IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 382 OF 2021 (IKJ)

BETWEEN

OLALEKAN AKINSOGA AKINYANMI

PLAINTIFF

AND

LEKOIL LIMITED

DEFENDANT

IN CHAMBERS

Appearances:	**Ms Gemma Lardner and Ms Nour Khaleq, Ogier, on behalf of the Plaintiff**
	Ms Clare Stanley QC, Mr Brett Basdeo, Mr Chaowei Fan, and Mr Barnaby Gowrie, Walkers, on behalf of the Defendant (the "Company")
Before:	**The Hon. Justice Kawaley**
Heard:	**10 March 2022**
Date of Decision:	**10 March 2022**
Draft Reasons Circulated:	**6 April 2022**
Ruling Delivered:	**14 April 2022**

HEADNOTE

Ex parte interim injunction –application to discharge-irreparable harm-balance of convenience-sufficiency of evidence as to Plaintiff's ability to comply with cross-undertaking as to damages- natural

justice –duty of Court to ensure that information forming part of the basis for an ex parte order is shared with the respondent to the application-effect of direction that respondent to ex parte injunction order may apply on short notice to discharge the order

REASONS FOR DECISION

Introduction

1. By his Amended Generally Indorsed Writ dated January 26, 2022, the Plaintiff sought declaratory relief including declarations that Resolutions 8 and 9 purportedly passed at the Company's Annual General Meeting for 2021 ("AGM") were void. In the Plaintiff's Statement of Claim of the same date, the case for seeking declarations that, *inter alia*, the "*Share Allotment Resolutions*" were invalid was fully set out. By a Notice of Motion filed on St Valentine's Day and issued returnable for March 21, 2022, the Plaintiff sought the following interim relief on an *inter partes* basis, namely an Order that:

> "*1. Until further Order of the Court, Lekoil Limited (the 'Company') be restrained from acting on Resolutions 8 and 9 passed at the annual general meeting of the Company held on 21 December 2021.*"

2. This somewhat sedate opening 'passage of play' in the contest was sharply interrupted when the Plaintiff filed an urgent Ex Parte Summons on February 28, 2022, issued returnable for the following day, March 1, 2022. The Ex Parte Summons primarily sought an Order that:

> "*Until further order of the Court, Lekoil Limited (the "**Company**") be restrained from issuing or allotting any shares in the Company pursuant to:*
>
> (a) *a convertible facility agreement entered into by the Company on 2 September 2021;*
>
> (b) *a convertible facility and option agreement entered into between the Company and Savannah Energy Investments Limited on 28 February 2022; and*
>
> (c) *a tripartite agreement entered into between the Company and Savannah Energy Investments Limited and others on 28 February 2022.*"

3. On March 1, 2022 I granted an ex parte Order substantially in those terms (the "Ex Parte Injunction"). On March 10, 2022, I discharged the Ex Parte Injunction and reserved costs until the present reasons had been delivered. These are the reasons for that decision.

The ex parte hearing

The application

4. Notice was properly given of the application and although Mr Basdeo for the Company attended, he elected to keep his powder dry and merely observed the hearing. The Plaintiff is the registered owner of 0.21% of the Company's shares although he beneficially owns a further 7.39 %. He is a former Chief Executive Officer of the Company who essentially complains in this action that the Share Allotment Resolutions contravene constitutional guarantees designed to protect against the dilution of existing shareholdings. In his Second Affidavit, he explained that a recent development was the discovery that the Company had, further to the September 2, 2021 convertible facility agreement ("CFA1") entered into a February 28, 2022 agreement ("CFA2") which would result in Savannah Energy Investments Limited ("Savannah Investments") holding 25.2% of the diluted share capital of the Company. He expressed surprise that the Company would decide to allot further shares while an application for an injunction to restrain any allotments (due be heard on an inter partes basis on March 21, 2022) was pending before this Court.

Findings

5. Two issues were of particular significance to me at the ex parte hearing. First, Ms Lardner persuaded me that the CFA2 clause providing for a $5million penalty if the conversion right was not honoured was at least arguably, as she put it, "*wholly uncommercial*". Secondly, because the risk of the injunction potentially causing commercial damage to the Company seemed obvious, the Plaintiff's offering a cross-undertaking (in the final paragraph of his Second Affidavit) as to damages without addressing his financial ability to honour it set off bells of alarm. Apart from the penalty clause, it seemed clear that the Company was in financial difficulties and that remediating these challenges likely provided a materially significant part of the reason for the consummation of CFA2. I was satisfied that there was a serious question to be tried on the merits of the Plaintiff's claim but felt it was more difficult to decide where the balance of convenience lay.

6. At the end of the ex parte hearing, I indicated that I would grant the Order sought subject to two conditions:

(a) the Company should be heard and were at liberty to apply to discharge the Ex Parte Order on 24 hours' notice; and

(b) the Plaintiff should satisfy me that I could safely accept his cross-undertaking in damages based on his financial means before the Order was perfected.

