THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0013

BETWEEN:

[1] ANZEN LTD.
[2] LUND 3 APS
[3] TRAVELLAB GLOBAL AB

Appellants

and

HERMES ONE LTD.

Respondent

On Paper

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise E. Blenman — Justice of Appeal
The Hon. Mr. Paul Webster, QC — Justice of Appeal [Ag.]

Appearances:

On written submissions filed on behalf of the Appellant by SCA Creque and on behalf of the Respondent by Forbes Hare

---

2014: June 11.

Interlocutory appeal – Arbitration – Option to arbitrate – Construction of arbitration clause in shareholders agreement – Application by appellant in court below under s. 6(2) of Arbitration Act, Cap. 6, for stay of proceedings commenced by respondent – Whether learned judge erred in refusing to stay proceedings – Whether parties obliged to refer disputes falling under shareholders agreement to arbitration

A shareholders agreement ("the SHA") in respect of a BVI company contained an arbitration clause which included the following words: 'If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled … through negotiation, any Party may submit the dispute to binding arbitration'. The parties to this appeal are among the signatories to the SHA. Disputes arose between the parties and the respondent commenced proceedings in the Commercial Court without referring the disputes to arbitration as had been provided for in the SHA. The appellants

made an application to the court under section 6(2) of the Arbitration Act[1] to stay the court proceedings brought by the respondent on the ground that there existed a valid, operative and binding arbitration agreement between the appellants and respondent, under which disputes between the parties under the SHA should be referred to arbitration. Section 6(2) of the Arbitration Act states: 'If any party to an arbitration agreement … commences any legal proceedings in any court against any other party to the agreement … in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.'

The learned judge dismissed the stay application, holding that neither party was obliged to refer a dispute falling under the SHA to arbitration, but if a party did, the dispute would have to be settled by arbitration. The appellants appealed the judge's ruling.

Held: dismissing the appeal, that:

1. An arbitration clause which provides for an option to arbitrate does not create an immediately binding contract to arbitrate. However, as soon as one of the parties invokes the arbitration clause by referring the dispute to arbitration, there is a binding agreement to arbitrate which is covered by section 2 of the Arbitration Act. If one of the parties by-passes the arbitration clause and files a claim in court, the other party still has the option to invoke the arbitration clause, refer the matter to arbitration and apply for a stay of the court proceedings. If the party against which the court proceedings were brought does not refer the matter to arbitration, or submits to the court's jurisdiction, the dispute will proceed under the court's jurisdiction. The appellants not having referred the disputes to arbitration, there was no binding agreement between them and the respondent to refer the disputes to arbitration and therefore, a stay under section 6(2) of the Arbitration Act was not available to them.

   Lobb Partnership Ltd v Aintree Racecourse Co Ltd [2000] BLR 65 applied; **Westfal-Larsen & Co A/S v Ikerigi Compania Naviers SA (The Messiniaki Bergen)** [1983] 1 All ER 382 applied; **Fiona Trust & Holding Corporation and Others v Yuri Privalov and Others** [2007] EWCA Civ 20 distinguished.

JUDGMENT

[1] **WEBSTER JA [AG.]:** This is an interlocutory appeal against the order and judgment of Bannister J dated 6th March 2014 refusing the appellants' application

[1] Cap. 6, Revised Laws of the Virgin Islands 1991.

under section 6(2) of the Arbitration Act[2] ("the Act") for a stay of the proceedings filed in the Commercial Court by the respondent in favour of arbitration.

Background

[2] The parties to this appeal and others are signatories to a shareholders agreement ("the SHA") executed in or around August 2012 in respect of their interests in Everbread Holdings Ltd., a BVI company. The SHA was preceded by two similar agreements. Each agreement contains the following dispute resolution clause:

> "19.5 This Agreement shall be construed in accordance with English Law, without reference to its conflicts of law principles. If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party may submit the dispute to binding arbitration. Such arbitration will be conducted by a sole arbitrator designated by the International Chamber of Commerce ("ICC") and will be in accordance with the ICC's arbitration rules. The arbitration will be held at a neutral site in London, England. The arbitrator will determine issues of arbitrability, including the applicability of any statute of limitation, but may not limit, expand or otherwise modify the terms of the Agreement. The arbitrator's decision and award will be in writing, setting forth the legal and factual basis. The arbitrator may in appropriate circumstances provide for injunctive relief (including interim relief). An arbitration decision and award will only be subject to review because of errors of law. Each Party will bear its own expenses in connection with the arbitration, but those related to the site and compensation of the arbitrator will be borne equally. The Parties, other participants and the arbitrator will hold the existence, content and result of arbitration in confidence, except to the extent necessary to enforce a final settlement agreement or to obtain and enforce a judgment on an arbitration award. The language to be used in the arbitration procedure shall be English." (emphasis added)

