In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2023 No: 162

BETWEEN:

MUHAMMAD ZIAULLAH KHAN CHISHTI

Plaintiff

And

AFINITI LTD

Defendant

RULING

Dates of Hearing:	Wednesday 20 September 2023
Supplemental Submissions:	Monday 9 October 2023
Date of Ruling:	Friday 19 December 2023
Counsel for the Plaintiff:	Mr. Alex Potts KC of Counsel and Mr. Richard Horseman (Wakefield Quin Limited)
Counsel for the Defendant:	Mr. Adam Zellick KC of Counsel and Mr. Ben Adamson and Mr. Conor Doyle (Conyers Dill & Pearman Limited)

Issue Estoppel and Res Judicata - Hearsay Evidence in Civil Proceedings - Objection on Admissibility of a Foreign Private Arbitration Award - Whether the Award is admissible evidence even where there is no res judicata or issue estoppel

RULING of Shade Subair Williams J

Introduction:

1. The ultimate issue for trial in these proceedings is outlined in an Amended Originating Summons dated 25 May 2023 by which the Plaintiff seeks declaratory and injunctive relief in support of his pursuit of orders for the Defendant Company (the "Company" / the "Defendant") to pay him an advancement of his expenses in respect of the costs of various Court proceedings including these proceedings. The Amended Originating Summons was supported by the First and Second Affidavits of the Plaintiff, Mr. Muhammad Chishti.

2. The Plaintiff's case is that the Defendant is so obliged in accordance with the terms of a Deed of Indemnity dated 1 January 2020 ("the Deed") entered into by the parties when the Plaintiff was a high ranking officer of the Defendant.

3. There are now three interlocutory applications which are to be decided by this Court:

   (i) Firstly, I am seized of the Plaintiff's 1 September 2023 summons application for an interim mandatory injunction ordering the Company to pay the Plaintiff US$1,000,000.00 in the form of an advancement on the expenses of these trial proceedings. This application may be referred to as the 'interim relief application.' (This application has not yet been argued before me.)

   (ii) By way of a further summons application dated 15 September 2023, the Plaintiff objects to any and all of the references made by the Defendant to the prior findings of a sole Arbitrator in his award in a private arbitration proceeding, namely *Spottiswoode v Chishti and Satmap Inc d/b/a Afiniti, Case No. 01-17-007-403* (the "Award") in which the Plaintiff was found to have committed sexual assault. Admissibility objections were also made in respect of findings made by an Independent Counsel as to the Plaintiff's entitlement to an advancement on his legal expenses. I will refer to this application as the 'strike-out application'.

   (iii) The third application before this Court is for a Confidentiality Order excluding members of the public and the media from access and reporting on these proceedings. This is the 'confidentiality application.'

4. This Ruling is a determination of the strike-out application and the confidentiality application, such applications having been heard as preliminary points to the interim relief application and

the substantive relief sought by the Amended Originating Summons which has not yet been heard.

5. Both of the applications heard were opposed by the Defendant and the Court received oral and written submissions from Counsel for both sides. After which, I reserved my decision to provide these written reasons.

Background:

6. The substantive issues in these proceedings will require this Court to resolve a dispute as to the proper construction of the Deed. The Plaintiff contends that the Deed entitles him to an advancement of his expenses in respect of the following US Court matters:

   (i) Chishti et al v. Spottiswoode et al., 22cv-03490-ABJ in the United States District Court for the District of Columbia
   (ii) Chishti v. Spottiswoode, 23-cv-00859-ABJ in the United States District Court for the District of Columbia
   (iii) TRG-I v. Chishti, JAMS Ref No. 5425000846 in the United States District Court for the Southern District of New York
   (iv) TRG-I v. Chishti, No. 23-cv-01760 (S.D.N.Y.), on appeal as TRG-I v. Chishti, No. 23-286 (2d. Cir.) in the United States Court of Appeals for the Second Circuit; and
   (v) Chishti v. Jameel, et al., JAMS Ref. No. 5425000957 in the United States District Court for the Southern District of New York.