7. The Plaintiff's counsel emailed an unsworn Third Affidavit of Mr Akinyanmi to the Court at 5.07pm that same day, March 1, 2022. This was forwarded to me at 5.13pm together with a letter from Walkers which, *inter alia*, contended that the Plaintiff owed the Company $1.5 million and that both evidence of his means and fortification should be required before the Order was made. I did not take the contents of this letter into account because it seemed to me to be inconsistent with the Company's counsel's position of merely having a watching brief at the ex parte hearing. I did not review the Plaintiff's Third Affidavit very critically, in large part because I was relying on it to justify granting an injunction which might potentially be in force for too short a time for any significant damage to be occasioned by it.

8. At 6.57pm, I administratively approved the Ex Parte Order (the "Ex Parte Injunction") in the following terms:

> "*1. Until further order of the Court, Lekoil Limited (the "**Company**") be restrained from issuing or allotting any shares in the Company pursuant to:*
>
> *(a) a convertible facility agreement entered into by the Company on 2 September 2021;*
>
> *(b) a convertible facility and option agreement entered into between the Company and Savannah Energy Investments Limited on 28 February 2022; and*
>
> *(c) a tripartite agreement entered into between the Company and Savannah Energy Investments Limited and others on or around 28 February 2022.*
>
> *2. Costs be reserved.*
>
> *3. The Company is at liberty to apply to discharge this order on not less than 24 hours' notice to the Plaintiff."*

9. For those familiar with the Christian calendar, March 1, 2022 was Shrove Tuesday and the following day, March 2, 2022, was the Ash Wednesday public holiday. As a result the Ex Parte

Injunction was not perfected until March 3, 2022. However, the fact that the Ex Parte Injunction had been made was communicated to counsel by the FSD Registry on March 2, 2022, the public holiday notwithstanding.

The March 3, 2022 Confidentiality Summons

The application

10. The Plaintiff filed his draft Third Affidavit by email at 5.07pm on March 1, 2022 to explain his means but requested that this not be disclosed to the Company, proposing a confidentiality clause be included in the Ex Parte Injunction. Via email I signified that this request was unprecedented and required a formal confidentiality application to be filed before granting any confidentiality directions. The Plaintiff on March 3, 2022 filed a Summons seeking the following substantive relief:

> "*1. The third affidavit of Olalekan Akinsoga Akinyanmi and its exhibit OAA-3 be sealed pursuant to Order 63, rule 3 of the Grand Court Rules until further order of the Court.*"

11. The Third Affidavit referred to monies (less than US$5 million) in a Cypriot bank account held by Lekoil Nigeria Ltd. ("Lekoil Nigeria") and exhibited a resolution passed by that company's board on March 1, 2022, which provided:

> "*1.3 **IT WAS RESOLVED THAT** the Company continue to provide financial support to the CEO, and to pay the legal fees incurred in his ongoing legal proceedings in jurisdictions including Cayman Islands, United Kingdom, and United States.*"

12. The Third Affidavit concluded by averring that the information was "*commercially sensitive*" to both the deponent and Lekoil Nigeria and asked that the entire document be sealed. The Plaintiff's Fourth Affidavit was sworn in support of the Confidentiality Summons and most importantly contained the following averments:

> "*7 On the basis that this is a question for the Court alone, Akinyanmi 3 provided confidential and commercially sensitive information as to my financial means. It is common ground between the parties that there are numerous outstanding disputes between me, the Company and Lekoil Nigeria in addition to these proceedings (which are listed by the Company in their 28 February 2022 announcement…) and I am*

concerned that the Company may use this information against me and/or others in the context of those disputes.

8. *To the extent that any application for fortification is made by the Company in due course, I understand from Ogier (without waiving privilege) that the application will be determined on an inter partes basis and as such, any evidence that I may wish to file and rely upon in defence of such an application will need to be made available to the Company.*"

13. My initial impression was that this evidence provided very slender support for the Confidentiality Summons. It was easy to understand why the Plaintiff would be reluctant to disclose to a litigation adversary what assets he had and where they were located. But there was a logical incoherence to the proposition that an applicant for ex parte injunctive relief could, in effect, compel the respondent to make an application for fortification without first reviewing the evidence relied upon to persuade the Court to accept the cross-undertaking in the first place. The respondent to an ex parte injunction is entitled to interrogate the evidence the applicant has placed before the Court to persuade the Court to accept the cross-undertaking in damages and then decide whether there is a sufficient evidential basis to apply either to discharge the ex parte injunction and/or to seek fortification of the applicant's cross-undertaking. The financial wherewithal of an applicant may in some cases be the strongest indicator of where the balance of convenience lies and thus pivotal to whether or not an application to discharge the injunction should be made.

14. It is the invariable practice in applications for interim injunctions that applicants expressly address their ability to comply with the cross-undertaking at the ex parte stage. How much detail is required depends in part on the identity of the applicant. A large and obviously liquid company (or individual) with a healthy balance-sheet would simply have to describe itself as such. A litigant of more uncertain means would ordinarily appreciate that they had to condescend to greater particularity. However this issue only requires any serious scrutiny at all in a case where it is obvious that the risk of damage being occasioned by an interlocutory injunction is a tangible one.

15. The present case was a classical instance of an interim injunction application which gave rise to anxious concern about the relative impact on the applicant and respondent respectively of clearly discernible risks of damage. The main borrowing transaction which it was proposed to restrain sought (accepting the Company's published explanation at face value) to obtain funds to enable the Company to pursue a restructuring as an alternative to a liquidation.

16. In the event, the Confidentiality Summons was listed for hearing together with the Company's application to discharge the Ex Parte Injunction on March 10, 2022. Having heard counsel for the Plaintiff on the issue of confidentiality, I somewhat summarily refused the application and directed that the Plaintiff's Third Affidavit had to be served if it was proposed to seek to continue the Ex Parte Injunction.

Findings

17. Mr Basdeo's Written Submissions made it clear beyond sensible argument that it was fundamentally contrary to principle for the Ex Parte Injunction to be made or continued by this Court on the basis of material relevant to the granting of the Order which was kept confidential from the Company. It was argued most powerfully as follows:

> "*13. It is a fundamental principle of natural justice that a party to proceedings is entitled to see all of the information put before the Judge and taken into account by him.*
>
> *14. In WEA Records Ltd v Visions Channel 4 Ltd [1983] 1 WLR 721, the Court of Appeal of England & Wales could not envisage any circumstances in which an applicant for an ex parte injunction would be entitled to reveal information to the Judge which could not later be revealed to the respondent. Per Lord Donaldson MR at p. 724:*
>
> > *'However we are told that counsel also revealed to the judge certain information which may well have been relevant, but which was so confidential and sensitive that the plaintiffs considered that it could not properly be revealed to the defendants at a later stage. I do not know what this information was, but* ***I cannot at the moment visualise any circumstances in which it would be right to give a judge information in an ex parte application which cannot at a later stage be revealed to the party affected by the result of the application.*** *Of course there may be occasions when it is necessary, for example, to conceal the identity of informants, but the judge should then be told that this information cannot be given to him and the judge will then have to make up his mind to what extent he is prepared to rely upon information coming from anonymous and unidentifiable sources.' (emphasis supplied)…*
>
> *16 In Pamplin v Express Newspapers [1985] 1 WLR 691, Hobhouse J (sitting with assessors), following WEA Records, explained at p. 691A-C:*

'The first principle is the principle of natural justice which applies wherever legal proceedings involve more than one person, and one party is asking the tribunal for an order which will affect and bind another. Natural justice requires that each party should have an equivalent right to be heard. This means that if one party wishes to place evidence or persuasive material before the tribunal, the other party or parties must have an opportunity to see that material and, if they wish, to submit counter material and, in any event, to address the tribunal about the material. One party may not make secret communications to the court.'

17 *The third relevant authority is VNU Business BV v Ziff Davis (UK) Ltd [1992] RPC 269. That was an opposed ex parte application for an interim injunction, at which the plaintiff relied on an affidavit which exhibited certain confidential documents, which was disclosed to the defendant's counsel and solicitors, but not to the defendant itself. Vinelott J held this was impermissible:*

'There can be no doubt about the general principle. It was stated by Upjohn LJ (as he then was) in Re K (Infants) [1963] Ch 381 in these terms:

"It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial."

...

'If the court has no jurisdiction at the trial of an action or at the effective hearing of an interlocutory application to refuse to allow a party to proceedings to see evidence on which the other party relies, so also a party against whom an ex parte injunction is granted must be entitled to see the evidence on which the injunction was granted, so that he can consider whether he can and should apply to discharge it.' (p. 275)

'In my judgment, therefore, if the plaintiff wishes to pursue the application for an injunction and to rely on the evidence of infringement which has so far been supplied, though only to the defendant's counsel and solicitors, the defendant will be entitled to see that evidence' (p. 276)"

18. In the '*Plaintiff's Written Submissions (sealing)*', it was argued by the Plaintiff's counsel:

> "*10. In this case, the Company is not a party to the ex parte order pursuant to which the Affidavit was sworn, nor does the undertaking, 'which is given to the court and not to the respondent' concern them.*"

19. This submission collapses in on itself under the weight of the elementary principles relating to the rules of natural justice as applied to ex parte applications upon which Mr Basdeo aptly relied. The redoubtable Ms Lardner in her oral submissions boldly sought to sidestep this towering impediment to her client's Confidentiality Summons by seeking to contend that the Plaintiff's financial position was (1) only relevant to the question of fortification and (2) was not relevant to the question of whether or not the Ex Parte Injunction ought to have been granted at all. This was a rather beguiling submission because the injunction applicant's financial means are most often analysed by reference to the need for fortification. That scenario in my experience typically arises when the Plaintiff places before the Court some evidence of his financial means at the ex parte stage, but the respondent seeks to establish that those means are inadequate having regard to the fact that either (a) the level of harm the respondent may suffer is shown to be greater at the *inter partes* stage, or (b) the value of the applicant's assets are shown to be far lower at the *inter partes* stage. The fact that these issues are most often explored more fully at the *inter partes* stage under the umbrella of the term "fortification" should not be allowed to obscure the true legal function of this line of factual inquiry at the ex parte stage. It is very much part and parcel of a somewhat fluid process of judicially assessing:

(a) where the balance of convenience lies, and

(b) whether (and if so on what terms) it is just and convenient to grant interim injunctive relief.