[3] Disputes arose between the parties and on 10th January 2014 the respondent commenced these proceedings in the Commercial Court against the appellants seeking what the learned judge described as 'a bewildering variety of relief', the details of which are not immediately relevant to this appeal. The respondent did

[2] Cap. 6, Revised Laws of the Virgin Islands 1991.

not avail itself of the option in clause 19.5 of the SHA to refer the disputes to arbitration, opting instead for court proceedings.

[4] The appellant's response to the claim was to apply to the Commercial Court to strike out the claim on the basis that it is an abuse of process, having been commenced in breach of the arbitration agreement in the SHA, or, alternatively, under section 6(2) of the Act to stay the proceedings on the ground that there exists a valid, operative and binding arbitration agreement between the appellants and the respondent under which disputes between the parties under the SHA should be referred to arbitration. Counsel for the appellants abandoned the strike out application at the commencement of the hearing before the Commercial Court and proceeded on the application under section 6(2) of the Act which reads:

> "If any party to an arbitration agreement, other than a domestic arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

[5] The stay application was heard on 26th February 2014. On 6th March 2014 the learned judge delivered a written judgment in which he dismissed the application for a stay (in favour of arbitration under clause 19.5), and ordered the appellants to file their defences within 28 days ("the Order").

[6] On 15th April 2014 a single judge of the Court of Appeal granted the appellants leave to appeal against the Order. On 6th May 2014 the appeal was filed and both sides have filed written submissions.

[7] On 13th May 2014 the appellants applied for a stay of the proceedings in the court below pending the outcome of this appeal.

Issues

[8] The issues in this appeal are whether clause 19.5 of the SHA is an arbitration agreement that obliges the parties to refer disputes under the SHA to arbitration, and if a disputing party opts to bypass clause 19.5 and goes directly to court, whether the other party is entitled to a stay of the court proceedings under section 6(2).

The Appellants' Case

[9] The essence of the appellants' case as disclosed in the grounds of appeal and their written submissions is that clause 19.5 is a binding arbitration agreement, and there being no dispute that the disputes arose out of the SHA, the judge was obliged under section 6(2) of the Act to stay the proceedings. The appellants relied on the cases of Fiona Trust & Holding Corporation and Others v Yuri Privalov and Others[3] and Lobb Partnership Ltd v Aintree Racecourse Co Ltd[4] of which more will be said later.

The Respondent's Case

[10] The respondent's position is that the words 'any Party may submit the dispute to binding arbitration' in clause 19.5 are permissive only and a disputing party is not obliged to refer disputes under the SHA to arbitration, although it is entitled to do so. Further, the appellants have not, before or since the commencement of these proceedings, referred the disputes in the claim to arbitration and there is no agreement to submit to arbitration within the meaning of section 6(2) of the Act. The judge was therefore right to refuse the application for a stay.

The Judge's Decision

[11] The judge decided at paragraph 7 of the judgment , in effect that while clause 19.5 could amount to an arbitration agreement within the meaning of section 2 of the Act,[5] neither party was obliged to refer a dispute falling under the SHA to

[3] [2007] EWCA Civ 20.
[4] [2000] BLR 65.
[5] Section 2 of the Act defines an arbitration agreement as "an agreement in writing … to submit to arbitration present or future differences capable of settlement by arbitration".

arbitration, but if he did the dispute must be settled by arbitration. It is worth setting out paragraph 7 in full:

> "[7] It seems to me that clause 19.5, while arguably amounting to an arbitration agreement within the meaning of section 2 of the Act, confers no more than a right upon any party to the third SHA to submit a dispute arising under or relating to the SHA to arbitration. Clause 19.5 does not oblige a party to the SHA to refer disputes arising out of or relating to it to arbitration. It entitles it to do so. The other parties agree that, if a party exercises that right in respect of a dispute falling within clause 19.5, the subject matter of the dispute is to be settled by way of arbitration, but until a party exercises the right it is impossible to say that the parties have agreed that disputes arising out of or relating to the SHA shall be referred to arbitration. The right is in the nature of an option and is outwith section 6(2)."

[12] The judge then went on to find that the appellant's failure to exercise the option to refer the disputes to arbitration was fatal and they cannot expect the court to 'shut down legal proceedings, commenced without infringing clause 19.5, without first having referred the identical subject matter to ICC arbitration.'[6]

Discussion

[13] The appellants' contention that clause 19.5 is an arbitration agreement within the meaning of section 2 of the Act, notwithstanding use of the words 'may submit the dispute to binding arbitration', finds support in the authorities cited in the written submissions.

[14] In **Lobb Partnership Ltd v Aintree Racecourse Co Ltd** clause 13.1 of the contract provided as follows:

> "Disputes may be dealt with as provided in paragraph 1.8 of the RIBA Conditions but shall otherwise be referred to the English Courts. …"

Paragraph 1.8 of the RIBA Conditions is a standard provision for arbitration. Colman J, sitting in the Queen's Bench Division, found that the clause 13.1 was not ambiguous and should be construed as giving either party the right to insist that disputes be resolved by arbitration. At page 84 he noted that:

[6] para. 8 of the judgment.

> "If the claim had simply consisted of the first part [of clause 13.1] or words to that effect – such as 'disputes may be referred to arbitration' – there could be little doubt that the meaning was that either party was to be entitled to refer a dispute to arbitration and, once he had done so, the other party would be bound to the reference. There would be no question of both parties subsequently having to agree to such a reference. Accordingly, in the absence of indications to the contrary, the first part of cl 13.1 would strongly indicate that it was to be open to either party to refer a dispute to arbitration if he chose to do so and that, if he did so, the other party would be bound to accept that reference. On the other hand, if one party ignored the availability of arbitration and commenced an action in court, the other would be entitled to insist that the dispute be referred to arbitration and to apply for a stay of the action."

[15] Similarly, in Westfal-Larsen & Co A/S v Ikerigi Compania Naviers SA (The Messiniaki Bergen)[7] (referred to by Colman J in the Lobb Partnership Ltd case above) clause 40(b) of the contract in question provided that any dispute arising under the contract was to be decided by the English courts, provided that 'either party may elect to have the dispute referred to [arbitration]' Bingham J found that clause 40(b) was not merely an agreement to make an agreement to arbitrate – once a valid election to arbitrate was made no further agreement was necessary or contemplated for the arbitration to take place.

[16] Counsel for both sides referred to Fiona Trust & Holding Corporation and Others v Yuri Privalov and Others, another case involving an optional arbitration clause. However, this case was decided on the issue that the disputes in question did not fall under the dispute resolution provision of the contract. The Court of Appeal and House of Lords decided that the dispute was covered by the arbitration clause and referred it to arbitration. The optional nature of the arbitration clause was not in issue.

]17] The following points emerge from the cases:

(1) An arbitration clause which provides for an option to arbitrate (as in this appeal) does not create an immediately binding contract to arbitrate.

[7] [1983] 1 All ER 382.

(2) As soon as one of the parties invokes the arbitration clause by referring the dispute to arbitration there is a binding agreement to arbitrate which is covered by section 2 of the Act.

(3) If one of the parties by-passes the arbitration clause and files a claim in court (as in this case) the other party still has the option to invoke the arbitration clause, refer the matter to arbitration and apply for a stay of the court proceedings.

(4) If the counter party, having been sued, does not refer the matter to arbitration, or submits to the court's jurisdiction, the dispute will proceed under the court's jurisdiction.

[18] It is apparent from a reading of the judgment that the learned judge was mindful of these principles. Paragraph 4 of his order suggests that he was not making a finding that the appellants had submitted to the jurisdiction of the court (thereby retaining the option to refer the disputes to arbitration under clause 19.5 in accordance with principle 4 in the preceding paragraph). However, their failure to refer the disputes to arbitration means that there was no agreement to refer the disputes to arbitration, and a stay under section 6(2) was not available to them. In common parlance the appellants could not have their cake (by not referring the matter to arbitration) and eat it too (by securing a stay of the court proceedings under section 6(2)). The judge was entitled to come to this conclusion on the facts and there is no basis for interfering with his decision. The appeal is accordingly dismissed.

The application for stay pending appeal

[19] In view of the court's decision to dismiss the appeal the application for a stay of the proceedings in the court below pending the outcome of this appeal is rendered otiose.

Order

[20] It is hereby declared and ordered as follows:

(1) The appeal is dismissed.

(2) Costs of the appeal to the respondent in the amount of $26,667.00 being two-thirds of the costs assessed in the court below.

Dame Janice Pereira, DBE
Chief Justice

I concur.

Louise Blenman
Justice of Appeal

I concur.

Paul Webster, QC
Justice of Appeal [Ag.]