In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2021: Nos. 107-109, 111-121, 123-125

IN THE MATTER OF JARDINE STRATEGIC HOLDINGS LIMITED

AND IN THE MATTER OF THE AMALGAMATION AGREEMENT BETWEEN JMH INVESTMENTS LIMITED AND JMH BERMUDA LIMITED AND JARDINE STRATEGIC HOLDINGS LIMITED

AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981

BETWEEN:

OASIS INVESTMENTS II MASTER FUND LTD.
and others

Plaintiffs

- and -

(1) JARDINE STRATEGIC HOLDINGS LIMITED
(2) JARDINE STRATEGIC LIMITED

Defendants

RULING

Date of Hearing: **6 March 2024**
Date of Ruling: **31 July 2024**

Appearances: **Jonathan Adkin KC (Instructed by Carey Olsen Bermuda Limited, Trott & Duncan Limited and Kennedys Chudleigh Limited), Matthew Watson, Carey Olsen Bermuda Limited, for the Plaintiffs in each of Nos. 107 and 108 of 2021**

Delroy Duncan KC, Ryan Hawthorne, Trott & Duncan Limited, for the Plaintiffs in No. 109 of 2021

Laura Williamson, Kennedys Chudleigh Limited for the Plaintiffs in Nos. 111-121 and 123 – 125 of 2021

Martin Moore KC (Instructed by Appleby (Bermuda) Limited), John Wasty, Appleby (Bermuda) Limited, for the Defendants

RULING of Mussenden CJ

Introduction

1. This matter appears before me on the Summons by the Plaintiffs in Nos. 107-109, 111-121 and 123-125 of 2021 (the "**Dissenters**") dated 6 November 2023 in which they ask the Court to resolve what was decided and not decided pursuant to the Order of Chief Justice Hargun ("**Hargun CJ**") (as he then was) dated 12 November 2021 (the "**Directions Order**") made in these proceedings and his related judgment dated 12 November 2021 (the "**Directions Judgment**") (the "**Application**").

2. The Application sought a declaration, for the avoidance of doubt, that the Directions Judgment and the Directions Order:
   a. Did not address the question of discovery from any third parties (including Evercore Inc. ("**Evercore**"));
   b. Did not decide that documents held by Evercore or Evercore Partners International LLP ("**Evercore UK**") were not relevant to the determination of the fair value of the Plaintiffs' shares in Jardine Strategic Holdings Limited (the "**Company**"); and
   c. Did not decide that discovery of documents held by Evercore or Evercore UK would be disproportionate for the purposes of the determination of the fair values of the Plaintiffs' shares in the company.

3. The Dissenters had asked Hargun CJ to grant the declaration on the papers. However, at the directions hearing for this Application on 16 November 2023, Hargun CJ refused to do

so, and directed that the matter be set down for a hearing. Hargun CJ retired from office in December 2023.

Background

4. These proceedings are 18 separate actions commenced by the Dissenters by way of Originating Summonses in which they seek appraisal of the fair value of their shares in the Company pursuant to section 106(6) of the Companies Act 1981. The central issue in the proceedings is the fair value of the Dissenters' shares in the Company which were acquired through an amalgamation concluded on 14 April 2021 between the Company and JMH Bermuda Limited (the "**Amalgamation**"). The two amalgamating companies continued as Jardine Strategic Limited.

5. Prior to the Amalgamation, Jardine Matheson Holdings Limited ("**Jardine Matheson**") held, indirectly, approximately 84.9% of the shares in the Company. Jardine Matheson is, and the Company was prior to the Amalgamation, a company incorporated in Bermuda and listed on the Main Market of the London Stock Exchange, with secondary listings in Singapore and Bermuda. The Jardine Matheson Group of companies (the "**Group**") is comprised of a broad portfolio of businesses operating principally in China and Southeast Asia. Across the Group, over 400,000 employees work in a wide range of businesses.

6. On 8 March 2021, the Company and Jardine Matheson announced plans to simplify the structure of the Group.

7. The Company's board delegated responsibility for considering the Amalgamation to a committee of directors referred to as the "**Transaction Committee**". Evercore UK advised the Transaction Committee as to the financial terms of the Amalgamation. Evercore UK is a subsidiary of Evercore. At the general meeting of the Company held on 12 April 2021, a resolution approving the Amalgamation was passed. The Amalgamation became effective on 14 April 2021.

8. The Dissenters contend that they have not received fair value for those shares and the Company refutes this. In short, Jardine Matheson paid approximately US$5.5 billion to acquire the minority shareholdings (including those of the Dissenters) who were paid US$33 per share. The Dissenters maintain that three days after the Amalgamation was announced, the Company reported in its Preliminary Results Announcement that the net asset value per share of the Company was US$58.22 per share as at 31 December 2020, (76% higher than the price it paid the minority shareholders). They claim that had the Company paid out the minority shareholders at US$58.22 then it would have had to pay US$4.2 billion more than the $5.5 billion that it did pay out, for a total of US$9.7 billion.

The Issue before the Court in the Application

9. The issue is whether the Directions Judgment and the Directions Order addressed the question of third-party discovery from Evercore and Evercore UK, and in particular whether Hargun CJ decided that such documents were irrelevant to the issues in the action or that their disclosure would be disproportionate.

The Dissenters' Submissions

10. The Dissenters submit that the Directions Judgment and the Directions Order were concerned only with the disclosure to be given by the Company. They contend that in the Directions Judgment, Hargun CJ rejected the Dissenters' argument that the Company should give general discovery, and held that the Company should be required to give initial disclosure of Evercore UK's valuation opinion and the documents provided to Evercore UK by the Company and that the parties' experts should thereafter be empowered to make requests to the Company for relevant documents which they reasonably required for preparation of their reports.

11. The Dissenters submit that Hargun CJ did not consider, and made no finding in his Directions Judgment or Directions Order on, whether Evercore should give discovery (it not being an issue before him) and made no finding on whether documents held by

Evercore were relevant to the fair value of the Dissenters' shares or whether disclosure of them by Evercore would be proportionate. They submit that it is clear that the Directions Judgment and the Directions Order did not:

a. Address the question of discovery from any third parties (including Evercore UK or Evercore);
b. Decide that documents held by such parties (i.e. Evercore UK or Evercore) were not relevant to the determination of fair value of the Dissenters' shares in the Company; or
c. Decide that discovery of documents held by Evercore UK or Evercore would be disproportionate for the purposes of the determination of the fair value of the Dissenters' shares in the Company.

12. The Dissenters submitted that they seek declarations to this effect.

13. The Dissenters submitted that the reason why it had become necessary to seek such declarations was because of certain representations made to the US Court on behalf of the Company. There, commencing on 25 May 2022 certain Dissenters made applications for disclosure from Evercore of documents which Evercore held but which the Company did not, before the District Court of Delaware pursuant to 28 U.S.C. 1782 ("**Section 1782**") (the "**1782 Application**"). The Dissenters submitted that the Company successfully intervened in that application to resist such disclosure being given by Evercore. Further, in doing so, the Company made a number of representations as to what Hargun CJ had decided in the Directions Judgment and Directions Order which, the Dissenters believe, were simply wrong. That 1782 Application was dismissed on 26 October 2023.

14. In light of the position taken by the Company before the Delaware Court, the Dissenters therefore issued the present application pursuant to the liberty to apply provision in the Directions Order to put the position as to what was and was not decided by the Directions Judgment and Directions Order beyond doubt.

15. The Dissenters submitted that the Company has taken an obstructive approach to the application. They claim that the Company objected to the Dissenters' efforts to have

Hargun CJ resolve the issue before he retired. They claim that after some correspondence between the parties, the Company accepted in a letter dated 5 January 2024 (the "**Company Letter**") that the Judgment was clear in the sense that although the issues were not expressly addressed by Hargun CJ, the Directions Judgment and the Directions Order had the effect of precluding disclosure from Evercore, without further explanation. On that basis, the Dissenters argue that the declarations should be made.

What was decided (and not decided) by the Directions Judgment and the Directions Order

16. The Dissenters submitted that Hargun CJ held in the Directions Judgment the following:

> *"79. … that large parts of Appendix 2, some of which are referred to at paragraphs 41-57 above, are overly broad, unfocused and will produce a massive amount of documentation (possibly as much as 35 million pages in response to the requests made in paragraphs 5.14 to 5.19 of Appendix 2) with little or no relevance to the valuation exercise required to be carried out for the purposes of section 106(6) of the Act. … that a large number of the requests in Appendix 2 are also disproportionate to the reasonable requirements of arriving at fair valuation of the shares in the Company.*
>
> *81. The appropriate approach, in the exceptional circumstances of this case, is that as suggested by the Company. Within 14 days of the Order (as provided for by paragraph 8 of the Company's proposed order), the Company shall upload to the Data Room the documents supplied to Evercore for its valuation opinion dated 7 March 2021 together with the Valuation Opinion.*
>
> *87. The valuation experts shall be entitled to make written requests of the Company and/or the Plaintiffs (in each case through their respective legal representatives) for (a) the provision of relevant documents and/or (b) the provision of relevant information, provided always that such documents or information are requested for the purpose of the preparation of their reports.*
>
> *91. Given the process of discovery outlined at paragraphs 81 to 87 above the Court is satisfied that general discovery under Order 24 rule 3(1) is not necessary in the exceptional circumstances of this case and in any event general discovery is not necessary at this stage. The issue can be revisited if there is a material change in circumstances."*

17. The Dissenters submitted that the Directions Order relevantly provided as follows:

> *"7. By 4pm on 26 November 2021, the Company shall upload to the Data Room the documents supplied to Evercore Partners LLP for its valuation opinion dated 7 March 2021 (the Valuation Opinion), together with the Valuation Opinion.*

7.1 The Valuation Experts shall be entitled to make written requests of the Company and/or the Plaintiffs (in each case through their respective legal representatives) for (a) the provision of relevant documents and/or (b) the provision of relevant information, provided always that such documents or information are requested for the purpose of the preparation of their reports (Information Requests).

28. Liberty for any party to apply for further directions in respect of the matters addressed in this order and any other matters, prior to the CMC."

18. The Dissenters submit that as a result of the Directions Judgment and Directions Order, the scheme devised by Hargun CJ was an expert-led process whereby it was up to the experts to make requests of the Company and determine what they wished to see. They explained that the Dissenters' expert (Mr. Mark Bezant) had made three information requests which included requests for communications and documents concerning the work undertaken by Evercore UK, insofar as the material was in the possession, custody or power of the Company[1]. The Company did hold some documents and provided some disclosure in reply to the requests. However the disclosure did not include: (a) communications between Evercore UK and third parties which were not also shared with the Company or the Transaction Committee; or (b) Evercore UK's internal work product. The Dissenters stated that the Company took the position that such documents were outside its possession, custody or power but at that stage it did not assert that disclosure of such documents (even from the Company itself) had been deemed irrelevant or disproportionate by Hargun CJ in his Directions Judgment and Directions Order.

<u>The representations made by the Company to the Delaware Court</u>

19. The Dissenters submitted that they sought to obtain documents from Evercore directly pursuant to the 1782 Application in Delaware. They referred to two declarations dated 27 June 2022 and 5 August 2022 by the Company's attorney John Wasty where he testified in affidavit evidence as follows:

<u>27 June 2022 Declaration</u>

"39. … The Directions Judgment and the corresponding Directions Order clearly and unequivocally restrict the scope of discovery in these proceedings to relevant

[1] The Dissenters' Expert has made three rounds of requests for documents and information: The Company quantifies these as First round – 68 requests; Second round – 200 requests; Third round – 140 requests.

documents and information requested by the parties' valuation experts for the purpose of the preparation of their reports on the fair value of the Company's shares.

42. Accordingly, the existing discovery restrictions in the Appraisal Proceedings remain in effect and the Petitioners' 1782 Application can properly be viewed as an attempt to circumvent the restrictions on directions ordered by the Bermuda Supreme Court in the Directions Judgment and the Directions Order.

44. The Company has already responded to the Plaintiffs' disclosure requests for all of the documents sought in the Evercore Subpoena that fall within the scope of the Directions Order. To the extent that the materials requested in the Evercore Subpoena have not already been produced, it is because they fall outside the scope of the Directions Order and thus have been deemed irrelevant by Chief Justice Hargun. According, the proposed Section 1782 Subpoena is, to the extent it seeks materials already produced, an unnecessary duplication of the existing discovery processes already taking place in the Appraisal Proceedings, and to the extent it seeks additional materials, an attempt to circumvent the Directions Order.

47. There is no need whatsoever to speculate as to what the Bermuda Court would do in these Appraisal Proceedings – there is an express and unequivocal Directions Order in place which squarely rejects the overly broad discovery sought by the Petitioners in their 1782 Application.

48. The Bermuda Supreme Court has clearly defined the universe of materials that comprise all facts and matters that may have a bearing on the determination of fair value and they do not include the discovery Petitioners seek here that goes beyond the materials they have already received.

<u>5 August 2022 Declaration</u>

*12. Mr. Chudleigh is correct to note in paragraph 19 of the Second Chudleigh Declaration that the disclosure of the documents provided to Evercore UK (the "**Evercore Documents**") for its valuation opinion dated 7 March 2021 (the "**Valuation Opinion**") was acknowledged to be a "first step" in the disclosure process. However, as the Directions Judgment clearly shows, the provision of the Evercore Documents was expressly contemplated as being the "first step" antecedent to the parties' experts issuing requests for documents and/or information under paragraph 7.1 of the Directions Order and/or the Dissenting Shareholders making requests under paragraph 8 of the Directions Order. It is manifestly not the case that the Chief Justice contemplated or condoned that the "first step" should be antecedent to an unmarshalled free-for-all. Paragraph 87 of the Directions Judgment reads:*

"The Court of course accepts that the expert valuers may require and request further categories of documents and information ***<u>from the Company</u>*** *after they have reviewed the Evercore material the publicly available documents concerning the Company and the Group.""*

20. The Dissenters submitted that the Delaware Court, in reliance on the Company's and Evercore's evidence, held that the Directions Judgment and the Directions Order foreclosed the discovery sought in the 1782 Application on relevance and proportionality grounds. However, the Dissenters take the view that what the Delaware Court was told as to what Hargun CJ decided was incorrect. In particular:
    a. At no stage did Hargun CJ ever consider the question of third-party discovery, whether from Evercore or anyone else, as the issue did not arise and was not discussed before Hargun CJ, the debate at the directions hearing being limited to the question of the discovery which the Company had to give of documents within its possession, custody and power. Thus, the Dissenters argue that Mr. Wasty's evidence was not correct that discovery from Evercore would be a circumvention of the Directions Judgment and Directions Order, that Hargun CJ had limited the scope of third-party discovery or had defined the universe of materials that comprise all the facts that have a bearing on fair value. They make the point that the Company has filed no evidence explaining how the Company felt able to submit the evidence that it did to the Delaware Court.
    b. Hargun CJ did not decide that documents held by Evercore/Evercore UK concerning its internal work product when producing its valuation opinion or its communications with third parties (the "**Evercore Material**") were not relevant. If he had, the Company would have relied on it as a basis to object to Mr. Bezant's requests, but did not do so. The Dissenters noted that the Company says that the Evercore Material has never been in its possession, custody or power. In essence, the Dissenters submitted that upon review of paragraphs 41 – 57 of the Directions Judgment, the documents that Hargun CJ had in mind when questioning relevance were documents held by the approximately 1,150 other companies within the Group. Thus, the notion that documents held by Evercore/Evercore UK which were

in the Company's possession, custody or power had somehow been found to be irrelevant by Hargun CJ was incorrect.

21. The Dissenters submitted that at no stage in the Directions Judgment was Hargun CJ purporting to make any general or conclusory findings on relevance of documents, let alone those held by third parties. They again make the point that the conspicuous absence of any explanation in this application about how the statement came to be made in the Delaware Court was telling. Further, the Dissenters submitted that the proportionality concerns that Hargun CJ addressed in the Directions Judgment had nothing to do with the discovery of Evercore/Evercore UK-related material. They argued that Hargun CJ, in paragraphs 79 – 81 was concerned about the prospect of discovery having to be given of documents held not only by the Company, but also of documents held by the many other companies in the Group. Additionally, the Dissenters submitted that Hargun CJ's rulings did not have the effect of foreclosing third-party discovery from Evercore/Evercore UK or deciding the relevance or proportionality of that discovery, as he made no such findings about those matters, as the questions were never before him.

22. The Dissenters submitted that there is no real dispute between them and the Company about what the Directions Judgment and Directions Order did not address or decide, but as the Company have refused to consent to a declaration, the Court is being asked to make such a declaration pursuant to the liberty to apply provision in the Directions Order. They relied on the following authorities:
    a. *Halsbury's Laws of England*, Volume 12A (2020), paragraph 1567, which explains that liberty to apply provisions enable the Court to "work out" the rights declared under an Order:

       "The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared."

    b. The White Book 2023 (at paragraph 3.1.17.3) which explains that:

       "In the context of interim orders, judges often include "liberty to apply" in the order. As was recognized in Tibbles[2], this is an express recognition of the possible need to revisit an order in an ongoing situation. In such cases the court

[2] *Tibbles v SIG plc (t/a Asphaltic Roofing Supplies)* [2012] EWCA Civ 518

> *making the order does not lose seisin of the matter: the inclusion of a liberty to apply indicates that it is foreseen that further applications are likely in the course of implementing the decision."*

23. Thus, the Dissenters submitted that it would be appropriate for the Court to make the declarations sought as this was precisely the kind of situation where the liberty to apply provision was appropriate in assisting the parties to "work out" what the Court decided – and did not decide – in the Directions Judgment and Directions Order.

24. The Dissenters anticipated that the Company would object to the application on three bases:
    a. That at no time prior to this application, did the Dissenters raise an issue about requiring a clarification of the Directions Order concerning Evercore. The Dissenters submitted that such an argument is irrelevant and misses the point as it is not the Dissenters' case that there is uncertainty around what the Directions Judgment and Directions Order did and did not decide that needs to be clarified, as both are clear.
    b. That the declarations will serve no useful purpose, because even if the declarations are granted, any new Section 1782 application made in Delaware will fail. The Dissenters reject this ground on the basis that there is no need for the Court to consider whether a new Section 1782 Application is likely to succeed. In any event, the declarations will serve a useful purpose in that it will resolve any doubt about what Hargun CJ did and did not decide.
    c. That this application invites the Court, in effect, to determine or correct the determination of a question of Delaware law by a Delaware Court and thus it is not an appropriate use of the Court's jurisdiction to grant declaratory relief. However, the Dissenters contend that they are not asking the Court to make any comment on any aspect of Delaware law and that they would be content for the Court to make clear that it is not expressing a view on any aspect of Delaware law.

The Company's Submissions

25. The Company opposes the application for the three declarations, submitting that it is one of the more extraordinary applications with which a Bermuda Court has been asked to address, which has no conceivable legal foundation and no factual merit, and thus it should be dismissed. The Company also submitted that, although the Dissenters appear to approach the application on the basis that it is for the Company to show why the Dissenters should not have their declarations, it is for the Dissenters to persuade the Court to exercise its power to grant declaratory relief. They noted that the Dissenters seek such relief in order to allow them to return to the Delaware Court, armed with the declarations sought, in order to persuade the Delaware Court to reconsider a renewed application there.

26. The Company submitted that the application is not a legitimate use of the declaratory relief jurisdiction for several reasons:
    a. A judgment of the Court speaks for itself. It is for a foreign court to determine what is the meaning or effect of a Bermuda judgment. Further, it was not for a party to ask the Bermuda Court at some later stage for an authoritative pronouncement as to what the earlier judgment may or may not have meant.
    b. An attempt to influence the courts of another sovereign state by obtaining an "*unsolicited advisory ruling*" from the Bermuda Court is "*both presumptuous and condescending*", relying on *Howden North America Inc v Ace Group Limited* [2010] EWCA Civ 1624 at 37. The Company submitted that the current application was worse because the Delaware Court has already determined the issue, thus what the Dissenters were seeking was not an "*advisory ruling*" but a determination that the Delaware Court was "*mistaken*".
    c. This application was not an appropriate case to grant declaratory relief as there was no dispute between the Dissenters and the Company as to their respective legal rights and obligations in Bermuda under the Directions Order. Further, any dispute between the Dissenters and a third party not before this Court, i.e. Evercore/Evercore UK, had already been resolved by the Delaware Court, thus the

Dissenters were asking this Court to resurrect already determined issues; not to determine unresolved ones.

27. The Company submitted that if the Dissenters were of the view that the Delaware Court fell into error, then their remedy was to appeal the decision, which they did not do, thus it was not for them to seek declaratory relief in this jurisdiction with a view to persuading the Delaware Court to change its mind.

28. The Company explained the jurisdiction of the Delaware Court in respect of the 1782 Application noting that evidence was filed by the Dissenters (three declarations of Mark Chudleigh), Evercore (first declaration of John Wasty) and the Company (second declaration of John Wasty). There were extensive submissions and the Court had before it, and very clearly had read carefully, the Directions Judgment, the Directions Order and the draft order which set out the discovery sought unsuccessfully by the Dissenters before Hargun CJ.

29. The Company submitted that the Dissenters' submission that the Delaware Court was misled was wholly without merit. They argued that the Judge in her judgment was aware that Hargun CJ did not consider the question of third-party discovery and did not expressly decide that the internal work product of Evercore UK was per se irrelevant. Also, she was well aware, per the second declaration of John Wasty, that the Company accepted that Hargun CJ "*did not address any particular comment to "documents communicated to or otherwise in the hands of [Evercore UK]*"" because the question resolved at the Directions hearing was "*as to the general approach to disclosure in the Appraisal Proceedings*". The Company submitted that the Judge gave her judgment (in the form of a "Report and Recommendation") in which she referred to the extensive submissions and evidence before her, the Directions Judgment and the Directions Order. The Company noted that there has been no suggestion that the Judge misunderstood the detailed and clear arguments presented to her, opining that the Dissenters simply do not like the conclusion she reached.

30. The Company submitted that the Dissenters made no secret as to the purpose of this application, namely that they consider that the Delaware Court got it wrong, and they ask this Court to put the Delaware Court right. However, the Company rejected such an approach, arguing that it is not for this Court to decide whether the Delaware Court was right or wrong, or to decide whether it misunderstood the Directions Judgment. To that point, the Company invites the Court to express no view on the correctness of the judgment of the Delaware Court and to simply summarily dismiss the Application.

Dissenters' Reply Submissions

31. The Dissenters submitted reply submission which I have considered fully.

Analysis

32. In my view, the Application should be dismissed for several reasons.

The Directions Judgment speaks for itself

33. First, in my view, the Directions Judgment is conclusive and speaks for itself. I rely on *Phipson on Evidence* (20th Ed) at 42-25 where it is stated that "… *an order of the court is conclusive evidence of that which has been decided and directed by the court.*" Also, I rely on the principle set out in *Zuckerman on Civil Procedure: Principles of Practice (4th Ed)* at 23.8 where it is stated that "*By their very nature, judgments are conclusive as to their legal effect. Once a judgment has been entered, it must be acknowledged by the whole world as such.*"

34. In *GFH Capital Ltd v Haigh and others* [2018] EWHC 1187 Bryan J said at [48] "*There are essentially two parts to the application. The first is, as I have already said, an application about what the effect of Sir Andrew Smith's judgment is. Well, Sir Andrew Smith's judgment can be read and it says what it says, and it says that clearly. So the first part of the application, it seems to me, is unnecessary and it is not appropriate for me to*

make any declaration as to what is said in the judgment of Sir Andrew Smith. That judgment speaks for itself."

35. On the basis of the above-mentioned authorities, I am fortified that the Directions Judgment speaks for itself. I agree with the submissions made by the Company that if an issue arises, whether in Delaware, Bermuda or elsewhere, then it is for the Court in that jurisdiction to interpret the Directions Judgment. I am satisfied that in the 1782 Application, there were full submissions heard before the Judge, who after consideration of such submissions and evidence gave judgment. It is clear that the Judge considered the contents of the Directions Judgment and the Directions Order and she made various pronouncements about the same. Adapting the principle from *GFH Capital Ltd*, 'Well, Hargun CJ's judgment can be read and it says what it says, and it says that clearly.'

36. I have considered the case of *B v C* [2016] EWHC 1462 where Keehan J issued a supplemental judgment dated 20 June 2016 to be read with his judgment of 18 March 2016 and his order dated 20 April 2016. That case involved a father and a mother and issues of custody of a child in Israel once one or both parents had moved to live in Israel. The mother had applied to the English Court for the supplementary judgment and the father objected to such a supplemental judgment. In any event, Keehan J considered that it would be helpful to provide a short judgment clarifying his earlier judgment and order, noting that he recognized that the Israeli Courts were seized of the matter and thus he did not seek to trespass on their jurisdiction over the matter. The Dissenters submit that this case is on point with the Application and thus the declarations should be made to prevent any possibility of the Company inaccurately representing the position (again) in the future (as the Dissenters submitted it had). The Company rejects this case for several reasons: (a) it was a family case where the interests of the child were the focus of the court and as such there was utility; (b) it is an unreported case with no commentary; (c) there is no context for the earlier judgment or what the proceedings were in Israel; (d) the case was between the same parties, mother and father, in England and Israel, unlike the present Application; (e) it was not clear from the judgment if the Israeli Court had decided anything or were in the process of deciding something whereas in the present Application the Delaware Court had already made a decision; (f) there was no professional representation advancing legal

arguments against the proposition that the judge should make the declaration; and (g) none of the authorities cautioning against overreach were cited. In my view, I am not satisfied to rely on this case for all the reasons stated by the Company as set out in this paragraph. Further, there may be significant differences in a case involving the custody of a child and the case before this Court.

Unsolicited Advisory Ruling

37. Second, in respect of what was contained in the Wasty declarations, in my view, Mr. Wasty took a view of the Directions Judgment and gave it his interpretation. He was entitled to do so just as all other parties were entitled to explain to the Delaware Court what was their understanding of the Directions Judgment and Directions Order. Although the Dissenters complain that what Mr. Wasty said was incorrect, the crucial point to me is that the Judge in the Delaware Court was able to scrutinize the Directions Judgment and Directions Order herself and come to her own conclusions. Thus, it seems that it was always open to her to accept or reject Mr. Wasty's evidence, or to that point, accept or reject the evidence of anyone else. This reasoning leads me to the conclusion that I do not find it necessary to examine what Mr. Wasty said in his declarations in the 1782 Application to determine whether it was correct or otherwise. It follows then why should this Court (or Hargun CJ before he retired) be required to - or need to – make declarations as to what the Directions Judgment said. In the Dissenters' Reply Submissions in this Application, they submitted that the Court should make the declaration and what (if anything) the Delaware Court may or may not make of such a declaration will be a matter entirely for the Delaware Court. It seems to me that this approach is entirely without merit, as the Delaware Court itself has already had the benefit of submissions and judicial scrutiny of the Directions Judgment and Directions Order.

38. Third, in my view, making an application for the purpose proposed by the Dissenters, namely to renew their 1782 Application in Delaware, runs afoul of the principles about a court in one jurisdiction giving its unsolicited advice to a court in another jurisdiction. In *Howden North America Inc* Aikens LJ, stated at [37] "… *In these circumstances, for my part, I would regard the idea that the English court should give its unsolicited judgment as*

'advice' to a federal Judge in the US District Court for the Western District of Pennsylvania on elementary principles of English law, in the expectation or even hope that such a judgment would be 'at the very least ... of considerable assistance' as both presumptuous and condescending. To use the phrase of Leggatt LJ in Barclays Bank Ltd v Homan [1992] BCC 757 at 778, it smacks of 'unacceptable hubris'."

39. In the White Book (1999) at 15/16/3, citing *Guaranty Trust of New York v. Hannay* [1915] 2 K.B. 575, it states *"... nor will a declaration be made merely to enable a plaintiff to utilize it in a foreign action.*" In *Ekinoil Hellenic Petroleum Co SA v Biotechnika SRO* [2020] EWHC 3592 at [9] it is stated "*The authorities make clear that caution is required where the true purpose of the relief sought is to influence the courts of another sovereign state by obtaining what, in effect, is an unsolicited advisory ruling from the English courts, whilst also making it clear that these issues impact on the discretion whether to grant declarations rather than the jurisdiction to do so.*" The passage went on to cite Aikens LJ in *Howden North America Inc* as set out above.

40. I am satisfied that the Dissenters wish to use the declarations in a renewed 1782 Application to influence the Delaware Court. However, in light of the aforementioned authorities, I will heed to caution by declining to exercise the Court's discretion to make declarations as I am of the view that it will be presumptuous and condescending for this Court to make declarations for the purpose of persuading the Delaware Court one way or the other. I am further resolved to not make the declarations because of the circumstances of this Application, namely that: (a) the declarations are sought as to the meaning of the Directions Judgment which, as stated above, speaks for itself; (b) the declarations are sought after the Delaware Court has ruled against the Dissenters, because the Delaware Court ruled against the Dissenters and they seek to persuade it to revisit its decision; and (c) the Dissenters seek declarations against the Company in order to influence its proceedings in Delaware against a third party, namely Evercore.

<u>No Declaratory Relief</u>

41. Fourth, I have considered the Court's power to grant declaratory relief. The principles derived from earlier cases were set out in *Rolls-Royce v Unite the Union* [2009] EWCA

Civ 387 at [120]. A summary was approved by this Court in *Edwards v Minister of Finance and Others* [2013] Bda LR 24 at [1010] and the principles were cited by me in *Soares and Hamilton Medical Centre Ltd v Bermuda Health Council* [2021] Bda LR 28 at [pp 15 -17] as follows:

> *"(1) The power of the court to grant declaratory relief is discretionary.*
> *(2) There must in general be a real and present dispute between the parties before the court as to the existence or extent of a legal rights between them. However, the claimant does not need to have a present cause of action against the defendant.*
> *(3) Each party must in general be affected by the court's determination of the issues concerning the legal right in question.*
> *(4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration provided that it is directly affected by the issue.*
> *(5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish even on "private law" cases. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.*
> *(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected either before it will have the arguments put before the court.*
> *(7) In all cases assuming that other tests are satisfied the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."*

42. In respect of the principles, in my view, there is no real and present dispute between the parties in this matter as to the Directions Judgment, still less a dispute as to the existence or extent of a legal right between them. I agree with the Company that: (a) there is or was a dispute in the Delaware Court between the Dissenters and Evercore, which is not before this Court; (b) that dispute concerns the exercise of a discretion of the Delaware Court under a US federal statute; and (c) that dispute has already been resolved by the Delaware Court, although it seems that it can be renewed. Further, in my view, if there was a real and present issue, then making declarations is not the most effective way of resolving the issue. Another option to resolve the matter is for it to be determined in and by the Delaware Court.

<u>Liberty to Apply</u>

43. Fifth, I have given consideration to the submissions and approach of the Dissenters which is to say that: (a) the Company should consent to the declarations as there is no real dispute

between them about what the Directions Judgment and Directions Order did or did not address; and (b) since they will not consent, then the Court is being asked to make such declarations under the liberty to apply provisions. In my view this approach is weak and without merit. The liberty to apply provision enables the parties to come back before the Court if there is a difficulty or ambiguity in working out the order or if there is a material change of circumstances. Thus, I reject the submissions that the Dissenters can avail themselves of the liberty to apply provision in this Application as, per *Halsbury's*, I find that simply there is no need to "work out" the rights declared under the Directions Judgment or the Directions Order and in respect of the purpose of the Application. In my view, there is no difficulty regarding the rights and obligations of the Company and the Dissenters arising out of the Directions Order.

44. Further, the Directions Order set out that there was "*Liberty for any party to apply for further directions in respect of the matters addressed in this Order and any other matters, prior to the CMC."* The Dissenters are not applying for further directions, but rather they are applying for declaratory relief. So too, in my view, there is no material change in circumstances in the case. In *Tibbles* the Court stated as follows:

> *"40. The revisiting of orders is commonplace where the judge includes a "Liberty to apply" in his order. That is no doubt an express recognition of the possible need to revisit an order in an ongoing situation: but the question may be raised whether it is indispensable.*
>
> *41. Thus it may well be that there is room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favor giving proper consideration to on all the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation), but would be giving consideration to something for the first time. On that basis, power within the rule would not be invoked in order to give a party a second bite of cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court."*

45. In light of the above, I find that the Dissenters are not able to avail themselves of the liberty to apply provision in order to seek declaratory relief in this Application.

Conclusion

46. In light of the reasons set out above, I dismiss the Plaintiffs'/Dissenters' application for declaratory relief.

47. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Company against the Plaintiffs/Dissenters on a standard basis, to be taxed by the Registrar if not agreed.

Dated 31 July 2024

HON. LARRY MUSSENDEN
CHIEF JUSTICE