IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 2 OF 2019 (IKJ)

IN THE MATTER OF AN APPLICATION FOR A DISCLOSURE ORDER

BETWEEN

ARCELORMITTAL USA LLC

PLAINTIFF

AND

(1) ESSAR GLOBAL FUND LIMITED
(2) ESSAR CAPITAL LIMITED

DEFENDANTS

IN CHAMBERS

Appearances: Mr Tom Weisselberg QC of counsel, Mr Paul Smith, Ms Anya Park and Ms Natasja Levy, Harney Westwood & Riegels, on behalf of the Plaintiff

Mr Vernon Flynn QC of counsel, Mr William Jones and Ms Victoria King, Ogier, on behalf of the Defendants

Before: **The Hon. Justice Kawaley**

Heard: **8 September 2020**

Draft Ruling Circulated: **18 September 2020**

Ruling delivered: **5 October 2020**

HEADNOTE

Case management stay-application by Plaintiff of the Defendants' application to Grand Court to set aside Norwich Pharmacal Order based on change of circumstances while awaiting appellate judgment on Defendant's own appeal against same Order-scope of jurisdiction to adjourn the hearing of interlocutory applications contrasted with staying an entire action-principle of finality-overriding objective- Grand Court Rules Preamble and Order 32 rule 4

REASONS FOR GRANTING CASE MANAGEMENT STAY

Background

1. On January 16, 2019, I granted an ex parte Norwich Pharmacal Order (the "NPO") in aid of enforcement of a foreign arbitral award. On January 31, 2019, Ernst and Young ("E & Y") were appointed to preserve the documents covered by the NPO pending a challenge to the ex parte Order. The Return Date hearing took place on 13 February 2019. By a Ruling dated March 29, 2019[1], I declined to discharge the NPO. A further hearing took place on May 29 and 30, 2019, when the Plaintiff's application for a Freezing Order and a Garnishee Order in FSD 74 of 2019 (IKJ) were also before the Court[2]. The NPO was formally continued.

2. Shortly after the hearing on 29 May 2019, accepting submissions advanced on behalf of the First Defendant, I determined that the NPO was a final Order so that the Defendants did not require leave to appeal. I subsequently gave short reasons for this decision[3].

3. The Defendants filed a Notice of Appeal against the NPO on June 20, 2019. On June 24, 2019 they issued a Summons seeking a stay of execution pending appeal. That Summons was heard on July 17, 2019 when I made an Order (the "Stay Order") in the following relevant terms:

> "*1.The execution of the Norwich Pharmacal Order is stayed until the final determination of the Defendants' Appeal to the Court of Appeal, on condition that:*
>
> > *(a) Pending final determination of the Appeal to the Court of Appeal, the Defendants shall continue their review of material imaged to identify documents and information which fall within the categories of disclosable documents pursuant to the Norwich Pharmacal Order, so that the Defendants are in a position to comply with the Norwich Pharmacal Order and disclose such documents and information on the*

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[1] *Arcelormittal USA LLC-v-Essar Global Fund Limited and Essar Capital Limited*, FSD 2/2019 (IKJ), Judgment dated March 29, 2019 (unreported).
[2] My Ruling on the Plaintiff's Freezing Order Summons and Garnishee Summons was delivered on July 2, 2019 although a draft of the Ruling was circulated on June 19, 2019.
[3] FSD No.2/2019(IKJ); FSD 74/2019 (IKJ), Judgment dated July 2, 2019 (unreported) at paragraphs 12-17.

> *conclusion of the hearing of the Appeal, if so directed by order of the Court of Appeal…"*

4. The fourth recital to the Order also recorded my indication at the July 17, 2019 hearing that the appeal was appropriate for listing on an expedited basis. The appeal was promptly heard and the Court of Appeal reserved judgment on November 6, 2019. The terms of the Stay Order obliged the Defendants to continue reviewing documents so as to be able to "*disclose such documents and information on the conclusion of the hearing of the Appeal, if so directed by order of the Court of Appeal"*. The Defendants, had they been focussing scrupulously on complying with the terms of the Stay Order, ought (as Mr Weisselberg QC submitted) to have been in a position to produce all relevant documents at the end of the appeal hearing. In fact they clearly were not in a position to do so, yet they sought no relief from paragraph 1(a) of the Stay Order from the Court of Appeal. The full extent of compliance problems would only emerge later, but on October 2, 2019 E &Y had already notified the parties that the usual keyword searches could not be carried out on the "SAP" platform. In fairness, the Plaintiff did not at this juncture appear to be pressing the review process issue.

5. The Plaintiff had bigger fish to fry. On December 31, 2019, the Plaintiff commenced a conspiracy claim against the Defendants and other parties in London and sought a Worldwide Freezing Order ("WFO") at an ex parte on notice hearing before Henshaw J. (the "English Proceedings"). That application was refused in a judgment delivered on March 30, 2020[4] (the "Henshaw Judgment"). The WFO was refused by Henshaw J in part on the grounds that the Plaintiff's case that a 2016 restatement of accounts and a related Subordination Agreement evidenced historic acts of dissipation lacked sufficient cogency (Henshaw Judgment, paragraphs 106, 123-130). Henshaw J also found that the adverse findings made in the *Algoma* proceedings in Ontario in 2014 provided no material support for the Plaintiff's case that the Defendants were involved in seeking to evade Essar Steel's obligations under an agreement which was only terminated 18 months later (Henshaw Judgment, paragraphs 157-158).