20. My own oral explanation at the end of the March 1, 2022 ex parte hearing admittedly can be read as indicating that I myself assumed that the Plaintiff's asset position was only relevant to the question of whether or not fortification was required:

> "…*before the order is actually drawn up it seems to me that the plaintiff has to file a short supplementary affidavit explaining why it is that his undertaking should be accepted without fortification… I do think that the court is entitled to form a general impression that he is not a man of straw. He's involved in litigation before this court and it's not trivial. He's involved in litigation seemingly in New Jersey so the court can infer he's not a pauper but on the other hand I think if he's not a pauper it should be possible to demonstrate that*

> *he's not a pauper fairly quickly in terms of identifying what his net worth is and where I suppose his assets are, because when one is looking at fortification one will be looking at knowing whether there are assets against which enforcement can bite as opposed to illiquid assets.*" [Emphasis added]

21. However, contextually read, it is clear that I was not minded to grant an injunction at all unless I was satisfied that the Plaintiff had the means to compensate the Company for any damage that might be occasioned by the Company if the Ex Parte Injunction was granted and either (a) the injunction was discharged before trial, or (b) the injunction was continued to a trial at which the Company ultimately succeeded. Having regard to the elementary and fundamental rules of natural justice applicable to the specific context of ex parte applications, the Plaintiff was simply not entitled to rely upon material evidence to obtain the grant of the Ex Parte Injunction and decline to disclose that material to the respondent to the application.

22. I accept that my own articulation of the significance of assessing the Plaintiff's ability to comply with the cross-undertaking at the ex parte stage was hardly a model of legal clarity. However, there is local academic and judicial authority, not canvassed in argument, which confirms the basic proposition that where there is a risk of damage flowing from the grant of ex parte injunctive relief, an applicant must generally (subject to considerations of access to justice) satisfy the Court of his ability to comply with any cross-undertaking required by the Court. Deborah Barker Roye's '*Civil Litigation in the Cayman Islands*', 3rd edition at pages 145-146[1], the learned author states:

> "*As the American Cyanamid principles indicate, in cases where any interlocutory injunction is sought, the applicant will be required to give an undertaking to pay the defendant damages for any loss sustained by the defendant as a consequence of the interim injunction… in the event the claimant fails to obtain a final injunction at trial.*
>
> *It should be noted that the plaintiff must demonstrate, through his affidavit evidence, that he has the means to satisfy an undertaking in damages….However, where there is no discernible damage to be caused to any defendant then the Court would forego the requirement of requesting an undertaking, as in the case of Ernst and Young v Immigration Department.*[2]"

23. In the *Ernst and Young-v-Immigration Department* case, Smellie CJ held in relation to the cross-undertaking issue:

[1] (CILS Academic Press: Cayman Islands, 2016).
[2] [2015(1) CILR 151].

> "*32. In granting the prohibitory and mandatory injunctive relief, I also accepted that there was no need to require an undertaking in damages from the plaintiffs as a condition of obtaining the injunctions-there appeared to be no individual to be affected by the injunctions except the F.O.I. officer herself, but she has no persona interest in the information herself nor in its dissemination…*"

24. My findings as to the need for evidence of an ex parte injunction applicant's means where a risk of damage is present also finds support in the decision of Quin J in *Brennini Sabre Incorporated v. Pirates Caves Limited* [2011 (1) CILR Note 8]

> "*Normally, an applicant for an injunction who has not had sufficient time to provide supporting affidavit evidence may give evidence orally. The applicant will then be required to file an affidavit as soon as reasonably practicable, and to provide notes of the hearing to any person affected by the relief sought. The notes should ensure full and frank disclosure by the applicant, setting out the factual background, the nature of the claim, the cause of action, evidence supporting the adequacy of the cross-undertaking in damages and any potential defence to the application.*" [Emphasis added]

25. The usual practice was departed from in the present case because the Plaintiff (for reasons which I will advert to below) was simply unable to address the adequacy of the cross-undertaking in a straightforward manner.

26. For these reasons on March 10, 2022, I (1) refused the relief sought in the Plaintiff's Confidentiality Summons and (2) directed that unless the Plaintiff's Third Affidavit was served on the Company, the Ex Parte Injunction would be discharged.

The Company's Set-Aside Summons

The application

27. By a Summons dated March 8, 2022 issued returnable for March 10, 2022 (the "Company's Set-Aside Summons"), the Company applied to set-aside the Ex Parte Injunction. The Summons was supported by the initially unsworn Affidavit of Anthony Hawkins, the interim Chairman of the Company. Because the only issue which was addressed at the *inter partes* hearing was the balance of convenience, the most pertinent parts of his evidence were the following:

"*15. Lekoil Nigeria has a share capital of ₦10,000,000 (ten million naira) divided into two types of shares:*

(a) A Shares: 4,500,000 A Shares, which were allocated to the Plaintiff (as founder), an employees' trust and a directors' trust, representing 60% of the equity interest but an economic entitlement to only 10% of any distributions made by Lekoil Nigeria.

(b) B Shares: 3,000,000 B Shares, which were allocated to Lekoil Cayman, representing 40% of the equity interest but carrying an economic entitlement to 90% of any distributions made by Lekoil Nigeria….

120. With respect to the Plaintiff's cross-undertaking as to damages and the fortification requirements to support that cross-undertaking, it is difficult for myself or the Company to comment without seeing the Plaintiff's Third Affidavit. I am concerned, however, that the Plaintiff may be wrongly using or relying upon the funds/assets of Lekoil Nigeria. Without knowing whether this is the case or not, I would submit that it is not appropriate for Lekoil Nigeria to assist the Plaintiff's fortification in anyway.

121. As I mentioned above at paragraph 111, if Lekoil Cayman is unable to issue the relevant shares pursuant to the Amended Existing CFA by on or about 14 March 2022 and pursuant to the Savannah CFA when legally possible, it would result in the liquidated damages penalties of US$1.125 million and US$4.45 million becoming payable under the Amended Existing CFA and Savannah CFA, respectively. Furthermore, the Company will be exposed to substantial legal costs associated with defending these proceedings.

122. Consequently, the continuation of the ex parte injunction will shortly become catastrophic to Lekoil Cayman and will most likely result in it being tipped into insolvent liquidation. Bearing in mind the effect this would have on the shareholder's position, including the Plaintiff's position (as set out in letters from Walkers to Ogier on 1 March 2022, appearing at pages 351 – 370 and pages 371– 372), I would characterise the dispute with the Plaintiff (and indirectly Lekoil Nigeria as his proxy) as an extreme case of brinksmanship.

123. In the circumstances set out in this Affidavit, most particularly the potentially catastrophic consequences to the Company if the injunction continues, when compared to the modest value of any damages claim by the Plaintiff (some £3,000), and the absence of evidence that the Plaintiff will or will be able (without fortification) to meet the damages suffered by the Company, I respectfully request that the injunction be discharged…" [Emphasis added]

Findings: general

28. The Plaintiff's Fifth Affidavit was sworn in response to the First Hawkins Affidavit. Unsurprisingly, it primarily addressed the merits of the underlying dispute and the attack on the Plaintiff's own motives in pursuing, *inter alia*, this litigation. The Plaintiff exhibited letters of support from over 20% of the Company's shareholders. However, he did not directly dispute or effectively undermine the following assertions made by the Company:

(a) the Company has a 90% economic interest in dividends from Lekoil Nigeria;

(b) Lekoil Nigeria was invited to provide funding to repay CFA1 and CFA2 on February 28, 2022 and did not respond to the invitation;

(c) the continuance of the Ex Parte Injunction placed the Company at risk of "*being tipped into insolvency*" by reason of continuing legal costs and the triggering of the penalty clauses in the two impugned agreements;

(d) the Company's potential losses if the Ex Parte Injunction were to have been continued were far greater (CFA1-US$1.125 million; CFA2- US$5million) than the Plaintiff's potential personal loss (£3000) if the Ex Parte Injunction was refused or discharged;

(e) "*the absence of evidence that the Plaintiff will or will be able (without fortification) to meet the damages suffered by the Company*".

29. Ms Stanley QC's limited admission was completed just in time for her to address the Court in support of the Company's Set-Aside Summons and only shortly after the Plaintiff's Third Affidavit was served following my decision on the Confidentiality Summons. Appreciating how vulnerable the Ex Parte Injunction was to being summarily discharged, she sought to persuade the Court through oral argument to grant the Company's application by pithily addressing key "*big picture points*" of (1) whether damages would be an adequate remedy for the Plaintiff and (2) the balance of convenience. The most significant points the Company's counsel advanced were the following:

(a) the Plaintiff was the only shareholder actually suing, and only had standing to sue in respect of his legally owned shares (a 0.2% stake in the Company);

(b) taking his case on their value at its highest, the Plaintiff's shares were on his case worth only approximately £14,000 and the dilution he complained of was a *de minimis* amount of some £6,800.00. This had not been adequately disclosed at the ex parte hearing. Because of this, damages were clearly an adequate remedy for the Plaintiff if the Ex parte Injunction was discharged and he succeeded at trial;

(c) in contrast the Company faced potentially "catastrophic" damage including a liquidated loss of US$6.125 million under the penalty clauses in the two impugned agreements;

(d) if the Ex Parte Injunction continued until trial and the Plaintiff lost, the key question was how would the cross-undertaking in damages be enforced; whether the Plaintiff was "*good for the money*";

(e) the only assets the Plaintiff himself had within the jurisdiction were his shares in the Company. In any event, those shares' *de minimis* value was doubtful as (1) the Company might be in liquidation and (2) trading in the shares was presently suspended;

(f) Lekoil Nigeria's Board had only in fact resolved to support the Plaintiff's legal fees. The letter from the Lekoil Nigeria Chief Financial Officer did not on its face provide sufficient comfort to the Court, bearing in mind that money in a foreign bank account could easily be moved and no formal undertaking by the third party was even proffered:

> "*We refer to the above proceedings and board resolution dated 1 March 2022 pursuant to which Lekoil Nigeria pledged to provide you with financial support in respect of the costs of proceedings.*
>
> *We confirm that the funds held in Lekoil Nigeria's enclosed account with Renaissance Securities (Cyprus) Limited are available to satisfy any order for damages made in the proceedings*";

(g) the Plaintiff had failed to disclose that the Company had a 90% economic interest in Lekoil Nigeria;

(h) as stated in the Company's February 28, 2022 Savannah CFA press release (which was placed before the Court at the ex parte stage), Lekoil Nigeria's refusal to financially support the Company lay at the heart of its cash crisis; and

(i) (in answer to a question from the Court) the First Hawkins Affidavit (sworn by a solicitor of Australia and England and Wales) credibly explained why the Savannah CFA was not an uncommercial arrangement: Savannah "*held all the cards*".

30. Ms Stanley QC completed her submissions before lunch on the first day of a hearing for which two days had been set aside. Before her mid-morning appearance, at the beginning of the day, I had postponed an adjournment application by the Plaintiff's counsel based on the argument she had been deprived of a full 24 hours to respond to the material filed by the Company (the Company's skeleton argument having been served at 8:55am prior to the commencement of the hearing at 11:00am. The Ex Parte Injunction provided as follows:

> "*9. The Company is at liberty to apply to discharge this order on not less than 24 hours' notice to the Plaintiff.*"

31. As I explained orally in provisionally refusing the adjournment application, the purpose of this direction was to enable the Company to apply on short notice to discharge the injunction in case it was possible to demonstrate summarily that the Ex Parte Injunction ought not to have been made. Paragraph 9 was by its terms quite clearly not a direction given in relation to a 'full' *inter partes* hearing that the respondent's evidence must be filed not less than 24 hours before the hearing. The full *inter partes* hearing was fixed for March 21, 2022. At the ex parte hearing on March 1, 2022, I somewhat tersely explained the reasons for this direction as follows:

> "*…Very narrowly I'm satisfied that the case for granting the ex parte injunction has been made out. However, it seems to me that the company should be entitled to be heard if it wishes to be heard before the 21st of March…*[*Ms Lardner: 'Return date?'*]*... I think in this particular instance one would want to sort of say that the defendant is at liberty to apply to discharge the order on not less than 48 hours' notice…I'm not sure whether it shouldn't be actually be even shorter than that. In view of the way this has been brought on it should be 24 hours' notice…*"

32. Before responding to the Company's counsel's brief but penetrating submissions, Ms Lardner renewed her adjournment application, suggesting that her opponent should address the serious issue to be tried question in the afternoon and enabling her to respond the following day. This made no sense to me in case management terms as it would entail extending the duration of the hearing to hear argument which appeared (based on my provisional views) to be entirely academic. I pointed out that the Company had thus far launched a targeted attack on the merits of the Ex Parte Injunction without raising any surprising new facts which the Plaintiff could

reasonably require time to respond to. The Plaintiff's counsel suggested, by way of a far more realistic fall-back position, a 1½ hour lunch break, a request which I acceded to.

33. Ms Lardner duly submitted that the prejudice the Plaintiff would suffer had been over-simplified by the Company. The real dispute was over control, so that mere dilution valued in present day terms was not a realistic measure of the longer-term prejudice the Plaintiff would suffer if there were no protections against dilution. It was not unusual in the early years of oil and gas companies for value to be generated in later years when early capital investments had borne fruit. In other words, Lekoil Nigeria was not deliberately failing to support the Company as part of a battle for control. Numerous other shareholders (with a 20% stake in the Company) had written letters of support for the Plaintiff's application; in reality the stake of concerned shareholders was far greater than the Plaintiff's miniscule legal interest.

34. I put to Ms Lardner that if one took the injunction out of play, parties dealing with the Company had to make a commercial judgment as to whether they wished to enter into transactions with the Company which might be unwound. She countered that unwinding transactions would be costly and uncertain. The first point appeared to me to carry greater weight than the second point.

35. Ms Lardner was keen to refer the Court to the Plaintiff's evidence in his Fifth Affidavit about the various reputable and well qualified people involved in Lekoil Nigeria. This was relied on both to rebut the Company's suggestion that Lekoil Nigeria was a mere pawn in the Plaintiff's hands and, implicitly, to dilute the impact of the Company's assertion that the Plaintiff had acted improperly in the recent past. I did not consider this was highly material as it was clear that the overwhelming majority of the Company's shareholders were not actively or demonstrably opposed to the Company's impugned Share Allotment Resolutions. The merits of the underlying control dispute had no bearing on whether the Ex Parte Injunction should be continued or discharged. The Company's announcement in relation to CFA2 suggested that institutional investors with a 42% stake were positively supportive of the transaction. The Plaintiff's counsel suggested that without knowing what those shareholders had received in return for their support, the Court should not infer that such support was indicative of the *bona fides* of CFA2.

36. The critical analysis ultimately appeared to me to be whether the Plaintiff could show irreparable harm if interim relief was refused despite the fact that Savannah Investments had

notice of the present proceedings when they entered into the CFA2 as reflected in the terms of the liquidated damages clause. The Plaintiff's counsel could understandably say little about the inadequacy of the evidence before the Court about the Plaintiff's ability to comply with the cross-undertaking in damages he offered to the Court. This seemingly explained her determined efforts to make a series of 'jury' points, designed to rekindle the doubts I expressed about the commerciality of the terms of CFA2 and the timing of its consummation, at the ex parte stage. In the event, it was not necessary for me to form a clear or firm view on the following matters at all:

(a) I assumed in the Plaintiff's favour that there was a serious question to be tried on the merits of his claims that CFA1 and CFA2 should be declared to be void, based on special pre-emption rights contained in the Company's Articles;

(b) I did not attempt to assess the merits of the grounds for Plaintiff's termination as CEO of the Company, a matter which is subject to pending litigation;

(c) I did not attempt to assess the merits of the Company's contention that Lekoil Nigeria is using "the Company's money" to fund the Plaintiff's litigation campaign here and elsewhere against the Company;

(d) ancillary to (c)), I did not attempt to assess the merits of the Company's contention that Lekoil Nigeria, at the direction of the Plaintiff, is deliberately failing to distribute available profits required to support the operations of the Company.

37. In reply, Ms Stanley QC most significantly advanced four points. She firstly argued that there would be no upside in terms of the value of the Plaintiff's shares if the Company went into liquidation. Secondly she submitted that the main prejudice the Plaintiff complained of (dilution and a change of control) would fall away if the agreements were found to be void at trial. As regards CFA2, she referred to the penalty (or liquidated damages) clause which made it clear that no change of control would occur if the agreement was found to be void:

> "*7.7* ***Conversion not possible or effective***
>
> *(a) In the event that the Outstanding Amount is not converted into Ordinary Shares pursuant to clause 7, unless the Lender has*

expressly consented in writing, or if any conversion is subsequently found to be void, voidable or ineffective, the Borrower shall pay to the Lender liquidated damages of US$5,000,000.

(b) The Borrower and the Lender agree that such liquidated damages are a genuine pre-estimate of the Lender's loss, and no other damages will be payable under any other clause of this Agreement in respect of the failure to convert."

38. Thirdly, the Company's counsel submitted that the status quo when the Plaintiff's application for interim relief was made was that CFA1 and CFA2 had already been entered into. So if the scales of prejudice where evenly balanced (which they were not), declining to restrain implementation of the CFAs would best preserve the status quo. And fourthly, Ms Stanley QC noted that if the Plaintiff and his supporters were really concerned about their special protections against dilution being bypassed, an offer should have been made to lend the Company the funds it was forced to obtain from Savannah Investments.

39. In the Plaintiff's Skeleton Argument for the ex parte hearing on March 1, 2022, the uncontroversial legal principles governing the grant of interim injunctive relief were helpfully summarised as follows:

"*The key principles set out in American Cyanamid were summarised by Mangatal J in Re Xie Zhikun & Ors v XiO GP Limited & Ors (unreported, 9 June 2017) at [101] as follows:*

'(a) Is there a serious issue to be tried; do the Plaintiffs have a real prospect of succeeding in their claim for permanent injunctions at the trial?

(b) If there is a serious issue to be tried, will the Plaintiffs be adequately compensated by damages for the loss they would have sustained as a result of the Defendants continuing to do that which it was sought to be enjoined, and are the Defendants in a position to pay the damages?

(c) If damages would not provide an adequate remedy for the Plaintiffs, if the Defendants were to succeed at trial, would they be adequately compensated under the Plaintiffs' undertaking as to damages? '"

40. Limbs (b) and (c) were the focus of attention at the March 10, 2022 hearing.

Findings: adequacy of damages as remedy for any harm the Plaintiff would suffer

41. The Plaintiff's counsel submitted:

> "*54. The Plaintiff would not be adequately compensated by damages for any losses occasioned by the Company as a result of acting on the Share Allotment Resolutions. If the shares are allotted, the shareholders of the Company stand to suffer an improper dilution of their shareholding which would be very difficult (if not impossible) to subsequently unwind.*
>
> *55. The damage that could be suffered by the Plaintiff as a result of a dilution of shares would be difficult to measure, given that trading in the Company's shares had been suspended.*
>
> *56. In the event that the Court considers the adequacy of damages to be uncertain, the Court should grant interim injunctive relief in any event (see Leo Pharma A/S and another v Sandoz Ltd [2008] EWCA Civ 850).*"

42. The first two of these three submissions do not withstand careful scrutiny although they initially appeared to be irresistible on their face. The weak link in the logical chain is that the assertion that the dilution complained of "*would be very difficult (if not impossible) to subsequently unwind*". The Plaintiff was substantively seeking declarations that the Share Allotment Resolutions were invalid. The necessary consequence of these claims succeeding would be that any allotments purportedly made pursuant to the invalid Resolutions would be void. Any allotments made after the Plaintiff commenced the present proceedings and could be set aside by order of this Court and *prima facie* any such order would 'bite' on shares located within the jurisdiction of this Court. As regards CFA2, Savannah Investments explicitly contracted on terms which contemplated the possibility that its allotment rights might be held to be invalid. So, as Ms Stanley QC argued, it is difficult to see how that counterparty could challenge any invalidity determination by this Court. Further and in any event, the Plaintiff could presumably apply to join the counterparties to CFA1 and 2 as "*necessary and proper parties*" to the present proceedings to ensure that they are bound by any findings in his favour.

43. Accordingly, bearing in mind that the only relevant damage to be taken into account for the "irreparable harm" limb of the interlocutory injunction test is damage that the Plaintiff would sustain if he succeeds at trial after having been refused interim relief, I was ultimately satisfied that this essential requirement for granting the Ex Parte Injunction was clearly not made out (on the basis of the case advanced by the Plaintiff at the ex parte and *inter partes* hearings) and

that the Order was liable to be discharged on this ground alone. I did not consider any material non-disclosure occurred in the course of the Plaintiff's counsel's forceful yet careful ex parte presentation.

Findings: balance of convenience

44. The balance of convenience limb of the *American Cyanamid* test is the limb that I focussed on most intently prior to granting the Ex Parte Injunction and at the hearing of the Summons to Set-Aside. This was on the basis the Plaintiff complained primarily about damage which could not be adequately compensated by damages at all while the Company complained of prejudice (liquidated damages) which it contended the Plaintiff could not compensate for in damages and insolvency which I inferred was not capable of being measured in damages in any event.

45. In her Skeleton Argument, Ms Lardner submitted at the ex parte hearing as follows. Firstly, after conceding that the Company could suffer some damage if the relief the Plaintiff sought was ultimately shown to be wrongly granted, it was submitted:

> "*59. In any event, the Plaintiff has given a cross-undertaking in damages and which would adequately compensate the Company if it is subsequently determined that the applicant was not entitled to the relief granted by the Court.*"

46. By the end of the *inter partes* hearing, it was clear that there was no sufficient basis for finding that the Plaintiff's cross-undertaking "*would adequately compensate the Company if it is subsequently determined that the applicant was not entitled to the relief granted by the Court.*" The Plaintiff's only relevant assets within the jurisdiction were his 0.2% stake in the Company, shares in a listed Caymanian company but shares which cannot currently be traded because trading has been suspended by AIM. The Plaintiff provided no information about any other personal assets (apart from his 60% shareholding in Lekoil Nigeria). Lekoil Nigeria had resolved to fund the Plaintiff's legal fees, but offered no undertaking to meet any damages claim and was itself in a highly adversarial relationship with the Company. The CFO's letter of commitment to meet any damages claim in my judgment gave insufficient comfort or support for the Plaintiff's cross-undertaking. The suggestion that the Plaintiff would if required to provide fortification lacked substance in light of the distinctly evasive way in which his asset position was explained at the ex parte stage.

47. With masterful understatement, Ms Stanley QC submitted that the Plaintiff had been "*coy*" about his asset position. The attempt to conceal his Third Affidavit from the Company appeared to me to reflect more than the usual concerns about conferring a tactical advantage on an opponent in terms of identifying what litigation funding arrangements were in place. Beyond that, revealing that he was completely dependent on Lekoil Nigeria for funding support would provide the Company with further ammunition to complain about Lekoil Nigeria's lack of financial support for the Company to which it was heavily commercially obligated.

48. It was clear that the Company stood to suffer more prejudice than the Plaintiff if the Ex Parte Injunction was continued and that there was no reliable basis for finding that the Plaintiff's cross-undertaking in damages afforded sufficient protection to the Company. The Company risked suffering insolvency flowing from, *inter alia*, multiple million dollar liquidated damages claims while the Plaintiff risked suffering *de minimis* temporary dilution damage if the Ex Parte Injunction was discharged and was able to prevail at trial and unwind the impugned allotments.

49. It was further submitted that:

> "*60. If and to the extent that there is any difficulty with respect to the availability of damages on either side, the balance of convenience favours preserving the status quo and restraining the Company from allotting the shares pursuant to the Share Allotment Resolutions, Existing CFA, Savannah CFA and Tripartite Agreements until such time as the substantive proceeding has been finally determined.*"

50. This was another beguiling submission. Should the status quo be viewed narrowly by reference to whether CFA1 or CFA2 had been fully implemented or more broadly by reference to the fact that CFA1 and CFA2 had already been consummated? This question does not admit a simple and clear-cut answer. However, intuitively it seemed to me that, taking a broad commercial view, and focussing on CFA2 (which was the sole rationale for urgent injunctive relief) that the critical consideration was that CFA2 had already been entered into on terms which took account of the possibility that the share allotment element of it might be held to be void if the Plaintiff's claims herein succeeded. The *status quo* as at March 1, 2022 favoured allowing CFA2 to be implemented rather than restraining its implementation. Closing CFA2 while the Plaintiff's *inter partes* injunction application was pending may have been a bold and somewhat surprising step for the Company to have taken. A different analysis might have been appropriate, however, if the Company, on notice of the *inter partes* application for injunctive relief due to

be heard on March 21, 2022, had expressly undertaken not to enter into any further funding agreements until that application had been heard.

51. But the need to consider this tie-breaking limb of the balance of convenience test did not ultimately arise because it was clear that the Company (if it succeeded at trial) would be seriously prejudiced by facing the risk of insolvency in two obvious respects:

(a) as regards triggering more than US$6 million in liquidated damages liabilities the Plaintiff being on the evidence not 'good for' his cross-undertaking in damages; and

(b) as regards the "catastrophic" risks of insolvency, the damage being very arguably irreparable.

52. The Plaintiff, on the other hand, would be prejudiced to an uncertain and far less tangible extent by being denied injunctive relief at the interlocutory stage, because his main complaint of prejudice flowing from unlawful dilution was capable of being remedied by substantive declaratory relief if he ultimately prevailed at trial.

53. I accordingly found that the balance of convenience leaned heavily against continuing the Ex Parte Injunction any longer and certainly not until trial. Again, I did not consider that any material non-disclosure at the ex parte stage occurred.

Conclusion

54. For the above reasons on March 10, 2022, I discharged the Ex Parte Injunction that I granted on March 1, 2022. I will hear counsel if required, preferably on the papers, as to costs. However, it is difficult to see why costs should not follow the event.

THE HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT