THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2013/0007
(Interlocutory appeal filed pursuant to CPR 62.10)

BETWEEN:

MICROSOFT CORPORATION

Appellant

and

VADEM LTD

Respondent

Before:
The Hon. Mr. Mario Michel — Justice of Appeal

Appearances:
Mr. Brian Lacy for the Appellant
Mr. Paul Webster, QC and Mr. Kissock Laing for the Respondent

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2013: April 18;
August 8.

Interlocutory appeal – Derivative proceedings – Written judgment containing statements which qualify judge's order – Whether written judgment containing judge's analysis and reasoning appealable – Whether learned judge erred in limiting the scope of the leave which he granted to the appellant to bring derivative proceedings in the name of and on behalf of the respondent company

Microsoft Corporation ("Microsoft") was a minority shareholder in the BVI registered respondent company, Vadem BVI. Vadem Inc. ("Vadem California") was a California corporation and a wholly owned subsidiary of Vadem BVI. In October 2011, Microsoft instituted proceedings in the Chancery Court of the State of Delaware, seeking to set aside the transfer of certain valuable patents which had been previously owned by Vadem California. These proceedings included claims asserted derivatively in the name of Vadem BVI. The defendants named in the Delaware proceedings filed a motion to dismiss the derivative claims on the ground that Microsoft did not have standing to bring them because it had not applied for and obtained the sanction of the BVI court to do so, as was required

by section 184C of the **BVI Business Companies Act, 2004**[1]. The Chancery Court upheld the defendant's motion and dismissed Microsoft's claims on the basis that it lacked standing to pursue the derivative claims because it had not first obtained leave from the BVI court pursuant to section 184C. Microsoft duly instituted proceedings in the BVI Commercial Court against Vadem BVI seeking this leave, and the learned trial judge, by order dated 9th November 2012, granted Microsoft "leave to bring derivative proceedings in the name and on behalf of Vadem BVI ...". The learned judge however, also delivered a written judgment in which he made certain statements which effectively limited the scope of the leave granted to Microsoft, by stating that "Microsoft has no authority and cannot be authorized to prosecute, here or anywhere else, causes of action vested in Vadem California." Microsoft appealed to the Court of Appeal, seeking an order that "the permission to Microsoft to bring derivative proceedings on behalf of Vadem BVI be extended to include claims involving causes of action vested in Vadem California".

Held: allowing the appeal (in part), and ordering that the respondent pay 75% of the appellant's costs on the appeal, that:

1. It is a correct statement of the law that it is the order arrived at by the judge and not the analysis and reasoning which informed it that is appealable. Where however a written judgment delivered by a judge (with analysis and reasoning included) contains conclusions bearing on the relief sought by a party to the proceedings, which conclusions are not reflected in the order settled by the court, the party seeking the relief has recourse to the appellate jurisdiction of the court if the conclusions reached by the judge in the written judgment are wholly or partly inconsonant with the relief which the party is seeking.

   Lake v Lake [1955] 2 All ER 538 distinguished.

2. It was not necessary, in the granting of leave pursuant to section 184C(1), for the learned judge to offer his interpretation of what that section means, because such interpretation had no bearing on any of the matters that he was required to satisfy himself about or take account of. Leave should have simply been given to Microsoft to bring proceedings in the name and on behalf of Vadem BVI – as per section 184C(1)(a) – without this leave being limited to "claims which are vested in Vadem BVI" or without having stated that "Microsoft has no authority and cannot be authorized to prosecute, here or anywhere else, causes of action vested in Vadem California." No such limitation or pronouncement was merited by the clear terms of section 184C.

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

JUDGMENT

[1] **MICHEL JA**: The appellant, Microsoft Corporation (hereafter "Microsoft") is a Washington corporation which owns 11.8% of the shares in the respondent, Vadem Ltd (hereafter "Vadem BVI") – a BVI registered company. Vadem Inc. (hereafter "Vadem California") – a California corporation – is a wholly owned subsidiary of Vadem BVI. Vadem California was the owner of certain valuable patents which in 2000 were transferred to Amphus Inc. (a Delaware corporation) which in turn transferred the patents to St. Clair Intellectual Property Consultants Inc. (a Michigan corporation).

[2] On 14th October 2011, Microsoft instituted proceedings in the Chancery Court of the State of Delaware seeking to set aside the transfers of the patents. The proceedings instituted by Microsoft included claims asserted derivatively in the name of Vadem BVI. On 5th December 2011, the defendants named in the proceedings filed a motion to dismiss the derivative claims on the ground that Microsoft did not have standing to bring the derivative claims because it had not applied for and obtained the sanction of the BVI court to do so, as required by section 184C of the **BVI Business Companies Act, 2004**[2] as amended by the **BVI Business Companies (Amendment) Act, 2005**[3] (hereafter "the Act"). On 27th April 2012, the Chancery Court upheld the defendants' motion and dismissed Microsoft's claims on the basis that Microsoft lacked standing to pursue the derivative claims because it had not first obtained leave from the BVI court pursuant to section 184C. The claims were however dismissed without prejudice to Microsoft's ability to re-file the claims should it obtain the leave of the BVI court.

[3] On 23rd May 2012, Microsoft instituted proceedings in the Commercial Division of the Eastern Caribbean Supreme Court in the Territory of the Virgin Islands against Vadem BVI seeking the following relief:

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[2] Act No. 16 of 2004, Laws of the Virgin Islands.
[3] Act No. 26 of 2005, Laws of the Virgin Islands.

(a) leave to bring an action in the name of and on behalf of the defendant in the form attached;

(b) an order that the defendant do indemnify the claimant against the reasonable costs incurred in bringing the action including any costs that the claimant may be ordered to pay in the action;

(c) an order that the file and transcript of this matter be sealed;

(d) costs.

[4] On 9th November 2012, Bannister J [Ag.] delivered a written judgment in which he analysed the relevant facts and law and arrived at certain conclusions. A formal order of the court was not however entered until 15th November 2012. In the order dated 9th November and entered on 15th November 2012, it was ordered that:

1. the claimant is hereby given leave to bring derivative proceedings in the name of and on behalf of the defendant;
2. the defendant does indemnify the claimant against the reasonable costs incurred in bringing those derivative proceedings, including any adverse costs that the claimant may be ordered to pay;
3. the file and transcript of this matter are sealed and are available only to the parties and their legal representatives;
4. the defendant is to pay 75% of the claimant's costs of this application, to be assessed if not agreed.

[5] On 4th February 2013 – pursuant to the leave of the court – Microsoft filed a notice of appeal against the judgment of Bannister J [Ag.] and sought from the Court of Appeal an order that "the permission to Microsoft to bring derivative proceedings on behalf of Vadem BVI be extended to include claims involving causes of action vested in Vadem California."

[6] Mr. Paul Webster, QC – appearing for the respondent on the appeal – submitted that it was not open to Microsoft to pursue the appeal because their complaint was really not with the judge's order (which is appealable) but with the judge's analysis of and reasoning on the facts and law (which is not appealable). Mr. Webster

relied on the case of **Lake v Lake**,[4] decided by the Court of Appeal of England and Wales, as authority for his submission.

[7] In **Lake v Lake**, the Court of Appeal held that a finding or statement made by the trial judge in giving his reasons for the conclusion which he reached, which finding or statement was not reflected in the order drawn up by the court disposing of the proceedings, is not appealable.

[8] It is a correct statement of the law that it is the order arrived at by the judge and not the analysis and reasoning which informed it that is appealable. Where however a written judgment delivered by a judge (with analysis and reasoning included) contains conclusions bearing on the relief sought by a party to the proceedings, which conclusions are not reflected in the order settled by the court, the party seeking the relief must have recourse to the appellate jurisdiction of the court if the conclusions reached by the judge in the written judgment are wholly or partly inconsonant with the relief which the party is seeking.

[9] **Lake v Lake** is distinguishable from the present case in that 'the finding or statement' made by the trial judge in **Lake v Lake** that he believed that the respondent wife had committed adultery, did not affect his conclusion that the charges in the husband's petition alleging cruelty and adultery by the wife were not sufficiently proved and that the husband's petition was accordingly dismissed. In the present case, 'the finding or statement' made by the trial judge that is being appealed is contained in paragraph 14 of his written judgment, as follows:

> "I am therefore satisfied that Microsoft has no authority and cannot be authorized to prosecute, here or anywhere else, causes of action vested in Vadem California. On the other hand, it does seem to me, taking into account all the matters referred to in subsections 184C(2) and (3) ... that Microsoft does make out a good case for leave to prosecute any claims which are vested in Vadem BVI and which arise out of the assignments of June 2000 and I propose to give it leave to do so."

This 'finding or statement' made by the learned judge in his written judgment preceded and qualified the order made by him that "the Claimant is hereby given

[4] [1955] 2 All ER 538.

leave to bring derivative proceedings in the name of and on behalf of the Defendant."

[10] Arising from the judgment and order, Microsoft now has the leave of the BVI court to bring proceedings in the name of and on behalf of Vadem BVI in relation to claims vested in Vadem BVI, but it has no authority to prosecute causes of action in the name of and on behalf of Vadem BVI which are vested in Vadem California - a wholly owned subsidiary of Vadem BVI. This is not the relief that Microsoft sought from the court or, at the very least, it is not the full extent of the relief which it sought, and Microsoft is therefore entitled to appeal the decision of the trial judge to deny it at least some of the relief which it sought in the court below.

[11] Having determined that Microsoft can and has in fact validly appealed the judgment of Bannister J [Ag.] dated 9th November 2012 in so far as that judgment, in granting leave to Microsoft to bring proceedings in the name of and on behalf of Vadem BVI, confined the leave granted only to proceedings vested in Vadem BVI and specifically excluded from the leave granted "causes of action vested in Vadem California", it now falls to be determined whether the appeal ought to be allowed and the order varied as requested by Microsoft in paragraph 4 of its notice of appeal.

[12] In the court below, Microsoft sought the leave of the court – pursuant to section 184C of the Act – "to bring an action in the name of and on behalf of the Defendant [Vadem BVI] in the form attached". In order to grant the relief sought, the court had to be satisfied that Microsoft was a member of Vadem BVI and – in accordance with subsection (2) of section 184C – it had to take the following matters into account:

(1) whether Microsoft was acting in good faith;

(2) whether the derivative action is in the interests of Vadem BVI taking account of the views of the company's directors on commercial matters;

(3) whether the proceedings are likely to succeed;

(4) the costs of the proceedings in relation to the relief likely to be obtained; and

(5) whether an alternative remedy to the derivative claim is available.

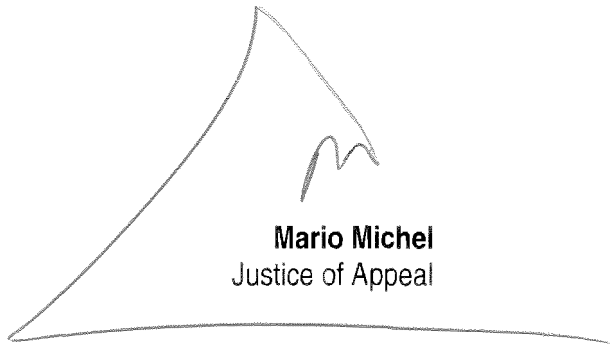
The court also had to satisfy itself – in accordance with subsection (3) – that Vadem BVI did not itself intend to bring the proceedings to set aside the transfers/assignments of the patents.

[13] These are the matters which the learned judge had to take into account in determining whether to grant leave to Microsoft and he specifically stated, in paragraph 14 of his judgment, that he did so and would give leave to Microsoft to bring derivative proceedings in the name of and on behalf of Vadem BVI. The interpretation of section 184C offered by the learned judge in his written judgment was, however, both unnecessary and unhelpful and may also have been incorrect. It was not necessary, in the granting of leave pursuant to section 184C, for the learned judge to offer his interpretation of what section 184C(1) means, because such interpretation had no bearing on any of the matters that he was required to satisfy himself about or take account of. It was unhelpful because it served only to confuse rather than clarify the issues for consideration and determination by the court. It may also have been incorrect because the fact that BVI law does not permit double derivative proceedings means only that it is not open to the BVI court to give leave to a member of a company to bring proceedings not just in the name of and on behalf of the company of which he is a member but so too in the name of and on behalf of a company of which the first company is a member. So that, in the present case, the court cannot do that which Microsoft asked in its notice of appeal, that is, for the court to give it leave to bring "claims involving causes of action vested in Vadem California"; but the court can and should simply give leave to Microsoft to bring proceedings in the name of and on behalf of Vadem BVI – as per section 184C(1)(a) of the Act – without limiting the leave to "claims which are vested in Vadem BVI" or without pronouncing "that Microsoft has no authority and cannot be authorized to prosecute, here or anywhere else,

causes of action vested in Vadem California." No such limitation or pronouncement is merited by the clear terms of section 184C.

[14] The appeal is accordingly allowed to the extent that the limitation placed on the judge's order to the effect that the appellant/claimant can only bring claims vested in Vadem BVI and not claims vested in Vadem California is removed, so that Microsoft has leave to institute any proceedings in the name of and on behalf of Vadem BVI, as provided for by section 184C of the Act. Whether this leave will enable Microsoft (in the name of and on behalf of Vadem BVI) to bring proceedings vested in a wholly-owned subsidiary of Vadem BVI will be determined by the lex fori. What is clear though is that this court or the court below has or had no authority to give leave to Microsoft to bring proceedings in the name of and on behalf of Vadem California – of which it is not a member – and no leave is here given to Microsoft so to do.

[15] I am not minded to interfere with the judge's costs order and indeed I will adopt his formula for the costs of this appeal, so that the respondent shall pay 75% of the appellant's costs on this appeal, being two-thirds of the amount awarded for costs in the court below.



Mario Michel
Justice of Appeal