6. The detailed scrutiny of the sufficiency of the Plaintiff's evidential case on historic dissipation underpinning a belief that future dissipation was likely to occur which Henshaw J carried out was not undertaken by me at the *inter partes* application to discharge the NPO. This was not an oversight; it was based on the way the Defendants advanced their challenge. As I stated in the March 31, 2019 Ruling:

> "*26. The crucial factual assertion relied upon is that 'AMUSA believes that steps have been taken and/or will be taken to dissipate and/or*

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[4] *Arcelormittal USA LLC-v- Mr Ravi Rua and Others* [2020] EWHC 740 (Comm).

obscure the location of Essar Steel's assets and so impede enforcement of the ICC Award.' This language most helpfully captures two dimensions of the wrongdoing alleged:

(1) past steps to impede enforcement of the ICC Award;

(2) future steps to impede the enforcement of the ICC Award.

27. The Defendants' application does not engage with this case on the factual plane. The submission that no wrongdoing was established was based on legal principles rather than evidential deficiency concerns…"

7. On April 7, 2020, just over a week after the Henshaw Judgment was delivered in London, Ogier wrote to the Registrar of the Cayman Islands Court of Appeal (the "Registrar') foreshadowing an application to this Court to discharge the NPO based on a "*material change of circumstances*". The only ground explicitly relied upon was the following*:*

> *"The English Proceedings are therefore the very proceedings which AMUSA claimed it was unable to bring without obtaining Norwich Pharmacal relief in these proceedings. The English Judgment accordingly shows that the Norwich Pharmacal relief sought by AMUSA is clearly no longer needed (to the extent that it was ever needed at all).*"

8. It was difficult to avoid concluding that implicitly the Defendants were seeking to rely on the evidential findings reached in the Henshaw Judgment about historic and future dissipation. This is in part because, on the face of it, if the English Proceedings are indeed the proceedings the NPO was obtained to commence, the very filing of those proceedings in December 2019 ought to have caused the Defendants to spring into action and to at least reserve the right to set the NPO aside, if needed, on the basis asserted post-judgment, four months later. Harneys, on behalf of the Plaintiff, informed the Registrar on April 15, 2020 that the Henshaw Judgment was irrelevant to the appeal. (The Plaintiff would subsequently submit that the Defendants could and should have placed the matters before the Court of Appeal, if they wished them to be adjudicated).

9. After the Defendants advised the Registrar on April 23, 2020 that the Plaintiff had been refused leave to appeal the Henshaw Judgment and communicated further with

the Court on May 1, 2020 advising that they would be applying to this Court, the Registrar notified Ogier by return email as follows:

> "*…The Court advised that they intend to issue a judgment shortly which will deal with the matters with which this exchange of correspondence is concerned…*"

10. So on May 1, 2020, the Defendants issued their Summons to set aside the NPO ("Set-Aside Summons") supported by the Sixth Affidavit of Sushil Baid. Extensive reference is made to the evidential findings reached in the Henshaw Judgment, which it is asserted should be taken into account when considering whether there is any need for the NPO. Those findings were substantially based on material which was before me with which the Defendants elected not to engage, presumably because another English Judge had at that time taken a different view of the material[5]. But the primary ground for the application to set aside based on a material change of circumstances explicitly advanced was the following:

> "*19. It is the Defendants' position that AMUSA's commencement of the English Proceedings represents a material change of circumstances which ought to result in the NPO being set aside.*"

11. The Set-Aside Summons case is said to be primarily a matter of submission, but in paragraph 20.2 of his Affidavit, the deponent posits the proposition that if the NPO was sought in order to "*plead a claim in relation to a particular piece of alleged wrongdoing*", once the Plaintiff is able to plead such a case (i.e. the English Proceedings), the NPO falls away. That proposition appeared at first blush sound. What was pivotally controversial, however, was whether or not the conspiracy claim advanced in the English Proceedings is sufficiently aligned with the wrongdoing relied upon by the Plaintiff when obtaining the NPO. Rightly or wrongly, I viewed the Plaintiff's case on wrongdoing in the March 29, 2019 Ruling as being focussed on past and threatened future steps to evade enforcement of the ICC Award.

12. While it was said to be common ground that the Defendants' Set-Aside Summons to set aside the NPO was arguable, I made it clear in the course of argument that I was quite flummoxed by the spectre of being invited to set aside an Order that the Defendants had on a previous occasion (at the hearing on 29 May 2019 when the

[5] Butcher J, who granted a similar *Norwich Pharmacal* Order to the NPO on January 14, 2019 in Claim No. CL-2019-000030.

Defendants were represented by different Leading Counsel) submitted was final, while the parties were awaiting judgment on the Defendants' own appeal.

13. For present purposes, however, it was striking that the Sixth Baid Affidavit (which was lodged with the Court in final, approved, unsworn form on May 1, 2020 but not sworn until August 5, 2020 due to restrictions caused by Covid-19) does not assert a case of urgency in terms or identify a pressing need for the Defendants' Summons to be heard. Instead, an entirely balanced and non-contentious approach is adopted to the question of whether the Set-Aside Summons should be heard before or after the Court of Appeal delivered its Judgment on the Defendants' appeal against the granting of the NPO:

> "*23. The Defendants accept that this raises a case management issue, in that:*
>
> > *23.1 If this Court proceeds to determine the Set Aside Application as soon as possible, there is a risk of it being overtaken by any judgment handed down in the Appeal.*
> >
> > *23.2 If, on the other hand, this Court waits for judgment in the Court of Appeal, and then proceeds with the Set Aside Application if and only if it becomes necessary to do so, there may be further delay in the final resolution of issues arising in connection with the NPO.*
>
> *24. The Defendants are in the Court's hands to the approach which it adopts, but do not have any objection to the Set Aside Application being determined as soon as possible.*"

14. The general tenor of these averments is more consistent with the scope of what I ultimately found the Court's jurisdictional powers to be. However, just over three months after this conciliatory Affidavit was served (in approved, signed but unsworn form) and 2 days after it was then sworn (in unchanged form), Ogier on August 7, 2020 notified Harneys that the firm had been instructed to proceed with the May 1, 2020 Summons on the grounds of the length of time which had passed since it was indicated the Court of Appeal Judgment would be delivered shortly (the latest communication had been on July 14, 2020[6]). I was unable to identify any ground-shifting event which occurred during the interval between the Defendants' diplomatic formal evidence in support of their Summons being served (and ultimately sworn) and

[6] The Registrar apologized for the delay which was attributed to "*personal difficulties*" encountered by one of the Justices.

Ogier's more warrish August 7, 2020 letter. This letter also indicated that the Defendants had completed their review of the "*Mauritian material*", but would not follow up with third parties or E & Y in relation to the "*SAP database*" in light of the fact that its Set Aside Summons was being pursued. On August 15, 2020, Harneys responded to the latter point, having queried the urgency for the Defendants' Summons being heard, in the following terms:

> "*Your clients appear to have made a unilateral decision to disregard the terms of the Stay Order and to cease reviewing the documents. As a result, they currently stand in breach of paragraph 1(a) of the Stay Order. As we have reminded you on numerous occasions, it is a matter for your clients to ensure that they are in a position to comply with the Norwich Pharmacal order if and upon being so directed by the Court of Appeal.*"

15. By letter dated August 18, 2020, Ogier explained their client's decision to proceed with their Summons as follows:

> "*In light of the Registrar's more recent indication* [the July 14 2020 email]*…we do not know when the Court of Appeal will be in a position to deliver its decision, and our clients accordingly consider it appropriate to proceed with the Application now, both in order to avoid incurring further substantial (and potentially wasted) costs in relation to the review exercise and because the Application, if successful, could avoid the need for the Court of Appeal to prepare a judgment at all…*"

16. At first blush, the prejudice of having to continue with the review process pending the appeal, based on a level of costs which had only become clear in early 2020, could be addressed by an application to vary the Stay Order. The idea of this Court rehearing an application which was subject to a pending appellate judgment with a view to making that judgment unnecessary was a startling one.

The Plaintiffs Temporary Case Management Stay Summons

17. Against the background set out above, on August 19, 2020, the Plaintiff issued a Summons seeking a Temporary Case Management Stay, which is the subject of the present Ruling. The substantive relief sought was as follows:

> "*1. Pursuant to the inherent jurisdiction of this Honourable Court the summons filed by the Defendants on 1 May 2020 in which the Defendants seek an order setting aside the Norwich Pharmacal order dated 31 May 2019 (Set Aside Application) is temporarily stayed pending formal handing down of the reserved judgment of the Cayman Islands Court of Appeal in CICA 15 of 2019 (on appeal from FSD 2 of 2019 (IKJ)) (Reserved Judgment).*"

18. That Summons was heard on September 8, 2020 when I granted the stay sought (with liberty to apply after 28 days) and ordered the Defendants to pay the Plaintiff's costs. Because I granted the application adopting, *ex proprio motu*, a different jurisdictional test to that proposed by counsel in their written submissions, I indicated that I would give reasons for my decision. These are the reasons for that decision.

Findings: governing legal principles on granting a "case management stay"

The relevance of the nature of the application to which the stay relates

19. In my judgment it is self-evident that when seeking to identify the principles governing the grant of a case management stay, the subject matter of the stay (the application or proceeding sought to be stayed) is highly relevant. This context informs the nature of the relief sought. Is the application for a stay really an exceptional application to "stay" (in the sense of suspending the operation of) an entire action in the usual, technical legal sense? Or is the application, in substance, merely a more routine interlocutory application to adjourn or postpone the hearing of another interlocutory application until the occurrence of some event, or the passage of a specific period of time? Both types of application might be labelled for convenience as applications for a "case management stay", but one would not expect each type to be governed by the same principles.

20. In the present case it was difficult to avoid the impression that the label attached to what might equally have been described as an application to adjourn the Defendants' Set-Aside Summons had become a tail which was wagging the jurisdictional dog. Cases in a different legal context dealing with what had in that context been labelled a "case management stay" were assumed to be magically imported into any application which used the same label. To the extent that the term "case management stay" has developed a special legal meaning applicable to staying actions in one jurisdiction pending the adjudication of overlapping issues in another forum (which may well be the case, at least in England and Wales[7]), the Plaintiff's decision to attach this label to their Stay Summons might be said to be an inapposite one. But the substance of any

[7] A keyword search using the term "case management stay" in the England and Wales judgment database found at www.bailii.org generates 44 results all of which appear (at a glance) to be international commercial cases.

application must always be considered, not merely its form. And for my part, the term "case management stay" as applied in the more prosaic and routine context of deciding when an interlocutory application should be heard seems more fitting than its use in the "grander" context of deciding whether or not, exceptionally, an entire action is to be stayed while issues are decided abroad.

<u>Principles governing contested applications by defendants to stay an entire action pending the conclusion of other proceedings</u>

21. It was initially seemingly agreed by counsel that the legal approach to applications for the stay of an entire action before trial applied to the Plaintiff's present application. When I put to Mr Weisselberg QC that a more flexible test applied, he readily adopted my suggestion but insisted (by way of a fall-back position) that he could meet the higher threshold test in any event. In the present case this Court has made a final Order, which the Defendants have appealed. The Plaintiff's application for a case management stay seeks to postpone the Defendant's interlocutory application to set aside that Final Order until the Court of Appeal has delivered judgment. It is readily apparent that this legal context bears no resemblance to that of the cases which commend a restrictive approach to "case management stays". Rather than hearing the Defendants' application to set-aside the NPO now, it is merely proposed by the Plaintiff that it should be adjourned, postponed or stayed until after judgment is delivered by the Court of Appeal on the Defendants' appeal. That appeal seeks to set aside the very same Order.