7. This stream of litigation all follows the Award against Mr. Chishti by which he was held liable in 2019 for sexual harassment and sexual assault against Ms. Tatiana Spottiswoode, a former employee of the Company's subsidiary. According to the background facts as outlined in the Defendant's written submissions, a few years later in November 2021, during the "Me Too" movement, the US House of Representatives Judiciary Committee (the "Judiciary Committee") were examining the practice of various corporations which required employees to privately arbitrate workplace sexual misconduct rather than engage in open and public litigation.

8. It is said that during this period, former UK Prime Minister, Mr. David Cameron, was the Chairman of Afiniti's Advisory Board. As matters unfolded, this Court was informed that Ms. Spottiswoode gave sworn evidence before the Judiciary Committee on her account of the acts carried out by Mr. Chishti. This resulted in the widespread publicity of her testimony together with the Award to the extent that it formed part of the Congressional Record. The Defendant

also pointed out that a moderately redacted copy of the Award continues to be accessible to the public online.

9. Days after Ms. Spottiswoode's testimony before the Judiciary Committee, Mr. Chishti's tenure as the CEO of the Company ended and the above litigation was set into motion. This consisted of legal action against Ms. Spottiswoode, the Company and also against The Resource Group International Limited ("TRG"), a shareholder of the Defendant and a company at which Mr. Chishti served as CEO and Chairman. Additionally, TRG rolled out its own course of litigation against Mr. Chishti. This litigation, which in part entails defamation suits, is now the subject of Mr. Chishti's pursuit for an advancement of his expenses in accordance with what he contends to be the proper construction of the Deed.

10. The Defendant's case is that Mr. Chishti has no proper or lawful entitlement to the pursued advancement of his expenses or any indemnity. The Company's position, as stated in Mr. Zellek's written submissions, is that "*the underlying question in this case is whether Afiniti, a company whose former CEO was found to have sexually harassed and assaulted a Company employee must thereafter fund that former CEO's legal campaign for revenge against the Company, his victim and others*."

11. Pursuant to various provisions of the Deed, an "Independent Counsel" may be called upon to determine the Plaintiff's entitlement to an advance under the Deed as a subsequent step to the Board's consideration of any such application. In this case, the Board declined to approve Mr. Chishti's requests for an advancement and on 19 September 2023 Mr. Delroy Duncan KC served as Independent Counsel and rendered a "Determination" by which he found against Mr. Chishti.

12. The Plaintiff has brought on these Court proceedings for final adjudication in the hope that the effect of the refusal by the Board and Independent Counsel will be reversed. That is the background to these Court proceedings.

The Confidentiality Application:

13. The premise for the Plaintiff's Confidentiality Application is that these proceedings unveil confidential material which ought never to have traveled beyond the doors of the private and foreign arbitration proceedings in which they were created or otherwise used.

14. Taking the precautionary approach, this Court excluded members of the public from the hearing of this application and from the hearing of the Strike-Out Application.

The Strike-Out Application:

15. On the strike-out application the Plaintiff says that the Defendant abused the process of the Court by filing additional yet inadmissible evidence on the eve of the 20 September 2023 hearing. This, Mr. Potts KC pointed out, was done without the leave of the Court.

16. Mr. Potts KC took further issue with the Defendant's written submissions, submitting that they should be amended to exclude the existing statements of fact and opinion which are non-evidentially based. He scathingly characterized those submissions as 'scandalous' and 'remarkable'.

17. The Plaintiff's admissibility objections were principally motivated by the Defendant's production of the following two exhibits: (i) the 19 September 2023 Determination of Independent Counsel, Mr. Delroy Duncan KC (the "Determination") and (ii) a redacted copy of the Award.

18. The admissibility arguments in respect of the Award mostly targeted the legal doctrines of *issue estoppel* and *res judicata*. The Defendant in this case asserts *issue estoppel* as a basis for admission of the Award for not only the record of the evidence which was received in the arbitration proceedings but also for the admission of the arbitrator's findings against Mr. Chishti.

Discussion

19. The Plaintiff's summons for interim relief was supported by the Third Affidavit of Mr. Chishti.

20. In the form of a Consent Order, dated 15 June 2023 and signed by Mussenden J, directions were given on the Amended Originating Summons. Mussenden J directed that the Defendant's evidence was to be filed no later than 13 July 2023 allowing for reply evidence by the Plaintiff to be filed by 10 August 2023.

21. On 18 July 2023, five days post-deadline, the Defendant filed the First Affidavit of Mr. Samuel Logan, the Chief Legal Officer of the Company. In reply, the Plaintiff filed Mr. Chishti's Fourth Affidavit which was sworn on 16 August 2023, six days after the 10 August end date. While no formal application was made by either party for an extension of time to file evidence, no issue arises out of these moderate filing delays.

22. However, Mr. Potts KC urged this Court to find that the Defendant was flagrant in its disregard for Mussenden J's directions when it filed the Second Affidavit of Mr. Logan on 19 September 2023 at 4:38pm, i.e. the eve of the hearing. It is the Defendant's filing of Mr. Logan's Second Affidavit which triggered the Plaintiff into making these preliminary applications.

23. At the nub of it all, the Plaintiff feels aggrieved not merely by his sense of the unauthorized belatedness of the Company's filing of Mr. Logan's Second Affidavit but more so by the Defendant's production of the Determination and the Award as an exhibit to that Second Affidavit. Plainly put, the Plaintiff vehemently objects to the admission of any evidence which asserts on its face, whether it be as a matter of a finding of fact or opinion, that (i) Mr. Chishti committed a sexual assault against Ms. Spottiswoode and that (ii) he has no entitlement to the advance payments and/or indemnities he seeks.

The Substantive Admissibility Objections

24. The substantive admissibility objections were argued on the following grounds of legal principle:

    (i) The rule in *Hollington v Hewthorn* [1943] 1 KB 587 CA; [1943] 2 All ER 35 precludes this Court from relying on the decision of another court or tribunal as evidence of the truth of its factual findings;

    (ii) The provisions of the Evidence Act 1905 prohibit the admission of hearsay and opinion evidence; and

    (iii) The Award has no legal effect under Bermuda law and is subject to express and implied obligations of confidentiality.

25. In *Hollington v Hewthorn* the English Court of Appeal held that a conviction by a criminal court is inadmissible in civil proceedings as evidence that the offence was committed. This has come to be known as the *Hollington v Hewthorn* rule. This rule has since then been more broadly applied to exclude evidence of factual findings made in earlier civil or criminal court, tribunal, or inquiry proceedings from subsequent proceedings. (See *Al-Hawaz v The Thomas Cook Group Ltd 27 October 200, New Law Online case 2001019305*). The effect of the rule is that any such previous conclusions drawn by the trier of fact will be reduced to inadmissible hearsay and opinion evidence for the purpose of the subsequent proceedings. (See *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1, and *Conlon v Simms* [2008] 1 WLR 484.)

26. On the facts of *Hollington v Hewthorn*, the defendant was sued on account of his driver's negligent driving which resulted in the death of the plaintiff's son. The driver of the defendant's car had been found to be criminally liable and was convicted of careless driving. In subsequent civil proceedings, the plaintiff, as the administrator of his son's estate, claimed for damages and sought to rely on the driver's conviction as evidence of the negligent driving. (As recited by Lord Rodger in *Caylon v Michailaidis [2009] UKPC 34 at 289*) Lord Goddard delivered the judgment for the English Court of Appeal stating [40]:

"*The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision.*

It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result. It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognised exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."

27. Mr. Potts KC submitted that *Hollington v Hewthorn* is binding authority on this Court and, on the facts of this case, he submitted that the rule must be applied to exclude the Award and the Determination. He distinguished the Bermuda law position from English law, pointing out that the rule, controversial as it may widely be considered, was reversed in England with the passing of section 11 of the Civil Evidence Act 1968 on the recommendation of the Law Reform Committee in its 15th report (the "Committee's Report"). (See para [84] *Rogers v Hoyle*.) Unsurprisingly, paragraphs 3 and 4 of the Committee's Report was recited in *Rogers v Hoyle* as it likely embodies the instincts of jurists near and far. In those passages, the Law Reform Committee reasoned as follows:

"*Rationalise it how one will, the decision in this case offends one's sense of justice…It is not easy to escape the implication in the rule in Hollington v Hewthorn that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right. It is not, of course, spelt out in those terms in the judgment of the Court of Appeal, although, in so far as their decision was based mainly upon the ground that the opinion of the criminal court as to the*

defendant driver's guilt was as irrelevant as that of a bystander who witnessed the accident, the gap between the implicit and the explicit was a narrow one.

It is in a sense true that a finding by any court that a person was culpable or not culpable of a particular criminal offence or civil wrong is an expression of opinion by the court. But it is a different character from expression of opinion by a private individual."

28. There is widespread criticism of the effect of the English Court of Appeal's decision in *Hollington v Hewthorn*. Unsurprisingly, there is no shortage of jurists who are perplexed by this rule which bars the admission of evidence of the findings of a previous Court proceeding as proof of the truth of its content. Admittedly, it splinters my intellectual peace to find that a previous conviction or judgment, as a matter of general principle, is inadmissible in subsequent proceedings wherein the same underlying facts are relevant to the issue for determination. After all, the findings made in a court proceeding are made after careful legal and evidential scrutiny in order to safeguard the fairness of the trial process and the result. This, in my estimation, particularly for previous criminal proceedings where the evidential burden is higher than the civil probability threshold, heightens the security and reliability of the facts found and established. However, it is evident from Lord Justice Leggatt's judgment for the Court of Appeal in *Rogers v Hoyle* that the *Hollington v Hewthorn* rule is indeed the continuing law on the rule which governs the question of admissibility of previous judicial findings. As Leggatt LJ explained [89]-[90], referring to binding case-law from the Privy Council:

"*In Caylon v Michailaidis [2009] UKPC 34 reliance was placed in proceedings in Gibraltar on a judgment of a Greek court which had found that the claimants were the lawful owners of an art collection. The defendant in the Gibraltar proceedings had not been a party to the Greek proceedings. The Gibraltar Court of Appeal nevertheless held that the Greek judgment was conclusive of the question of ownership. On appeal to the Privy Council the board held, following Hollington v F Hewthorn & Co Ltd, that, far from being conclusive, the Greek judgment was not admissible as evidence at all.*

Thus, unless and until it is reconsidered by the Supreme Court, the rule in Hollington v F Hewthorn & Co Ltd must, except in so far as it has been reversed by statute, be taken to represent the law."

29. So, it is plainly so that the *Hollington Hewthorn* rule governs the common law position. This is endorsed by the learned editors of Phipson on Evidence (Nineteenth Edition) ("Phipson"):

[43-77]

"*At common law a judgment in personam (whether delivered in civil or criminal proceedings) is no evidence of the truth either of the decision or of its grounds, between strangers, or a party and a stranger, except upon questions of public and general interest; in bankruptcy, administration and patent cases, to a limited extent; or when so operating by contract, admission or acquiescence*."

[43-79]
"***For stranger against parties*** *At common law, judgments in personam are said not to be evidence for a stranger even against a party, because their operation would thus not be mutual.*

The principal authority which settled the common law was the decision of the Court of Appeal in Hollington v F Hewthorn & Co Ltd…In that case, the court's principal objection was that the previous conviction was no more than the expression of the opinion of the tribunal as to the guilt of the accused, and as such was irrelevant at the second trial. The Court also expressed the difficulty of identifying the conduct which was the subject-matter of the conviction. It also took the practical view that findings of fact in, for example, motoring cases in magistrates' courts or in undefended divorce proceedings may be qualitatively different from certain other adjudications. The case has been criticised, and it has even been said that it is generally considered to have been wrongly decided. It is thought, however, that these three objections are forcible ones, and that a relaxation of the rule against hearsay in respect of former testimony would have been the most satisfactory way of dealing with the problem of dead witness (which arose in Hollington F Hewthorn & Co. Ltd…itself). This was achieved by Pt I of the Civil Evidence Act 1968 (see now Civil Evidence Act 1995); but the legislature accepted the view that these provisions by themselves would not be sufficient. …. …. Notwithstanding recent criticisms of the decision which have high authority, … Hollington F Hewthorn & Co. Ltd was treated as clear authority by the Privy Council in Hui Chi-Ming v R. Consequently it is probably safe to say that the rule still applies in all cases not covered by a common law exception… …or the various statutory exceptions…."

30. Insofar as I am aware, there are no statutory provisions in Bermuda which operate to displace the *Hollington v Hewthorn* rule. So, having considered the effect of the Privy Council's judgment in *Caylon v Michailaidis*, I accept that this Court is, in the general sense, bound by the *Hollington v Hewthorn* rule, insofar as it is applicable on the facts of any given case.

31. Mr. Zellick KC's overarching answer was simply and correctly stated: the *Hollington v Hewthorn* rule does not apply in cases where there is an *issue estoppel*. Under this common law doctrine, it is generally the case that a party is barred from re-litigating issues previously decided if the previous cause of action was litigated and decided between the same parties as those party to the later proceedings. The Defendant says that the Award gives rise to *issue estoppel*.

32. From this starting point, Mr. Zellick KC submitted that Mr. Chishti would be deprived of any entitlement to an advance under the Deed if I find that (i) the Award is a final and binding non-appealable judgment of a Court of competent jurisdiction and (ii) that both parties were privy to the Award. This, he argued, would exempt the Award from the *Hollington v Hewthorn* rule. However, Mr. Potts KC urged me to find against both propositions.

33. Mr. Potts KC highlighted the absence of a contractual deadline for the filing of an appeal against the Award. He said that it is open to the Plaintiff to appeal at any future stage. Be that as it may, the fact of the matter is that the Award was made years ago and, to date, no appeal proceedings have been brought against the findings made by the Arbitrator. I am unable to accede to any suggestion that for as long as a notice of appeal has not been filed, even if several years pass, that the Award remains appealable. This is particularly so in this case since Mr. Chishti made payment of the substantial damages awarded. All things being equal, there comes a point in all litigation proceedings where excessive delay amounts to an abuse of process. So, in practical terms and in all circumstances, I agree with Mr. Zellick KC that in the forum of litigation selected by Mr. Chishti to adjudicate Ms. Spottiswoode's allegations, the Award is indeed the final determination.

34. While on the subject of finality, I will also address the finality arguments as it relates to the Determination. The Defendant highlighted that the Determination, having only been first received on the eve of the hearing, triggered the effect of Article 1(c) of the Deed which, in its material part, provides:

    "*…Any determination of Independent Counsel under this Article 1(c) shall be the final determination of entitlement under this Article 1, subject to Article 4 of the Procedural Appendix*."

35. Article 4 of the Deed, to the extent that it is relevant to the circumstances of this case, states:

    "*In the event that a determination is made that Indemnitee is not entitled to indemnification by the Company hereunder…, Indemnitee shall be entitled to seek final adjudication in a court of competent jurisdiction of entitlement to such indemnification or payment of Expenses. The determination in any such judicial Proceedings shall be made de novo and Indemnitee shall not be prejudiced by reason of a determination (if so made) pursuant to Articles 1 or 3 of this Procedural Appendix that Indemnitee is not entitled to indemnification. The Company shall not oppose Indemnitee's right to seek any such adjudication or any other claim. … If such court shall determine that Indemnitee is entitled to any indemnification or payment of Expenses hereunder, the Company shall also pay all Expenses incurred by Indemnitee in connection with such adjudication (including any appellate Proceedings).*"

