

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2023/0009

BETWEEN:

CALDICOTT WORLDWIDE LTD

Applicant

and

[1] SIONG BENG SENG

[2] CHING HUI HUAT

[3] SPRINGFIELD INVESTMENTS & NOMINEES PTE LTD

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

The Hon. Mde. Nicola Petra Byer

Justice of Appeal [Ag.]

The Hon. Mr. V. Dexter Theodore

Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Moverley Smith KC with him Mr. Dhanshukal Vekaria for the Applicant

Mr. Timothy Collingwood KC with Mr. Iain Tucker for the Respondents

2025: March 25;
October 17.

Application for conditional leave to His Majesty in Council – Section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 - The interplay between arbitration clauses and statutory unfair prejudice remedies - Threshold for leave to appeal to the Privy Council - Whether the appeal raises matters of great general or public importance or otherwise which justify consideration by the Privy Council

Caldicott Worldwide (“Caldicott”) is a minority shareholder in Hector Finance Group Limited (“Hector” or “the Company”). Caldicott brought a claim of unfair prejudice in the lower court under section 184I of the **BVI Business Companies Act** (“BCA”) against the Company and certain shareholders, inclusive of the respondents herein, Siong Beng Seng, Ching Hui Huat and Springfield Investments & Nominees PTE Ltd (“the respondents”) who collectively control the Company. Caldicott alleged that the respondents unfairly prejudiced its interests as a minority shareholder by, inter alia, causing the Company to withhold dividends.

The Company’s Articles of Association contain an arbitration clause providing that any difference between the Company and a member relating to the Company’s affairs must be referred to arbitration. On this basis, the Commercial Court stayed the proceedings against Hector in favour of arbitration. However, the court allowed the claim against the respondents to proceed, subject to certain limitations. The respondents sought to extend the stay to encompass claims against them, initiating a series of appeals before this Court.

The First Appeal was brought by the respondents and the judgment is dated 1st June 2021. The First Appeal addressed whether the Court should exercise its discretion under Rule 62.10 of the **Civil Procedure Rules 2000** (“CPR”) to stay proceedings against the respondents on case management grounds, given the ongoing arbitration with the Company. This Court upheld the trial judge’s refusal to grant a general stay, emphasizing that unfair prejudice claims under section 184I of the BCA are fundamentally disputes between shareholders. The Court emphasized that the respondents, as controlling shareholders, could be held liable independently of the Company’s arbitration.

The Second Appeal was also brought by the respondents and the judgment is dated 22nd March 2023. The Second Appeal addressed the scope of the arbitration clause. This Court held that any issue falling within the scope of the arbitration agreement must be stayed, regardless of which party the claim was against. It was accordingly held in the Second Appeal Judgment that: “(1) the appeal is allowed; (2) the order by the learned judge permitting the seeking of a declaration that the resolution passed on 30th November 2019 is unlawful, void and of no effect or alternatively voidable is set aside and this head of relief shall be stayed for the duration of the stay or until further order and (3) the order by the learned judge permitting the seeking of a declaration that the dividends are properly due and owing is set aside and this head of relief shall be stayed for the duration of the stay or until further order.”

The Third Appeal, brought by Caldicott, addressed whether the stay in the Second Appeal Judgment extended to claims against the respondents. Levy JA determined that the Second Appeal Judgment had stayed all heads of relief relating to dividends, whether they related to the resolution or to the dividends being owing, and that this applied to claims against the respondents as well. The Third Appeal Judgment thus stayed the factual issue itself of whether dividends were improperly withheld and dismissed Caldicott’s appeal.

Being dissatisfied with the judgment in the Third Appeal, Caldicott filed an application on 9th October 2024 seeking leave to appeal to the Judicial Committee of the Privy Council against the judgment in the Third Appeal dated 18th September 2024. Caldicott argued that the Third Appeal Judgment wrongly interpreted the Second Appeal Judgment as staying claims

against the respondents, and conflicted with the First Appeal Judgment, which allowed shareholder disputes to proceed without the Company.

Held: granting the application for conditional leave to appeal to the Privy Council and making the orders set out at paragraph 48 of this judgment that:

1. The threshold for leave to appeal to the Privy Council is that the question must be one of great general or public importance. It must be a genuinely disputable issue, not one that is merely academic or of interest to the parties. The issue must be substantial, and its resolution must be necessary for the future guidance of the courts or the public.

Section 3(2)(a) **Virgin Islands (Appeals to Privy Council) Order 1967** applied; **Martinus Francois v The Attorney General** SLUHCVP2000/0037 (delivered 7th June 2004, unreported) followed.

2. The Second Appeal Judgment does not treat with arbitration clauses as universally ousting or staying statutory unfair prejudice claims. Instead, the judgment adopts a two-stage, fact sensitive, issue-specific approach. It requires the court to identify firstly which claims or issues fall within the scope of the arbitration agreement and secondly to stay only those issues, not the entire unfair prejudice claim or claims against the parties. While the Second Appeal Judgment stayed specific declaratory relief, it did not expressly stay the underlying factual issue of whether dividends were improperly withheld.
3. The Third Appeal Judgment may overstate the Second Appeal Judgment, which only stays issues that are properly subject to arbitration under the Company's articles, not all unfair prejudice claims. The Third Appeal Judgment, by interpreting the Second Appeal Judgment as staying the factual foundation of the unfair prejudice claim, may have made it difficult for Caldicott to establish the essential element of its claim against the respondents. While there has been no appeal against the Second Appeal Judgment, it can be argued that the "Catch-22" situation now existing was created by the interpretation of the Third Appeal, rather than being an inevitable consequence of the Second Appeal Judgment. The Third Appeal Judgment could therefore be seen as the operative decision that has resulted in a potential quandary for minority shareholders seeking relief under section 184I of the BCA.
4. The question raised, whether an arbitration clause between a company and a shareholder can be used to stay the factual basis of a shareholder-versus-shareholder unfair prejudice claim, has wide-reaching implications for the operation of section 184I of the BCA and for minority shareholder protection in the BVI and similar jurisdictions. It affects the integrity of statutory remedies for thousands of companies.
5. The Third Appeal Judgment is the appropriate subject for appeal because it operationalized the procedural deadlock and its systemic consequences. Its effect

is to allow arbitration clauses to oust the court's jurisdiction over the factual matrix of unfair prejudice claims, potentially rendering statutory remedies illusory, raising a significant policy concern for which guidance from the Privy Council is warranted. Therefore, the application raises a genuinely disputable and substantial issue of great general or public importance regarding the interplay between arbitration clauses and statutory unfair prejudice remedies, and the practical ability of minority shareholders to obtain relief under section 184I of the BCA.

JUDGMENT

Introduction

- [1] **THEODORE JA [AG.]**: This is an application filed on 9th October 2024 by Caldicott Worldwide Ltd ("Caldicott") for leave to appeal to the Judicial Committee of the Privy Council ("Privy Council") against the judgment of this Court dated 18th September 2024 (the "Third Appeal Judgment") which dismissed Caldicott's appeal against the order of Wallbank J dated 22nd May 2023.
- [2] The underlying proceedings concern a claim of unfair prejudice under section 184I of the **BVI Business Companies Act**¹ ("**BCA**") brought by Caldicott, a minority shareholder in Hector Finance Group Limited ("Hector" or "the Company") against Hector and certain shareholder defendants, including the respondents herein (together "the respondents") who collectively control Hector.
- [3] Caldicott alleges that the respondents unfairly prejudiced its interests as a minority shareholder by, inter alia, causing Hector to withhold dividends.

Procedural History

- [4] The complex procedural history of this matter is central to determining whether leave to appeal to the Judicial Committee of the Privy Council should be granted.

¹ Act No. 16 of 2004 amended by 26/2005, Laws of the Virgin Islands.

- [5] The Company's Articles of Association contain an arbitration clause providing that any difference between the Company and a member relating to the Company's affairs must be referred to arbitration.
- [6] On this basis, the Commercial Court stayed the proceedings against Hector in favour of arbitration. However, the court allowed the claim against the shareholder defendants to proceed, subject to certain limitations.
- [7] The respondents sought to broaden the stay to include claims against them as well, setting in motion a series of appeals leading to the present application.

The Court of Appeal Judgments

The First Appeal Judgment of 1st June 2021²

- [8] The First Appeal was brought by the respondents and sought an order granting a stay of their claim in favour of arbitration. The First Appeal addressed whether the Court should exercise its discretion under Rule 62.10 of the Eastern Caribbean Supreme Court **Civil Procedure Rules 2000 ("CPR")** to stay proceedings against the respondents on case management grounds, given the ongoing arbitration with the Company. This Court upheld the trial judge's refusal to grant a general stay, emphasizing that unfair prejudice claims under section 184I of the BCA are fundamentally disputes between shareholders. Webster JA observed that the Company's absence did not preclude adjudicating claims against the respondents, as the "real complaint" was the respondents' conduct in allegedly causing the Company to withhold dividends.
- [9] The First Appeal Judgment did not rule on the substantive scope of the arbitration clause. Instead, it affirmed that case management factors (e.g. avoiding fragmented proceedings) did not justify staying the *entire claim* against the respondents. Critically, this Court noted that the respondents, as controlling shareholders, were the primary actors alleged to have caused unfair prejudice, and their liability could be determined independently of the Company's arbitration.

² BVIHCMAP2020/0020 (delivered 1st June 2021, unreported).

The Second Appeal Judgment of 22nd March 2023³

- [10] The Second Appeal was again brought by the respondents. The respondents adduced seven grounds of appeal. The seven grounds of appeal can be summarised as follows: the Judge applied the wrong test for staying claims, misunderstood the claim as not being primarily against the Company, and erred in allowing certain declaratory reliefs to proceed despite their close connection to disputes between the appellant and the Company, which should have triggered a stay under the arbitration clause. The Second Appeal Judgment, which I authored, addressed the proper scope of the arbitration clause. The Second Appeal Judgment addressed a discrete question: whether the **dividend withholding issue** fell within the arbitration clause in the Company's Articles.
- [11] The arbitration clause (Article 156) required "differences between the Company and its members relating to any of the affairs of the Company" to be arbitrated. The dividend issue squarely related to the Company's financial governance, as it concerned the validity of resolutions passed and dividends declared under the Articles. Following **Zanotti v Interlog Finance Corp and Others**⁴, I held that such disputes constitute "differences" under the arbitration clause, even if framed as shareholder unfair prejudice.
- [12] However, the Second Appeal Judgment did not stay the *entire claim* against the respondents. At paragraph [102], I clarified that the test was whether **any issue** (not the entire claim) fell within the arbitration clause. Drawing on **Lombard North Central plc and another v GATX Corporation**⁵, I emphasized that courts may allow court proceedings to continue while staying matters that are the subject of an arbitration between a company and one of its members.

³ BVIHMAP2021/0007 (delivered 22nd March 2023, unreported).

⁴ [2010] ECSCJ No. 36 BVIHCV2009/0394 (delivered 8th February 2010).

⁵ [2012] EWHC 1067 (Comm).

- [13] I stated at paragraph [129] that:
- “Had the Judge confined himself to the proper construction of the arbitration clause it seems clear to me that he would have found that differences had arisen between the respondent and the Company regarding the November Resolution and the matter as to whether the Company had improperly withheld dividends from the respondent.”
- [14] This Court held that any issue falling within the scope of the arbitration agreement must be stayed, regardless of which party the claim was against. The Court stayed two specific heads of relief that required resolution of a "difference" with the Company: (1) a declaration that the November Resolution was unlawful, void and of no effect or alternatively voidable; and (2) a declaration that the dividends are properly due and owing. No appeal was brought against this judgment, which is now final and binding.
- [15] Accordingly, the stay that was granted applied only to the **declaratory relief** concerning the November Resolution and dividend withholding (paragraph [143]). Other reliefs, such as compensation or share purchases, remained actionable, as they did not require resolving differences between Caldicott and the Company.
- [16] Nowhere in the Second Appeal Judgment is it stated that all dividend-related issues are arbitrable, as the intention was for claims targeting shareholder conduct to proceed, save for those which directly implicated Hector's actions. This aligned with **Zanotti** in that claims directly against the Company were to be stayed, while shareholder claims proceeded.
- [17] It was accordingly held in the Second Appeal Judgment that: “(1) the appeal is allowed; (2) the order by the learned judge permitting the seeking of a declaration that the resolution passed on 30th November 2019 is unlawful, void and of no effect or alternatively voidable is set aside and this head of relief shall be stayed for the duration of the stay or until further order and (3) the order by the learned judge permitting the seeking of a declaration that the dividends are properly due and owing

is set aside and this head of relief shall be stayed for the duration of the stay or until further order.”

The Third Appeal Judgment of 18th September 2024⁶

- [18] The Third Appeal was brought by Caldicott on the grounds that Wallbank J failed to recognise the scope of the Second Appeal Judgment and that the learned judge erred in law in deciding that the issue in the proceedings of whether dividends were improperly withheld from Caldicott was required to be stayed until further order on the basis that it touches and concerns Hector's conduct. The Third Appeal addressed whether the Second Appeal's Judgment stay extended to claims against the respondents.
- [19] Levy JA determined that the Second Appeal Judgment had stayed all heads of relief relating to dividends, whether they related to the resolution or to the dividends being owing, and that this applied to claims against the shareholder defendants as well.
- [20] The Court acknowledged the practical difficulties and the potential for a "Catch-22" for minority shareholders but felt bound by the Second Appeal Judgment.
- [21] The Third Appeal Judgment thus stayed the factual issue itself of whether dividends were improperly withheld.

The Parties' Submissions

- [22] Caldicott argued that the Third Appeal Judgment misinterpreted the Second Appeal Judgment as staying claims against the respondents, rather than merely the Company. Caldicott further submitted that the Third Appeal Judgment is in conflict with the First Appeal Judgment, which held that unfair prejudice claims are primarily disputes between shareholders and can proceed without the Company's participation.

⁶ BVIHCMAP2023/0009 (delivered 18th September 2024, unreported).

- [23] Caldicott finally submitted that the Third Appeal Judgment's stay of the core factual issue paralyzes the statutory unfair prejudice remedy, creating a "Catch-22": Caldicott cannot prove unfair prejudice without arbitrating the dividend issue with Hector, but the Shareholder Defendants (who control Hector) are not parties to that arbitration. Caldicott contended that this outcome threatens the operation of the BVI's statutory unfair prejudice jurisdiction and, if upheld, would allow arbitration clauses to routinely nullify section 184I claims by staying essential factual issues.
- [24] Caldicott argued that "the interaction between a shareholder's right to prosecute claims for unfair prejudice in the BVI Courts and arbitration agreements, and the impact of an arbitration agreement between a shareholder and company on claims between shareholders" were matters of great general or public importance as they "will have a significant bearing on the way in which parties will prosecute or defend unfair prejudice claims in the BVI" and affect thousands of BVI companies with similar arbitration provisions and could systematically undermine the protection afforded to minority shareholders under section 184I of the BCA.
- [25] The respondents argued that the Third Appeal Judgment correctly applied the Second Appeal Judgment and merely determined that certain factual issues fell within the arbitration agreement.
- [26] The respondents further argued that the Third Appeal Judgment did not create new law or extend the reach of arbitration clauses beyond what was established in the Second Appeal Judgment.
- [27] The respondents maintained that the Third Appeal Judgment raised no question of great general or public importance, and that rather the issues between the parties were fact-specific.

Legal Framework

[28] The application for conditional leave to appeal to the Privy Council is made under section 3(2)(a) of the **Virgin Islands (Appeals to Privy Council) Order 1967**, which provides:

"...An appeal shall lie... with the leave of the Court... where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty⁷ in Council..."

[29] The threshold for leave under section 3(2)(a) was authoritatively defined in **Martinus Francois v The Attorney General**⁸. There, Saunders JA (as he then was) explained:

"The question must be one of great general or public importance. It must be a genuinely disputable issue, not one that is merely academic or of interest only to the parties. The issue must be substantial, and its resolution must be necessary for the future guidance of the courts or the public."

[30] This Court in **Martinus Francois** further clarified:

"This Court has stated repeatedly before, that leave to appeal to the Privy Council is not granted lightly. The threshold is a high one. The requirement that the question must be one of great general or public importance must not be taken as a mere form of words. It must be a genuinely disputable issue and one that is substantial."

[31] As Saunders JA also expatiated in **Martinus Francois**, this threshold is achieved when the appeal turns not on factual application, but on novel legal principles.

Analysis

[32] The critical question is whether the application raises a genuinely disputable issue of law of great general or public importance arising from the Third Appeal Judgment itself, as required by **Martinus Francois**.

[33] The Second Appeal Judgment at paragraph [84] sets out the statutory test under the **BVI Arbitration Act**⁹, which is materially similar to section 9 of the **English**

⁷ I believe that we must now read, "His Majesty".

⁸ SLUHCVP2003/0037 (delivered 7th June 2004, unreported).

⁹ No. 13 of 2013 of the Laws of the Virgin Islands.

Arbitration Act 1996. The court must determine whether the "matter" is the subject of an arbitration agreement and, if so, refer it to arbitration unless the agreement is null, void, inoperative, or incapable of being performed.

[34] At paragraph [89] of the Second Appeal judgment, it was clarified that the correct approach is to:

"first identify the matter which is the subject of the arbitration agreement and then determine whether that matter is one that the parties have agreed can only be arbitrated".

[35] At paragraph [102] of the Second Appeal Judgment I stated:

"The test therefore is a simple one: whether any issue before the court falls within the scope of the arbitration agreement and not whether the claims between the respondent and the appellants required an issue of fact or law arising between the respondent and the Company to be first resolved."

It is pellucid therefore that the Second Appeal Judgment does **not** treat arbitration clauses as universally ousting or staying statutory unfair prejudice claims. Instead, the judgment adopts a two-stage, fact sensitive, issue-specific approach: it requires the court to identify firstly which particular claims or issues fall within the scope of the arbitration agreement and secondly to stay only those issues, not the entire unfair prejudice claim or all claims against all parties.

[36] This approach is consistent with the English authorities, which require a nuanced analysis of arbitrability and do not permit a blanket ouster of statutory remedies.

[37] While the Second Appeal Judgment stayed specific declaratory reliefs, it did not expressly stay the underlying factual issue of whether dividends were improperly withheld.

[38] Levy JA is correct to highlight the importance of distinguishing between disputes between a shareholder and the Company (which may be subject to an arbitration clause in the articles) and disputes between shareholders inter se (which may not be). The Second Appeal Judgment, however, does not expressly state that all

disputes between shareholders are subject to the arbitration clause. Instead, it focuses on whether the particular issue or head of relief falls within the scope of the arbitration agreement.

[39] Levy JA expressed concern that the Second Appeal Judgment "blurs" the distinction between company and shareholder disputes although it must be noted that the Second Appeal Judgment does attempt to maintain this distinction by focusing on the nature of the issue and whether it falls within the arbitration agreement, rather than simply the identity of the parties.

[40] To that extent the Third Appeal Judgment may overstate the effect of the Second Appeal Judgment, which does not universally stay all unfair prejudice claims, but rather stays only those issues that are properly referable to arbitration under the company's articles.

[41] The Third Appeal Judgment, by interpreting the Second Appeal Judgment as staying the factual foundation of the unfair prejudice claim, might have made it difficult for Caldicott to establish the essential element of its claim against the shareholder defendants.

[42] It is true, as the respondents have pointed out, that there has been no appeal against the Second Appeal Judgment, however, it is thus arguable that the "Catch-22" situation that may now exist was not the inexorable consequence of the Second Appeal Judgment but was rather created by the Third Appeal Judgment's interpretation of it. To that extent the Third Appeal Judgment could be seen as the operative decision that has resulted in the possible quandary for minority shareholders seeking relief under section 184I of the BCA.

[43] The question now raised—whether an arbitration clause between a company and a shareholder can be used to stay the factual basis of a shareholder-versus-shareholder unfair prejudice claim, has wide-reaching implications for the operation of section 184I of the BCA and for minority shareholder protection in the BVI and similar jurisdictions. It is not merely of interest to the parties but affects the integrity

of statutory remedies for thousands of companies where similar questions may arise.

[44] In my mind therefore the application therefore meets the test for leave to appeal as articulated in **Martinus Francois**: the issue is "genuinely disputable" and "substantial," and its resolution is "necessary for the future guidance of the courts or the public."

[45] While finality is a fundamental principle, it should not prevent appellate review where a subsequent judgment applies precedent in a way that produces a novel and potentially unjust result. The Third Appeal Judgment is the appropriate subject for appeal because it is the decision that operationalized the procedural deadlock and its systemic consequences.

[46] The effect of the Third Appeal Judgment is to allow arbitration clauses to oust the court's jurisdiction over the factual matrix of unfair prejudice claims, potentially rendering statutory remedies illusory. This raises a significant policy concern on which guidance from the Privy Council is warranted.

Conclusion

[47] For these reasons, the application raises a genuinely disputable and substantial issue of great general or public importance regarding the interplay between arbitration clauses and statutory unfair prejudice remedies, and the practical ability of minority shareholders to obtain relief under section 184I of the BCA.

Disposition

[48] I would accordingly make the following orders:

(1) Leave to appeal to His Majesty in Council is granted to the applicant pursuant to section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 against the judgment of the Court of Appeal issued herein on 18th September 2024 upon the following conditions:

- (a) the applicant within ninety (90) days of the date hereof do enter into good and sufficient security in the sum of Five Hundred Pounds (£500.00) for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office;
- (b) within 90 days of the date hereof, the applicant takes the necessary steps for the purposes of procuring the preparation of the record, the settling of such records with the solicitors of the respondent to this application, and the certification of the record by the Registrar of the Court of Appeal;
- (c) the record shall be prepared in accordance with rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2024 and its Practice Direction 5.3 to 5.8 shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted;
- (d) Costs of this application are reserved to the Privy Council.

(2) The applicant shall make an application to the Court for final permission to appeal to His Majesty in Council, supported by the certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed by this Order to the satisfaction of the Registrar.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Petra Nicola Byer
Justice of Appeal [Ag]

By the Court

Chief Registrar