22. The factual and legal matrices of the cases cited may be summarised as follows:

- *Tianrui (International) Holding Company Limited*, FSD 161/2018 and 19/2019 (NSJ), Judgment dated April 6, 2020 (unreported): the defendant sought to strike out a winding-up petition and writ action on abuse of process grounds and alternatively for a temporary stay of the petition and writ altogether (before they were substantively heard) pending the determination of two sets of Hong Kong proceedings;

- *Re Nangfong International Investments Limited; Oriental Knowledge Tank Limited-v-Business Intelligence Investment Limited* [2018 (2) CILR 321] (Court of Appeal): an application for a temporary stay of the petition altogether was made (before it was substantively heard) pending the determination of certain issues in Samoa;

- *Ahmad Hamad Algosaibi and Brothers Company-v-Saad Investments Company Limited et al* [2010(2) CILR 289] (Court of Appeal): as an alternative

to striking out or staying the proceedings on *forum non conveniens* grounds, a temporary case management stay was sought of the Cayman proceedings altogether (before they were substantively heard) pending the determination of certain issues in Saudi Arabia;

- *Reichold Norway A.S.A.-v-Goldman Sachs* [2000] 1 W.L.R. 173: a temporary case management stay was sought of the Cayman proceedings altogether (before they were substantively heard) pending the determination of an arbitration proceeding in Norway.

23. The test for granting a so-called "case management stay", derived from *Reichold Norway* and applied in each of the subsequent cases, was based upon the final paragraph in the following passages of Lord Bingham's judgment at pages 185H-186 B-C:

> "*I would for my part accept the submissions made by Mr Pollock, subject to all the qualifications which were inherent in them. Mr Carr went on to submit that to uphold the judge's order would open the door to a flood of applications, some successful and some unsuccessful, would involve the court in trying to adjudicate on matters which were barely justiciable, would introduce a new dimension of uncertainty and would give a charter to evasive and manipulative defendants. He suggested that the court would run a risk, if it made such orders, of infringing Article 6 of the European Convention on Human Rights. In reliance on all these matters he suggested that the court should draw back from taking the first and fatal step.*
>
> *Mr Pollock did not suggest that this would be the only such application of its kind if the judge's order were upheld, and he would have had difficulty making such a submission since another application has already been successfully made. He did, however, suggest that the court was well able to control its own business, and he accepted that the grant of stays such as this would be a rarity, account always being taken of the legitimate interests of plaintiffs and the requirement that there should be no prejudice to plaintiffs beyond that which the interests of justice were thought to justify. <u>It is plain that in exercising this jurisdiction the court would have to be mindful of the effect of Article 6.</u>*
>
> *I for my part recognise fully the risks to which Mr Carr draws attention, but I have no doubt that judges (not least commercial judges) will be alive to these risks. <u>It will very soon become clear that stays are only granted **in cases of this kind** in rare and compelling, circumstances</u>. Should the upholding of the judge's order lead to the making of unmeritorious applications, then I am confident that judges will know how to react.*" [Emphasis added]

24. It may readily be seen that the "*rare and compelling circumstances test*" was articulated with respect to "*cases of this kind*", where a defendant was seeking to suspend the ability of a plaintiff suing him as of right from proceeding to trial with his claim pending the conclusion of other proceedings abroad. The central concern in the first of these cases was, in my judgment, interfering with a plaintiff's fundamental right of access to the Court in respect of a substantive cause of action. The right of access to the Court arose in England and Wales under article 6 of the European Convention on Human Rights and in the Cayman Islands under section 7 of the Bill of Rights in the Cayman Islands Constitution Order. This restrictive test cannot possibly be applicable in every legal context where a litigant applies for what is in substance a temporary case management adjournment, merely because:

(a) the relevant summons is framed as an application for a "case management stay"; and

(b) the term "case management stay" has most commonly only been used in relation to case management stays of an entire action so that relevant issues can be determined in foreign proceedings.

<u>Principles governing "interlocutory" case management stay or adjournment applications</u>

25. However, as I indicated during argument, I accepted that certain generic principles may be extracted from the cited cases on case management stays of an entire action in favour of other (typically foreign) proceedings. These were principles broad enough to apply even where a stay is <u>not</u> sought to temporarily suspend a plaintiff's right to proceed in the ordinary way to have its substantive claim tried on its merits. The clearest and most helpful statement of principles applicable to case management stays in their broader canvass in the cases placed before this Court may be found in the judgment of Segal J in *Tianrui (International) Holding Company Limited* where he opined as follows:

"*141. In my view, the correct approach, based on these authorities, can be summarised as follows:*

(a). it is important to start by noting when a case management stay will be justified. Granting a stay involves the exercise of the Court's inherent jurisdiction and case management powers to control and manage the

conduct of litigation to promote the overriding objective and the efficient, fair and cost effective disposition of the proceedings (see Oriental Knowledge at [42]). The Court must consider what would be most likely to further the interests of justice in the case at hand.

(b). in particular, as Moore-Bick J said in Reichold, the purpose of the stay is to manage the order in which proceedings are to be heard to avoid inconsistent decisions and because the outcome of one set of proceedings may have an important effect on the conduct of the other. But, as Moses JA said in Oriental Knowledge, a case management stay must be based on principles other than those identified in Spiliada.

(c). it is necessary to identify the benefits to the defendant or respondent which are likely to result from imposing a temporary stay and the disadvantages likely to result to the plaintiff and then decide whether the former clearly outweigh the latter and provide very strong reasons for the stay. There is a very real burden on the applicant for a case management stay to satisfy the court that the ends of justice (how justice can best be done between the parties) would be served by granting a stay.

(d). the Court is required to have regard to and weigh the different benefits and disadvantages (to undertake, to use Mr. Flynn's phrase, a balancing exercise)."

26. These principles, articulated in the context of a pre-judgment application to stay two entire actions, require some refinement for present purposes because I do not accept there must be "*very strong reasons for the stay*". The Plaintiff's counsel, relying upon paragraph 141(a) in *Tianrui (International) Holding Company Limited*, FSD 161/2018 and 19/2019 (NSJ), Judgment dated April 6, 2020 (Segal J) (unreported), accurately (subject to one qualification) summarised the overarching legal principles and identified their legal source in their Skeleton Argument as follows:

"*41. There is no specific power contained within Cayman Islands legislation for the imposition of a case management stay. Instead, the courts invoke their*

inherent jurisdiction and their general case management powers from the preamble to the Grand Court Rules (GCR). The Court must consider what would be most likely to further the interests of justice in the case at hand.

42. The overriding objective of the GCR is to enable the Court to deal with every cause or matter in a just, expeditious and economical way. The Court must further the overriding objective by actively managing proceedings, which may include deciding the order in which issues are to be resolved." [Emphasis added]

27. The qualification I would make to the first of the above two submissions is as follows. If reference is being made to the jurisdiction to stay an entire action before it is heard on its merits, it is correct to assert that: "*There is no specific power contained within Cayman Islands legislation for the imposition of a case management stay*". If, as is the case here, one is considering in reality the power to adjourn an interlocutory summons, then the GCR does provide a legislative basis for granting a case management stay. This is through the interaction of the Overriding Objective set out in the Preamble with GCR Order 32 rule 4, which confers a statutory power to adjourn interlocutory summonses.

28. The guiding principles in the Preamble to the GCR give the Court a broad and generous discretion as regards what might for convenience be described as "interlocutory" case management stays which only restrict the prosecution of interlocutory applications. It frequently occurs in civil litigation that the Court has to decide not simply the order in which certain substantive issues should be tried, but also the order in which competing interlocutory summons should be heard. It has never been suggested in these sorts of procedural contexts that the Court can only temporarily stay (i.e. adjourn and/or postpone the substantive hearing of) one interlocutory summons while another one is heard upon proof by the stay applicant of "*rare and compelling circumstances*" justifying the stay. Indeed, the following submissions by the Defendants' Skeleton Argument betrayed the true character of the present contextual position:

"*9. Ultimately, the Stay Application gives rise to a relatively straightforward issue of case management. The question is whether, in all the circumstances, the most just and convenient course is to proceed with the Set Aside Application now, or to wait and see what the CICA says in its judgment on the Appeal…*"

29. In the present case the Defendants are seeking through an interlocutory Summons filed within the present proceedings to set aside a final Order before the appeal which they have themselves filed is determined. This was to my mind a strikingly unusual application. It merely required the Court to decide a question of "internal" interlocutory case management within the same civil proceeding after the parties' substantive rights had already been finally adjudicated. The application simply obliged the Court to determine when the Defendants' interlocutory Summons should be heard. This legal context bears no resemblance to the situation where a pre-trial stay of an entire action is sought to enable substantive issues to be determined in entirely separate proceedings abroad.

30. The most pertinent elements of the Overriding Objective for the purposes of the present application are the following provisions of paragraph 1.2 of the Preamble to the GCR, which provides:

> "*Dealing with a cause or matter justly includes, as far as is practicable-*

> *(a) ensuring that the substantive law is rendered effective and that it is carried out;*
>
> *(b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed*".

31. It was common ground that the goal of economy (paragraph 1.2 (c), "*saving expense*") would be advanced by awaiting the decision of the Court of Appeal which the Defendants hope will result in the NPO being set aside in any event. So the Plaintiff began the hearing with "runs on the board". The Plaintiff's counsel emphasised what I considered to be a self-evident point. Irrespective of how the appeal was decided, how the key legal question placed before the Court of Appeal (whether evading judgment enforcement steps qualifies as wrongdoing for *Norwich Pharmacal* purposes) was decided would be potentially relevant to the determination of the Defendants' Summons.

32. It is also important to remember that the Overriding Objective, strictly, must be applied by this Court when exercising a discretion conferred by the GCR. As paragraph 2 of the Preamble itself states:

> "*2.1 The Court must seek to give effect to the overriding objective when it-*
>
> *(a) applies, or exercises any discretion given to it by these Rules; or*

(b) interprets the meaning of any Rule."

33. The Plaintiff's interlocutory Stay Summons seeks to stay the Defendants' interlocutory Set-Aside Summons, an application to be determined in Chambers pursuant to GCR Order 32 rule 4. Order 32 rule 4 was not explicitly referred to. But unless Order 32 rule 4 (or some other relevant rule) is engaged, reliance on the Preamble was meaningless. Strictly speaking, the Preamble does not operate at all if it is completely untethered from the application of a substantive 'operational' provision of the Rules themselves.

34. The relevant procedural power which the Plaintiff's Summons engages is so well known that it is routinely exercised without any need to consciously reflect upon or even refer to the rule's actual terms. Order 32 rule 4 is extremely broadly drafted in the following terms:

> "*4. (1) The hearing of a summons may be adjourned from time to time either generally or to a particular date, as may be appropriate.*
>
> *(2) If the hearing is adjourned generally, the party by whom the summons was taken out may restore it to the list on 4 clear days' notice to all the other parties on whom the summons was served.*"

35. GCR Order 32 rule 4 confirms that this Court has a broad discretion to "adjourn" (some might prefer the word "stay") an interlocutory summons with a view to achieving the case management objectives of the Overriding Objective, unconstrained by the restrictions imposed by judge-made law on staying an entire action. This does not mean that the starting assumption in many (if not most) cases may well be that in the ordinary course of events, a litigant who files an interlocutory application will be entitled to have it promptly and substantively heard.

36. A few examples of how this and other similar broad adjournment powers are routinely exercised, even as a contentious case management exercise, in circumstances in which there is neither any conscious jurisdictional analysis nor any application of a restrictive test should suffice to support this conclusion:

    (a) a strike-out summons is adjourned generally or to a specific point in time without being heard pending the service of a draft amended pleading on the application of the respondent;

(b) a summons seeking specific discovery is adjourned to enable the respondent to provide an amended list of documents or voluntary discovery (deploying either GCR Order 32 rule 4 or, perhaps more appropriately, GCR Order 24 rule 8) ;

(c) a summons for directions is adjourned pending the determination of an interlocutory appeal (under GCR Order 25 rule 2);

(d) an application to discharge an ex parte interim injunction is adjourned because the respondent complains that more time is needed to respond to the applicant's evidence, which was filed late.

The relevant substantive law

37. The objective of upholding the effectiveness of the substantive law clearly means the substantive law of the claim, but must sensibly be viewed as also extending to the substantive "law of the land", to such extent as generally applicable legal principles are engaged by a case management decision. The Plaintiff has obtained the NPO as a final Order and the Defendants have appealed as of right, obtaining a limited stay of their obligation to deliver up the documents required to be produced. Because an appeal does not operate as a stay (Court of Appeal Law section 19(3) and rule 20(1) of the Court of Appeal Rules), this Court's *prima facie* duty is to uphold the integrity of the NPO. Further, the general legal policy principle of finality and the allied rule that a judgment creditor should not lightly be deprived of the fruits of his judgment are important legal policy rules in the context of an application which seeks to invite the trial court to set aside an order which is simultaneously the subject of a pending appeal. Substantive legal rights will be worth little if, despite being vindicated by a final judgment, they are lightly undermined.

38. It was contended in effect by the Defendants that the starting assumption was that the Court should use its case management powers to facilitate the setting aside of its own final Order, notwithstanding the fact that it was (a) an Order which the Defendants had elected to appeal, and (b) an Order that the Defendants might soon succeed in having the Court of Appeal set aside. Adopting such a case management approach would obviously entail a major diminution of (and/or conflict with) the finality principle.

The normal advancement of the proceedings

39. It is unarguably clear that the normal advancement of proceedings when defendants have properly appealed against a final order of this Court is that the order appealed against cannot be impeached in this Court until it has been set aside on appeal. The jurisdiction for a trial Court to set aside a final order it has made is, for obvious legal policy reasons, very limited indeed. This represents another strand of the finality principle. This is why I expressed puzzlement in the course of argument as to the basis on which the Defendants were seeking to set the NPO aside. When I suggested that the Defendants' application was highly unusual, Mr Flynn QC (without seeking an opportunity to fortify the submission by reference to authority) implied that it was unremarkable to apply to the trial court to set-aside *Norwich Pharmacal* orders. Even if some such special jurisdiction exists, the crucial question here was the normality of seeking to ride two remedial horses in different courts at the same time.

40. Reliance on a "*material change of circumstances*" to set aside the NPO is only ordinarily apposite for applications to vary or revoke interlocutory orders. Without reference to authority, the most well- known basis for setting aside an *inter partes* final order is fraud. The grounds on which a final order may be set aside by the court which made the order were recently described in *Sangha-v-Amicus Finance plc* [2020] EWHC 1074 (Ch) (May 5, 2020), which was not referred to in argument, where Zacaroli J held:

> "34. *The most recent authoritative statement of the test to be applied under Rule 3.1(7) is to be found in the judgment of Hamblen LJ, giving the judgment of the Court, in Terry v BCS*[8]*… at [75]:*
>
> *'In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality. An example is provided by cases involving possession orders made when the defendant did not attend the hearing where CPR 39.3 may be relied upon by analogy – see Hackney London Borough Council v Findlay [2011] EWCA Civ 8, [2011] HLR 15. Another example is the use of powers akin to CPR 3.1(7) to vary or revoke financial orders made in family proceedings in relation to which there is a duty of full and frank disclosure and the court retains jurisdiction – see, for example, Sharland v Sharland [2015]*

[8] [2018] EWCA Civ 2422.

UKSC 60, [2016] AC 871 and Gohil v Gohil (No 2) [2015] UKSC 61, [2016] AC 849.' "

41. To be clear, these *dicta* are cited not by way of deciding whether or not the Defendants' Set-Aside Summons is arguable, a point which was not directly raised at the hearing. They are cited to illustrate why the Defendants' Summons could fairly be regarded as *prima facie* inconsistent with the normal way in which the proceedings would advance after the delivery of a final judgment. There is another principle which is also potentially relevant in this regard. It is trite law that it is potentially an abuse of process to pursue inconsistent remedies, or to raise matters in subsequent proceedings (or applications) which were and/or could have been raised at an earlier hearing. This basic point may be illustrated by reference to another authority which was not considered at the hearing. In *De Crittenden-v-The Estate of Charles Bayliss (deceased)* [2005] EWCA Civ 1425, Parker J summarised these related principles as follows:

> "*28. There are two general rules of public policy in play in relation to the issues of election and abuse of process. First, there is the so-called rule in Henderson v Henderson 3 Hare 100 that in the ordinary way a claimant must bring forward his entire case in a single action. That is a rule based on the need for finality in litigation. However, as Lord Millett made clear in Johnson v Gore Wood, the effect of that rule is not to raise a presumption against the bringing of successive actions. Rather, as he said at page 59H, "the burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action." Second, there is what I may call the rule in Tang Man Sit, that in the ordinary way a claimant who claims inconsistent remedies must elect before judgment is entered as to which remedy he wishes to pursue. That rule is based upon the need for fairness in the conduct of litigation. Once again it is not an absolute rule. As Lord Nicholls said in Tang Man Sit:*
>
> > *'The principle, however, is not rigid and unbending. Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to wider public interest in the conduct of court proceedings.'*"

42. These principles are also relevant in that they potentially supply grounds for concluding that staying the Defendants' Summons was more consistent with the "*normal advancement*" of this action than hearing it on its merits while judgment on the Defendants' own appeal was pending from the Cayman Islands Court of Appeal.

Summary of principles

43. The Plaintiff's Case Management Stay Summons required the Court to exercise a broad discretion under GCR Order 32 rule 4 as to whether to adjourn the Defendants' Set-Aside Summons until the determination of the Defendants' own appeal. The Preamble to the GCR governs the exercise of this discretion under the Rules. The restrictive test applicable to pre-judgment stays of entire actions pending the determination of overlapping issues in foreign proceedings does not apply. I felt entitled to view the Plaintiff's Case Management Stay Summons through a different legal lens than was foreshadowed by counsel's written submissions because I was not deciding a substantive application. In modern civil litigation, the Judge is not constrained to adjudicate case management applications within the parameters of the arguments presented by counsel, particularly if the relevant application does not materially impact on substantive legal rights. Parties often have what are to the Court obscure, tactical reasons for not pursuing points when the Court considers the points could conveniently be adjudicated. The Court is positively obliged to make an independent assessment of how the Overriding Objective may best be achieved. In the present case, this required me to form an early preliminary view of the merits of the Defendants' Set-Aside Summons rather than ignoring the merits and applying an inapplicable legal test to the Plaintiff's cross-application simply because it was agreed. Paragraph 4.3 of the Preamble to the GCR provides:

> "*4.3 Whenever a proceeding comes before the Court, whether on a summons for directions or otherwise, the Court will consider making orders on its own motion for the purpose of giving effect to the overriding objectives of the rules.*"

Findings: grounds for granting case management stay

The respective arguments

44. The Plaintiff advanced what I considered to be two important submissions in support of its Summons (in addition to the unanswerable wasted costs point). Firstly, the risk of inconsistent decisions:

> "*54. There is plainly a risk of inconsistent decisions as between the position to be expressed by the CICA on the Set Aside Application, and by this Court if the Set Aside Application proceeds in the interim. That is a position that should be avoided if at all possible. A case management stay is required in order to ensure that the Appeal is decided before the Set Aside Application, being the order that will most likely further the ends of justice.*
>
> *55. In circumstances where the CICA has indicated it will address the matters now in issue in the Set Aside Application, the Plaintiff submits it is reasonably entitled to know the CICA's view on these matters before it should be required to respond to the Set Aside Application in evidence.*"

45. Secondly, it was submitted, albeit in a somewhat muted way, that the Defendants' new point could and should have been raised before the Court of Appeal:

> "*56. It was the Defendants who brought to the attention of the CICA the existence of Mr Justice Henshaw's judgment dismissing the Plaintiff's application for worldwide freezing relief in England and who indicated that they considered the Justices of the Court of Appeal should be made aware of the judgment. The Plaintiff submits that the Defendants should not now be permitted to retreat from the path which they opened up to the Justices of the Court of Appeal.*
>
> *57. The Defendants could have sought permission to file further submissions but they did not do so. They could have decided to await the judgment of the CICA and raised the existence of the English judgment either with the CICA or this Court. They did not do so, instead deciding to raise in correspondence the basis upon which they asserted that the NPO should be set aside.*"

46. In my judgment this was a very *sotto voce* way of advancing what ought to have been a *fortissimo* submission: having appealed the NPO on the basis of this Court's determination that it was a final Order, any further grounds of attack should have been placed before the Court of Appeal in any event. The risk of inconsistent decisions was in substance a point which was illustrative of the vice of pursuing inconsistent remedies and why litigation is not ordinarily conducted in such an unusual manner.

47. The Defendants advanced one main central argument as to why justice would be better served by allowing their Summons to proceed:

"*8. AMUSA's core argument in favour of a stay of the Set Aside Application is that the Judgment on the Appeal could render that application otiose. The Defendants do not dispute that that is the case. However:*

> *8.1. The point applies equally in the other direction. If the Set Aside Application succeeds, then the NPO will go, and the Appeal will be rendered otiose.*
>
> *8.2. On the basis of their correspondence, Harneys appear to have assumed that the CICA is free to consider the Set Aside Application on its merits. For reasons set out at 7.9 above, that assumption is incorrect, and indeed is inconsistent with the position which Harneys itself has adopted in its correspondence with the Court…*"

48. This beguiling argument was to my mind wholly dependent on the validity of the threshold submission to the effect that where further grounds for impugning a final Order arise while an appeal against that Order is pending, the proper forum in which to pursue such further arguments is before this Court, not the Court of Appeal. In the Defendants' Skeleton Argument, the point was advanced in this way:

> "*7.9. It is the Defendants' position that the only way in which the CICA's judgment could properly "deal" with the points raised in the Set Aside Application would be by allowing their Appeal, setting aside the NPO, and thereby rendering that application otiose. It would clearly not have been (and would not now be) appropriate for the CICA to seek directly to grapple with the Set Aside Application on its merits. That is particularly so in circumstances where:*
>
> > *(1) The CICA was not properly seized of the Set Aside Application (that application having been to this Court, and not to the CICA)…*"

49. In answer to my query in the course of argument as to what the basis of the Defendants' Summons was, counsel referred me to the Sixth Baid Affidavit. Yet the only grounds advanced in that Affidavit were:

(a) a material change of circumstances, namely the filing of and the judicial findings made in subsequent English proceedings about the weight of the evidence in support of the NPO, issues of weight which were not advanced at the *inter partes* hearing although they could have been raised in argument and were not dependent on the supportive observations of another Judge (paragraphs 19-20). This presupposed that the same basis for revoking an interlocutory order applied to the NPO;

(b) discretionary factors (the lack of any further need for the NPO), which also presupposed that this Court had a flexible discretion to review its final orders (paragraph 21).

50. Moreover, no attempt was made to identify any prejudice which the Defendants would suffer from waiting for the Court of Appeal judgment. Although the First Affidavit of Victoria King subsequently updated the Court by exhibiting further correspondence, the only additional argument explicitly raised (the inconsistency between the conspiracy claim pleaded in the English Proceedings and the case asserted by the Plaintiff in the distinct context of obtaining the NPO in aid of enforcement of the ICC Award) failed to raise any readily recognisable legal ground for this Court setting aside the NPO.

51. In correspondence Ogier raised the issue of whether it would be fair for them to incur the time and expense of restoring and reviewing the SAP platform when the NPO may soon be set aside either by this Court or the Court of Appeal. This appeared to me to be a potentially valid concern and I considered amending this Court's Stay Order (of the Court's own motion). This was despite my strong view one year ago that, come what may, the Defendants should be ready to produce all documents if and when the appeal against the NPO is dismissed.

52. The landscape has changed somewhat since then. Most significantly, the Plaintiff has not sought this Court's assistance to enforce the strict terms of the Stay Order and both the costs and logistics of the outstanding elements of the review process are greater than they would originally have been expected to be. That restoring and reviewing the SAP platform would be technically difficult was communicated to the parties by E & Y on October 2, 2019. What the costs of reconstructing the database and making the data accessible would be was communicated by E& Y to the parties on May 19, 2020. It was, however, unclear whether all the relevant material in relation to the document review process was before the Court. Mr Weisselberg QC ultimately persuaded me that varying the Stay Order should be the subject of a formal application.

53. In the final analysis I regarded such an application (i.e. an application to vary the Stay Order) as a more appropriate remedy for the Defendants to pursue if they wished to

address the only prejudice they somewhat tentatively identified as flowing from waiting for the result of their own appeal. On the face of it, of course, the notion of an appellant complaining of prejudice flowing from its own appeal is wholly incongruous. During the hearing I observed that it is always open to the Defendants as appellants to withdraw their appeal.

Findings: grounds for staying the Defendants' Set-Aside Summons

54. The substantive interests of justice, viewed through the lens of the application of the Overriding Objective to the adjournment discretion conferred by GCR Order 32 rule 4, decisively favoured granting the Plaintiff's application for the following main reasons:

(a) the principle of finality is a fundamental substantive law principle which would be furthered by granting a stay. Entertaining an application to set aside a final Order at the instance of parties which have filed an appeal against that Order which has been heard by the Court of Appeal and in relation to which a judgment is due to be delivered would undermine the principle of finality (GCR, Preamble, paragraph 1.2(a));

(b) accepting the submission that an appellant which has filed and argued an appeal against a final order can at its sole election render the need for an appellate judgment otiose would manifestly undermine the integrity of the processes of the Court of Appeal. The Defendants' Summons is arguably liable to be struck-out and/or dismissed on the grounds that it constitutes an abuse of the processes of this Court (re-litigating the risk of dissipation issue not previously pursued) and/or on the grounds of disclosing no reasonable grounds for success. Forming this view did not require me to reject the contrary proposition that the Defendants were also arguably entitled to have their Summons heard.

Even assuming that the Set-Aside Summons is arguable, permitting the Defendants' application to proceed in the present context would on any view be wholly inconsistent with the normal advancement of proceedings in light of the still pending appeal (GCR, Preamble, paragraph 1.2(b));

(c) hearing the Defendants' Set-Aside Summons before the Court of Appeal potentially itself sets aside the NPO would not save but waste costs (GCR, Preamble, paragraph 1.2(c)), even if that Summons is entirely meritorious. The Clerk to the Court of Appeal has signified that the

Court believes that its Judgment will dispose of the issues raised by the Defendants. The determination by the Court of Appeal of the question of whether evading judgment enforcement steps qualifies as wrongdoing would either make the Defendants' application to this Court redundant (if the appeal is allowed) or potentially inform how the evidence of wrongdoing relied upon by the Plaintiff should be reassessed (if the appeal is dismissed) if the Defendants' Set Aside Summons is heard on its merits; and

(d) the Defendants could seek relief from the only prejudice they identified as likely to flow from postponing the effective hearing of their Summons by applying to vary the Stay Order, an application which I indicated would be favourably considered despite the contrary impression created by my observations when the Stay Order was granted on July 17, 2019.

55. In my judgment the wider background of complex multi-jurisdictional litigation which looms over the present case increases rather than diminishes the importance of remembering that the Overriding Objective as applied to the implementation of the Grand Court Rules requires case management decisions to be infused with generous servings of practicality and common sense.

Summary

56. For the above reasons, on September 8, 2020, I stayed the Defendants' Set-Aside Summons pending the determination of the Defendants' appeal to the Court of Appeal. I also granted the Defendants liberty to apply after 28 days in case subsequent events materially altered the basis of the present decision.

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THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT