THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0001

BETWEEN:

EMMERSON INTERNATIONAL CORPORATION

Appellant

and

RENOVA HOLDING LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Phillip Marshall, KC, with him Mr. Robert Weekes, Mr. Ajay Ratan, Mr. Iain Tucker and Ms. Colleen Farrington for the Appellant
Mr. Paul McGrath, KC, with him Ms. Arabella di Iorio, and Mr. Andrew Mcleod for the Respondent

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2019: July 29;
2023: February 7.

Interlocutory appeal – Commercial appeal – Grounds on which appellate court will upset decision of trial judge – Exercise of discretion by trial judge to impose a confidentiality club – Whether learned judge erred in imposing a confidentiality club - Case management – Disclosure – Court's discretion to order disclosure

Emmerson International Corporation ("Emmerson") appealed against the order of Wallbank J dated 12th December 2018 ("the 12th December Order" or "the Order"), extending time for compliance by Renova Holding Limited ("Renova") with the disclosure provisions of an ex-parte freezing order made against it on 19th November 2018 ("the Freezing Order" or "the Renova Freezing Order") and imposing a confidentiality club in respect of the information to be provided.

Paragraph 3 of the 12th December Order provided that the ancillary disclosure required by the Freezing Order made against Renova was to be given solely to Emmerson's British Virgin Islands (the "BVI") admitted legal practitioners, pending the determination of Renova's discharge application. Paragraph 5 of the Order granted Emmerson's BVI legal representatives liberty to apply on notice for permission to share documents and or information with individuals outside the confidentiality club.

Emmerson filed several grounds of appeal. However, ground 7 formed the crux of the appeal and was the main ground advanced by Emmerson. In ground 7, Emmerson alleged that it was inappropriate to impose a confidentiality club in respect of the information to be provided by Renova under the provisions of the Freezing Order so that the same would only be seen by Emmerson's BVI lawyers.

Held: dismissing the appeal and awarding costs to Renova, to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:

1. Case management decisions are discretionary decisions in which the discretion is entrusted to the first instance judge. An appellate court does not exercise the discretion itself but can interfere with the discretion of the first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors, or has come to a decision that is plainly wrong in the sense of being outside the ambit where reasonable decision makers may disagree.

   Broughton v Kop Football Ltd [2012] EWCA Civ 1743 applied.

2. The provision of protection by the use of confidentiality clubs in appropriate cases, including confidentiality clubs to which the parties' lawyers alone are admitted at least during the interlocutory stage of litigation is part of the court's inherent jurisdiction to regulate its own procedure in the interest of justice. In this case, by imposing the confidentiality club, the learned judge was exercising a case management decision which this Court ought only to interfere with if it was plainly wrong. In circumstances where Renova raised serious concerns as to confidentiality, and where Emmerson maintained that it needed the information to police the Freezing Order, the learned judge conducted the balancing exercise required by the authorities and struck a compromise in the exercise of his discretion. In all the circumstances, it was a sensible case management decision by an experienced judge seeking to balance the interests of justice between the parties and there is no basis for the appellate court to interfere with the judge's exercise of discretion.

   Raja v Hoogstraten [2004] EWCA Civ 968 applied; **Libyan Investment Authority and Societe Generale S.A.** [2015] EWHC 550 (Comm) applied.

JUDGMENT

[1] **BAPTISTE JA**: Emmerson International Corporation ("Emmerson") appealed against the order of Wallbank J dated 12th December 2018 ("the 12th December Order" or "the Order"), extending time for compliance by Renova Holding Limited ("Renova") with the disclosure provisions of an ex-parte freezing order made against it on 19th November 2018 (the "Freezing Order") and imposing a confidentiality club in respect of the information to be provided.

