COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2018/CLE/gen/1050

IN THE MATTER OF Section 55(3) of the Arbitration Act, 2009 of the Laws of The Bahamas

AND IN THE MATTER OF a Shareholders Agreement dated 29th July, 2014

AND IN THE MATTER OF Section 21 of the Supreme Court Act Ch. 53 of the Laws of The Bahamas

AND IN THE MATTER OF Order 29 rules 1 and 2 of the Rules of the Supreme Court 1978, Ch. 53 of the Laws of The Bahamas

BETWEEN

LYFORD HOLDINGS N.V.

Plaintiff

AND

VERNES HOLDING LTD

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. John Wilson with him Ms. Knijah Knowles and Mr. Lemarque Campbell of McKinney Bancroft & Hughes for the Plaintiff
Mr. Raynard Rigby and Mr. Randol Dorsett of Baycourt Chambers for the Defendant

Hearing Dates: 1 October, 3 October, 4 October, 11 October 2018

Arbitration proceedings – Interim measures – Application for interim mandatory injunction compelling defendant to comply with clause in Shareholders Agreement – Drag Along Option – Arbitration not yet commenced – Whether jurisdiction to grant injunctive relief – Whether parties to arbitration can invoke jurisdiction of the court –

Whether injunctive relief aiming at preserving or dissipating assets – Meaning of "assets" – Whether injunction urgent and necessary

Stay of proceedings – Precise nature of dispute for arbitration seems opaque – Is there anything to stay – Order sought is in aid of arbitral proceedings –Arbitration Act, 2009, ss. 9 and 55

The Plaintiff and Defendant are both shareholders in Lyford International Bank ("LIB"), owning 77.44% and 22.56% of the issued shares respectively. The Plaintiff has determined to sell its shares in LIB. In late June 2018, the Defendant was notified of the Plaintiff's intention to sell all of its shares in LIB to Ansbacher. In accordance with Clause 14 of the Shareholders Agreement, the Plaintiff demanded that the Defendant also sells its shares to Ansbacher. The Defendant refused, prompting the Plaintiff to apply to the Supreme Court for injunctive relief.

Held: Application granted, costs of application are the Plaintiff's to be taxed if not agreed.

1. The court's jurisdiction under section 55 of the Arbitration Act, 2009 is limited, in cases of urgency, to the making of orders the court thinks necessary for the preservation of evidence or assets. The provision does not preclude the court from making an order merely because to do so may involve the preliminary determination of an issue which the parties have agreed to arbitrate. Whether the Order granted will have that effect is a matter for the court to consider when contemplating how to exercise the discretion granted by the section. It does not however affect the existence of the jurisdiction to grant.

2. The court finds that the English Court of Appeal decision in **Cetelem SA v Roust Holdings Ltd** [2005] EWCA Civ 618 is highly persuasive. The contractual right to sell shares is an asset within the meaning of section 55 of the Arbitration Act; therefore the Plaintiff's clause 14 contractual right to sell its shares, which cannot be exercised without the concomitant right to drag along the Defendant, is an asset within the meaning of section 55(3) of the Arbitration Act, 2009. There is urgency for the Order. The Long Stop Date as set out in the Share Purchase Agreement has passed. Any further delay will adversely affect the value of the sale to Ansbacher and may lead to their withdrawal from the transaction. This withdrawal will result in a significant loss of opportunity for the Plaintiff.

3. The principles governing the grant of interim injunctions are well established. The basic principle is that the court should take whichever course seems likely to cause the least irredeemable prejudice to one party or the other. In my opinion, the extent and ramifications of the probable damage to the Plaintiff as a result of the Defendant's refusal to comply with its contractual obligations would be significant.

4. The grant of the injunction will not undermine the proposed arbitration. The Notice of Commencement of Arbitral Proceedings dated 2 August 2018 appears wanting leaving the Plaintiff to presume that the Defendant must be of the view that the Amber Group offer is financially more beneficial to it than the Ansbacher transaction and thus wishes to direct a sale to its chosen purchaser, Amber Group; a power which the Defendant does not possess. The Plaintiff has given an undertaking in damages to the Defendant whose primary concern is one of securing the best available economic return from the sale of the shares.

5. In relation to the application for Stay of Proceedings, both parties have indicated that Arbitration proceedings will continue. The Defendant has served the Notice to Commence Arbitration and the Plaintiff has conditionally agreed to submit to the same. In my view, there is nothing to stay, the injunction is in aid of the Arbitration Proceedings and does not stand in the place of any Order the Arbitrator may make.

Cases referred to in the Judgment

1. **AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC** [2012] 1 All ER (Comm) 845) mentioned.

2. **American Cyanamid Co. v Ethicon Ltd** [1975] A.C. 396 considered.

3. **Belair LLC v Basel LLC** [2009] EWHC 725 (Comm) mentioned.

4. **Cetelem SA v Roust Holdings Ltd** [2005] EWCA Civ 61 followed.

5. **Channel Tunnel Group Limited & Another v Balfour Beatty Construction Limited & Another** (1993 A.C., 334 mentioned.

6. **Cunningham Reid and Another v Buchanan-Jardine** [1988] 1 W.L.R. 678 mentioned.

7. **Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe** [2013] EWHC 3010 (TCC) mentioned.

8. **Etri Fans Limited v NMB UK Limited** (1997) 1 WLR 1110 mentioned.

9. **Euroil Ltd v Cameroon Petroleum SARL** [2014] EWHC 52 (Comm) mentioned.

10. **Harcourt Development (Bahamas) Limited v Steel H.Q. (Bahamas) Limited** [2013] 2 BHS J. No. 100 mentioned.

11. **Heyman & Another v Darwins Limited** (1942) 356 mentioned.

12. **Hiscox Underwriting Ltd v Dickson** [2004] EWHC 479 mentioned.

13. **Maldives Airports Co. Ltd and another v GMR Malé International Airport Pte Ltd** [2013] SGCA 16 mentioned.

14. **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC 16 considered.

15. **Zim Integrated Shipping Services Limited v (1) European Container KS et al** [2013] EWHC 3581 (Comm) mentioned.

JUDGMENT

CHARLES J:

Introductory

[1] This matter came before me on an urgent basis. I heard it partially over a three-day period and, on 11 October 2018, I rendered an oral ruling with abbreviated reasons in favour of the Plaintiff, Lyford Holdings N.V. ("Lyford") compelling the

Defendant, Vernes Holding Ltd ("Vernes") to comply with Clause 14 of a Shareholders Agreement ("SA") entered into, between the parties on 29 July 2014, in relation to the exercise by Lyford of its drag along option right under that Agreement. I also awarded costs to Lyford to be taxed if not agreed. With respect to the Summons filed by Vernes, pursuant to section 9 of the Arbitration Act, 2009 ("the Act"), I did not see the necessity for a stay because, in my opinion, there are no further matters in this action to be stayed pending arbitration.

[2] I promised a reasoned written ruling. I do so now.

The applications

[3] There are two applications before the Court namely:

1. An Originating Summons filed on 11 September 2018 by Lyford seeking an order, pursuant to section 55(3) of the Act , Section 21 of the Supreme Court Act, Ch. 53, and/or the inherent jurisdiction of the Court :-

    (i) To compel Vernes to comply with Clause 14 of a Shareholders Agreement entered into, between Lyford and Vernes dated 29 July, 2014 in relation to the exercise by Lyford of its drag along option right under that Agreement and;

    (ii) Costs of and occasioned by this application to be paid by Vernes to Lyford.

2. A Summons filed on 27 September 2018 by Vernes, pursuant to Section 9 of the Act and/or under the inherent jurisdiction of the Court seeking the following relief:

    (i) An Order that all further proceedings in this action be stayed on the ground that the said proceedings are brought in respect of and concern a matter which under an arbitration agreement between the parties is to be and has been referred to arbitration and;

    (ii) Costs of and occasioned by this application to be paid by Lyford to Vernes.

[4] Lyford relies on the affidavit of Frederic Hottinger filed on 11 September 2018 ("Hottinger Affidavit") and also, the affidavit of Krysta Moxey filed on 28 September 2018 ("Moxey Affidavit") in support of its application while Vernes relies on the affidavit of Christopher F.D. Francis which exhibits the unsworn affidavit of Cyrille Vernes to be executed and authenticated overseas and then couriered to Nassau ("Vernes Affidavit").

Background facts

[5] Lyford, previously Hottinger Holdings N.V, is a company incorporated under the laws of the Netherlands Antilles and holds 77.44% of the issued and outstanding shares in Lyford International Bank ("LIB"). LIB is licensed by the Central Bank of the Bahamas ("Central Bank"). It engages in non-retail banking business in and from The Bahamas.

[6] Vernes is a company incorporated under the laws of The Bahamas and holds the remaining 22.56% of the issued and outstanding shares in LIB.

[7] The relationship between Lyford and Vernes is governed by a SA dated 29 July 2014. Clause 14 of the SA provides as follows:

> **"If Hottinger Holdings N.V. [Lyford] seeks to transfer, directly or indirectly, any or all of its shares (for the purposes of this paragraph) called the "Selling Shareholder" to a purchaser ("the Proposed Purchaser") the Selling Shareholder may by notice to the remaining Shareholders, demand that the remaining Shareholders transfer a pro rata portion based on the percentage of Shares being transferred by the Selling Shareholder to the Proposed Purchaser ("the Drag Along Option"). If the Selling Shareholder exercises its Drag Along Option, the other Shareholders and their representatives in the Board of Directors fully and voluntarily hereby consent to so transfer their Shares to the Proposed Purchaser on the same terms and conditions under which the Selling Shareholder shall transfer its Shares to the Proposed Purchaser; provided however that no Shareholder shall be required to assume any liability or obligation in connection with such sale without his or her consent except with respect to customary representations as to such Shareholder's title to the Shares being transferred and the due authority and authorization, if necessary, to transfer such Shareholder's Shares."**[Emphasis added]

[8] Lyford has determined to sell its shares in LIB. On 28 June 2018, Vernes was notified of Lyford's intention to sell all of its shares in LIB to Ansbacher. In accordance with Clause 14 of the SA, Lyford demanded that Vernes also sells its shares to Ansbacher. The demand is contained in the Notice which reads:

> **"TAKE NOTICE THAT:**
>
> **Lyford Holdings N.V. (formally Hottinger Holdings N.V.) ("Lyford") seeks to transfer directly all 77.44% ownership shares in Lyford International Bank Ltd. (formally Hottinger Bank and Trust Limited) ("the Company") to Ansbacher (Bahamas) Limited (the "Proposed Purchaser") as evidenced by the attached draft Share Purchase Agreement. AND LYFORD HEREBY DEMANDS in accordance with Paragraph 14 of the Agreement that you Vernes Holding Ltd [a]lso transfer all of your 22.56% ownership shares in the Company to the Proposed Purchaser."**[Emphasis added]

[9] On 29 June 2018, Vernes offered to purchase Lyford's shares and, via a back-to- back transaction, sell the entire shareholding to Amber Group Holdings Ltd and Accent Capital Solutions Ltd ("Amber Group"). Vernes says that Amber Group will purchase the LIB shares at net asset value ("NAV") as at 30 June 2018 and will engage several senior current employees of LIB. The offer will be perfected by formal share purchase agreement and will have a hard stop closing date of 31 October 2018. Vernes exhibited a copy of a letter of confirmation dated 29 June 2018 on behalf of Amber Group evidencing its commitment to purchase the LIB shares. The offer contains no purchase price and the signatures on the letter of confirmation are illegible. Besides these observations, it is plain that Vernes is not in a position to purchase Lyford's shares; otherwise it would have made the offer itself rather than on behalf of Amber Group.

[10] On 2 July 2018, Lyford entered into a Share Purchase Agreement ("SPA") with Ansbacher (Bahamas) Limited ("Ansbacher") for the sale of all of Lyford's shares in LIB to Ansbacher: see Hottinger Affidavit at Tab 4. It appears to me that the SPA has all of the hallmarks of a serious purchaser.

[11] Lyford asserts that, to date, despite repeated requests, Vernes has refused to transfer its shares to Ansbacher in direct contravention of Clause 14 of the SA,

thereby jeopardizing the sale of LIB to Ansbacher and placing Lyford in imminent harm.

[12] Vernes objects to Lyford's demand alleging that, in all the circumstances of the case, Lyford is not permitted to use Clause 14 of the SA in the manner it has purported so to do. In particular, Vernes alleges that Lyford's proposed use of Clause 14 is improper, in contravention of Clause 14 itself, and a violation of Vernes' contractual rights under the SA which will result in serious economic detriment to Vernes. At paragraph 8 of Vernes Affidavit, Mr. Vernes averred:

> **"VHL's (Vernes) goal is that any sale of the shares in VHL secures the best available economic return. VHL has arranged for the purchase of all the shares in LIB via a back-to-back transaction pursuant to which VHL has offered ("VHL's offer") to purchase LHNV's (Lyford) shares at net asset value ("NAV"), plus payment of a premium of 25% (and terms as per a VHL offer letter dated 29 June 2018, at Tab.2 of CV1 and, concurrently, a well-established banking group would buy from VHL all the shares of LIB. LHNV (Lyford has rejected the VHL (Vernes) offer."** [Emphasis added]

[13] It is plain from the above that Vernes' concern is one of securing the optimal economic return from the sale of the shares in LIB.

[14] Clause 25.2 of the SA expressly provides that any claim arising out of or related to the SA must be submitted to binding arbitration. It states:

> **"The parties to this Agreement agree that, with respect to any claims arising out of or related to this Agreement (including any question regarding its existence, validity or termination) each party, their heirs, successors, assignees, will irrevocably submit to binding arbitration under the applicable rules and legislation in force in The Bahamas at the time of the execution of this Agreement which rules are deemed to be incorporated by reference into this clause…..Any award entered in any such arbitration shall be final and binding and may be entered and enforced in any court of competent jurisdiction. Nothing contained herein shall be construed as preventing any of the other parties from instituting legal or equitable action in any jurisdiction against any of the other parties for temporary or similar provision relief to the full extent permitted under the laws applicable to this Agreement or any such other written agreement between the parties or the performance hereof or thereof or otherwise pending final settlement of any dispute, difference or question by arbitration. Any such provisional relief may be modified or amended in any way by the arbitrator at any time after**

his appointment and the parties agree to take all steps necessary to effect such modification or amendment."[Emphasis added]

[15] In accordance with Clause 25.2 of the SA, Vernes commenced arbitral proceedings against Lyford by Notice dated 2 August 2018.

[16] Lyford seeks an interim mandatory injunction to compel Vernes to comply with Clause 14 of the SA. It says that Clause 25.2 expressly provides for any party to the SA to seek such relief from the court.

Relevant statutory framework

[17] It is common ground that the jurisdiction of the court to grant an interim injunction in aid of Arbitration Proceedings is to be found in section 55 of the Arbitration Act, 2009 ("the Act"). That section provides as follows:

> **"55 (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.**
>
> **(2) Those matters are –**
>
> **(a) …**
> **(b) …**
> **(c) …**
> **(d) …**
> **(e) the granting of an interim injunction or the appointment of a receiver**
>
> **(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."**[Emphasis added]

Submissions by Counsel

[18] Mr. Rigby correctly submits that section 55 of the Act imposes some important pre-conditions before it can be invoked by an applicant. They are:

(i) The arbitral agreement must not have excluded its use – "unless otherwise agreed…".

(ii) The jurisdiction must be invoked "in aid of arbitral proceedings".

(iii) For the purposes of (3) – the application must be "urgent" and must be "for the purpose of preserving evidence or assets" for the arbitration.

(iv) The order sought must be interim and NOT permanent.

(v) The order must be necessary.

[19] Learned Counsel submits that Clause 25.2 of the SA expressly excludes section 55 of the Act. According to him, the relevant portion provides as follows:

> **"The parties to this Agreement agree that, with respect to any claims arising out of or related to this Agreement...each party...will irrevocably submit to binding arbitration...Nothing contained herein shall be construed as preventing any of the other parties from instituting legal or equitable action in any jurisdiction against any of the other parties for temporary or similar provision (sic) relief to the full extent permitted under the laws applicable to this Agreement …"**[Emphasis added]

[20] Mr. Rigby submits that there are six parties subject to the SA, of which two are the shareholders and are the parties to the arbitration proceedings which Vernes commenced. He argues that the use of the words "**any of the other parties**" was intended to draw a contrast between "parties" to the SA who also become "parties" to the arbitration proceedings, and "other parties" who are parties to the SA, but who do not become parties to such arbitral proceedings.

[21] According to learned Counsel, Clause 25.2 of the SA foreshadows if there is a dispute between any of the parties – which is subject to arbitration – the parties not involved in that dispute can seek temporary relief from the court for the purpose of aiding the arbitration.

[22] He argues that Clause 25.2 of the SA seeks to limit the right to seek "temporary relief" to "**any of the other parties**" and not to the Shareholders.

[23] Mr. Rigby forcefully argues that the effect of the Order sought by Lyford cannot be said to be in aid of arbitral proceedings because its effect, if granted, would be

to defeat the arbitration and make it purely academic. In other words, the arbitration would be rendered nugatory.

[24] He next submits that the clear intention of section 55(3) of the Act (if the court finds that it applies) is to aid the parties to arbitration in the preservation of the "fruits of the arbitration". It is not intended to grant permanent injunctive relief. Consequently, the court lacks the jurisdiction to do so. Learned Counsel refers to the English Court of Appeal decision of **Cetelem SA v Roust Holdings Ltd** [2005] EWCA Civ 618 at paragraphs 37, 62 and 64.

[25] I should state that, according to **Cetelem,** the court has the power to grant an *interim* mandatory injunction (para 64)**.** Further at para 48, Clarke LJ had this to say:

> **"…It is important to emphasize that it is not because the order may incidentally involve the preliminary (or even final) determination of an issue which the parties have agreed to arbitration. The section does not provide that the court must not make an order under section 44(3) which might have that effect. Whether it is appropriate for a court to make an order in such circumstances may be an important matter to take into consideration in deciding how to exercise the discretion conferred by the section but it is not a matter which goes to the jurisdiction of the court."** [Emphasis added]

[26] Learned Counsel further submits that Vernes' right to arbitrate is also an "asset" under section 55(3) which requires (equal) protection. The court cannot exercise its discretionary power under the section to diminish or destroy that right. To act in that way would be to do violence to its limited jurisdiction.

[27] Mr. Rigby next submits that in determining to invoke the section 55 jurisdiction, the court must be satisfied that it is "preserving evidence or assets". According to him, preserving is the critical word – that is the function that the order must seek to achieve. That mandates that the court must closely examine the ambit of the order sought and to determine if it will "protect or to keep something as it is, or prevent it from being damaged or destroyed".

[28] Additionally, Mr. Rigby submits that the "preserving" test in **Cetelem** was rightly applied to ensure that the application was made to the Russian Central Bank by 10 December 2004. Without that application proceeding, the sale of the shares was a moot point. He says, on the facts, **Cetelem** is wholly distinguishable. He submitted that, in the present case, Lyford is not seeking an order for Vernes to take any preparatory steps to advance the sale. The order is in effect seeking that the sale be actualized and completed. Such an order is not in support of the arbitration.

[29] Learned Counsel argues that there is no urgency in the matter. He says that while Lyford refers to the Long Stop Date, it avoids any references to Clauses 4.1 and 4.7 of the SPA. Clause 4.7 provides that "the Seller may, in its sole discretion, withdraw from this Agreement …"**.** According to him, there is not an iota of evidence to demonstrate that Ansbacher will seek to withdraw from the SPA due to the fact that the Long Stop Date "has been exceeded without closing having taken place".

[30] Counsel next argues that Central Bank has indicated to Lyford that it will await the outcome of the arbitration before giving approval to the deal and there is no evidence that Central Bank requires any communication from Vernes in relation to the application for approval as in **Cetelem.** Mr. Rigby submits that Lyford's feigned appearance of urgency falls far short on the evidence and this alone is a basis for the court to dismiss the application.

[31] Learned Counsel argues that the Order sought by Lyford is final and not interim as provided for in the Act.

[32] Mr. Rigby also submits that this was made clear by Counsel for the Plaintiff in his letter dated 3 September, 2018 to Central Bank where he penned that this application *"will have the effect of relegating the arbitration dispute over the exercise of the drag along right to monetary issue only thus freeing up the sale of LIB". Yet,* Lyford now turns around and argues that it is seeking temporary relief.

[33] Learned Counsel contends that the “asset” to be preserved in this dispute is the shares. If the sale to Ansbacher goes ahead, then there will be no dispute that is capable of being submitted to arbitration. In **Cetelem**, notwithstanding the order compelling the application to the Russian Central Bank, there remained in substance a dispute (the central matter) between the parties on the sale of the shares. According to him, Lyford is not seeking to preserve the asset but to dissipate it and the court has no authority and jurisdiction under section 55 of the Act to order the dissipation of assets.

[34] Learned Counsel fought hard to prevent the court from granting the Order which Lyford seeks. He submits that such an Order is unnecessary. He also submits that there is no evidence that the customers of LIB or its business dealings are compromised or is likely to suffer harm or financial ruin by the arbitration. Similarly, there is no evidence of commercial prejudice to Lyford or to Ansbacher.

[35] Next, learned Counsel argues that Lyford needs to demonstrate that the Order is necessary and urgent and, in the absence of these requirements, the court’s jurisdiction cannot be properly invoked.

[36] Counsel implores the court to dismiss the application which Lyford seeks.

[37] Learned Counsel Mr. Wilson submits that Vernes appears to be of the view that its purported commencement of arbitration proceedings should somehow preclude Lyford from proceedings with its Originating Summons application and seeking its *interim* mandatory injunction. According to him, this view is unfounded and without merit.

[38] Mr. Wilson argues that firstly, Clause 25.2 of the SA expressly carves out and preserves the right of the parties to move the court to grant interim relief and section 55 of the Act expressly recognizes the rights of contracting parties to make such provisions. As learned Counsel Mr. Wilson correctly submits, not only is Lyford entitled to move the court for the relief it is seeking but its right to that relief is not qualified by satisfying the pre-conditions imposed under section 55 in

order to obtain an injunction. He also correctly contends that section 55 is not one of the mandatory provisions which cannot be contracted out of under the Act.

[39] Learned Counsel submits that, in the event that Lyford is wrong in its construction of Clause 25.2 of the SA, it is still able to advance its application. He says that section 55 of the Act mirrors section 44 of the Arbitration Act, 1996 of England and Wales ("the UK Act"). Counsel contends that the arguments advanced by Vernes are without merit as section 44 of the UK Act has judicially been considered in the landmark case of **Cetelem**, an authority that Lyford heavily relies upon.

[40] Mr. Wilson submits that, in **Cetelem**, the UK court had the occasion to consider whether section 44 (our section 55) conferred jurisdiction on the court to grant an interim mandatory injunction in aid of arbitration proceedings that had, at the time of the hearing, not begun. The appellate court was further tasked with determining whether the meaning of assets in section 44 extended to choices in action and if so whether the section extended to protecting the right of an owner to sell its shares.

[41] In a unanimous decision, the UK court determined that (i) on a proper construction of section 44(3) , the court had the jurisdiction, where the case is one of urgency, to grant any of the orders set out in section 44 (1) that it thought necessary for the purpose of preserving assets; (ii) that the right to purchase shares, whether regarded as a conditional right or not, is an asset within the meaning of section 44(3) and (iii) it must then follow from the language of the section that a court must therefore have the jurisdiction to grant an injunction, where it considers it necessary, to preserve the right to purchase shares.

Analysis and findings

[42] I agree with Mr. Rigby that the court's jurisdiction under section 55 of the Act is intended to be a limiting provision, applying only to the preservation of specific subject matter in the cases of urgency and should not be used to

usurp the function of the arbitral tribunal. It is equally true that this limited jurisdiction is quite distinct from the unfettered jurisdiction of the court under section 21 of the Supreme Act: **AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC** [2012] 1 All ER (Comm) 845).

[43] The focal reason for that limited jurisdiction is because courts believe that those who make agreements to arbitrate should be compelled to do so. A similar view was taken by the English Court of Appeal in **Cunningham Reid and Another v Buchanan-Jardine** [1988] 1 W.L.R. 678 where Bingham L.J. stated:

> **"The parties in this case incorporated an agreement to arbitrate in their contract at a time when they know who would be claiming against whom and at a time when they no doubt reasonably anticipated that there would be no claim to arbitrate at all; it was an agreement which they made for better or worse, for richer or poorer, and the ordinary duty of the court is to give effect to the parties own agreement. "**

[44] Further support for this proposition are the cases of **Channel Tunnel Group Limited & Another v Balfour Beatty Construction Limited & Another** (1993) A.C. 334 and **Etri Fans Limited v NMB UK Limited** (1997) 1 WLR 1110.

[45] The question now is whether Clause 25.2 of the SA excludes section 55 of the Act? Learned Counsel Mr. Rigby vehemently contends that section 55 is excluded since it seems to limit the right to seek "temporary relief" to "any of the other parties" and not the shareholders, arguing that there are six parties to the SA of which two are shareholders and they are the parties to the arbitration agreement which Vernes has commenced.

[46] In my opinion, this argument, despite its attractiveness, is unconvincing since, in reality, there are only two parties to the SA. The majority shareholder is Lyford with 77.44 % of the issued shares and the minority shareholder, Vernes holds 22.56 % of the issued shares. So, between the two shareholders, they own all of the shares in LIB. The persons named in the SA are family members of Lyford and Vernes. "Family Member" is defined as, "in relation to Vernes Holdings Ltd,

Cyrille Vernes (in my view, the driving force behind Vernes) and in relation to Hottinger Holdings N.V. (now Lyford), Henri Hottinger, now deceased, and his son, Frederic Hottinger, the Chairman of Lyford (in my view, the driving force behind Lyford). So, there is no merit in the argument that Lyford is precluded from seeking the order in its Originating Summons because Lyford is not "any of the other parties".

[47] Besides challenging the jurisdiction of the court to make the Order sought by Lyford because it does not fall under the rubric of "any of the other parties", Vernes challenges the Originating Summons on four other discrete grounds which are as follows:

1. The Order sought cannot be said to be in aid of arbitral proceedings because, the effect of the Order, if granted, would be to defeat the arbitration and to make it purely academic since the "fruits of the arbitration" would have been dissipated and not preserved;

2. There is no urgency in the matter since the Long Stop Date of 2 October 2018 has passed and no prejudice will result as Lyford may, in its sole discretion, withdraw from the SPA without any consequences;

3. The Order sought is not interim but final and;

4. The Order is not necessary since there is no cogent evidence before the court that customers of LIB or its business dealings are compromised or will suffer harm of financial ruin as a result of the arbitration.

[48] Learned Counsel Mr. Rigby refers to the cases of **Zim Integrated Shipping Services Limited v (1) European Container KS et al** [2013] EWHC 3581 (Comm); judgment of Males J; **Euroil Ltd v Cameroon Petroleum SARL** [2014] EWHC 52 (Comm), judgment of Males J; **Belair LLC v Basel LLC** [2009] EWHC 725 (Comm), a decision of Blair J and **Maldives Airports Co. Ltd and another v**

GMR Malé International Airport Pte Ltd [2013] SGCA 16, a case from the Singapore Court of Appeal to fortify his arguments.

[49] In my opinion, **Cetelem**, a decision of the UK Court of Appeal, though not binding on this Court is certainly more persuasive than cases from the Commercial Court of England or a decision from the Singapore Court of Appeal for reasons which are obvious.

[50] Indeed, the facts of **Cetelem** are very similar to the facts in the present case. By virtue of a written agreement between the parties, which was expressly governed by English law and provided for the resolution of disputes by ICC arbitration in London, the defendant, RHL agreed to sell and the claimant, Cetelem agreed to buy RHL's 50% interest in a Cypriot company. The sale and purchase of the shares in that company were intended to effect the indirect transfer to Cetelem of 50% of the shares in RSB, a Russian bank indirectly owned by RHL. The approval of the Russian Central Bank was a condition precedent of the agreement which was to be null and void in the event that the approval had not been obtained by a particular date.

[51] RHL asserted that Cetelem had taken no steps to commence arbitral proceedings before that deadline passed. Cetelem made an application, pursuant to section 44(3) of the Arbitration Act, 1996 for an interim mandatory injunction requiring RHL to submit its application for approval of the share purchase agreement to the Russian Central Bank.

[52] RHL submitted that there was no jurisdiction because the SPA involved the transfer of shares by a BVI company [this is incorrect: the transferor was actually RHL] in a Cypriot company to a French company (Cetelem) where the BVI company had no assets in England & Wales. The section 44 powers were in support of arbitral proceedings but here there was no arbitration in immediate contemplation; hence the order sought would not be in support of arbitral proceedings but would be a usurpation of the powers of the arbitrators. Further,

where there was no arbitration imminent, the powers in section 44(3) were confined to the matters specified therein, namely, preserving evidence or assets.

[53] Cetelem submitted that the court did indeed have jurisdiction over the application because the arbitration agreement contained in the SPA was subject to the Arbitration Act 1996. It also argued that subsections 44(3) and (5) of the Arbitration Act 1996 applied and relied on the decision of Cooke J in **Hiscox Underwriting Ltd v Dickson** [2004] EWHC 479. In that case, Cooke J held that section 44(3) was permissive and not exhaustive of the court's powers, and that an interim injunction prior to the appointment of an arbitrator was permissible in an urgent situation where the injunction would be supportive of the arbitral process (in **Hiscox** a mandatory injunction was in fact given).

[54] Alternatively, in any event, the court had a residual jurisdiction under section 37 of the Supreme Court Act 1981 to act in the interests of fairness and justice. Cooke J had noted that in making an order of this type it was essential not to prejudge the issue(s) which had to be determined by the arbitrator; further, a key principle in exercising jurisdiction was that section 1(c) of the 1996 Act provided that the court ‘should not’, as opposed to ‘shall not’, intervene in the arbitration process (similar to section 3(c) of our Act).

[55] Cetelem also referred to other authority governing mandatory injunctions to support its application for a mandatory, as opposed to temporary, injunction.

[56] Beaton J. held that the decision in **Hiscox** showed that the court did have jurisdiction; in particular, section 44(3) refers to a *proposed party* to arbitration proceedings (same as section 55(3) of our Act) and he agreed with Cooke J that the language of section 44(3) was permissive. In particular, section 44 (3) did not distinguish between cases involving a party to an arbitration and a proposed party.

[57] On appeal , Clarke LJ reasoned as follows:-

"*Jurisdiction of the High Court in cases of urgency*

29. I focus here only on the jurisdiction of the court under section 44 of the 1996 Act…. The critical provision of the 1996 Act is section 44(3), which it will be recalled provides:

> **"If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."**

The question is whether in a case of urgency, as Cooke J held and Mr. Black submits, the subsection is simply permissive and does not in any way restrict the circumstances in which the court can exercise the powers conferred upon it by subsections 44(1) and (2) …

37. The DAC identified, in para. 214, the purpose of section 44, namely to give the court powers to be used when the tribunal cannot act effectively. The key paragraph for present purposes is para 215 which Mr. Dunning relies upon in two respects. The first is that it makes clear that the purpose of subsection (3) was to prevent any suggestion that the powers of the court might be used to interfere with or usurp the arbitral process or any attempt to do so. The second is that it shows that in cases of urgency the powers of the court are limited to the exercise of powers "with regard to the preservation of assets or evidence". Mr. Dunning submits that it is plain from para 215 that the DAC did not intend the court should have the power in cases of urgency to make orders other than for the preservation of assets or evidence. [Emphasis added]

46. In all the circumstances, it is in my judgment appropriate to construe the subsection consistently with the intention identified in para 215 of the DAC Report. That report makes it clear that it was intended to interfere as little as possible with the arbitral process and to limit the power of the court in urgent cases to the making of orders which it thinks are necessary for the preservation of evidence or assets.

47. It follows that I would hold that in the instant case there was only power under section 44(3) to make an order if the judge thought that it was necessary for the preservation of evidence or assets. …

"*Preserving assets*"

48. … the power in the subsection [44(3)] is limited to the making of orders which the court thinks are necessary for the purpose of preserving evidence or assets. It is important to emphasize that it is not because the order may incidentally involve the preliminary (or even final) determination of an issue which the parties have agreed to submit to arbitration. The section does not provide that the court must not make an order under section 44(3) which might have that effect. Whether it is appropriate for a court to make an order in such circumstances may be an important matter to take into consideration in deciding how to exercise the discretion

conferred by the section but it is not a matter which goes to the jurisdiction of the court. [Emphasis added]

49. It is also important to note that section 44(3) is not restricted to orders for the preservation of evidence or assets. Under the subsection "the court may ... make such orders as it thinks necessary for the purpose of preserving evidence or assets". As I see it, the effect of subsection (3) is that the court may make any order which it could make under subsection (1) provided that it thinks that it is necessary for that purpose. It may thus make an order about any of the matters set out in subsection (2), provided that it is "necessary for the purpose of preserving evidence or assets". [Emphasis added]

57. Mr Dunning correctly accepts that "assets" are not limited to tangible assets but include, for example, choses in action. That is evident, both because section 44(2) refers to "property" and "goods", so that "assets" must be wider than both and because the classic freezing injunction freezes bank accounts, which, when in credit, evidence choses in action. It seems to me that, once it is accepted that "assets" includes "choses in action" there is no reason to limit them to particular types of chose in action. …I do not see any reason why a contractual right should not be an "asset" within the meaning of the subsection. Further, given the fact that the purpose of section 44(3) is to permit orders for the preservation of assets, and given the limitations on the operation of the subsection, namely that it can only be invoked (a) when "the case is one of urgency" and (b) when the judge thinks that it is "necessary" to make the order, it seems to me that in this context there is no good reason for construing the meaning of "assets" narrowly.

58. … I can see no reason why "assets" should be limited to the defendant's assets.

59. Similarly, Mr Dunning submitted that an order had to be for the purpose of preserving assets in the sense of ensuring, for example, in the case of a freezing order, that assets are available against which an award or judgment can be enforced. I of course accept that that is the paradigm case but I do not see why it should be held to be the only example of a case within the language of section 44(3).

62. It is important to note that we are considering only the powers of the court and not how those powers should be exercised. Thus section 44(3) only gives jurisdiction to the court to make orders which are necessary for the purpose of preserving evidence or assets. It is evident that the purpose of the order must be to facilitate the arbitration or the enforcement of an award and not to usurp the functions of the arbitral process. However, as I observed earlier, there is nothing in the subsection to limit the power of the court to orders which do not involve a preliminary determination of a contractual right of the parties. I see nothing in the subsection or the Act which provides that the court has no power to make an order which it thinks necessary for the purpose of preserving evidence or assets because it will also involve forming a view on the merits of the dispute which the

parties have agreed to submit to arbitration or because it involves directing a party to take a step which the contract provides that it must take. Whether it is right in principle to make such an order in any given case is an entirely different question but I cannot see that there is anything in the subsection or the Act which deprives the court of the power to make an order which it thinks is necessary for the purpose of preserving evidence or assets. It is that power which is expressly conferred by the subsection.[Emphasis added]

63. Mr Dunning submitted that the international arbitration community would be particularly horrified by the idea of a mandatory injunction. I am not persuaded that that is so. … Section 44(1) and (2)(e), read together, expressly include the same powers to grant interim injunctions for the purposes of and in relation to arbitral proceedings as the court has for the purposes of and in relation to legal proceedings. Those powers include a power to grant interim mandatory injunctions, although the authorities make it clear that the court should exercise such a power very sparingly. That would be particularly so in the context of proposed arbitral proceedings but that consideration does not go to the jurisdiction of the court but to the exercise of its jurisdiction. [Emphasis added]

64. It is important to note that the power is to grant an interim mandatory injunction. The power does not extend to granting final injunctions. Although it is not necessary to resolve this question in this case, the power does not extend to making a final determination of the rights of the parties. The purpose of the power, in the context of section 44(3) is to preserve evidence or assets and no more. Moreover the defendant will be protected by an appropriate cross-undertaking in damages such was included in the order in the instant case.…[Emphasis added]

68. In his written submission provided to us after the hearing, without in any way resiling from any of his previous submissions, Mr Dunning took a somewhat different point. While accepting that a chose in action is an asset, he sought to distinguish between the substantive rights created by the contract, which he accepted were choses in action (and thus assets), and the remedies which were or might be available to enforce those rights such as specific performance. He submitted that Cetelem's claim for specific performance of the SPA was not a chose in action but merely a form of relief or remedy to enforce a substantive right. He accordingly submitted that the order of the judge was not an order for the preservation of assets and that it was not an order which it was open to him or indeed this court or any other court to make.

69. In response Mr Black submitted that the relevant assets are not the rights to have RHL's promises in the SPA specifically enforced but the promises themselves, principally the right to buy the shares in RCL. He submitted, as he had submitted orally both to us and to the judge, that that right was in danger of being destroyed by administrative and artificial means, that is by the failure of RHL to operate the terms of the SPA, and that it was that right that he had invited the court to preserve by granting

the interim mandatory injunction. He thus submitted that in granting the injunction it was plain that the judge thought it necessary to preserve the right to purchase the shares so that, although he did not put it in these express terms, the judge was making an order which he thought necessary for the purpose of preserving an asset within the meaning of section 44(3) of the 1996 Act.

70. For my part, I prefer the submissions of Mr Black on this point to those of Mr Dunning. I would not accept the submission that the injunction was granted merely for the protection or preservation of Cetelem's claim for specific performance and not for the protection or preservation of its contractual right to buy the shares. It appears to me that the right to purchase the shares under the SPA was indeed a substantive right, although it may properly be regarded as a conditional right since it depended upon the performance of certain conditions precedent. In my opinion, whether regarded as a conditional right or not, it was to my mind an asset within the meaning of section 44(3). It follows from the language of the subsection that, if the judge thought that it was necessary to grant the injunction in order to preserve the right, he had the power (but not of course the obligation) under the subsection to make an appropriate order. Moreover, it appears to me that it was that right (and not simply Cetelem's equitable remedies) which the order was designed to protect or preserve."[Emphasis added]

[58] I have quoted quite extensively from **Cetelem** because, in my opinion, this case properly disposes of all of the issues advanced by learned Counsel Mr. Rigby.

[59] As Mr. Wilson correctly submits, **Cetelem** has been followed by the UK courts since 2005. In **Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe** [2013] EWHC 3010 (TCC), the court stated at paragraphs 29 – 32 of the judgment:

"29. Section 44 (3) of the Arbitration Act 1996 provides as follows:

> **"If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."**

30. In *Cetelem SA v Roust Holdings* [2005] EWCA Civ 618, Clarke LJ said, at paragraph 57:

> **"It seems to me that, once it is accepted that 'assets' includes 'choses in action' there is no reason to limit them to particular types of choses in action. There may be some other reason for limiting the operation of section 44(3) but I do not see any reason why a**

> **contractual right should not be an 'asset' within the meaning of the subsection. Further, given the fact that the purpose of section 44(3) is to permit orders for the preservation of assets, and given the limitations on the operation of the subsection, namely that it can only be invoked (a) when 'the case is one of urgency' and (b) when the judge thinks that it is 'necessary' to make the order, it seems to me that in this context there is no good reason for construing the meaning of 'assets' narrowly."**
>
> **31. I see no reason why an order should not be made for the purpose of the preservation of a right if its effect is to preserve the value of that right: see also the observations of Clarke LJ in *Cetelem* at paragraph 65. A contractual right is not preserved if a failure to give effect to it would destroy much or all of its value.**
>
> **32. <u>So, if the requirements of urgency and necessity are met, this is a case where in my judgment the court has the power to grant an injunction under section 44(3)</u>. …"**[Emphasis added]

[60] Indeed, **Cetelem** is sound authority that, on a true construction of section 55(3) of the Act, if the case is one of urgency, the court has jurisdiction to grant orders as it thinks necessary for the purpose of preserving evidence or assets. I agree with learned Counsel Mr. Wilson that, applying the *ratio decedendi* of **Cetelem** to the facts of the present case, since a contractual right to purchase shares is an asset within the meaning of section 44(3) of the UK Arbitration Act, the converse must also be true; therefore Lyford's Clause 14 contractual right to sell its shares, which cannot be exercised without the concomitant right to drag Vernes along, is an asset within the meaning of section 55(3) of the Act.

[61] Additionally, Clause 14 of the SA is absolute and unqualified. There needs not be any unnatural meaning or interpretation of it. It grants Lyford the right to sell its shares in LIB to a purchaser of its choosing. Clause 14 further gives Lyford the right to demand that Vernes transfers its shares to the chosen purchaser on similar terms. By the clear wording of Clause 14, Vernes' full and voluntary consent to transfer its shares in LIB, in a sale negotiated by Lyford, is pre-agreed. Any derogation by Vernes from this clause especially in the face of a concluded SPA, is a serious threat to Lyford's asset; namely its contractual right

to sell. After all, one cannot be oblivious to the fact that Lyford holds 77. 44 % of the issued shares in LIB.

[62] There is urgency for the Order. Learned Counsel Mr. Rigby states that there is no urgency as the Long Stop Date of 2 October 2018 has expired. He also submits that by Clause 4.7 of the SPA, Lyford may, in its sole discretion, withdraw from this Agreement without any consequences. I pose this question: why should Lyford withdraw from the SPA? It seems to me that by Clause 14 of the SA, there is not much that Vernes could do. It agreed to the drag along option right. Learned Counsel Mr. Rigby referred to other clauses in the SA namely Clause 12. In my opinion, none of these clauses provides any succour to Vernes.

[63] I agree with learned Counsel Mr. Wilson that the need for the Order is urgent especially since the Long Stop Date has passed. Ansbacher has expressed to Lyford that it is critical that the sale be completed prior to the end of the third quarter. The beneficial value of the acquisition of LIB to Ansbacher is contingent on its ability to integrate LIB into its current structure in a timely basis. Any further delay will adversely affect the value of the sale to Ansbacher and may lead to their withdrawal from the transaction. This withdrawal will result in a significant loss of opportunity for Lyford and a loss of significant legal and other professional fees expended to date in the negotiation and preparation of the two versions of the SPA.

[64] Additionally, as Mr. Hottinger averred in his affidavit, Lyford has crafted investment plans, based on the anticipated proceeds of the sale of LIB and any further delay in the receipt of those funds will result in further loss of opportunity to Lyford.

[65] There is no doubt in my mind that any further delay in the conclusion of the SPA exposes Lyford to serious reputational harm and substantial impairment to its client base. It is a known fact that public confidence in a financial institution and

its reputation plays a direct role in that institution's ability to attract clients and in the event of a sale, a purchaser.

[66] For all of these reasons, I will grant the Order prayed for compelling Vernes to comply with Clause 14 of the SA entered into, between the parties dated 29 July 2014 in relation to the exercise by Lyford of its drag along option right under that Agreement.

Principles governing the grant of interim injunctions

[67] The law governing the grant of interim injunctions is well settled. The basic principle underpinning the grant of an interim injunction is that the court should take whichever course seems likely to cause the least irredeemable prejudice to one party or the other. In **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC 16, the Privy Council re-stated the principles a Court should be guided by. At paragraphs 16 – 20 of the judgment, Lord Hoffman, delivering the opinion of the Board stated:

> **"[16] … the court must … assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.**
>
> **[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in *American Cyanamid* [1975] 1 All ER 504 at 511:**
>
> > **'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where**

the balance lies, let alone to suggest the relative weight to be attached to them.'

[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

[19] There is, however, no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other … [w]hat is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772 at 780-781. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1970] 3 All ER 402 at 412, 'a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted'.

[20] <u>For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see Films Rover International Ltd v Cannon Film Sales Ltd [1986] 3 All ER 772.</u> What matters is what the practical consequences of the actual injunction are likely to be. …" [Emphasis added]

[68] In my view, the extent and ramifications of the probable damage to Lyford as a result of Vernes' refusal to comply with its contractual obligations would be significant. Given the value of the Ansbacher transaction, damages to Lyford, should the Ansbacher SPA fall through, could amount to approximately $15 million. Vernes is clearly not in a position to pay those damages (otherwise it would have made the offer to purchase Lyford's shares itself instead of on behalf of Amber Group) so an undertaking in damages from Vernes would be inadequate as it would not be in a position to pay them.

[69] Additionally, there is no assurance that should the sale to Ansbacher fall through, Lyford will be able to locate another purchaser for the same price or a higher value. Amber Group has not even made a monetary offer. It seems to me from their letter that they are cloaked with a façade as not even their names are revealed. It is my firm view that the likelihood of irredeemable and irreparable prejudice to Lyford, which owns more than ¾ of the shares in LIB far outweighs any that may accrue to Vernes. In the event that an Arbitrator concludes that the exercise of the drag along option was somehow improper, the only question as far as Vernes is concerned is simply one of adequate remuneration. In recognition of this, Lyford has provided an undertaking in damages to Vernes, should it be determined that the injunction as wrongly obtained.

[70] Furthermore, I agree with learned Counsel Mr. Wilson that the grant of the injunction will not undermine the proposed arbitration. I also agree with him that since the Notice of Commencement of Arbitral Proceedings dated 2 August 2018 appears wanting, Lyford is left to presume that Vernes must be of the view that Amber Group offer is financially more beneficial to Vernes than the Ansbacher transaction and thus wishes to direct a sale to its chosen purchaser, Amber Group; a power which, in my opinion, Vernes does not possess.

[71] For these reasons, I will grant the Order sought by Lyford compelling Vernes to comply with Clause 14 of the SA entered into, between Lyford and Vernes dated 29 July 2014 in relation to the exercise by Lyford of its drag along option right under the said Agreement. I will also award costs to Lyford to be taxed if not agreed.

Stay of legal proceedings

[72] Vernes seeks an order that all further proceedings in this action be stayed on the ground that the said proceedings are brought in respect of and concern a matter which under an arbitration agreement between the parties is to be and has been referred to arbitration.

[73] Lyford has conditionally agreed to go to arbitration but still expects to be served with a proper notice commencing the arbitration proceedings, by fully setting out the dispute which Vernes is referring to arbitration: see letter of 25 September 2018. Whether there has been compliance or not with the law will be a matter for the arbitrator, not this court.

The law

[74] The process of instituting arbitration proceedings pursuant to the Act is governed by section 9 which reads:

> **"(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern the matter.**
>
> **(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.**
>
> **(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.**
>
> **(4) On application under this section the court shall grant a stay unless satisfied that the arbitration is null and void inoperative, or incapable of being performed.**
>
> **(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."**

[75] Learned Counsel for Vernes, Mr. Rigby submits that there is no dispute that the subject proceedings concern a matter which under the SA is to be referred to arbitration and there is no contention as to the validity of the Arbitration Agreement. In fact, he submits that learned Counsel for Lyford, Mr. Wilson has conditionally accepted the appointment of a proposed arbitrator. Mr. Rigby argues that once the court is satisfied that:

(a) these proceedings touch and concern a matter which by agreement between the parties is to be referred to arbitration;

(b) there is no bar to bringing a stay application under section 9(3) and

(c) that the arbitration agreement is not null and void, inoperative or incapable of being performed,

then it must grant a stay of proceedings.

[76] Mr. Rigby cites the case of **Harcourt Development (Bahamas) Limited v Steel H.Q. (Bahamas) Limited** [2013] 2 BHS J. No. 100, where, despite the defendant having taken a procedural step to answer the substantive claim in those proceedings, the court still granted a stay in aid of arbitration. Evans J. at paras 21 - 22, stated:

> **"21. It seems to me that it would, therefore, be sensible for the matter to be referred to arbitration, particularly as the parties agreed by virtue of Clause 19 aforesaid to refer all disputes to arbitration and I agree with counsel for the defendant that the onus was on the plaintiff, who commenced this action, to comply with the terms of the agreement and refer the matter to arbitration instead of commencing an action in the Supreme Court.**
>
> **22. So, in the exercise of my discretion, and under the inherent jurisdiction of the court, I order that this action be stayed so that the parties may proceed to arbitration pursuant to the provisions of Clause 19 aforesaid."**

[77] Mr. Rigby submits that this is a matter suited for arbitration and in the interest of justice the court should stay these proceedings in aid of arbitral proceedings.

[78] Mr. Wilson did not forcefully refute the argument that the dispute and claims made fell within the arbitration agreement. Rather, he submits that Vernes has issued to Lyford Notice of Commencement of Arbitral Proceedings pursuant to Clause 25 of the Shareholders Agreement in an effort to further delay the completion of the sale to Ansbacher. The Notice, he submits, insufficiently sets out the precise nature of Vernes' dispute; leading once again, as he puts it, to the

conclusion that promulgating the same is merely a step to frustrate Lyford's stated plans.

Analysis and conclusion

[79] In **Heyman & Another v Darwins Limited** (1942) 356, Lord Macmillan observed at page 370:

> **"The first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the Arbitration Clause. Then sometimes the question is raised whether the Arbitration Clause is still effective or whether something has happened to render it no longer operative. Finally the nature of the dispute being ascertained, it having been held to fall within the terms of the Arbitration Clause and the clause having been found to be still effective, there remains for the Court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."**

[80] So, what is the precise nature of the dispute which has arisen? A good starting point is to look at the Notice itself. The Notice of Commencement of Arbitral Proceedings dated 2 August 2018 states "*those disputes and differences relate to clause 14 of the Agreement dated 29 July 2014 pertaining to a drag along option and a recently declared intention of Lyford to exercise the same to compel Vernes to transfer its shares in LIB further to a certain agreement for the sale and purchase of the shares in LIB entered on (or about) 2 July 2018 between Lyford and Ansbacher (Bahamas) Limited*."

[81] There have been several exchanges of correspondence between the parties. Lyford seems puzzled as to the basis of Vernes' challenge and what exactly the arbitrator will be called upon to arbitrate. Vernes opines that it has complied with the Encyclopaedia of Forms and Precedents. Lyford says that the Form, while intended to be a guide, is not determinative of the legal requirements for a valid notice.

[82] I myself am perplexed on what basis Vernes challenges its exercise of its undoubted contractual right. Is it relating to an interpretation of Clause 14? In my opinion, Clause 14 is absolute and unqualified. The Notice appears opaque. But I

say no more since, from the correspondence between the parties and the submissions that both Counsel advanced in this court, that the matter will be arbitrated upon. In addition, Lyford has conditionally submitted itself to arbitration by choosing one of the two named arbitrators.

[83] Returning to whether these proceedings should be stayed pending arbitration, in my opinion, there is nothing to stay. The *interim* mandatory injunction which I granted is to aid the arbitral proceedings and disposes of the issue(s) before this Court.

[84] Last but not least, I owe a great depth of gratitude to all of the lawyers and in particular, Mr. Rigby and Mr. Wilson for their sterling presentation and immeasurable assistance to this court.

Dated this 22nd day of October, A.D., 2018

Indra H. Charles
Justice