

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0007

BETWEEN:

HARVEST NETWORK LIMITED

Appellant

and

CHC INVESTMENT HOLDINGS LIMITED

Respondent

Before:

The Hon. Dame Janice Pereira, DBE

Chief Justice

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Godfrey Smith, SC

Justice of Appeal [Ag.]

Appearances:

Mr. Peter Ferrer, with him, Ms. Sarah Bolt for the Appellant

Mr. Brian Lacy for the Respondent

2018: November 1;
2020: November 23.

REASONS FOR DECISION

Civil appeal – Whether an order granting leave to file a derivative action is final or interlocutory – Final Order – Interlocutory Order – Application Test – Sections 184C, 184E and 184F of the BVI Business Companies Act

[1] **SMITH JA [AG.]:** Harvest Network Limited (“the appellant”) commenced this appeal against the order of Wallbank J without seeking leave of the court. CHC Investment Holdings Limited (“the respondent”) applied to strike out the appeal on

the ground that the appeal was from an interlocutory order for which leave was required and for which no leave had been sought or obtained. At the conclusion of the hearing, this Court ruled that the order was indeed an interlocutory order and dismissed the appeal as a nullity. We promised to provide reasons for this decision at a subsequent date. These reasons are set out below.

- [2] The background to this appeal may be shortly stated. The respondent had applied to the court below for leave to bring a derivative claim on behalf of the appellant pursuant to section 184C(1)(a) of the **BVI Business Companies Act, 2004**¹ (“the BCA”). After a contested hearing, the learned judge, on 16th November 2017, made an order (“the Order”) granting the respondent leave to bring a derivative action. On 14th March 2018, the appellant filed a notice of appeal against the Order without first seeking leave to appeal.
- [3] Mr. Ferrer, on behalf of the appellant, contended that the Order appealed was not an interlocutory order but a final order since it was determinative of the issue and therefore no leave to appeal was required. Mr. Lacy, on the other hand, argued that the Order was interlocutory because the court retained a supervisory role in respect of the proceedings for which leave had been granted and that permission is expressly subject to further order. The single issue to be determined is whether an order granting leave to file derivative proceedings is final or interlocutory.
- [4] In the Eastern Caribbean, the century-old debate in the Commonwealth, over whether to apply the “order test” or the “application test” to determine whether an order is final or interlocutory, has ended. This Court has consistently stated that the application test is to be used to determine whether an order is interlocutory or final. It has also decided that, based on this test, an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the

¹ Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

application is decided. This is set out in rules 62.1(3)(a) and (b) of the **Civil Procedure Rules 2000** (“CPR”).

[5] Section 30(4) of the of the **West Indies Associated States Supreme Court (Virgin Islands) Ordinance**² provides that no appeal shall lie without leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge except in cases expressed in subparagraphs (i) to (iv), none of which exceptions are engaged in the instant matter.

[6] The contention as to whether an order granting derivative leave is final or interlocutory has apparently not been determined by the Court of Appeal of the Eastern Caribbean. In **Microsoft Corporation v Vadem Ltd**,³ it appears that such an order was dealt with as an interlocutory order, leave to appeal having been granted by the court below, but the propriety of its treatment as interlocutory did not arise for determination by the Court of Appeal. We therefore approach this issue by examining the nature of an application made under section 184C of the BCA, the terms of the application made by the appellant, and the order of the judge on 16th November 2017 granting derivative leave.

[7] The BCA provides at section 184C that:

- “(1) Subject to subsection (3), the Court may, on the application of a member of a company, grant leave to that member to
 - (a) bring proceedings in the name and on behalf of that company; or
 - (b) ...
- (2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court must take the following matters into account
 - (a) whether the member is acting in good faith;
 - (b) whether the derivative action is in the interests of the company taking account of the views of the company’s directors on commercial matters;
 - (c) whether the proceedings are likely to succeed;

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

³ BVIHCVAP2013/0007 (delivered 8th August 2013, unreported).

- (d) the costs of the proceedings in relation to the relief likely to be obtained; and
 - (e) whether an alternative remedy to the derivative claim is available.
- (3) Leave to bring or intervene in proceedings may be granted under subsection (1) only if the Court is satisfied that
- (a) the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or
 - (b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders or members as a whole.”

[8] The respondent applied, under section 184C, for:

“An order:

1. for leave to bring a derivative claim on behalf of the Defendant pursuant to Section 184C(1)(a) of the BVI Business Companies Act, 2004 (the ‘**Act**’);
2. for an indemnity in respect of the costs of, and any order for costs in, those derivative proceedings pursuant to Section 184D(1) of the Act; and
3. for a declaration that the Claimant’s standing to bring claims derivatively on behalf of World Success Investments Limited (‘**World Success**’) and Shanghai De Yi Er Investment Management Consulting Co. Limited (‘**Shanghai De Yi**’) in Hong Kong is not governed by BVI law and is outside the jurisdiction of this Honourable Court.”

[9] The Order, in the operative paragraphs, stated:

“**IT IS ORDERED** that:

1. leave is granted to the Claimant to bring a derivative action pursuant to section 184C(1)(a) of the Business Companies Act 2004 (the ‘**Act**’) of those claims identified in the draft Statement of Claim at Appendix A to this Order (the ‘**HK Proceedings**’);
2. the whole of the reasonable costs of bringing the action (including adverse costs) shall be paid by the Defendants pursuant to section 184D(1) of the Act; and
3. the Defendant is to pay the Claimant’s costs of this claim, to be assessed if not agreed.

IT IS DECLARED that:

4. the Claimant's standing to bring claims derivatively on behalf of World Success Investments Limited and/or Shanghai De Yi Er Investment Management Consulting Co. Limited is not governed by BVI law and is outside the jurisdiction of this Court."

[10] Mr. Ferrer relied on two Commonwealth authorities in support of his contention that an order granting derivative leave is final: **Sax v Aurora**,⁴ a decision of the Ontario Superior Court of Justice, and **Huang v Wang**,⁵ a decision of the New South Wales Court of Appeal.

[11] In **Sax v Aurora**, Cavanagh J. concluded, at paragraph 31 of that decision, as follows:

"The motion judge concluded that the Plaintiff's proposed pleading amendments do not constitute a newly pled cause of action. This conclusion was fundamental to the motion judge's order granting leave to the Plaintiff, *nunc pro tunc*, to commence a derivative action. The order disposed of the issue raised by [the defendant] that the Plaintiff's motion for leave to commence a derivative action should be dismissed because it was brought after the expiry of the applicable limitation period. The disposition of this issue deprived [the defendant] of a substantive right that could have been determinative of the entire derivative action. Such an order is final..." (underlining supplied)

[12] It is clear from the above passage that the Court in **Sax v Aurora** applied the order test which is not applicable in this jurisdiction. Similarly, **Huang v Wang** applied the order test; that decision turned on the criteria necessary for the grant of leave to bring a derivative action. The only reference in the judgment of Bathurst CJ to whether the order was final or interlocutory was the following remark made *obiter*:

"58 It is correct that these cases were decided at a time when it was considered that proceedings under s 237 of the Act were final in nature, a view held to be incorrect in *McEvoy* at [4] per Macfarlan

⁴ (2018) ONSC 1834.

⁵ [2016] NSWCA 164.

JA, Allsop P and Beazley JA agreeing. In my opinion, that does not alter the requirement that an applicant satisfy the court on the balance of probabilities that the proceedings are in the best interests of the company. That is consistent with the words of s 237(2)(c) and recognises the serious nature of an order requiring a company to bring proceedings which it is unwilling to take itself.”

- [13] In a separate opinion, Barrett AJA, in **Huang v Wang**, remarked *obiter* that an order under section 237 of the Corporations Act of Australia may constitute either an interlocutory order or a final order:

“82 In *McEvoy v Caplan* [2010] NSWCA 115; 78 ACSR 167, Macfarlan JA expressed the opinion (with which Allsop P and Beazley JA agreed) that, if an order granting leave under s 237 had been made in that case, it would have been an interlocutory order. His Honour referred to the test said by Gibbs J in *Licul v Corney* [1976] HCA 6; (1994) 180 CLR 213 at 225 to be established by authority in Australia:

‘Does the judgment or order, as made, finally dispose of the rights of the parties?’

...

84 In those circumstances, it was no doubt correct to say that an order granting leave under s 237 would not have finally disposed of the rights of the parties and that the order would therefore have been interlocutory. In some other cases, however, the position may be different and the order might properly be viewed as a final order.”

Sax v Aurora and **Huang v Wang** are therefore of no assistance to the appellant.

- [14] Mr. Ferrer further contends that the Order is final because the fixed date claim for leave is a stand-alone claim (as opposed to an application within proceedings) for which the court, after hearing factual and expert evidence and arguments, granted relief in full. He said the application test was satisfied because, whichever way the matter was decided, it would have been determinative of the issue, namely, whether derivative leave should be granted.

- [15] It is clear that if derivative leave had been refused, that would have been determinative of the entire claim. If, on the other hand, leave was granted, as

indeed it was, is that really determinative of the claim? There is, in our view, force in Mr. Lacy's submission that, by virtue of section 184E and 184F of the BCA, the court retains a supervisory role over the derivative proceedings, even after leave has been granted. As he put it, permission remains "live", could be taken away and was "contingent upon final order".

[16] Sections 184E and 184F of the BCA provide that:

"184E. The Court may, at any time after granting a member leave under section 184C, make any order it considers appropriate in relation to proceedings brought by the member or in which the member intervenes, including

- (a) an order authorising the member or any other person to control the proceedings;
- (b) an order giving directions for the conduct of the proceedings;
- (c) an order that the company or its directors provide information or assistance in relation to the proceedings; and
- (d) an order directing that any amount ordered to be paid by a defendant in the proceedings must be paid in whole or in part to former and present members of the company instead of to the company.

184F. No proceedings brought by a member or in which a member intervenes with the leave of the Court under section 184C may be settled or compromised or discontinued without the approval of the Court."
(underlining supplied)

[17] Mr. Ferrer responded that the section 184E and 184F powers relate to derivative proceedings brought consequent to obtaining leave, as opposed to the application for permission, which is fully concluded. He submitted that the fact that the court retains a discretion under sections 184E and 184F to make further orders in relation to the proceedings does not affect the final nature of the determination in relation to the issue of permission. By analogy, he argued, when a court makes an order on liability with damages to be assessed, the fact that the court retains jurisdiction to determine the issue of damages does not mean that the liability order is not final.

- [18] It is clear that the court's powers to make any order it considers appropriate under sections 184E and 184F of the BCA are engaged after leave has been given and in relation to the derivative proceedings instituted consequent upon the grant of leave. The critical question is whether the grant of leave can be considered as determinative of the issue that arose on the fixed date claim for leave. What is the nature of the derivative leave granted?
- [19] There is some utility in examining how the court treats an order granting leave to institute a judicial review claim. Derivative proceedings, like judicial review proceedings, require the grant of leave before the substantive proceedings can be pursued. In both sets of proceedings, the requirement for leave serves to filter out cases that have no merit or can be dealt with through alternative means. Both sets of proceedings therefore require, among other things, that the court be satisfied that the applicant is acting in good faith, that the claim has a likelihood of success and that there is no alternative remedy available.
- [20] In the Eastern Caribbean, an order granting leave to make a judicial review claim is treated as an interlocutory order. The reason for this is stated in **Marvin Roy Dey v The Attorney General**⁶ in which Carrington JA [Ag.], sitting as a single judge of the Court of Appeal, held:
- “[2] An application for leave to seek judicial review is made under Part 56.3 of the **Civil Procedure Rules 2000 (CPR 2000)** as the first step in an application for judicial review. By its very nature, it is a procedural first step that must be taken and overcome before the merits of a substantive claim can be determined by the High Court. An appeal against the decision of the High Court with respect to such an application therefore must be classified as a procedural appeal, which is defined at Part 62.1 of the **CPR 2000** as an appeal from the decision of a judge, master or registrar which does not directly decide the substantive issues in a claim.
- ...
- [3] **The Eastern Caribbean Supreme Court (St. Lucia) Act Cap 2.01** provides that any person who wishes to appeal an

⁶ Saint Lucia, HCVAP 2008/023 (delivered 14th October 2008, unreported).

interlocutory decision of a judge must seek leave to appeal, unless the appeal falls within one of the excepted categories, none of which applies here. In **Maria Hughes v Attorney General of Antigua and Barbuda**¹[*Antigua and Barbuda Civil Appeal No. 33 of 2003 (delivered 13 April 2004)*], Gordon JA ruled that a procedural appeal was but one member of the category of appeals against an interlocutory order and so required leave to appeal. I agree with that ruling that has been consistently followed by this court.”

- [21] By parity of reasoning, derivative leave, by its very nature, should not be viewed as an independent, freestanding claim but rather as a procedural first step; a *sine qua non* for the institution of substantive derivative proceedings. On this view, it cannot be viewed as determinative of the issue between the parties whichever way the application is decided.
- [22] Put a different way: has the court that granted derivative leave a continuing power to vary its terms, as distinct from making orders in aid of enforcing those terms? It will be seen that Wallbank J’s order granting leave (set out at paragraph 9 above) is indeed subject to a continuing power to vary by virtue of the court’s broad power, in the chapeau to section 184E, to “make any order it considers appropriate in relation to proceedings brought by the member” (underlining supplied). This is sufficiently broad to include the power to order an end to the derivative action for which leave had been granted. The power to give “directions for the conduct of the proceedings”, under section 184E(b), also includes the power to order a discontinuance of the proceedings for which leave had been granted. It is this residuary power which makes it difficult to conclude that the grant of derivative leave is determinative of the matter. We therefore conclude that an order granting leave to bring derivative action under section 184C(1)(a) of the BCA is in the nature of an interlocutory order.

Conclusion

- [22] This Court holds the view that the order of Wallbank J was an interlocutory order and that the appellant therefore required leave to appeal against it. It is settled law that if leave to appeal was required but not obtained, then the appeal is a nullity and is accordingly struck out.

I concur.
Dame Janice Pereira, DBE
Chief Justice

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar