In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2016: No. 202

BETWEEN:-

(1) AK BAKRI & SONS LTD
(2) MOHAMMED HANI ABDUL KADER BAKRI AL BAKRI
(3) ZOHAIR ABDUL KADER BAKRI AL BAKRI

Plaintiffs

-v-

(1) ASMA ABDUL KADER BAKRI AL BAKRI
(2) FAISAL ABDUL KADER BAKRI AL BAKRI

Defendants

RULING

In Chambers

Family dispute over share ownership – concurrent action in Bermuda and arbitral proceedings in Saudi Arabia – whether to grant Plaintiffs' application to stay action in Bermuda which they had commenced – whether exceptional circumstances – whether to discharge injunction against company in which the disputed shares were held – whether real risk of dissipation – whether to grant Defendants' application for anti-suit injunction re arbitral proceedings – whether exceptional circumstances

Date of hearing: 19th and 20th April 2017
Date of ruling: 26th May 2017

Mr Jan Woloniecki and Mr Nathaniel Turner, ASW Law Limited, for the Plaintiffs
Mr Kevin Taylor and Ms Nicole Tovey, Taylors, for the Defendants

The parties

1. The First Plaintiff is a company incorporated in Bermuda ("the Company"). It is part of the Al Bakri Group of companies ("the Group"), which is active throughout the Middle East in energy, shipping and financial services. The Company is the holding company for the companies in the Group which are outside Saudi Arabia.

2. The Group was founded by Sheikh Abdul Kadar Al Bakri ("the Sheikh"). He had five sons by his first wife ("the Five Brothers"). They include the Second and Third Plaintiffs ("Hani" and "Zohair"), who are directors and shareholders in the Company. He had two children by his second wife. They are the Defendants ("Asma" and "Faisal"), who were formerly directors of the Company.

The dispute

Introduction

3. There are a number of disputes currently being litigated in Saudi Arabia between one or more of the Sheikh, the Five Brothers and companies in the Group on the one side and one or more of the Defendants and their mother on the other. Hani has sworn an affidavit explaining that the Sheikh made grants of shares and other property for no consideration to the Defendants, including some very valuable land in Mecca. The Sheikh has come round to the view that this was unfair to the Five Brothers and contrary to Sharia law

– a position which unsurprisingly the Five Brothers appear to share. Hani explains that the Five Brothers had contributed capital upon the formation of the Al Bakri family business and had worked hard for over 35 years to further its growth and development. The Defendants, as the Five Brothers saw it, had made little or no contribution to the business. I make no findings of fact and express no views about the merits of this dispute. However it does provide the larger context within which the particular dispute before this Court takes place. This concerns shares in the Company and has three elements: (i) share transfers; (ii) dividend payments; and (iii) the allotment and subscription of shares.

Share transfers

4. On 2nd May 2009 Faisal became the registered holder of 1.8 million shares in the Company. On 25th March 2010 Asma became the registered holder of 900,000 shares in the Company. The Plaintiffs say that the shares were granted or caused to be granted by the Sheikh and that this was for no consideration, although the Defendants do not accept this.

5. On 9th December 2015 the Sheikh signed share transfer forms transferring Faisal's shares in the Company to Zohair and Asma's shares to Hani. The Plaintiffs say that he had authority to do so under various powers of attorney which he held on behalf of the Defendants, including powers of attorney issued pursuant to a Shareholders Agreement dated 1st July 2014 ("the Agreement"). They say that he did so at the Defendants' request so as to achieve a fair distribution of assets from the Sheikh among his children in compliance with Sharia law.

6. The Defendants say that the purported transfer of their shares was unlawful, as the powers of attorney were either invalid or inapplicable, and assert that they are not bound by the Agreement.

7. Both sides have adduced expert evidence on Sharia law to support their respective positions.

Dividend payments

8. The Defendants claim dividends in the sum of about US$5.3 million which were declared while they were still shareholders but which they say they never received.

9. The Plaintiffs say that throughout the period when the Defendants were shareholders it was, as the Defendants well knew, the practice of the Sheikh to direct the Company to pay all of the dividends to charity. The Defendants say that they were unaware of this practice and did not consent to their dividends being dealt with in this way.

10. The Plaintiffs have exhibited shareholders' resolutions authorising a number, but by no means all, of the said declarations and distributions of dividends. Each resolution is ostensibly signed *inter alia* by Faisal, and by the Sheikh on Asma's behalf, and acknowledges safe receipt by each signatory of their share of the dividend. Faisal does not deny signing these resolutions but says that he cannot recall doing so. Asma says that she had no knowledge of them and does not accept that her dividends were in fact paid to charities.

11. The Defendants also claim payment of any dividends declared in relation to what were formerly their shares after they were removed from the Company's Register ("the Register").

Allotment and subscription of shares

12. At a Special General Meeting of the Company on 22nd June 2015 the members voted to approve, upon the recommendation of the directors, that the authorised share capital of the Company be increased from US$ 20 million to US$ 100 million by the creation of 80 million additional common shares of par value $1.00 each. Faisal did not attend the meeting as he was on his honeymoon but Asma attended on behalf of them both. They did not support the increase in share capital.

13. The Defendants complain that all the other shareholders were given the opportunity to subscribe to the additional shares whereas they were not.

They allege that the Company's omission to advise them of this opportunity was deliberate and intended to dilute their interest in the Company. They rely upon the fact that the Register was not updated to show their brothers' increased subscriptions, as required by section 65(1) of the Companies Act 1981 Act ("the 1981 Act"), as evidence of an intention to conceal the subscription from the Defendants. The Plaintiffs claim that the Defendants did have the opportunity to subscribe to additional shares. They say that the failure to update the Register was merely an oversight.

Relief sought

14. By a generally endorsed writ issued on 17th May 2016 the Plaintiffs sought declarations that the Defendants were not entitled to orders: (i) transferring the shares back to them, and (ii) rectifying the Register accordingly. A statement of claim followed on 24th June 2016.

15. By a defence and counterclaim dated 6th April 2017 (the action has a complicated procedural history which explains the delay) the Defendants denied that the Plaintiffs were entitled to the declarations sought. They counterclaimed for: (i) a declaration that they are not bound by the Agreement; (ii) an order restoring them to the Register, whether as a "*mandatory order*" or alternatively an order for the rectification of the Register pursuant to section 67(1) of the 1981 Act; (iii) payment of dividends which were declared while they were members but which they say they never received; (iv) payment of any dividends declared after they were removed from the Register; and (v) an order setting aside a subscription of shares in the Company in which they say they were wrongfully not permitted to participate; alternatively an order permitting them to participate in the subscription; or alternatively damages.

The applications

16. There are three applications before the Court.

(1) The Plaintiffs' application by way of a summons dated 11th July 2016 that the action be stayed.

(2) The Plaintiffs' application by way of the same summons to discharge an ex parte on notice injunction made by the Court on 2nd June 2006.

(3) The Defendants' application by way of summons dated 16th February 2017 seeking an anti-suit injunction in relation to an arbitration in Saudi Arabia.

Chronology

17. It will be helpful to consider the applications in the context of a brief chronology.

18. On 10th May 2016 the Defendants' then attorneys (who are no longer acting for them) hand delivered a letter before action to the Plaintiffs' attorneys. The letter sought an explanation of the share transfers and the restoration of the Defendants to the Register. Alternatively, it sought a written undertaking from the Company by 18th May 2016 not to take certain steps, ie declare dividends; issue, transfer, or deal with its shares; or dispose of or encumber its assets other than in the ordinary course of business, pending the determination of an application by the Defendants to the Court for their restoration.

19. The Plaintiffs' attorneys replied by a letter dated 17th May 2016 enclosing the aforesaid generally endorsed writ. They stated that the Defendants were not entitled to any information about the Company and averred that there was no basis for the injunction which the Defendants had foreshadowed. In the event that the Defendants applied for an injunction, the Plaintiffs' attorneys requested two clear days' notice.

20. On 18th May 2016 the Defendants filed a memorandum of appearance.

21. On 31st May 2016 the Defendants filed an ex parte summons seeking a freezing injunction against the Company. On 2nd June 2016 an ex parte hearing took place on short notice to the Plaintiffs. The Defendants' counsel submitted that on the limited material available to them they appeared to have been fraudulently deprived of their respective shareholdings by reason of an unlawful conspiracy between Hani and Zohair. The Court made an interim injunction prohibiting the Company from: (i) dealing with or disposing of its assets other than in the ordinary course of business; (ii) declaring or paying dividends; or (iii) issuing or allotting shares or increasing its authorised capital.

22. On 24th June 2016 the Plaintiffs filed the aforesaid statement of claim. On 11th July 2016 they filed the aforesaid summons seeking a stay of the action and to discharge the injunction.

23. On 24th August 2016 the Company emailed a Dispute Notice to both Defendants pursuant to clause 26 of the Agreement. Clause 26 provides that if a dispute arises in relation to the Company or any of its shareholders then any party to the dispute can serve a Dispute Notice on the other parties. This starts a 180 day period within which the parties or their representatives are enjoined to attempt to resolve the dispute. If the dispute has not been resolved by the end of that period then it shall be resolved by arbitration. The seat of the arbitration is Saudi Arabia and the applicable law is Sharia law as applied in Saudi Arabia and the law of Saudi Arabia. The Dispute Notice concerned the matters in dispute in this action.

24. Various orders for directions followed. The Defendants, through no fault of their own, had to change attorneys.

25. On 16th February 2017 the Defendants sought the said injunction prohibiting the Plaintiffs from commencing or prosecuting arbitration proceedings in Saudi Arabia or elsewhere in relation to the dispute mentioned in the Dispute Notice. On 20th February 2017 the 180 day period under the Dispute Notice expired. The Court declined to hear the Plaintiffs' application before the expiry date.

26. On or about 10th April 2017 the Plaintiffs served, or purported to serve, a Notice of Arbitration under the Shareholder Agreement on the Defendants via their attorneys. As the Defendants' attorneys took issue with the validity of service, on 20th April 2017 the Company served the Notice by email on the Defendants directly.

Plaintiffs' application for stay

27. The Plaintiffs submit that the action should be stayed and that the appropriate mechanism for the resolution of the dispute between the parties is the arbitration that has been commenced in Saudi Arabia. They rely upon clause 26 of the Agreement. There is a dispute between the parties – and conflicting expert evidence – as to whether under Sharia law the Agreement is binding upon the Defendants. I express no views on the question.

28. The Agreement was signed by the Sheikh, purportedly on behalf of the Company and each of the shareholders, including the Defendants. He appears to have done so pursuant to a Shareholders Resolution of the Company dated 1st July 2014 ("the Resolution"). I should note that the Agreement is in English whereas the Resolution is in both English (with a Gregorian calendar date) and Arabic, although nothing turns on this. Faisal signed the Resolution but Asma did not. However the Sheikh purportedly signed on her behalf.

29. The Resolution approved the Byelaws and the Agreement, which complements the Byelaws and regulates the relationship between the shareholders and companies, including the Company, in which they hold shares. The approval was expressed to be "*as per drafts attached to this resolution*". Although the extant copy of the Agreement is not attached to the Resolution, there is no evidence of any other Agreement to which the Resolution could refer. The Resolution also authorised the Sheikh to do whatever may be necessary to give effect to the Resolution. That would include, the Plaintiffs submit, signing the Agreement on the shareholders' behalf.

30. Further or alternatively, the Plaintiffs invite the Court to stay the action using its case management powers on the ground that Saudi Arabia is the convenient forum for resolving the dispute. The test for a stay on this basis was stated by Lord Goff in the House of Lords in Spiliada Maritime Corp. v Cansulex Ltd [1987] 1 AC 460 at page 476 C:

> "*The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be more suitably tried for the interests of all the parties and the ends of justice.*"

31. The Plaintiffs submit that the arbitral proceedings in Saudi Arabia satisfy this test. As appears from the Statement of Claim, the Plaintiffs' entire case relies on principles of Sharia law. The dispute is between members of a Saudi family. The family and most or all of the likely witnesses live in Saudi Arabia and speak Arabic as their first language. I had the benefit of written evidence from some 28 witnesses for this hearing alone.

32. Moreover, the Plaintiffs submit, it would be open to the Sheikh or the other shareholders, who are not subject to the jurisdiction of this Court, to bring arbitral proceedings in Saudi Arabia relating to the dispute. Thus, irrespective of any orders made by the Court in the present case, an arbitration might very well proceed. If it does, Bermuda would recognise and enforce any order made by the arbitral tribunal as both Bermuda and Saudi Arabia are parties to the 1958 New York Arbitration Convention. However there are no treaties for the reciprocal recognition and enforcement of judgments between these jurisdictions, with the result that any judgment of the Bermuda Court would be unenforceable in Saudi Arabia. As noted previously, the present dispute is in any case one of a number of disputes between the Defendants on the one hand and the Sheikh and other members of his family on the other. All these other disputes are being litigated in courts in Saudi Arabia. The Plaintiffs submit that these factors all support their contention that Saudi Arabia is the appropriate forum for the resolution of the current dispute.

33. It is on the face of it surprising that the Plaintiffs seek to stay an action which they have themselves brought. They explain that when proceedings were commenced in Bermuda the Company's books and records were in storage as it had recently moved offices. The Defendants do not accept that explanation. Assuming the explanation to be true, it does not explain why the Plaintiffs, instead of discontinuing the proceedings as soon as they retrieved the Agreement from storage, filed instead a statement of claim. Their attorneys must have been familiar with the Agreement when they drafted the statement of claim as the pleading makes frequent and detailed references to it. Their attorneys would also have been familiar at that time with the facts and matters which they now say make Saudi Arabia the convenient forum for the resolution of this dispute. Mr Woloniecki, who appeared for the Plaintiffs, aptly characterised the decision to file the statement of claim as a "*blunder*".

34. The Defendants, who oppose the stay application, have two lines of attack. First, they rely upon article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). Section 23 of the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act") provides that, subject to certain qualifications which are not relevant to the present case, the Model Law has the force of law in Bermuda. Article 8 of the Model Law provides:

> "*Arbitration agreement and substantive claim before court*
>
> *(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
>
> *(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*"

35. The Defendants submit that the statement of claim was the first statement which the Plaintiffs submitted on the substance of the dispute. I agree. The Defendants further submit that as the Plaintiffs have filed their statement of

claim it is now too late for them to seek a stay. But that is not correct. Article 8(1) states when a court is required to refer a dispute to arbitration; it does not prohibit the court from referring a dispute to arbitration in other circumstances. Article 8(2) is relevant to both the stay applications before the Court as it expressly permits arbitration proceedings to run in parallel with court proceedings.

36. Second, the Defendants submit that as the Plaintiffs have voluntarily brought these proceedings they must show exceptional circumstances in order to stay them. The Defendants rely upon the principles enunciated by Gloster J in Excalibur Ventures LLC v Texas Keystone [2012] 1 All ER (Comm) 933 QB at paras 75 – 80:

"*75. In circumstances where a claimant is applying to stay proceedings voluntarily brought by it, it needs to show that there are 'special', 'rare' or 'exceptional' circumstances to justify a stay. As Neuberger J (as he then was) observed in Ledra Fisheries Ltd v Turner [2003] EWHC 1049 (Ch) at paragraph 12:*

> *'... it appears to me that, where a claimant has brought a claim against the same defendants for essentially the same relief arising out of the same facts in two jurisdictions, then, absent special circumstances, it would be wrong for the court to grant a stay of one set of proceedings at the instigation of the claimant, the very person who has brought both sets of proceedings.'*

76. To similar effect, Mustill LJ held in Attorney-General v Arthur Andersen & Co [1989] ECC 224 at paragraph 13:

> *'... if a plaintiff has thought fit to commence an action, with all the hardship to the defendant which this involves in terms of expense, worry and disruption, he should in general be made to face up to the situation which he has chosen to create, and should not be permitted to conduct the action to a timetable which corresponds only to his own whimsy. Having put his hand to the plough he should continue to the end of the furrow. This is only fairness and common sense.'*

77. The usual approach where a claimant is seeking a stay of proceedings brought by it is therefore to refuse the stay, but an exceptional case may be made out where the proceedings sought to be stayed were started purely to protect the claimant's limitation position: see Attorney-General v Arthur Andersen & Co (supra). That is not this case.

78. In Klöckner Holdings v Klöckner Beteiligungs [2005] EWHC 1453 (Comm) at paragraph 21, I set out relevant principles governing the grant of a stay of proceedings in favour of proceedings which a claimant had commenced elsewhere. These included the following:

> *(i) The court has a wide discretion to stay proceedings, but in circumstances where the claimant itself has voluntarily brought the two sets of proceedings, a stay should only be granted in very rare circumstances.*
>
> *(ii) Even where there are such reasons for a stay, a stay should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party.*
>
> *(iii) A stay will not generally be appropriate if the other proceedings will not even bind the parties to the action stayed or finally resolve all the issues in the case to be stayed.*
>
> *(iv) A defendant against whom a serious allegation (such as deceit) is made is entitled to an expeditious hearing, and should not be left for years waiting for the outcome of another case over which he (and the court) has no control. An action alleging fraud should come to trial quickly.*
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> . . . . .
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> *80. Since Excalibur has voluntarily commenced two sets of proceedings, the court should not grant a stay unless Excalibur can show exceptional circumstances to justify this. ...*"

37. The Plaintiffs submit that the arbitral tribunal in Saudi Arabia is the most appropriate forum for the resolution of the present dispute and that this is an exceptional circumstance. If the Plaintiffs had not commenced this action I should have agreed that Saudi Arabia was the appropriate forum. But in my judgment the factors connecting the dispute to Saudi Arabia are not exceptional but generic. A dispute will very often be more closely connected with one jurisdiction rather than another. There are no other circumstances which are exceptional. The Plaintiffs' application for a stay of this action is therefore dismissed. It follows that, once the need to demonstrate exceptional circumstances is taken into account, I am not satisfied that the arbitral tribunal is the appropriate forum for the resolution of the present dispute, at least not in the context of the stay application.

38. I need not go on to consider whether, had I found exceptional circumstances, I should have ordered a stay. I shall nonetheless do so. The Defendants submitted that the present action had certain advantageous features which would or might not be present in an arbitration. Specifically, the likely award of costs to the successful party; discovery of documents, eg documentation of dividend payments; and greater expedition. Moreover, the Defendants have incurred costs in defending the present action which would be wasted if it were stayed.

39. As to expedition, I am unable to say which set of proceedings would likely be resolved more quickly. They are both at an early stage. Although the Defendants alleged fraud when first applying for an injunction they have not done so in their subsequent defence and counterclaim. As to the Defendants' concerns about costs and discovery, these could have been appropriately addressed by ordering a stay on terms. On the other hand, I am not at present able to say whether the arbitration proceedings would bind the Defendants, who contend that they would not.

40. On balance, had I found exceptional circumstances, I should have been minded to order a stay of this action. But as I have found that there were no exceptional circumstances the question does not arise.

Plaintiffs' application to discharge injunction

41. The Defendants claim the right to be restored to the Register as holders of 1.8 million shares (in the case of Faisal) and 900,000 shares (in the case of Asma). The injunction granted on 2nd June 2016 was made pursuant to that claim and was for the purpose of protecting the value of those shares. It did so by preventing the Plaintiffs from stripping the Company of its assets or from diluting the value of its individual shares through allotment, but permitted the Company to carry on its normal business activities. The injunction was made pursuant to section 19(c) of the Supreme Court Act 1905 ("the 1905 Act"), which provides that an injunction may be granted by an interlocutory order of the Court in all cases in which it appears to the

Court to be just or convenient that such order should be made. This power is very broad. The background to the injunction was the Defendants' claim, justifiable on the information (or lack of it) available to them at the time but since abandoned, that they were the victims of a fraud perpetrated by the Plaintiffs.

42. The Defendants indicated at the 2nd June 2016 hearing that once restored to the Register they intended to bring proceedings alleging oppressive or prejudicial conduct pursuant to section 111 of the 1981 Act. The Plaintiffs rightly submit that the Defendants, unless and until they are restored to the Register, cannot properly obtain an injunction in support of a section 111 claim. See Gold Seal Holdings v Paladin Ltd [2014] Bda LR 81 *per* Kawaley CJ at para 25. But that is not relevant because the injunction was not granted in aid of a future section 111 claim but pursuant to the Defendants' existing causes of action for restoration to the Register. The Plaintiffs further submitted, both at the 2nd June 2016 hearing and in prior correspondence, that the Defendants had no proprietary interest in the Company's assets. That is correct, but was not relevant to the grant of an injunction as the injunction was not sought in aid of any claim against those assets.

43. That, as the Plaintiffs submitted, the Defendants had no proprietary interest in the Company's assets or power to interfere with its operations was nothing to the point.

44. The application to discharge the injunction took the form of a rehearing of the application to obtain one. It was immaterial that the rehearing was triggered by an application to discharge rather than a return date. See The Niedersachsen [1983] 1 WLR 1412 EWCA *per* Kerr LJ, giving the judgment of the Court, at 1425H – 1426B. (The case concerned a Mareva injunction, but the principle is in my judgment applicable to ex parte interim injunctions generally.) Thus it was for the Defendants to persuade me that the injunction should be continued rather than for the Plaintiffs to persuade me that it should not.

45. Before granting an injunction, the Court must be satisfied inter alia that the Defendants' claim passes a threshold merits test. They no longer allege fraud, but nonetheless seek an injunction pursuant to their claims for restoration to the Register. Such an injunction would be analogous to a Mareva injunction, ie an injunction to prevent a defendant from dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment – see Fourie v le Roux [2007] 1 WLR 320 HL per Lord Bingham at para 2. In this case an injunction is sought to prevent the Company from dissipating its assets or otherwise acting so as to undermine the value of the shares claimed by the Defendants. Consequently the applicable merits test is "*a good arguable case*" – see The Niedersachsen *per* Kerr LJ at 1417F – rather than "*a serious question to be tried*", which is the test for interlocutory injunctions generally – see American Cyanamid Co v Ethicon Ltd [1975] AC 296 HL *per* Lord Diplock at 407G. Another reason why the Defendants seek an injunction is to ensure that the Company can satisfy their claims for payment of the dividends declared while they were shareholders. Such an injunction would plainly be a Mareva.

46. Taking into account the evidence summarised earlier in this judgment, I am satisfied that both Defendants have a good arguable case on the restoration issue. I am further satisfied that Asma, but not Faisal, has a good arguable case in relation to the payment of dividends while she was a shareholder. I distinguish between the two because Asma, unlike Faisal, did not sign any shareholders resolutions in relation to the dividend payments.

47. Before continuing the injunction, I would need to be satisfied that there was a real risk of dissipation. Ie a real risk that the Plaintiffs would act: (i) in relation to the restoration claims, to undermine the value of the shares in the Company; and (ii) in relation to Asma's claim for dividend payments, to divest the Company of its assets so as to frustrate enforcement of any judgment she might obtain.

48. As the impugned share transfers are no longer alleged to be fraudulent they do not, in my judgment, provide evidence of a risk of dissipation. To establish such risk the Defendants refer to a number of other matters. I need

not go through them all. The most important are in my judgment: (i) the aforesaid allotment and subscription of shares; (ii) the waiver by the Company in April 2015 of the right to demand repayment of two loans amounting to around 13.3 million to a subsidiary company in the AK Bakri Group; and (iii) bonus payments made to the Five Brothers in 2014 in the total sum of about $44 million. The Defendants do not know whether other bonuses have been paid (there is no evidence either way) and express the fear that, absent an injunction, future bonus payments might deplete the Company's assets. Although the minutes dated 4th March 2014 record that both Defendants were present at the meeting which awarded the bonus, the Defendants say that they were not present and had no knowledge of the meeting. The Sheikh has signed the minutes on behalf of them both.

49. The Plaintiffs say that: (i) the allotment took place to make the capitalization of the Company consistent with the size of the Group; and (ii) the waiver of loans was part of the intra-group financing arrangements and not waiving them would have given the same result in terms of the net equity value of the Group. As to (iii), the minutes record that whereas the Chairman, ie the Sheikh, had decided to award the directors a bonus, he had requested that payment of the bonus be deferred to allow the Company to continue to grow and enhance its cash flow position and capabilities. The minutes record that the directors, ie the Five Brothers, agreed to this course. Indeed the allotment of shares in June 2015 may suggest that the Company was in no position to pay out the bonus. I have seen no evidence that it has done so. The reference in the minutes to the award of a bonus being the decision of the Chairman (rather than the Board) may be indicative of where the de facto power in the Company lies.

50. The question of risk of dissipation is finely balanced. I have had the benefit of much fuller evidence than I had on the original ex parte application. In the end the Defendants have not satisfied me that there is a real risk. An injunction is a serious matter. I cannot make one merely from an abundance of caution or where the risk of dissipation is speculative rather than real. The Plaintiffs' application to discharge the injunction is therefore granted. It

will of course be open to the Defendants to make a fresh application for an injunction if there is a material change of circumstances.

51. There are two further matters I should address. First, had I been satisfied that there was a real risk of dissipation, I should not have been satisfied in relation to the restoration claims that, if the Defendants were to succeed at trial, an award of damages would be an adequate remedy. The Defendants seek to be restored as shareholders, not damages for wrongful deprivation of shares. Moreover, I accept their submission that the valuation of the shares would likely be a challenging exercise.

52. Faisal gave affidavit evidence that the Company's financial statements show that it has 17 subsidiaries across numerous jurisdictions globally including Panama, the BVI, St Vincent, Delaware, Pakistan, Liberia and Turkey. They were listed with the note: "*the financial statements of the above entity was (sic) not included in these financial statements*". The value of the Company's shares would depend upon the value of the subsidiaries. In light of the hostility between the parties to the present action I have no confidence that the financial information needed to produce such a valuation would be forthcoming.

53. Second, the Plaintiffs allege that the Defendants were guilty of material non-disclosure on the original ex parte application. The applicant at an ex parte hearing has a duty to make a full and fair disclosure of all the material facts which are known to him or which would have been known to him had he made proper enquiries before making the application. See, eg, Locabail International Finance Limited v Manios [1988] Bda LR 26 CA, *per* da Costa JA at 16 – 19. The Defendants were not in my judgment relieved of this duty by the fact that the Plaintiffs' counsel was in attendance at the ex parte hearing, of which he had only been given two hours' notice. I do not understand them to contend otherwise.

54. Most of the allegations of material non-disclosure relate to disputed facts which I am not in a position to resolve on an interlocutory application. This is notwithstanding the detailed submissions which I have received from both

sets of parties on this point. To address one such allegation, I am satisfied that the Defendants did disclose that the present action is part of a wider pattern of litigation. To address another, the Defendants can fairly be criticised for not disclosing the existence of proceedings which they had brought or were about to bring in Saudi Arabia to appoint a guardian over their father. The first hearing in the guardianship proceedings took place on 5th June 2016. The Defendants must have known about it when their ex parte application in this action was heard just three days earlier on 2nd June 2016. On the other hand, the guardianship proceedings were consistent with the allegation made by the Defendants at the ex parte hearing that the Sheikh was a sick and mentally impaired man who was being manipulated by the Five Brothers.

55. The Plaintiffs also complain that the Defendants did not draw the Court's attention to the Agreement and in particular clause 26. Whereas I admire the chutzpah of this allegation, the Defendants say that they were not aware of the Agreement until they received a copy from their attorneys on 26th June 2016. Even if they were aware that some such Agreement existed, unless they had a copy they would have had no reason to suspect the existence of clause 26, particularly given that the Plaintiffs had chosen to bring the present action.

56. In the circumstances, and as I have discharged the injunction for other reasons, I need say nothing further about material non-disclosure.

Defendants' application for anti-suit injunction

57. This application mirrors the Plaintiffs' stay application. The Defendants seek an anti-suit injunction prohibiting the Plaintiffs from arbitrating the dispute in Saudi Arabia or elsewhere. They rely upon the breadth of the Court's powers under section 19(c) of the 1905 Act. These are analogous to the powers of the High Court of England and Wales to grant an injunction under section 37(1) of the Senior Courts Act 1981 ("the 1981 Act EW"). This provides that the High Court may grant an injunction (whether

interlocutory or final) in all cases in which it appears to the court to be just and convenient to do so.

58. In Excalibur Ventures LLC v Texas Keystone at paras 54 – 60 Gloster J held it was settled law that the Court had jurisdiction under section 37(1) of the 1981 Act EW to stay an arbitration where the seat of the arbitration was in a foreign jurisdiction:

"*54. It is clear that the English courts have jurisdiction under s. 37 of the Senior Courts Act 1981 to grant injunctions restraining arbitrations where the seat of the arbitration is in a foreign jurisdiction, although it is a power that is only exercised in exceptional circumstances and with caution: see, for example, Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG [1981] 2 Ll Rep 446 , 458; Cetelem SA Roust Holdings Ltd [2005] 1 CLC 821 per Clarke LJ at [74]; Weissfisch v Julius [2006] 1 CLC 424 per Lord Phillips CJ at [33(v)]; Elektrim SA v Vivendi Universal (No. 2) [2007] 1 CLC 227 at [51]; Albon v Naza Motor Trading Sdn Bhd (No. 4) [2007] 2 Ll Rep 420; affirmed [2007] 2 CLC 782 ; Claxton Engineering Services v TXM [2011] EWHC 345 (Comm).*

55. An English court will be particularly slow to restrain arbitration proceedings where there is an agreement for the arbitration to have its seat in a foreign jurisdiction and the parties have 'unquestionably agreed' to the foreign arbitration clause: see Weissfisch v Julius (supra) at paragraph 33. That is because, given the priority to be accorded to the parties' choice of arbitration, and the limited nature of the court's powers to intervene under the provisions of the Arbitration Act 1996 ('the Act'), the court should not simply apply the same approach as for the grant of the normal antisuit injunction: see Elektrim SA v Vivendi Universal SA (No. 2) (supra) per Aikens J (as he then was) at paragraph 77. Questions relating to arbitrability or jurisdiction, or to staying the arbitration, may in appropriate circumstances better be left to the foreign courts having supervisory jurisdiction over the arbitration.

56. Nonetheless, in exceptional cases, for example where the continuation of the foreign arbitration proceedings may be oppressive or unconscionable so far as the applicant is concerned, the court may exercise its power under s. 37 to grant such an injunction. Those circumstances include the situation where the very issue is whether or not the parties consented to a foreign arbitration, or where, for example, there is an allegation that the arbitration agreement is a forgery. See also: Dicey, Morris & Collins: The Conflict of Laws (14th edn) 4th Cumulative Supplement at 16–0–88.

57. Moreover, it is clear from the decision of the Supreme Court in Dallah Real Estate and Tourism v Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46; [2010] 2 CLC 793 that, despite the doctrine of ' Kompetenzkompetenz ' or 'competence-competence' (i.e. the ability of an arbitral tribunal to determine its own jurisdiction even where challenged), the English court retains the jurisdiction to determine the issue as to whether there was ever an agreement to arbitrate; see ibid per Lord Mance at paragraphs 26–30; Lord Collins at paragraphs 84, 93–98, 105–106. The question is whether it is appropriate to do so in the particular circumstances of the case.

58. Mr Picken submitted that Lord Collins' remarks in paragraphs 97 and 98 of his judgment in Dallah meant that (absent exceptional circumstances) only if there was an application under s. 9 for a stay could the court determine whether there was an agreement to arbitrate; otherwise, the party which challenges the jurisdiction of the arbitral panel has to do so in the courts of the arbitral seat or resist enforcement in the court before which the award is brought for enforcement. I do not consider that Lord Collins intended so to constrain the powers of the court. There is no reason why the power to grant such an injunction should not be available under s. 37 in appropriate circumstances, even if s. 9 of the Act is not engaged.

59. In the present case, Excalibur has clearly submitted to the jurisdiction of the English court by starting the substantive Commercial Court proceedings and seeking extensive injunctive relief. Excalibur itself has emphasised that '... the circumstances of this case are substantially connected to England and Wales' (see Mr Panayides' first witness statement, paragraph 11.2). Excalibur is therefore clearly amenable to the English court's personal and territorial jurisdiction.

60. In those circumstances, I am satisfied that I have jurisdiction to grant an antisuit injunction should it be appropriate to do so."

59. In the present case there is an agreement for an arbitration with its seat in a foreign jurisdiction, Saudi Arabia, although there is a dispute between the parties as to whether the Defendants are bound by the Agreement and hence whether they have submitted to the jurisdiction of the arbitral tribunal. If the Defendants have submitted to its jurisdiction, there is a further dispute as to whether the Plaintiffs, by reason of commencing the present action, have waived their right to arbitrate. On the other hand, it is not disputed that the Plaintiffs have, by reason of having brought this action, submitted to the

jurisdiction of this Court. The Company would be subject to its jurisdiction in any event as it is registered in Bermuda. These are all points of similarity with the facts in Excalibur.

60. However the circumstances of the case have very little connection with Bermuda beyond the fact that the Company is registered here but have a strong connection with the seat of the arbitration. That is a point of dissimilarity with the facts in Excalibur.

61. The Defendants submit that the continuation of foreign arbitral proceedings would be oppressive given the existence of the present action. They submit that they should not be subjected to the trouble and expense of two sets of proceedings. I have already summarised their reasons for preferring to resolve the dispute in Bermuda.

62. The Plaintiffs respond that article 8(2) of the Model Law expressly contemplates that arbitral proceedings can run in parallel with court proceedings and that Saudi Arabia is the more appropriate forum for the resolution of the dispute. They further submit that if the Defendants consented to a stay of the Bermuda proceedings, no doubt on terms which addressed their procedural concerns about the arbitration, then the dispute could conveniently be addressed in just the one – arbitral – forum.

63. In my judgment the circumstances of the Defendants' anti-suit application are exceptional in that the Plaintiffs chose to commence the present action in Bermuda. The Plaintiffs knew or ought to have known of the factors which they now say make the Saudi arbitral tribunal the convenient forum when they did so. It is reasonable for the Defendants to hold them to that choice. It would be oppressive to subject the Defendants to arbitral proceedings relating to the same dispute in Saudi Arabia as well. The application for an anti-suit injunction is therefore allowed.

64. The Plaintiffs have indicated that if their application for a stay is dismissed they may seek leave to discontinue the action and then raise the arbitration clause in the Agreement as a defence to the Defendants' counterclaim. If the

Plaintiffs plead the arbitration clause then its effect is an issue which this Court will have to resolve. By reason of article 16 of the Model Law an arbitral tribunal is competent to rule on its jurisdiction, but its competence is not exclusive.

Summary

65. The issues before the Court are resolved thus:

(1) The Plaintiffs' application that the action be stayed is dismissed.

(2) The Plaintiffs' application to discharge the injunction is granted.

(3) The Defendants' application for an anti-suit injunction is granted.

66. I shall hear the parties as to costs.

Dated this 26th day of May 2017

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Hellman J