[2] Paragraph 3 of the Order provided that the ancillary disclosure required by the Freezing Order made against Renova was to be given solely to Emmerson's British Virgin Islands (the "BVI") admitted legal practitioners as set out in a schedule, pending the determination of Renova's discharge application. Paragraph 5 of the Order granted Emmerson's BVI legal representatives liberty to apply on notice for permission to share documents and or information with individuals outside the confidentiality club. That decision was made in circumstances where Renova had brought an application to discharge the Freezing Order and sought to suspend disclosure requirements in the interim on the basis that significant prejudice would be suffered if the documents were disclosed before it had the chance to challenge that Freezing Order.

[3] Emmerson filed several grounds of appeal. The first four grounds contended that the judge erred in entertaining Renova's application to defer the provision for disclosure under the Freezing Order. Ground 5 concerned Emmerson's complaint that Wallbank J erred in granting Renova further time to comply with the disclosure provisions of the Freezing Order. Ground 6 averred that Wallbank J provided no reasons in arriving at his conclusion that the application to discharge the Freezing Order had reasonable prospects of success.

[4] In ground 7, Emmerson alleged that Wallbank J erred in concluding that it was appropriate to impose a confidentiality club in respect of the information to be

provided by Renova under the provisions of the Freezing Order so that the same would only be seen by Emmerson's BVI lawyers.

[5] Although several grounds of appeal were filed, Ground 7 is the crux of the appeal and was the main ground advanced by Emmerson. Emmerson sought permission to include two new grounds within Ground 7. Ground 7 essentially represents an attempt to impugn a discretionary case management decision of the judge. It is well established that case management decisions are discretionary decisions. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the discretion of the first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors, or has come to a decision that is plainly wrong in the sense of being outside the ambit where reasonable decision makers may disagree. The question is not whether the appeal court would have made the same decision as the judge; the question is whether the decision was wrong in the sense explained per Lewison LJ in **Broughton v Kop Football Limited**[1] at paragraph 51.

[6] Emmerson contended that the judge erred in concluding that it was appropriate to impose a confidentiality club. Emmerson argued that such a confidentiality club would be wrong in principle or alternatively, could only be justified by compelling evidence of prejudice to Renova. Further, there was no cogent or any proper evidence of any potential prejudice to Renova at all by the provision of the information to Emmerson as required by the Freezing Order. This was particularly so, having regard to its express undertaking only to use the information so supplied for the purpose of these proceedings. Emmerson submitted that the learned judge ought to have concluded that the information should be supplied without any such restriction in the form of a confidentiality club, which, if permissible at all, was a highly exceptional measure and not warranted in the present case.

[1] [2012] EWCA Civ 1743.

[7] Emmerson further argued that there was no application before Wallbank J for the imposition of a confidentiality club. Wallbank J imposed the confidentiality club on his own motion. In the premises, the learned judge had no benefit of argument on the point or reference to relevant authorities and there was nothing to base a confidentiality club upon. Had the judge considered the authorities and heard arguments, it would have been clear that it was only appropriate to exercise his discretion to impose a confidentiality club if he had first found that certain stringent threshold tests had been satisfied.

[8] Emmerson contended that a confidentiality club amounts to a serious interference with the twin principles of natural justice and open justice that are fundamental features of the legal system and as such the discretion to order a confidentiality club only arises where three threshold requirements are met:

(a) The applicant must establish the existence of information that is so sensitive that it cannot be satisfactorily protected in any other way. The test is therefore one of necessity. An example would be a trade secret which, if disclosed, 'would render the proceedings futile'. Absent a trade secret or some other analogous form of sensitive information, there will be no necessity for protection sufficient to warrant such an exceptional measure as a confidentiality club. Mere assertion of commercial sensitivity is not enough.

(b) Secondly, the applicant must show that the protection arising under the Civil Procedure Rules, or any express undertakings provide insufficient protection so that there would be a real risk of irreparable harm.

(c) Thirdly, the applicant must also prove the strict necessity of each aspect of the additional protection sought.

[9] Emmerson submitted that it is only if these three threshold conditions are met is the judge then required to carry out a balancing exercise to determine whether to impose a confidentiality club. Emmerson posited that had Wallbank J considered the authorities he would have seen that the threshold conditions had not been met. Emmerson argued that Renova had not identified any material to be disclosed that was so sensitive that its collateral use would cause prejudice of sufficient severity to warrant a confidentiality club. There was no basis to conclude that the collateral undertakings and the cross-undertaking in paragraph 6 of Schedule B to the Freezing Order made against Renova provided insufficient protection.

[10] Emmerson also contended that even if the threshold conditions had been met, considerable caution is required where a confidentiality club is sought in respect of asset disclosure provided in support of world-wide freezing injunctions. This was not one of the extremely narrow type of case in which a confidentiality club was necessary or appropriate.

[11] In summary, Emmerson submitted that the judge was not reminded of his earlier judgment where he refused to impose a confidentiality club with respect to the same subject matter. There was no basis to say that the documents fell within any of the principles for the imposition of a confidentiality club. The case was not one of a trade secret. There was an express undertaking not to use the material for any other purpose. The judge did not have regard to the proper legal principles and reached a wrong decision. This was not one of the type of cases where a confidentiality club was appropriate. Emmerson urged that this Court should exercise its own discretion and hold that it's not a case for the imposition of a confidentiality club.

[12] For its part, Renova posited that Emmerson's submission that disclosure must be given notwithstanding and prior to the discharge application was bad in law and misinterprets the authorities. Renova submitted, quite properly, that the court has a discretion to stay ancillary disclosure obligations pending the hearing of an application to discharge the Freezing Order under which that disclosure was

ordered. In that regard Renova relied on Chadwick LJ 's judgment in **Raja v Hoogstraten.**[2]

[13] Renova submitted that it is clear from the **Hoogstraten** case that it was entirely within the court's discretion to balance the competing interests of the claimant's right to police the Freezing Order on the one hand and, on the other, the prejudice that would be suffered by the respondent who is forced to disclose information that, once disclosed cannot be 'undisclosed', notwithstanding having made a serious challenge to the Freezing Order itself.

[14] Renova refuted the contention that no specific instance of prejudice was provided. Paragraphs 101 to 113 of the first affidavit of Mr. Michaelides ("Michaelides 1") made it clear that there were serious and significant concerns about information being used for ulterior purposes by Mr. Abyzov and Mr. Andrey Titarenko. Emmerson's contention that it needed the information to police the Freezing Order, could not and did not outweigh Renova's concerns. The key point being that Renova's Freezing Order was a targeted freezing order over specific assets which had already been identified following the asset disclosure order. Emmerson's submission in the court below was that the disclosure was needed to consider whether to apply for other freezing relief against different entities.

[15] Renova submitted that in those circumstances the judge conducted the balancing exercise required by the authorities. In exercising his discretion and as a matter of case management, the learned judge struck a compromise between both parties' concerns and ordered disclosure into the confidentiality club.

[16] Renova also submitted that Emmerson's contention that the confidentiality cub was a serious interference with the client's ability to conduct the litigation is misconceived and ought not to have weighed heavily in the balancing exercise. Emmerson's counsel did not contend at the 12th December 2018 hearing that in order to conduct

[2] [2004] EWCA Civ 968.

the litigation a representative of the client needed to be included in the club. It was argued that Cypriot or Swiss lawyers and even a professional accountant, ought to be included.

[17] Further, the 12th December Order expressly provided that Emmerson had liberty to apply, on notice to Renova, for permission to disclose in the confidentiality club to the client. The authorities make it clear that a confidentiality club which excludes the lay client does not impede that client from giving effective instructions.

[18] Renova posited that the judge has jurisdiction to suspend the disclosure order pending the hearing of the set aside application. The judge was entitled to employ the confidentiality club and it was for a short time period. There was a high burden on Emmerson to show that the judge erred. Renova asserted that it would be wrong in principle for it to have to provide 'highly confidential' and 'commercially sensitive' documents to Emmerson before it had the right to challenge the Freezing Order pursuant to which it is being asked to give disclosure, in circumstances where it would suffer serious prejudice from the mere fact of disclosure. In those circumstances, Renova's position was that it should not be required to provide disclosure in advance of the determination of the discharge application.

[19] As stated above, Renova regarded as bad in law, and a misrepresentation of the authorities, Emmerson's position that disclosure must be given notwithstanding and prior to any discharge application. Renova submitted that the court has a discretion to stay ancillary disclosure obligations pending the hearing of an application to discharge the Freezing Order under which that disclosure is ordered. In support of that position, it cited the case of **Hoogstraten** at paragraph 105, where the court noted:

> "The need to strike a balance between the prejudice to the defendant if he is allowed to disclose assets which it is later held he should have been required to disclose and the prejudice to the claimant if the defendant is not required to disclose assets which it is later held he was required to disclose …"

[20] Renova submitted that the confidentiality club was a sensible case management decision by an experienced judge seeking to balance the interests of both parties before him. Renova further submitted that the judge was entitled to employ the confidentiality club and was not endeavouring to protect Emmerson from seeing all the documents that were being disclosed up to trial. There was a high burden on Emmerson to show that the judge went plainly wrong. The confidentiality club reflected the interests of both parties.

[21] Renova also submitted that the denial of natural justice point cannot stand in circumstances where it was within Emmerson's ability to employ the liberty to apply clause at paragraph 5 of the Order. The confidentiality club was temporary, pending the hearing of the discharge application. The judge was alive to the competing interests and imposed the confidentiality club for a limited time period to balance those interests pending the discharge. The imposition was an exercise in case management and should not be disturbed.

[22] Renova argued that Emmerson must establish that there are documents held in the confidentiality club which were necessary for the discharge application. At no stage did they exercise the general liberty to apply. The disclosure was to police the Freezing Order. It was a targeted freezing order. It was not ordered for the underlying issues in the substantive appeal. Emmerson needed to show the court that it would have been denied the opportunity to put evidence which would have been important for the hearing.

[23] Renova argued that confidentiality clubs are a regular feature of international commercial litigation, and its use is not restricted to cases involving trade secrets and national security. The power to make orders imposing confidentiality clubs arises from the court's inherent power in controlling its own procedures by deciding the scope of disclosure in cases involving confidential material. The source of, and rationale for, the power derives from control of the court's own procedures makes

clear that there could be no obstacle to the court exercising the power of its own motion.

[24] Renova described as a misconceived attempt to avoid the high threshold for appellate review of case management decisions, Emmerson's suggestion that there are certain stringent threshold tests or conditions which are mandatory, and conditions the discretion to create a confidentiality club. Renova submitted that the imposition and terms of a confidentiality club depends on all the circumstances of the case and generally involves a balancing exercise, which was a matter for Wallbank J's discretion. The matters which Emmerson seeks to transmogrify into mandatory pre-conditions are nothing of that kind. Contrary to Emmerson's submission, there is no requirement to 'prove the strict necessity of each aspect of the additional and exceptional protection sought'. I agree.

[25] In **Libyan Investment Authority and Societe Generale S.A.**[3] Hamblen J stated at paragraph 23:

> "The provision of protection by the use of confidentiality rings or clubs in appropriate cases, including confidentiality clubs to which the parties' lawyers alone are admitted at least during the interlocutory stage of litigation, is well recognised -see for example, Al Rawi v The Security Service [2011 UKSC 34, [2012] 1AC 53 at [64] per Lord Dyson".

The basis of such orders, as Hamblen J recognised at paragraph 24, 'is the court's inherent jurisdiction to regulate its own procedure in the interest of justice'. A confidentiality club which would interfere with the conduct of the trial itself, would have a more direct impact on the overarching principles of open justice and natural justice, than would occur at the interlocutory stage.

[26] Renova submitted and I agree, that in imposing a confidentiality club, the learned judge was exercising a case management decision which this Court ought only to interfere with if it was plainly wrong, and it was not. Renova contended that in

[3] [2015] EWHC 550 (Comm).

circumstances where it raised serious concerns as to confidentiality, and where Emmerson maintained that it needed the information to police the Freezing Order, the learned judge conducted the balancing exercise required by the authorities and struck a compromise in the exercise of his discretion. It was a sensible case management decision by an experienced judge seeking to balance the interests of both parties. The appellate court should not interfere with the decision.

[27] Emmerson sought permission to add two new grounds within ground 7; namely, Wallbank J failed to consider his earlier refusal to impose a confidentiality club in respect of disclosure under the asset disclosure order dated 29th October 2018. As Renova pointed out, Emmerson did not bring this matter to the attention of Wallbank J and as such, it is inappropriate for Emmerson to rely on that alleged failure to consider a matter not brought before the judge. This is not a valid basis to interfere with the judge's exercise of discretion.

[28] In any event, as Renova correctly submitted, the refusal of a permanent confidentiality club in relation to disclosure under the asset disclosure order could not bind Wallbank J in relation to a temporary arrangement relating to ancillary disclosure under the Renova Freezing Order. The confidentiality club requested in relation to the asset disclosure order and that established under the 12th December Order were fundamentally different. The confidentiality club established under the 12th December Order was temporary in nature, merely intended to hold the ring pending the determination of the discharge application. The asset disclosure order was made after a full inter partes hearing; the confidentiality club sought by Renova at that stage was permanent.

[29] In the second proposed additional ground, Emmerson contended that Wallbank J erred in failing to take into account the overlap between the (1) scope of disclosure required pursuant to the Renova Freezing Order and (2) prior disclosure required to be provided by Mr. Vekselberg and Renova under the asset disclosure order, or documents voluntarily supplied by Renova in support of its discharge application.

As pointed out by Renova, the subject matter of the disclosure required by the asset disclosure order and the Renova Freezing Order were distinct. The asset disclosure order concerned a single transaction requiring disclosure of 'all documents relating to the transfer of shares in Liwet Holding AG the so called 'Liwet Transfers'. The ancillary disclosure provisions of the Renova Freezing Order were fundamentally different in scope; they primarily concerned the assets frozen under that order (shares in three Swiss companies) and required disclosure related to company and group structures as well as detailed information about assets and liabilities of companies within those structures.

[30] Secondly, Renova posited that Emmerson identified only two documents in its supplemental skeleton argument which it contended were made subject to the confidentiality club under the 12th December Order but also were voluntarily disclosed in Michaelides 1. Renova pointed out that even in those cases, the documents disclosed into the confidentiality club are different from disclosed on an open basis.

[31] Renova did not contend that all of the information to be disclosed under the Freezing Order was confidential or sensitive information, only that 'much of it is'. Renova submitted that Wallbank J ordered the confidentiality club knowing that a proportion of the information to be disclosed into it would not be confidential or sensitive. Renova submitted that this was an inherent part of the balancing exercise, the judge conducted. It does not assist Emmerson now to point to a very small number of documents which it asserted are not confidential or sensitive to support its argument that the confidentiality club should never have been ordered in the first place.

[32] In the circumstances, these two grounds do not advance Emmerson's appeal.

[33] The imposition and terms of a confidentiality club depends on all the circumstances of the case and generally involves a balancing exercise, which was essentially a matter for Wallbank J's discretion. The confidentiality club appeal essentially

concerns a challenge to the discretionary case management decision of Wallbank J. The decision fell within the generous ambit of discretion available to Wallbank J. It cannot be said that the decision was plainly wrong. The confidentiality club was a sensible and pragmatic temporary measure which was put in place fairly to balance the parties' competing interests pending Renova's discharge application. Wallbank J exercised his discretion appropriately, after conducting a careful balancing of all circumstances of the case. The decision fell within the range of reasonable decision making. It is not a decision to which no reasonable judge could reasonably have come. The high threshold for appellate interference of discretionary case management discretion of the judge has not been met.

[34] Accordingly, it is ordered that the appeal is dismissed with costs to Renova Holding Limited, to be assessed by a judge of the Commercial Court if not agreed within 21 days.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

EASTERN CARIBBEAN SUPREME COURT
SEAL
COURT OF APPEAL

By the Court

Chief Registrar