² Paragraph 59 of the Judgment.

¹³ Paragraph 60 of the Judgment.

paragraph 39 of **Outlook**, which speaks to the court's wide discretion to permit an amendment in the interest of justice, and to grant an opportunity 'to save the action by amendment of the pleadings'. Taking these principles into account, the learned judge opined that the rule in **Outlook** should also apply to applications for summary judgment which overlap with the jurisdiction to strike out statements of case or parts thereof.¹⁴

[45] Accepting that the court has the power to grant permission to amend retrospectively, and citing CPR 26.1(2)(w) and CPR 42.8, the learned judge reasoned that the original defence had foreshadowed Med Trading's case that the 2018 ITHC amendments to its articles had been made without notice to them and without its knowledge or consent, as well as Med Trading's 'defence' based on the doctrine of estoppel. While accepting that these matters as originally pleaded 'would not have been enough for a trial court to understand [Med Trading's] case', the learned judge considered that 'it would be wrong to presume and treat the original defence as [Med Trading's] definitive statement of case.'¹⁵ The judge also formed the opinion that the amended defence 'seeks to flesh out the points raised in the [original] Defence', which in his view was not objectionable as a first amendment prior to case management conference, 'even though the effect inevitably is to introduce and articulate issues of fact and law that might make a trial desirable and thus tend to defeat a summary judgment application'.¹⁶

[46] As to the pleading in the amended defence with respect to the 2019 amendment to the articles of ITHC, the learned judge accepted that this had not been foreshadowed in the original defence. He considered it to be a distinguishing feature as between the instant case and **Outlook**, and a 'crucial consideration', that the amended defence and counterclaim had been filed prior to the hearing of the appellants' summary judgment application.¹⁷ Further, that this amended

¹⁴ Paragraph 64 of the Judgment.

¹⁵ Paragraph 70 of the Judgment.

¹⁶ Paragraph 71 of the Judgment.

¹⁷ Paragraph 75. of the Judgment.

pleading was fully considered at the hearing of the application for summary judgment where counsel for the appellants was able to address it articulately and competently, and with no apparent prejudice. Accordingly, the learned judge determined that it was a proper exercise of the court's discretion under CPR 26.1(2)(w) to grant permission retrospectively to Med Trading to amend its defence and counterclaim, subject to his decision to strike out certain parts of both pleadings which relied on or claimed relief against Intraco based upon the doctrine of estoppel.¹⁸

[47] Specifically concerning the counterclaim, the learned judge, having accepted that a counterclaim is a specie of ancillary claim under CPR Part 18, for which permission to file was required where it was not filed along with the defence. The judge granted Med Trading permission to file its counterclaim, subject to his order striking out Med Trading's pleaded case in the amended defence and counterclaim based on the doctrine of estoppel in defence of Intraco's claim.¹⁹ At paragraph 101, the learned judge concluded that the 'correct course is for the Court to strike out this part of [Med Trading's] Amended Defence and Counterclaim as disclosing no reasonable ground for defending the claim or bringing the counterclaim.' From this aspect of the ruling and decision of the lower court there has been no appeal.

[48] In the Judgment, the learned judge dealt specifically with the 2018 amendments to ITHC's articles of association and the challenges in the amended defence to the validity of the 2018 shareholders' resolution and to the 2018 amendment to ITHC's articles of association, based on lack of notice to Med Trading of the said resolution and, alternatively, that the directors and members resolutions were made for an improper purpose and thus oppressive within the meaning of section 184 of the **BVI Business Companies Act, 2004**. In summary, the learned judge reasoned that: (i) the amendment introduced a requirement for arbitration to be conducted in the BVI; (ii) if the purpose of the amendment was to oppress a

¹⁸ Paragraph 78 of the Judgment.

¹⁹ Paragraph 119 of the Judgment.

member, such an amendment is liable to be set aside and to attract other relief designed to remedy oppression; (iii) it would be necessary to determine whether there was a requirement to consult with all the company's members, including Med Trading, before the amendments were made, and whether that consultation had been done – such a determination could not be made on a summary judgment application; and (iv) in all the circumstances, it cannot be said that the Defendant has no reasonable ground for defending the claim or for pursuing its counterclaim on the issues of validity and oppression.

[49] From this decision and judgment, the appellants have appealed.

The Appeal and Counterappeal

[50] The appellants have appealed on 11 grounds, challenging the judge's refusal of their summary judgment application and the decision of the judge to grant retrospective permission to the respondent to file its amended defence and counterclaim. It is not necessary to recite these grounds in detail here. It suffices to say that the grounds together challenge the learned judge's conclusions of law made in relation to the claims by both ITHC and Intraco.

[51] The grounds raise the following 5 issues for this Court's determination:

- (1) Whether the learned judge erred in the exercise of his discretion by granting Med Trading retrospective permission to amend its defence and in deeming the amended defence and counterclaim filed without the permission duly filed.
- (2) Whether the learned judge, having struck out Med Trading's estoppel defence to Intraco's claim, ought to have granted summary judgment in favour of Intraco for the declaratory and anti-suit injunctive relief it sought against Med Trading.

- (3) Whether the learned judge erred in concluding that the validity of the shareholders' resolution and the legal effect of the 2018 Arbitration Agreement ought not be determined on summary judgment.
- (4) Whether the learned judge wrongly held that Med Trading had a realistic prospect of establishing at trial that there was some improper purpose or oppression inherent to the 2018 amendment of ITHC's articles of association.
- (5) Whether the learned judge adopted an overly cautious approach to issues of construction and law on the summary judgment application and/or misapplied the test applicable to summary judgment applications.

[52] By its counternotice of appeal, the respondent submits two additional grounds upon which it says that the learned judge's dismissal of the appellants' summary judgment application ought to be upheld by this Court. These are:

- (a) that the grant of a declaration is a discretionary remedy and the Court could and should have taken into account the delay by [the appellants] in seeking this remedy and the consequential injunctive relief in light of their evidence that the impugned court actions in the UAE had been ongoing since 2013; and that the proceedings in this jurisdiction were being brought with the motive of ensuring that the Dubai courts and experts are not misled as to the state of BVI law whereas the proper method of ensuring this is by leading expert evidence of BVI law before such courts; and
- (b) that the absence of pleading or evidence of further actions being commenced by the Defendant in UAE no purpose is served by the grant of the declaration or injunction.

Summary of Arguments on Appeal

[53] It is the case for ITHC that, by the terms of the 2018 arbitration agreement, it was expressly agreed that any dispute touching or concerning 'the earnings, profits and dividends' of ITHC are to be decided by arbitration in accordance with the **BVI IAC Arbitration Rules**, and that the seat of arbitration is Road Town, Tortola BVI.²⁰ Alternatively, if the 2018 Amendments to the articles of ITHC was invalid, or arguably so, the 2001 Arbitration Agreement in the then articles would govern, and the position in law would be no different. They contend that the law governing the rights and entitlements of shareholders of a BVI company (such as ITHC and Intraco) is the place of its incorporation. In support of this principle, they rely on the case of **Spiller v Turner**.²¹ Further, the appellants submit that the capacity of a BVI company to make a distribution to its members is also governed by BVI law²² and, specifically, by section 57 of the **BVI Business Companies Act, 2004**. Accordingly, any claim to a share of the profits or to dividends in ITHC was caught either by the 2001 ITHC Arbitration Agreement or by the 2018 ITHC Arbitration Agreement. Furthermore, it was not open to Med Trading to claim a share of the profits or entitlement to the payment of dividends in ITHC by way of the Dubai proceedings, as it is bound by the arbitration agreement in the articles of ITHC (both the 2001 and 2018 versions).

[54] The appellants also argue that Med Trading is only entitled to dividends declared by the directors or shareholders of ITHC and not, *simpliciter*, to a share of its profits or to any dividends declared by Intraco payable to ITHC, and accordingly cannot properly claim such dividends in the Dubai proceedings. As to the Dubai proceedings brought by Med Trading between 2012 and 2018, it is ITHC's position based on the judgments in the various proceedings exhibited in the court below, that ITHC did not participate in the said proceedings, except to take a jurisdictional

²⁰ Paragraph 16 of the statement of case.

²¹ [1897] 1 Ch 911.

²² *Shaker v Al-Bedrawi and Others* [2002] EWCA Civ 1452.

point.²³ ITHC also asserts that the only Dubai proceedings in which it fully participated, as a defendant, is case 351/2020, commenced by Med Trading after the claim in the instant proceedings and after the appellants' application for summary judgment, both of which were filed in 2019. Accordingly, ITHC is entitled to summary judgment and to a permanent anti-suit injunction preventing Med Trading from pursuing any such further claims or proceedings, whether before the courts in Dubai or elsewhere.

[55] As regards Intraco, the gravamen of the appellants' case is that it is, unquestionably, a fundamental principle of English company law applicable to Intraco as a BVI company, that only shareholders or members of a company are entitled to share in the profits or dividends of the company, and only in the event that dividends are declared by the directors of the company in accordance with section 57 of the **BVI Business Companies Act, 2004**. Accordingly, Med Trading, having not been a shareholder of Intraco at any time, is not entitled to share in the profits or dividends of Intraco. Furthermore, Intraco argues that the expert accounting report in case 256/2017 found that Intraco had no liability to Med Trading for a share of its profits, and the 14th October 2020 Dubai judgment of the Dubai Preliminary Court in case 351/2020 so held as well. It must be observed that the basis of the finding of no liability by Intraco in case 351/2020 was that the claim against Intraco for a share of its profits was statute barred.

[56] On the other hand, it is Med Trading's case that, notwithstanding the corporate structure created as a result of the restructuring in 2001, it was the practice of Intraco to distribute its profits, not to its majority shareholder ITHC for onward distribution to the latter's shareholders, but instead directly to the shareholders of ITHC, including Med Trading. Furthermore, pursuant to the applicable laws of the UAE, Med Trading was entitled, based upon its 25% shareholding in ITHC and ITHC's 80% shareholding in Intraco, and accordingly its 'indirect' interest in 20% of

²³ See the decision of the Court of Cassation in case 385/2013, at pg. 117 of the Record of Appeal, Bundle B.

the profits in Intraco, to bring a claim for payment of its share of the profits of both ITHC and Intraco. Med Trading also relies on the fact that the UAE is the country in which both ITHC and Intraco operate and where they are (or were) licensed to conduct business. Med Trading also lays great stock on the fact that the appellants have not relied on or put before any of the courts in Dubai, expert evidence as to BVI company law; nor have they relied, in the various proceedings, either on the arbitration agreement (2001 or 2018 versions) on Med Trading not being a shareholder of Intraco, except in case 351/2020, where those 'defences' were not acceded to under UAE law in the 14th October 2020 Dubai judgment. For these and other reasons, Med Trading contends that the learned judge was correct in rejecting the appellants' application for summary judgment in these proceedings.

- [57] I propose now to discuss, in brief, the law applicable to applications for summary judgment and to the payment of dividends by a company under BVI law.

The Law

The Applicable Test for Summary Judgment Applications

- [58] CPR 15.2 provides that a court may give summary judgment on a claim or a particular issue if it considers that the defendant has no real prospect of successfully defending the claim or the particular issue. An application for summary judgment is to be determined based on the pleadings and on the evidence adduced by the parties in support and in opposition to the application. This is an important feature of the summary judgment application process. It has its genesis in CPR 15.5 which provides that an applicant for summary judgment must file evidence in support of the application, and a respondent to the application may also file affidavit evidence. Both the appellants (as applicants) and Med Trading (as respondent) filed evidence in the court below.
- [59] Summary judgment ought only to be granted in the clearest of cases and in circumstances where the other party has no real prospect of successfully

defending the claim. In **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**²⁴ this Court opined that summary judgment should only be granted 'where it is clear that a [statement of case] on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court'. This is a high bar which must be met if such an application is to succeed.

[60] Recently, in the English Court of Appeal decision of **Doncaster Pharmaceutical Group Ltd and Ors v Bolton Pharmaceutical Company 100 Ltd**,²⁵ Mummery LJ affirmed the longstanding rule that a 'real' prospect is one which is 'more than fanciful or merely arguable'. The learned Lord Justice formulated the following cautionary statements which are to guide a court in the proper consideration and determination of an application for summary judgment:

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

²⁴ [2010] ECSCJ No.8, delivered 11th January 2010.

²⁵ [2006] EWCA 661 Civ 661.

evidence available to a trial judge and so affect the outcome of the case.²⁶

Payment of Dividends under BVI Law

[61] It is a fundamental principle of English company law that only members of a company are entitled to the payment of dividends from the profits of the company. It is also a fundamental principle and one of the tenets of the principle of separate legal personality,²⁷ that members of a company having a right *qua* shareholder to dividends, do not have an absolute entitlement to the payment of dividends, which must first be declared by the company, whether by the directors or by the shareholders, in accordance with its memorandum and articles of association and in accordance with the provisions of the applicable legislation. In the BVI, where dividends can be declared from the profits of a company, this may only lawfully be done upon the company satisfying the 'solvency test' in section 56 of the **BVI Business Companies Act, 2004**.

[62] In this vein, section 57(1) of the **BVI Companies Act, 2004** provides:

“Subject to this Part and to the memorandum and articles of the company, the directors of a company may, by resolution, authorise a distribution by the company to members at such time and of such an amount, as it thinks¹ fit if they are satisfied, on reasonable grounds, that the company will, immediately after the distribution, satisfy the solvency test.”

[63] Dividends paid out by the company in breach of section 57 of the **BVI Business Companies Act, 2004** are void.²⁸ Furthermore, by section 58(1) of the Act, the company may recover from a shareholder any dividends paid to the member at a time when the company did not satisfy the solvency test, unless the requirements of the section are satisfied. These requirements are that: (a) the shareholder received the said distribution in good faith and without knowledge of the company's failure to satisfy the solvency test; (b) the shareholder has altered his

²⁶ Paragraphs 10 to 12 and 17 to 18 of *Doncaster*.

²⁷ *Salomon v Salomon & Co. Ltd.* [1896] UKHL 1.

²⁸ See *Precision Drippings Ltd. v Precision Drippings Marketing Ltd.* And Ors. [1985] 3 WLR 812.

or her position in reliance on the validity of the distribution; and (c) it would be unfair to require repayment in full or at all.

- [64] Regulations 103, 104 and 106 of the articles of association of ITHC provide for the declaration and payment of dividends and interim dividends. These provisions stipulate:

“103. The Company may, by a resolution of directors, declare and pay dividends in money, shares or other property, but dividends may only be declared and paid out of surplus.

104. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the Company.

...

106. No dividend shall be declared and paid unless the directors determine that immediately after payment of the dividend the Company will be able to satisfy its liabilities as they become due in the ordinary course of its business, and the realizable value of the assets of the Company will not be less than the sum of its total liabilities, other than deferred taxes, as shown in the books of account, and its capital. In the absence of fraud, the decision of the directors as to the realizable value of the assets of the Company is conclusive, unless a question of law is involved.”

- [65] A copy of the memorandum and articles of association of Intraco was not provided as part of the evidence before the learned judge below or as part of the record of appeal.

Issue 1 – Whether the learned judge erred in the exercise of his discretion by granting Med Trading retrospective permission to amend its defence and in deeming the amended defence and counterclaim filed without the permission duly filed

- [66] This is a short point. Before this Court, learned counsel for the appellants, Mr. Willins, while not expressly conceding this issue, did not argue that the learned judge erred in permitting Med Trading to amend its defence retrospectively.

Instead, counsel argued that the matters pleaded in the amended defence and counterclaim did not support the learned judge's finding that it disclosed reasonable grounds for defending the claims by ITHC and Intraco and, accordingly, the judge seriously erred in dismissing the summary judgment application.

[67] In response, Med Trading submitted that the learned judge correctly applied the principles in **Outlook**, properly considered the various factors which ought to guide the exercise his discretion, and therefore that there is no basis upon which the exercise of that discretion to permit the amendments can be soundly criticised or the order set aside.

[68] In my view, counsel for the appellants has adopted a wise approach in not actively pursuing this ground of appeal. In my judgment, the learned judge properly exercised his discretion in permitting Med Trading, as the defendant in the proceedings below, to amend its original defence and to file the amended defence and counterclaim. It was within the judge's power and discretion to permit Med Trading to file its amended pleading retrospectively, having sought such permission orally during the hearing of the application for summary judgment. In accordance with the well settled principles upon which an appellate court can review a judge's exercise of discretion set out in this Court's decision in **Dufour et al v Helenair Corporation Ltd et al**,²⁹ there is no basis upon which this Court ought to disturb or set aside the judge's order granting permission to amend, the exercise of which discretion was within the generous ambit of disagreement.

[69] While there may be some basis for complaint as to the lateness of the amended pleading filed by Med Trading without permission, a mere two clear days before the date for the hearing of the summary judgment application, in my view the learned judge was correct in discounting any prejudice to the appellants, who were able competently to deal with the matters pleaded in the amended defence and

²⁹ (1996) 52 WIR 188.

counterclaim, as the judge observed. In any event, the appellants adopted the practical step, in the court below, of submitting that while permission to amend ought not to be granted, the judge could look at and consider the amended pleading 'to determine whether or not [Med Trading] had a defence which could be cured by amendment'.³⁰ In my view, the learned judge did not err in this regard.

Issue 2 – Whether the learned judge, having struck out Med Trading's estoppel defence to Intraco's claim ought to have granted summary judgment in favour of Intraco for the declaratory and anti-suit injunctive relief against Med Trading

[70] As mentioned above, the learned judge struck out the defence to Intraco's claim based on the doctrine of estoppel pleaded at paragraph 2.d of the amended defence and sought by way of relief in the counterclaim against Intraco. From this ruling there has been no appeal. The appellants argue that, in light of this, the learned judge ought then to have entered summary judgment against Med Trading on Intraco's claim. Essentially, this striking out of the plea based upon estoppel, left Med Trading's pleaded defence with only paragraphs 2.a, 2.b and 2.c, which asserted the alleged historical practice by Intraco of paying dividends directly to the shareholders of ITHC, including Med Trading, and its alleged reliance on this practice to its detriment 'in seeking accounts for and payment of distributions due to it as a shareholder of ITHC'.

[71] The learned judge in addressing this issue, considered that the line of argument by the appellants that, without paragraph 2.d, Med Trading had no reasonable grounds for defending Intraco's claim, was flawed. In his view, this submission failed to take into consideration that Med Trading's pleading was based not just on payments, but on seeking accounts from Intraco, and that Med Trading could supply details of the various payments in its witness statements at a later stage in the proceedings.³¹ This notwithstanding, the judge struck out the defence and

³⁰ See paragraph 17 of the appellants' submissions.

³¹ See paragraph 87 of the Judgment.

claim based on estoppel. His basis for doing so was that Med Trading had not, in its amended defence, specified the type or specie of estoppel it sought to rely on and did not plead the basis upon which it asserts that it would be unconscionable or unjust for Intraco to start paying dividends declared to ITHC, and not directly to the shareholders of ITHC in accordance with the alleged practice.³² At paragraph 100, the learned judge opined that:

“It would require a clear case of estoppel to displace the usual legal scheme under BVI company law which typically holds that only a member of a company is entitled to claim a share in a distribution or dividend, and then typically only if the company’s directors in their discretion declare one. Such a case is not pleaded here.”

[72] On this issue, Mr. Carrington, QC, learned counsel for the respondent, submitted that in the proceedings before the courts of Dubai, Med Trading’s claims were for a share of the ‘profits’ of Intraco and not for dividends. He also submitted that in refusing the declaration, the learned judge correctly took account of the purpose or motive for which it was being sought by Intraco, which was essentially to ‘wave a court order before a foreign court’, as disclosed by the Mr. Frazer Mitchell in his evidence in support of the summary judgment application. In support of this submission, counsel relied on the learning at paragraphs 103 and 104 of the decision of the Grand Court of the Cayman Islands in **XIO GP Limited v Joseph Pacini and others**.³³ Reliance was also placed on an extract from paragraph 4-32 of **Zamir & Woolf: The Declaratory Judgment**³⁴ which reads:

“The least unsatisfactory solution is probably to accept that while declarations are for the most part statutory in origin, they have throughout their history had a close affinity with equitable remedies which has left its mark upon them. This is especially evident in the discretionary nature of the declaration. This discretion is employed, as it was originally employed with regard to all equitable remedies, primarily to do justice in the particular case before the court. It is wide enough to allow the court to take into account most objections and defences available in equitable proceedings. Thus, in one declaratory action the court took into consideration the motives of the claimant in bringing the action; in another, the court held that the claimant had waived his right to take proceedings

³² See paragraph 99 of the Judgment.

³³ Cause No. FSD 57 of 2019 (IMJ) (delivered 12th August 2019, unreported).

³⁴ 4th Edition, Sweet & Maxwell (2011).

and, further, assumed that the claim might also be dismissed on the grounds of undue delay...”.

[73] The declaration sought by Intraco is that ‘as [Med Trading] is not a shareholder of Intraco, [Med Trading] has no right or entitlement to receive dividends from Intraco’. There can be no doubt that under BVI law, Med Trading, not being a shareholder of Intraco, has no right or entitlement to a distribution or to payment of dividends by Intraco, a fundamental principle of English company law which the learned judge adverted to at paragraph 100 of the Judgment. This principle is self-evident and does not require any authority. It, in any event, accords with section 34(c) and 57 of the **BVI Business Companies Act, 2004**. These provisions speak *seriatim* to the right of ‘members’ to share in the distribution of surplus, and to the entitlement of ‘members’ as the only beneficiaries of a distribution by the company.

[74] The appellants’ argument for summary judgment and for the anti-suit declaration sought against Med Trading, and the respondent’s bases of objection thereto, were considered by the learned judge at paragraphs 103 and 104 of the Judgment. In declining to make an order for summary judgment on claim for reliefs sought by Intraco, the learned judge seems to have accepted Med Trading’s argument that the purpose for the declaration was to use it in the still active Dubai proceedings (case 351/2020) and in any future proceedings brought by Med Trading in any court claiming a share of the profits or dividends of ITHC and Intraco. I say this because the judge concluded at paragraph 104:

“A declaration from this Court would then be merely academic and this Court does not make academic pronouncements. So it is not automatic that this Court would make a declaration even if the Claimants establish the facts of their case.”

[75] Additionally, Med Trading in its counternotice, now seeks to support the refusal by the learned judge to grant the declaratory and injunctive relief sought by each of the appellants in their respective claims, on the further grounds of (i) delay in seeking the said remedies – the claims before the courts of Dubai having

commenced since 2013; (ii) that the declarations are being sought for the inappropriate purpose or motive of 'waiving a judgment of the BVI court' before the Dubai courts and experts – the appellants having not put expert evidence of BVI law before the said courts in the various proceedings on the issues of BVI law raised in their claim; and (iii) the absence of evidence of any other actions brought or threatened to be brought before the Dubai courts or elsewhere by Med Trading seeking a share of profits from ITHC and Intraco.

[76] Med Trading also submitted before this Court that the injunctions sought are to restrain future claims and the appellants have not in their supporting evidence made any reference to future claims being even probable. They also submit that in the statement of claim, the appellants have not pleaded that the proceedings in Dubai for a share of the profits were oppressive, and in any event, Dubai, and not the BVI, is the natural forum for the trial of the cause of action for a share of the profits of ITHC and Intraco. In relation to the proceedings in Dubai, Intraco was able to participate and to mount a successful limitation defence to the claims brought against it for a share of profits and there is no evidence of any injustice being done to Intraco from the courts of Dubai in a country where it has operated for several years.

[77] It is settled law that the grant of a declaration or an injunction is a discretionary remedy which must be exercised judicially and in accordance with equitable principles, including the 'clean hands' principle. This is so notwithstanding that provision for both remedies is made by statute.³⁵

[78] Where a claimant has established the right or interest upon which the declaration sought is based, it would be wrong in principle to refuse to grant the declaration unless the claimant has done something or there exist special considerations which would disentitle him to the declaration, or some good reason why the court

³⁵ See for example sections 22 and 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 80 of the Revised Laws of the Virgin Islands.

ought to exercise its discretion not to grant the declaration sought.³⁶ Accordingly, the appellate review of the exercise by the lower court of its discretion to grant or to refuse declaratory relief, rests on the well-established principles upon which an appellate court will review the exercise of any judicial discretion – it must be shown that it was plainly wrong or not within the generous ambit of reasonable disagreement, for it to be set aside.

[79] In my judgment, the appellants' argument for summary judgment on the declaration and injunction sought by Intraco ignores four important considerations and is, therefore, flawed and unsustainable. Firstly, as is clear from the decision of the Dubai Court of Cassation in case 385/2013 and the 14th October 2020 judgment of the Dubai Preliminary Court in case 351/2020, it appears to be an established principle of the laws of the UAE that party to litigation in the position of Intraco, may be held liable to satisfy a claimed right if it is responsible, directly or indirectly for that right or shared in that responsibility. In the 14th October judgment, the court stated:

“As for the pleading by the second defendant [Intraco] for dismissing the case being filed without any capacity to do so, it is stipulated by cassation jurisdiction is that the capacity on the part of the plaintiff or the defendant exists when the person responsible for the claimed right shares the responsibility for that right or the legal centee that is to be protected (cassation number 110/2003 -rights) since the second defendant is a company owned in the form of 80% for the first defendant and that the manager [Mr. Trak] of the plaintiff was the executive manager for both companies (the defendants) and is asking for his entitlements in the two companies, that makes the second defendant [Intraco] responsible and therefore the court rules for confronting this and gives him the capacity in the case and therefore the court rules for dismissal of the pleading made by the second defendant [Intraco] and only states it in the reasons and not in the pronounced verdict.”

[80] It is this cause of action and principle on which Med Trading made its claims before the courts in Dubai for payment or a share of the profits of Intraco, recognizing, (as was never in dispute in these various proceedings), that Med

³⁶ See Zamir & Woolf – The Declaratory Judgment 4th Edition, Sweet & Maxwell (2011) at 4-17, 4-30 and 4-31; and R (Edwards) v Environment Agency [2008] UKHL 22).

Trading is not a member or shareholder of Intraco. Furthermore, the Dubai Preliminary Court in its 14th October judgment relied on the said principle in rejecting Intraco's plea of lack of capacity to bring the claim for a share of profits of Intraco. As mentioned above, the dismissal of the claim for a share of the profits of Intraco was on the sole basis that the said claims were statute barred.

[81] The second consideration is that Intraco did not put before the courts in Dubai any evidence of BVI law as to the non-entitlement of Med Trading to distributions or dividends declared by Intraco, it being not a member of Intraco. This is a rather peculiar posture to have adopted in the face of its strong assertion and reliance upon these very same important principles of English and BVI company law in disputing any claim by Med trading to a share of profits or of distributions of Intraco.

[82] The third consideration is that, in my judgment, the learned judge was correct in opining that courts reach decisions as to its jurisdiction over a claim and its power to grant certain types of remedies, based upon expert evidence of foreign law, and not on the basis of a declaration made by the foreign court as to its own law.

[83] The fourth is as Mr. Carrington, QC has argued, that the appellants have effectively delayed since the first action was brought by Med Trading before the courts in Dubai in 2013, in commencing any claim and in seeking declaratory or anti-suit injunctive relief against the respondent in BVI; and they now seek to obtain an order of this Court for the declared purpose of the on-going proceedings in Dubai. Accordingly, in my judgment, the declaration sought by Intraco is arguably 'academic' and the learned judge was correct in declining to grant it. This was a proper exercise of the judge's discretion in all the circumstances and one which has not been shown to be plainly wrong.

[84] The anti-suit injunction sought by Intraco is to restrain the commencement or pursuit of any further claims and/or proceedings against 'ITHC, whether in the

UAE or elsewhere, against Intraco, which are inconsistent with the terms of the above declaration'. Accordingly, if it was not proper for the court to grant summary judgment for the declaratory relief sought by Intraco, then equally so it would not have been correct as a matter of principle for the court to grant summary judgment for the anti-suit injunction. It is well-established that in deciding whether to grant an anti-suit injunction, the court is not to apply the same principles applicable to a stay on grounds of *forum non conveniens*. Such an injunction will only be granted where the interest of justice requires that a party amenable to the jurisdiction of the BVI court should be restrained from proceeding in the foreign jurisdiction. In the Privy Council decision in **Societe Nationale Industrielle Aerospatiale v Lee Kui Jak and another**³⁷ Lord Goff formulated a two-stage test: (i) the court granting an injunction must conclude that it provides the natural forum for the trial of the action, to whose jurisdiction the parties are amenable (applying the principles in **Spiliada Maritime Corporation v Cansulex**³⁸); and (ii) the court will only restrain a party from pursuing proceedings in a foreign court if such pursuit would be vexatious or oppressive.

[85] Injunctions may be granted where it is just and convenient so to do.³⁹ The appellants argue that the anti-suit injunction sought is forward-looking and intended to restrain future claims or proceedings brought by Med Trading claiming a share of the profits of Intraco. They submit that it would be unconscionable for Med Trading to continue with or to commence new foreign proceedings against Intraco for a share of its profits, since Med Trading is not a shareholder or member of Intraco and therefore not entitled, under the laws of the BVI, to a share in any distributions.⁴⁰

[86] In establishing unconscionability, the burden rests with the appellants. In my judgment, they have failed to discharge that burden and the learned judge was

³⁷ [1987] AC 871.

³⁸ [1986] UKHL 10.

³⁹ Section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act.

⁴⁰ See *Cadre S.A. v Astra Asigurai S.A.* [2005] EWHC 2626 Comm at paragraph 6 per Morison J; and *British Airways Board v Laker Airways Ltd* [1985] AC 58 per Diplock LJ at paragraph 86.

quite correct in so finding. I am resolved to the view that there is nothing unconscionable in Med Trading pursuing the claims it has brought before the courts in Dubai for an accounting and a share of the profits of Intraco in circumstances where the laws of the UAE permit such a claim to be brought where the defendant is 'indirectly' responsible for satisfying the right or interest claimed. Indeed, it was not until the case 351/2020 in which the jurisdiction of the court in Dubai to determine such a claim was put into question by either Intraco or ITHC. Med Trading was entitled to commence and to pursue the various proceedings which it brought, including case 351/2020 in which it has obtained a money judgment against ITHC, its claim against Intraco being dismissed, not on grounds of lack of jurisdiction, but on the basis that it was statute barred. Accordingly, the pursuit of those proceedings cannot be said to have been unconscionable. Furthermore, in my judgment, if it is not proper to grant the declaration sought by way of a summary judgment application, it is not correct in principle to grant summary judgment in terms of the anti-suit injunction sought, the latter being conditional upon the grant of the former. I therefore find that the learned judge's refusal to grant summary judgment on Intraco's claim was not plainly wrong, and was, in any event, correct.

Issue 3 – Issues as to the Validity of the 2018 ITHC Shareholders' Resolution and the Legal effect of the Arbitration Clause

- [87] The shareholders' resolutions, upon which the ITHC places its greatest reliance as being valid in effecting the 2018 amendments to the articles of the company, purports to be made in accordance with regulation 72 of ITHC's articles and the Act. It is signed by or on behalf of three shareholders and dated individually 'April 16, 2018'. While the document shows a signature block for Med Trading to sign as a shareholder, it is unsigned, and inserted in typed print are the words 'not available to sign'. No evidence was put before the learned judge below, as to any prior notification of this resolution or of the intention to amend the articles being given or communicated to Med Trading, Mr. Trak or anyone representing the said shareholder. Likewise, there is no evidence that Med Trading had been sent a

copy of this resolution either before or after it had been signed by the other three shareholders or had been invited or was not available to sign the said document.

- [88] At paragraph 9 of the amended defence and counterclaim, the validity of the 2018 shareholders' resolutions has been put in issue. It is averred that this resolution was not validly passed in accordance with the memorandum and articles of association of the company; that Med Trading did not receive any notice of any meeting of the members of ITHC or of the written document pursuant to regulation 8.2 of the articles for the purpose of passing the said resolutions; and, if valid, the purported amendment is oppressive. It is also averred that in so far as the 2018 amendments to the articles were purportedly made by the resolution of the directors, it was made for an improper purpose 'namely to create difficulty for [Med Trading] in pursuing its legitimate claims for its entitlement to a share of profits in the jurisdiction in which the operations of the group and the Defendant [Med Trading] are closely connected.'

Absolute Majority – Shareholders' Resolution

- [89] As to the power to make written resolutions of the company, regulation 72 of the original articles of association of ITHC states:

"An action that may be taken by members at a meeting of members may also be taken by a resolution of members consented to in writing or by telex, telegram, cable or other written electronic communication, without the need for any notice."

- [90] The term 'resolution of members' is defined in regulation 2 of the articles to mean:
- "(a) a resolution approved at a duly constituted meeting of the members of a company by the affirmative vote of
 - (i) a **simple majority** of the votes of the shares that were present at the meeting and entitled to vote thereon and were voted and did not abstain, or
 - (ii) a **simple majority** of the votes of each class or series of shares which are present at the meeting and entitled to vote thereon as a class or series and were voted and not abstained and of a simple majority, of the votes of the remaining shares

entitled to vote thereon that were present at the meeting and were voted and not abstained, or

(b) A resolution consented to in writing by

(i) An **absolute majority**, of the votes of shares entitled to vote thereon, or

(ii) An **absolute majority**, of the votes of series of shares entitled to vote thereon as a class or series and of an absolute majority, of the votes of remaining shares entitled to vote thereon.” (Emphasis added)

[91] The respondent says that the 2018 shareholders’ resolution was invalid because it was not passed by an ‘absolute majority’ of the shareholders of ITHC entitled to vote thereon, within the meaning of that term in the definition of ‘resolution of members’ at sub-paragraph (b)(i) above. On the other hand, the appellants submit that the meaning of the expression ‘absolute majority’ in the definition is pellucid and means ‘50% plus 1’.⁴¹ Accordingly, they submit, there is simply nothing to be resolved at trial. In buttressing this submission, the appellants pray in aid the definition of ‘absolute’ in the Cambridge English Dictionary⁴² and the decision of the Caribbean Court of Justice (“CCJ”) in **Charrandas Persaud v Compton Herbert Reid and Others**.⁴³ At paragraph 23 of the lead judgment of Saunders PCCJ, he opines:

“It is not difficult to distinguish between a ‘simple’ majority and an ‘absolute’ majority in parliament. The former refers to the majority obtained when the votes of those present and voting are tallied. An absolute majority, on the other hand, refers to a majority of the total number of votes or seats in the Assembly irrespective of the number of members who actually vote.”

[92] In the definition of ‘resolution of members’ in the articles, a distinction is clearly drawn in subparagraphs (a) and (b) between a ‘simple majority’ and an ‘absolute majority’. They clearly do not mean the same thing. A ‘simple majority’ is just that, one vote over 50% of the shares present at the meeting and entitled to vote on the

⁴¹ See respondent’s submissions at paragraph 29.

⁴² See also Hon. Mark Brantley et al v Hon. Curtis Martin et al [2017] ECSCJ No. 249, delivered 7th November 2017.

⁴³ [2019] CCJ 10 (AJ).

resolution. On the other hand, the expression 'absolute majority' does not mean all members of the company must sign in support of the written resolutions for it to be validly passed. In my view, the expression 'absolute majority' as used in the definition of 'resolution of members in the articles' is a majority of all the shareholders or members entitled to vote on the resolution, whether they all sign the resolution or not. The appellants submitted that the three members who signed the shareholders' resolution, equated to 58% of the votes of all shareholders entitled to have voted on or signed the said resolution. This percentage has not been disputed by counsel of the respondent. Accordingly, the inescapable conclusion is that the said written resolution was signed by an 'absolute majority' of the shareholders of ITHC entitled to vote thereon.

- [93] However, the matter does not end there. The question remains as to whether the apparent or alleged failure to notify Med Trading or to provide it with the written resolution for its consideration, coupled with the as yet unsubstantiated (an allegedly false) statement 'not available to sign' noted on the shareholders' resolution, raises a reasonably arguable issue as to the validity of said resolution and hence the 2018 amendments to the articles, such that the appellants, as applicants in the court below, had failed to establish, to the requisite standard, that Med Trading had no reasonable grounds for defending ITHC's claim.

Requirement for notice – Shareholders' Resolution

- [94] Article 72 provides for any action which could be taken by members in general meeting to be taken by a resolution of members consented to in writing, 'without the need for any notice.' The appellants make a number of points in submitting that this issue does not give rise to any reasonable grounds for defending against ITHC's claim.⁴⁴ They contend that there was plainly no requirement under the articles for prior notice of the written resolution of shareholders as article 72 clearly states. In any event, such a 'circulation' resolution takes effect immediately upon being signed by the last shareholder establishing an 'absolute majority'. In support

⁴⁴ Paragraph 30 of the appellants' submissions.

of this proposition, they rely on paragraph 15-05 of **Shackleton on the Law and Practice of Meetings**.⁴⁵ The relevant extract states– ‘The date of the resolution means when the resolution is signed by or on behalf of the last member to sign and until that point in time it has no effect.’

[95] The appellants also say that any procedural irregularities will not invalidate the shareholders’ resolution if it would have been passed by an absolute majority anyway.⁴⁶ They also say that, in accordance with section 13 of the **BVI Business Companies Act, 2004**, the shareholders’ resolution took effect upon it being filed at the Companies Registry in the BVI. The material part of section 13(2) states– ‘An amendment to the memorandum and articles has effect from the date that the notice of amendment, or restated memorandum or articles incorporating the amendment, is registered by the Registrar...’.

[96] While there is much force in these points relied on by the appellants, does this rise to the level of determining, on these issues, to the summary judgment standard, that the respondent has no reasonable grounds for successfully defending the claim brought by ITHC? In my judgment, the appellants’ points on this aspect do not satisfy the burden on them to establish that the respondent has no real prospect of successfully defending the claim, that is, that the defence is fanciful or not more than merely arguable. In my opinion, the learned judge was quite correct in finding, that the defence raises issues which ought to be more fully ventilated at trial. I so conclude for the following reasons:

- (i) In my view, it is more than merely arguable that the words ‘without any notice’ in article 72 does not obviate the necessity to circulate the proposed written resolution to all shareholders for their consideration and signature or not. This is, as the judge said, is a question of law to be determined following full argument at trial.

⁴⁵ 15th Edition, Sweet and Maxwell (2020).

⁴⁶ *Browne v La Trinidad* (1887) 37 ChD 110, per Cotton LJ at p.10.

(ii) In this matter, the circumstances under which the shareholders' resolution was passed (as distinct from whether those members who signed it constituted an absolute majority of the members entitled to vote on the said resolution) and, in particular, the placing of the note 'not available to sign' in the signature block for Med Trading, raises certain evidential issues which will require further investigation at trial as found by the learned judge. This note implies, at minimum, that the intention in drafting the resolution was to circulate it to all shareholders including Med Trading; that for some unexplained reason, Med Trading, a company with a registered office in BVI, could not be found or that its principal Mr. Trak could not be found to sign it, with no evidence having been led as to whether there had been any attempt made to find him or to send the resolution to him, and why it is noted that the company (or Mr. Trak on its behalf) was not available to sign. These are issues which the appellants have not addressed either in their statement of claim or in their evidence in support of the summary judgment application and require fuller investigation at a trial taking all relevant facts and circumstances into account.

(iii) The appellants' section 13(2) point is not dispositive of any of the questions of law or fact identified by the judge. The fact that a resolution takes effect once registered at the Companies Registry, does not lead to the conclusion that it is valid as a matter of law, or that any invalidity has been cured by the fact of registration or that it cannot be declared invalid by a court of law and thus rendered wholly ineffective. Put simply, the requirement under section 13(2) for registration is to give a definitive date as when the resolution will be effective. It has nothing to do with whether the resolution had been validly passed in accordance with the memorandum and articles of a company and whether it is or was legally effective.

(iv) In my view, the case of **Browne v La Trinidad** is at least arguably distinguishable from the instant matter such as to undermine the force of the appellants' point that an irregularly made resolution would nevertheless be valid if it could have been passed by the requisite majority anyway. In that case, it was held that even assuming that the board meeting at which the resolution was passed to summon an extraordinary general meeting of the shareholders to remove the plaintiff as a director had been irregular (the plaintiff having received a mere 10 minutes notice of the said meeting) to the point where the plaintiff could have required another meeting to be summoned, the general meeting having been summoned, in all other respects regularly, the shareholders were competent to act. In the instant matter, the validity of the written resolution has been challenged by Med Trading in its amended defence and counterclaim on certain grounds including not being included in the circulation of the resolution for consideration for signature and on grounds of improper motive and oppression. There has been no subsequent resolution or general meeting of the shareholders of which notice has been given to all shareholders leading to the validity of the prior amending resolution.

Duty to give effect to arbitration clauses

[97] The courts of the BVI are required, as a matter of fundamental principle, to give effect to arbitration clauses or agreements to settle disputes by way of arbitration and not by ordinary litigation before the courts, unless there are strong reasons for not doing so. This principle is well-settled and has been upheld in the courts of England and the Eastern Caribbean, including this Court. A leading authority on this important principle is the decision of the House of Lords in **Donohue v Armco Inc and Others**.⁴⁷ Equally, it is well recognised that arbitration clauses are agreements reached by the parties to a contract and thus enforceable by the

⁴⁷ [2001] UKHL 64.

courts. However, issues concerning whether ITHC by its conduct, particularly in relation to the Dubai proceedings, may have 'waived' its right to have the arbitration clause enforced against Med Trading, can arise for consideration on the pleaded facts of this case.

[98] It was therefore open to ITHC to rely on the 2001 ITHC Arbitration Agreement in the Dubai proceedings, from as early as 2013. This, it did not do. ITHC did not invoke or rely on the 2001 Arbitration agreement when those sets of proceedings were brought against it by Med Trading for an accounting and payment of what they claimed was their share of the profits of both Intraco and ITHC relying, as they did, in the case of Intraco, on a principle of Dubai law based on 'indirect' responsibility notwithstanding that Med Trading was not and had never been a member of Intraco entitled to share in its distributions under BVI law. ITHC did not rely on the 2001 ITHC Arbitration Agreement to say that any dispute over the payment of dividends or profits between Med Trading as a shareholder and ITHC must be decided by arbitration. They only did so in case 351/2018 some 5 years later. In that matter, the Dubai Preliminary Court has ruled in its 14th October 2020 Judgment that such a plea is unsustainable for the reason given that ITHC took no positive steps to object at the first available opportunity when the claims were brought in 2013 before the courts in Dubai nor did they do so in the subsequent cases and appeals.

[99] In all the circumstances, there is no traction in the appellants' assertion that the learned judge 'lost sight' of or failed to apply the principles espoused by the House of Lords in **Donohue v Armco Inc and Others** by failing to give effect to the arbitration agreement. In dealing with the principles applicable to the grant of an anti-suit injunction, Lord Bingham of Cornhill at paragraph 16 stated:

"The grant of an anti-suit injunction, as of any other injunction, involves an exercise of discretion by the court. To exercise its discretion reliably and rationally, the court must have the fullest possible knowledge and understanding of all the circumstances relevant to the litigation and the parties to it. This is particularly true of an anti-suit injunction because, as explained below, the likely effect of an injunction on proceedings in the

foreign and the domestic forum and on parties not bound by the injunction may be matters very material to the decision whether an injunction should be granted or not. Thus although the two main issues before the House cannot be regarded entirely independently of each other, it is preferable to consider the issue of joinder of the PCCs before considering the grant of an anti-suit injunction more generally.”

[100] Where the proceedings sought to be restrained by an anti-suit injunction involve not only the contracting parties (as, for example, to an arbitration agreement or an exclusive jurisdiction clause) but a non-contracting party or the dispute in such proceedings involve grounds of claim not bound by the applicable clause in the contract, it is open to the court in the proper and rational exercise of its discretion to refuse to grant an anti-suit injunction.⁴⁸ In this matter, ITHC’s claim is rooted on the applicable arbitration clause, albeit it has only pleaded a breach of the 2001 ITHC Arbitration Agreement. On the other hand, Intraco’s claim is not based upon any arbitration clause but principally, if not exclusively, on the basis that Med Trading is not and has never been a shareholder of Intraco and thus is not entitled, under the laws of the BVI, to share in any distributions or dividends declared by the company’s directors. In my view, this raises a justiciable issue as to the appropriateness of granting to ITHC, as the majority holding company of Intraco, the injunction it seeks by way of summary judgment restraining proceedings already on foot in the UAE and/or proceedings which Med Trading may commence in the future. These are issues of mixed law and fact which ought to be ventilated more fully and determined after a trial, as the learned judge correctly decided.

[101] I also hold that the learned judge did not fail to properly consider the principles espoused in **British Airways Board v Laker Airways Ltd** by not granting the injunction sought by ITHC. In my view, the matters raised in the amended defence and counterclaim in relation to the efficacy of the 2018 Arbitration clause and its entitlement to declaratory relief and a consequential anti-suit injunction are more than merely arguable. In short, the defence is not ‘rubbishy’ in the words of

⁴⁸ *Donohue v Armco Inc and Others* [2001] UKHL 64 at paragraphs 25 and 27.

Mummery LJ in **Doncaster Pharmaceutical Group Ltd**. It cannot be said that the proceedings brought before the courts in Dubai for an accounting and payment of a share of profits, including case 351/2018, are frivolous or an abuse of the court's process so as to warrant summary judgment for an anti-suit injunction. In this regard, I merely note that the appellants did not seek an interim anti-suit injunction restraining Med Trading from continuing or from bringing proceedings in the UAE as set out in the prayer to their claim.

[102] In accord with the findings above, the arguments on this issue fail.

Issue 4 – Whether the learned judge wrongly held that Med Trading had a realistic prospect of establishing at trial that there was some improper purpose or oppression inherent to the 2018 amendment of ITHC's articles of association.

[103] At paragraph 73 of the Judgment, the learned judge, having recognised that the respondent's case that the 2018 amendments to ITHC's articles had not been foreshadowed in the original defence, summarised the arguments of the appellants in relation to the pleaded case in the amended defence and counterclaim. This issue was considered at some length by the judge from paragraph 108 onwards in the Judgment. At paragraph 111, the judge observed that the appellants' argument that it cannot be oppressive to require parties to abide by an arbitration clause, ignores the aspect of the respondent's amended defence which puts into question the validity of the 2018 amendments which, if correct, would render the said amendments and arbitration clause invalid. Alternatively, even if valid, the arbitration clause is oppressive and ought not to be allowed to stand as it was 'singled out and specifically targeted with this corporate act'.⁴⁹

[104] As the learned judge stated at paragraph 112, there is nothing inherently wrong with the shareholders of a company amending the company's articles of

⁴⁹ Paragraph 108 of the Judgment.

association to stipulate that disputes between a shareholder and the company or between shareholders themselves concerning the affairs of the company are to be referred to and determined by arbitration. This is a fundamental principle which is both rooted in freedom of contract and which gives full recognition to the legal process of arbitration as a means for the determination of disputes between contracting parties without resorting to court proceedings. Arbitration as a means for resolving domestic and international disputes is now one of the most established and recognised means of alternative dispute resolution, and is underpinned and undergirded by international conventions and domestic legislation and procedural rules.

[105] However, the enforceability of an arbitration clause, its breath and scope, are matters (if in issue) to be determined by either the court or the arbitral tribunal itself. Likewise, it behoves a party to an arbitration agreement to not sit by and allow legal proceedings to be initiated and continued by another party to the said arbitration agreement, to the point of decisions being rendered by a court, whether domestic or foreign, which affect the rights or asserted of the parties.

[106] The learned judge determined that the issue whether ITHC's articles of association were validly amended and whether the manner in which that was done was oppressive of Med Trading's rights as a member of ITHC, 'involves a complex inquiry of law and fact which requires determination at trial'⁵⁰ and considered that if the outcome is that the articles had not been validly amended in 2018'. He stated further that:

"...the [respondent's] legal proceedings in Dubai would not inherently have been abusive under BVI law. It is not possible to determine as part of this application whether or not the [appellants] should have an anti-suit injunction and declaration they seek".⁵¹

[107] The judge also concluded that there was no material before him which could lead him to conclude that the courts in Dubai are or were treating the various proceedings brought before them by Med Trading for an accounting and a share of

⁵⁰ Paragraph 122 of the Judgment.

⁵¹ Paragraph 123 of the Judgment.

the profits of ITHC and Intraco as being abusive of the process of their court. This observation by the learned judge has been fully borne out by the 14th October Dubai judgment.

[108] Before this Court, learned counsel for the appellants argued strenuously that the points of defence raised in the amended defence on the issue of improper purpose and oppression were ‘nonsense’ for the following reasons: (i) as BVI companies, the BVI is the proper forum for any litigation concerning an entitlement to be paid dividends; (ii) the claims by Med Trading to dividends are not legitimate and are unsustainable under BVI law; (iii) the 2018 amendments did nothing to ‘create difficulty for [Med Trading] in pursuing its claims’ and, in any event, the 2001 articles already were effective to prevent Med Trading from litigating those claims before the courts of the UAE; and (iv) that effect would be right and proper since the relationship between the shareholders of ITHC is governed by BVI law.⁵²

[109] These points have already been addressed in this judgment. In my view, they are not as simple or straightforward or unanswerable as the appellants contend so as to give rise to summary judgment on ITHC’s claim. This is not to say that there is no force in the appellants’ points in answer to the issue of improper motive, unfair prejudice and oppression under section 184I of the **BVI Business Companies Act, 2004**. But, on the summary judgment application, the learned judge was not called upon to weigh the relative strengths or merits of each party’s case on these issues, which are fact sensitive, and to do so at this stage of the proceedings before the usual pre-trial procedures have been embarked upon.

[110] As to the role of the BVI courts (as the seat and *forum conveniens* of the arbitration) to grant an anti-suit injunction preventing a party to the arbitration agreement from litigating before the courts disputes caught by the arbitration clause, the appellants relied on the decision of the English Court of Appeal in

⁵² Paragraph 36 of the appellants’ submissions.

Enka Insaat Sanayi A.S. v OOO “Insurance Company Chubb” and Others.⁵³

The correctness and primacy of this principle is undoubted and cannot be called into question for the cogent reasons advanced at paragraph 42, 43, 46 and 50 of the judgment of Popplewell LJ in **Enka Insaat**. At paragraph 53, Popplewell LJ opined:

“The primary role of the curial court in granting anti-suit relief is supported by principle. The anti-suit injunction jurisdiction is concerned to protect and enforce the integrity of the arbitration agreement. Questions of the substantive jurisdiction of the [arbitral] tribunal are paradigm issues of curial law assigned to the court of the seat.”

[111] It cannot be gainsaid that if the 2018 arbitration clause is valid, the seat of the arbitration is BVI, and hence the BVI courts are the crucial courts for granting an anti-suit injunction restraining a party to the arbitration agreement from proceeding to litigate an issue or dispute caught by the arbitration clause before the courts, whether in BVI or elsewhere. However, as the learned judge opined, this argument resting as it does on sound principles and high authority, ignores that the very validity and enforceability of the 2018 arbitration agreement is called into question in the amended defence and counterclaim and to the extent that to grant summary judgment without a full trial and hearing would not be justified.

[112] The appellants also submit that Med Trading has no real prospect of establishing the elements of a claim for unfair prejudice, ‘as it will not usually be unfair for the company to insist on the agreements recorded in the articles of association being enforced’.⁵⁴ In this respect, reliance has been placed on the decision of the House of Lords in **O’Neill and Another v Phillips and Others**.⁵⁵ The ‘held’ portion of the headnote reads:

“...**although it might in certain circumstances be unfair** for those conducting the affairs of a company to rely on their strict legal powers, **ordinarily** unfairness to a member required some breach of the terms on which he had agreed that the company's affairs should be conducted....”.
(Emphasis added)

⁵³ [2020] EWCA 574.

⁵⁴ Paragraph 38 of the appellants’ submissions.

⁵⁵ [1999] 1 WLR 1092.

[113] In my respectful view, this submission by the appellants is flawed. The very authority on which they rely makes clear that in certain circumstances it may be unfair or unfairly prejudicial for a member of a company to rely on his or her strict legal rights or powers, as against either the company or another member. This is precisely what the respondent is contending in its amended defence – that, in light of all that has transpired between them in the proceeding brought in Dubai since 2013, it would be unfair or prejudicial or unsustainable for ITHC to rely on either the 2001 or 2018 arbitration clauses, and therefore, ITHC has not discharged the burden on it to show that Med Trading does not have any reasonable ground for successfully defending ITHC’s claim. In any event, Med Trading now has, as a result of the 14th October 2018 Dubai judgment, a money judgment against ITHC for payment of profits for certain years. As mentioned, claims or defences based upon improper motive or oppression or unfair prejudice are usually fact sensitive and the learned judge was, in my considered view, correct in so finding and in holding that Med Trading has reasonable grounds on its amended defence and counterclaim for successfully defending the claim brought against it by ITHC. In so concluding, the learned judge did not ‘abdicate responsibility for upholding the integrity of the arbitration process in the BVI to the courts of the U.A.E’ as the appellants argue.⁵⁶

[114] In so concluding, and as a postscript, I hasten to add that this finding does not in any way undermine the efficacy of arbitration clauses and of the BVI as a jurisdiction for the determination of international disputes by arbitration. In fact, while upholding the policy of the BVI to promote arbitrations as a means for deciding disputes as between a BVI company and its shareholders or between the shareholders of the company, each case must be decided on its merits. The merits of the claims by ITHC and Intraco and of the defence and counterclaim of Med Trading, all three companies being BVI companies, are still to be fully and properly considered by a BVI court, and nothing which I say in this judgment is

⁵⁶ Paragraph 42 of the appellants’ submissions.

meant to tie the hands of the High Court in BVI in exercising that undoubted jurisdiction.

Issue 5 – Whether the learned judge adopted an overly cautious approach to issues of construction and law on the summary judgment application and/or misapplied the test applicable to summary judgment applications

[115] From the above, it is evident that I am of the considered view that the learned judge adopted a careful and measured approach in assessing the merits of the summary judgment application and correctly applied the relevant principles in determining whether Med Trading had, in its amended defence and counterclaim, a real prospect of successfully defending the claims by ITHC and Intraco. From my assessment I am satisfied that the learned judge did not adopt an overly cautious approach to deciding issues of construction or issues of pure law, with the exception of the meaning in law of the expression ‘absolute majority’ in the articles of ITHC. Further, the learned judge was correct to refrain from deciding issues of law where those issues would be, to some extent, fact based such as the issues of improper purpose and oppression.

[116] In my view, it is clear that the learned judge did not misapply the test and principles applicable to the grant of summary judgment as set out in **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste** and **Doncaster Pharmaceutical Group Ltd and Ors v Bolton Pharmaceutical Company 100 Ltd**. Relying on **ICI Chemicals v TTE Training**,⁵⁷ the appellants argued that there were no issues of fact which arose, and which needed to be resolved at trial and any questions of law fell to be decided by the judge in determining the summary judgment application. In my view, the judge was correct in deciding that there were issues of fact and certain questions of law which required fuller investigation and accordingly this was not a proper case upon which to grant summary judgment for the declarations and anti-suit injunctions sought by ITHC and Intraco in their respective claims. I also do not accept the appellants’ submission that they had shown that it was unconscionable for Med Trading to

⁵⁷ [2007] EWCA Civ 725.

commence or to continue with the proceedings before the courts in Dubai, neither was it vexatious for it to do so nor were such proceedings bound to fail, as the 14th August 2018 Dubai judgment clearly demonstrates. In short, the justice of the case required that, at this stage, summary judgment for the anti-suit injunctions sought by ITHC and Intraco, not be granted.

[117] In all the circumstances, there is no basis upon which this Court may interfere with the learned judge's judgment.

Disposition

[118] For the reasons set out in this judgment, the appeal fails and is accordingly dismissed. The order of the learned judge made on 18th December 2019 dismissing the appellants' application for summary judgment and permitting the respondent to file its amended defence and counterclaim effective 18th October 2019, is affirmed. The respondent, Med Trading, shall have its costs in this appeal to be assessed at no more than two-thirds of its costs in the court below.

[119] I express my appreciation to learned counsel on both sides for their very helpful submissions and authorities.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar