IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NO. BVIHCV 0341 of 2008

IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004

And

IN THE MATTER OF THE INSOLVENCY ACT, 2003

And

IN THE MATTER OF LEADING MANUFACTURERS LIMITED

BETWEEN:

JANET CHIANG

Claimant/Respondent

And

(1) VERSA DIE CAST INC.

First Defendant/Applicant

(2) LEADING MANUFACTURERS LIMITED

Second Defendant

VERSA DIE CAST INC.

Counterclaimant

And

(1) JANET CHIANG
(2) CLEMENT CHIANG
(3) LEADING MANUFACTURERS LIMITED

Defendants to counterclaim

Appearances: Daniel Saoul of Conyers Dill & Pearman for the First Defendant/Applicant
Paul B Dennis and Willa Tavernier of O'Neal Webster for the Claimant/Respondent

JUDGMENT IN CHAMBERS

[2009; 1 July; 10 July]

[Injunction continued inter partes; application to vary; whether material change in circumstances; whether jurisdiction to vary]

[1] **Bannister J [ag]:** This is an application made by the first Defendant in these proceedings, Versa Die Cast Inc. ('Versa'), to vary an injunction continued inter partes by Olivetti J on 19 January 2009. I infer, but have seen no material in support of this, that the injunction granted originally ex parte by Justice E Anthony Ross, QC and subsequently varied inter partes, must have been continued by agreement between its original return date of 27 November 2008 and the decision of Olivetti J.

[2] The background to these proceedings is fully set out in the judgment of Olivetti J and I shall set out only a very brief summary for present purposes. The Claimant, Janet Chiang, was until June 1999 the sole owner of the second Defendant ('LML'). LML is a BVI registered company and acted as the holding company of another company, En Yao. En Yao is a Chinese company with its registered office at Shanghai in the People's Republic of China ('PRC'). Its business is the production of top end die casts for the telecommunication and related industries. On 16 June 1999 the Claimant sold 51% of the shares in issue in LML to Versa and at the same time the two parties entered into a shareholders agreement and a letter of understanding. Since this matter has yet to come to trial the less I say about the purpose and effect of these documents the better, but it is common ground that they provided for equal representation at board level in both LML and En Yao and equal sharing of profits and that their overall effect was to constitute a joint venture between the parties such that their relationship as the holders of the issued shares of LML amounted to what is commonly referred to as a quasi partnership. In addition to En Yao, mentioned above, a second wholly owned operating company, En Jia, was incorporated in January 2005 as a subsidiary of

LML and a distribution company, Versatile Manufacturers Limited, was formed by the Claimant and Versa in 2002. There was also a company incorporated by the claimant and Versa in Finland which dealt with sales. I shall where appropriate refer to these companies as 'the group'.

[3] The relationship between the parties collapsed in September 2008. Versa says that the blame lies on the Claimant, because she and her associates were failing to play the part allotted to them in the joint venture. The Claimant says that Versa simply excluded her from participation in the management and control of the group. Those matters are for the trial.

[4] There is no dispute that what Versa actually did in September 2008 was to use its 51% shareholding in LML to dismiss the Claimant and her nominee directors from the boards of LML, En Yao and En Jia, leaving directorial and operational control of LML, En Yao and En Jia in Versa's hands. Further, in October 2008 Versa caused LML to open a new bank account for LML in the United States of America, which the Claimant believed was intended to be used instead of LML's existing bank account in Taiwan to disburse dividends from LML, as well as royalty payments paid up to LML by En Yao as licensee under a sub-license agreement and then passed on to the two participators under license agreements made between the Claimant and LML on the one hand and Versa and LML on the other.

[5] On 6 November 2008 the Claimant applied for and Justice Ross, QC granted an ex parte injunction until 27 November 2008. The broad effect of the injunction was to restrain Versa from making further alterations to the constitutions of the boards of LML, En Yao or En Jia; to restrain Versa from representing that any persons other than the original appointees were members of the boards of those three companies; to restrain Versa from representing that its chairman and CEO ('Mr Moffat') was general manager of En Yao or En Jia; to restrain Versa from obstructing the Claimant from entering the business premises of the LML, En Yao

or En Jia or from participating in their day to day management or control; to restrain Versa from changing the identity of LML's registered agent; (by sub-paragraphs (ix) and (x) of the order) to restrain Versa from disposing of or 'diminishing' the value of any of the assets of any of LML, En Yao or En Jia; and (by sub-paragraph (xi) of the order) to restrain Versa from causing the distribution of any cash from any of the group companies' bank accounts for the purpose of paying dividends, royalties or other payments 'to the shareholders of LML'.

[6] On 11 November 2008 Versa applied inter partes before Ross J for a variation of his ex parte order. The principal reason for the variation sought was the perception that the original order prohibited payments in the ordinary course of business. I do not think that that was actually its effect, but one well understands the need for caution in these matters and Versa cannot be criticized for seeking the clarification which it did. The variations sought were as follows:

> "3. Paragraph (x) of the ex parte Order of this Court dated 6 November 2008 ("the ex parte Order") be varied as follows (the variation being shown with underlining):
>
> (x) [The Respondents are hereby restrained until further Order, whether by themselves, or by their servants and/or agents, directly or indirectly, or in any way whatsoever from] …. Disposing of, encumbering, or diminishing the value of, any of the assets of any of the subsidiaries of LML, including En Yao and Den Jia, save that nothing in this Order shall prevent the First Respondent from procuring that the said subsidiaries make any payments and deliver products bona fide, in the ordinary course of business.

4. Paragraph (xi) of the ex parte Order be varied as follows (the variation being shown with underlining), namely either:

> (xi) [The Respondents are hereby restrained until further Order, whether by themselves, or by their servants and/or agents, directly or indirectly, or in any way whatsoever from] …. Causing the distribution of any cash from any of LML's En Yao' En Jia's or Versatile <u>Manufacturers</u> Limited's bank accounts located in the US or elsewhere, for the purpose of paying dividends, royalties or any other payments to the shareholders of LML, <u>save that nothing in this Order shall prevent the First Respondents from procuring that Versatile Manufacturers Limited, from making payments the ordinary course of business.</u>

Or (variation shown by strike out):

> (xi) [The Respondents are hereby restrained until further Order, whether by themselves, or by their servants and/or agents, directly or indirectly, or in any way whatsoever from] …. Causing the distribution of any cash from any of LML's En Yao' En Jia's or Versatile Manufacturers Limited's bank accounts located in the US or elsewhere, for the purpose of paying dividends, royalties ~~or any other payments~~ to the shareholders of LML."

[7] On 12 November 2008 Ross J varied the material parts of his order as follows (with the variation actually made shown underlined):

> "(x) Disposing of, encumbering, or diminishing the value of, any of the assets of any of the subsidiaries of LML, including En Yao and En

Jia, save that nothing in this Order shall prevent the First Respondent from procuring that the said subsidiaries make any payments and deliver products *bona fide*, in the ordinary course of business. For the avoidance of doubt, the foregoing shall be without prejudice to such rights as the Applicant might have (any right not being admitted by the First Respondent) for her and/or her designated representative or representatives to audit all accounts of the subsidiaries of Leading Manufacturers Limited, together with all supporting vouchers, invoices, commercial papers, correspondence and other documents related to any of their finances, upon giving reasonable notice, during business hours.

(xi) Causing the distribution of any cash from any of LML's, En Yao's en Jia's or Versatile Manufacturers Limited's bank accounts located in the U.S. or elsewhere, for the purposes of paying dividends, royalties or any other payments to the shareholders of LML, save that nothing in this Order shall prevent the First Respondent from procuring that Versatile Manufacturers Limited, make payments in the ordinary course of business.

(xii) for the avoidance of doubt, and notwithstanding any provision in this Order, Mr. John W. Moffat may continue to perform his duties *bona fide* as legal representative of each of en Yao and En Jia under the law of the PRC."

[8] It will be seen, therefore, that the order as varied retained the original prohibition against:

"(xi) Causing the distribution of any cash from any of LML's, En Yao's En Jia's or Versatile Manufacturers Limited's bank accounts located in the U.S. or elsewhere, for the purposes of paying

dividends, royalties or any other payments to the shareholders of LML."

[9] On 24 November 2008 Versa applied for the discharge of the entire order; alternatively for the deletion from it of 'such of paragraphs (i) to (xi) as the Court should consider appropriate'. Paragraphs (i) to (xi) contained the elements of the order summarised in paragraph 4 above. The grounds relied upon may be summarised without, I hope, doing violence to them, as follows: the Claimant showed no good arguable case; there was no legal basis for preventing Versa from exploiting its majority shareholding in LML; there was no risk of dissipation; the Claimant had not given proper disclosure in obtaining her ex parte relief; no case had been shown for urgency; procedural irregularities had occurred at the ex parte stage; and finally, the order as granted deviated from what it was said was the normal form of order in such circumstances.

[10] The application came on for a full inter partes hearing before Olivetti J on 17 December 2008. She gave judgment in writing on 19 January 2009. She deleted the provision restraining Versa from changing the identity of LML's registered agent but otherwise left the injunction (as amended by Ross J on 12 November 2008) unchanged. In summary, her reasons for taking this course were as follows:

(a) the nature of the relief sought by the Claimant was not freezing relief; the threshold which she had to cross was therefore that of showing a serious issue to be tried rather than the higher one of good arguable case;

(b) in any event, the Claimant had made out a good arguable case;

(c) only one of the items of alleged non-disclosure relied upon by Versa could be described as material and in respect of that item Versa had failed to show that the Claimant ought to have known that she had anything to disclose;

(d) there had been a compelling argument for moving ex parte;

(e) there were no material procedural irregularities affecting the hearing before Ross J;

(f) the form of order was unconventional in the respects complained of, but the most significant of those irregularities had been cured when the exception for business expenses had been made and provided that the Claimant brought US$2 million into court within 28 days to fortify her cross undertaking the others did not warrant discharge;

(g) so far as individual elements of the order were concerned, the learned Judge acceded, as I have said, to the removal of the restriction against changing LML's registered agent but otherwise declined to interfere.

[11] The Claimant paid the US$2 million into court on 20 February 2009 after having obtained an extension of time.

[12] On 14 April 2009 Versa issued the application which is before me. It seeks further variation of the order by permitting (a) payments of royalties pursuant to the three license agreements mentioned in paragraph 4 of this judgment (i.e. by En Yao to LML and by LML to the Claimant and Versa); and (b) payments of dividends authorized by the boards of En Yao and En Jia and payable in accordance with the laws of the PRC. There is a proviso for any such payments to be made to the Claimant and Versa in equal shares and for payments by En Yao to be made to two separate named bank accounts of LML for onward transmission. It needs to be appreciated that the first of those two named bank accounts (that proposed as the vehicle for transmission of dividend and royalty payments to the Claimant) is LML's long standing bank account in Taiwan. The second, proposed as the vehicle for transmission of payments to Versa, is an account opened for LML by Mr Moffat at a branch of a bank in Minneapolis in October 2008. The opening of this bank account, described in her judgment by Olivetti J as 'a new bank account for [LML] in the United States of America to receive the payments from the subsidiaries and to distribute dividends' formed

part of the material upon which the Claimant was able to obtain and then maintain the injunction.

[13] Versa did not appeal this order. Mr Dennis, who appeared with Ms Tavernier for the Claimant, urged that no variation of the injunction should be granted on the grounds that if Versa had wished to build in a mechanism providing for the payment of dividends or royalties it should have presented argument to that effect when it sought the first amendment from Ross J or, later, at the hearing before Olivetti J. So far from doing that, the amendment proposed by Versa to Ross J on 12 November 2008 actually retained the prohibition against the payment of dividends and royalties. So far as the hearing before Olivetti J is concerned, I have been unable to detect from her judgment any indication that an exception for dividends and royalty payments was canvassed by Versa before her. Although he did not put it quite in this way, I think it was inherent in Mr Dennis' submission that had Versa attempted to appeal the judgment of Olivetti J in this respect it would have been in some difficulty because it would have been attempting to raise before the Court of Appeal a point which it could have taken below. I think that there is force in that.

[14] It is well established that (leaving aside purely procedural orders) a court has, generally speaking, no jurisdiction to vary orders made by itself or by another court of concurrent jurisdiction. Variations must be sought by way of appeal. Yet there plainly exists an inherent jurisdiction to vary where the variation can be justified by change of circumstance occurring since the making of the original order. I was referred in this regard to the decision of Patten J in the English case of *Lloyds Investment (Scandinavia) Limited v Ager-Hanssen* [2006] 1 WLR 1945, cited with approval by the English Court of Appeal in *Collier v Williams* [2003] EWHC 1740, [2006] 1 WLR 1945, at [39]. Patten J said at [7] in *Ager-Hanssen*:

"The Deputy Judge exercised a discretion under CPR Part 13.3. It is not open to me as a Judge exercising a parallel jurisdiction in the same division of the High Court to entertain what would in effect be an appeal from that order. If the Defendant wished to challenge whether the order made by Mr. Berry was disproportionate and wrong in principle, then he should have applied for permission to appeal to the Court of Appeal. I have been given no real reasons why this was not done. That course remains open to him even today, although he will have to persuade the Court of Appeal of the reasons why he should have what, on any view, is a very considerable extension of time. It seems to me that the only power available to me on this application is that contained in CPR Part 3.1(7), which enables the Court to vary or revoke an order. This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.7(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ. It is therefore clear that I am not entitled to entertain this application on the basis of the Defendant's first main submission, that Mr. Berry's order was in any event disproportionate and wrong in principle, although I am bound to say

that I have some reservations as to whether he was right to impose a condition of this kind without in terms enquiring whether the Defendant had any realistic prospects of being able to comply with the condition."

[15] Patten J was relying on an express provision in the English CPR. No equivalent provision exists in our Rules, but as I have said I have no doubt that there exists a broadly similar inherent jurisdiction. Versa's case for variation, put shortly, is that some seven months has elapsed since the original grant of the injunction and that during that period the effect of the injunction has been to deprive it of an income flow which has now begun to cause it embarrassment, including embarrassment in the conduct of its defence and counterclaim in these proceedings. It says, therefore, that the circumstances have changed since the injunction was originally granted and have changed over the five month period since Olivetti J continued it. So, Versa says, the injunction should be relaxed in order to permit the payment of at least some dividends on terms that protect the Claimant as well as to permit the resumption of the payment of royalty pursuant to the licences which I have briefly referred to above.

[16] In deciding this application, it is important to have in mind the nature of the injunction in question. It is not a freezing, or *Mareva*, order. Such orders restrain a defendant from so dealing with his own property as to create a risk that any judgment which the claimant may obtain against him will be unsatisfied. Since such orders represent a significant infringement of a person's right to the enjoyment of his own property the courts endeavour to balance the risks to the claimant against the needs, personal and business, of the defendant. Nothing in the present order restrains Versa from dealing with its own property. What the present order does is to restrict Versa's freedom to deal with the management and assets of LML and its subsidiaries.

[17] Indeed, it seems to me that Versa' financial circumstances are irrelevant to the question whether or not the injunction should be varied. The order was made, and

continued inter partes by Olivetti J, in order to protect the Claimant from the risk that Versa, having obtained *de jure* control of LML and its subsidiaries, might unilaterally mismanage them to the prejudice of the Claimant's interests. That purpose is the same whether Versa is cash rich or cash poor or whether Versa was cash rich at the outset but has become cash poor subsequently. To use the language of Patten J, which I respectfully adopt, the changes upon which Versa relies are not material, because, as I would put it, they are extraneous to the intended operation of the injunction. Thus, the changes in its personal financial position upon which Versa relies do not, even if established, justify modifications to the order.

[18] I might add (although I have held it to be immaterial) that I have in any case been wholly unimpressed by Versa's evidence of financial distress. Versa relies upon paragraph 28 of Mr Moffat's fifth affidavit as evidence of hardship, but that paragraph is in general terms and is not supported by any specific financial information. In paragraph 30 of the same affidavit, Mr Moffat says that he believes that the Claimant opposes the application to vary in order to starve Versa of the funds required to defend these proceedings. That is an allegation of motive which does not seem to me to have anything to do with the question whether there has been a sufficient change in circumstances. Mr Dennis says, and I agree with him, that the evidence relied upon by Versa as to change in its circumstances is inadequate. I ought to add that during argument Mr Saoul, who appeared for Versa and who urged upon me every argument which he possibly could in support of its application with great skill and tenacity, manfully attempted to give evidence on instructions as to Versa's financial state. Mr Dennis, for the Claimant, objected and I declined to allow Mr Saoul to introduce new material in this way.

[19] This seems to me to be the short answer to this application. But I should say something about the other arguments that have been addressed to me.

[20] Mr Saoul said that this application is unlike the ordinary case where a party relies upon change of circumstance in order to justify an application (otherwise than by way of appeal) to vary an earlier order. He says this is a stand alone application and that it is not an attempt to go behind anything specifically decided by Olivetti J. I think that the fallacy in this argument is that it confuses the fact that a fresh application has (unarguably) been made with the fact that its object is the deletion and replacement of parts of an earlier order which has never been appealed. In any case, as I have already said, it is plain that Olivetti J did indeed decide for the reasons I have earlier summarised that the Claimant was entitled to relief in the form of the injunction which (as amended by her) she continued, including those parts which Versa now seeks to have varied.

[21] Mr Saoul argues that it is a strong thing for a court to make an order which has the effect of preventing a party (in the present case, En Yao as sub-licensee and LML as licensee) from carrying out its contractual obligations (in this case, as to payment of 6% royalty fees). But the order does not do that. It merely precludes *Versa alone* from causing the distribution of cash from specified bank accounts in payment of such fees to the shareholders of LML. That is because, as her judgment makes plain, Olivetti J was concerned to hold the ring between the parties. It is because there exists a dispute as to Versa's entitlement to act as the sole controller of LML and its subsidiaries that restrictions have been placed upon what acts it is permitted, on its own, to cause to happen.

[22] Mr Saoul says that the payment of royalties pursuant to long standing contracts is payment in the ordinary course of business and should, therefore, fall within the exception of the amended clause (x) of the injunction. While that is true as a general proposition, the difficulty is that clause (xi) of the amended order makes clear that royalties are to be excepted from the class of payments made in the ordinary course of business and are to be given separate treatment.

[23] Finally, Mr Saoul says that any variation of the order could provide that payment be permitted only of dividends already declared by 'equal' boards before 7 November 2008 and dividends declared in the future by similarly constituted boards could be permitted to be paid by way of variation of the injunction. He says that that can cause no damage to the Claimant because any such payments will be on the basis of parity. Mr Dennis says that that is all very well but because of the evidence of exclusion upon which he relies and which he says (correctly, so far as I can see) was not challenged before Olivetti J, neither his client nor the court can be satisfied whether LML or its subsidiaries have the cash flow (or are in a position to make the necessary borrowings) to make any payments, whether in respect of dividends previously declared or not. If in future both parties agree that they wish to pay a dividend, they will no doubt make a joint application for variation to enable that to be done.

[24] A similar point arises in respect of royalty payments. Mr Saoul says that provided they are paid in accordance with the strict terms of the license agreements, there can be no objection. Mr Dennis' point is similar – that his client is not in a position to judge whether the calculations of the sums due are correct.

[25] But it seems to me that questions whether or not payment of dividend or royalty would or would not prejudice the Claimant are irrelevant. The injunction was continued (as amended by her) by Olivetti J for the reasons which she gave in her careful judgment. That judgment was not appealed. The purpose for which it was granted remains as valid today as it was when she granted it. No material change in circumstances has been identified such as to justify its variation in the way sought by Versa.

[26] For the above reasons this application is dismissed.

Edward Bannister
Commercial Court Judge
10 July 2009