36. In my judgment, the wording of Article 1(c), as read with Article 4, is plain and gives way only to a literal interpretation. The Determination is final in terms of the internal two-tier procedure involving the Board and Independent Counsel. However, Article 4 makes it perfectly clear that this Court has jurisdiction to adjudicate the Plaintiff's claim anew once the 'final determination of entitlement' procedure has come to an end. So, for the avoidance of doubt, the Determination cannot give rise to an issue estoppel.

37. That said, it is to be recognized that up until 19 September 2023 when the Determination was first made available to the Company, the Defendant would have been right to complain that the engagement of the Court process was premature.

38. I now return to the Award. The question as to whether the Award is binding as a previous judgment is the next step. The argument made by Mr. Potts KC is that the Award, not having been registered as a judgment in accordance with the provisions of the Bermuda International Conciliation and Arbitration Act 1993 Act ("the 1993 Act"), has no binding effect in this jurisdiction. However, Mr. Zellick KC highlighted that the registering of a foreign arbitration award under the 1993 Act is for the purpose of converting it into an enforceable judgment. In this case, he pointed out, there is no need for enforcement because the damages awarded were fully paid to Ms. Spottiswoode. More forcefully, Mr. Zellick KC emphasized that the non-registering of the Award has no connection to the question of issue estoppel.

39. The effect of Convention Awards is expressly stated in the 1993 Act. Section 40 provides:

> *40 (1) A Convention award shall, subject to this Part, be enforceable in Bermuda either by action or may by leave of the Court, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award.*
>
> *(2) Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Bermuda and any reference in this Part to enforcing a Convention award shall be construed as including references to relying on such an award.*

40. As I see it, Mr. Zellick KC is plainly correct in that any relevant application of the 1993 Act would be for the purpose of achieving enforcement. The parties contractually submitted to the arbitration process as a forum for adjudication. So, it follows that the Award, in the absence of any appeal proceedings, is not only final but also binding on the parties privy to the proceedings to the extent that it is not open to them to re-litigate the same issues.

41. Next, is the question of privity. The rule which underpins *Hollington v Hewthorn* applies to previous proceedings involving a party who is a stranger to the current proceedings. Otherwise put, where the plaintiff and defendant in the current proceedings are the same parties who were privy to the judgment of the earlier proceedings the said rule is not engaged. So, I must decide whether the Plaintiff and the Defendant were both party to the Award.

42. Mr. Potts KC submitted, as a reason in support of the exclusion of the Award, that the Company was not party to the arbitration which was brought by Ms. Spottiswoode against its subsidiary, Afiniti Inc, and Mr. Chishti. In this regard, Counsel's principal argument was that the Company, as the major shareholder of Afiniti Inc, could not properly assert itself as a party to the arbitration proceedings on the grounds of it being a parent company to Afiniti Inc. Developing this area of objection in his written submissions, Mr. Potts KC relied *on PJSC National Bank Trust & Anor v Mints & Ors* [2022] EWHC 871 (Comm) [33 (iii)]:

    "*That argument must be approached with particular caution when it is alleged that a director, shareholder or another group company is privy to a decision against a company, because it risks undermining the distinct legal personality of a company as against that of its shareholders and directors*."

43. Mr. Zellick KC, however, pointed out that the Defendant has a 100% shareholding in Afiniti Inc. This, he argued, gives rise to the Company's privity of interest. Citing *Michael Jones v Stewart Technology Services Ltd* [2017] SC (Bda) 92 Civ (30 October 2017), Mr Zellick KC directed this Court to Hellman J's recital of Arnold J on privity of interest in *Resolution Chemicals Limited v Lundbeck* [2013] EWHC 739:

    "*i) The test for privity of interest is whether, having due regard to the subject of the matter of the dispute, there is a sufficient degree of identification between the relevant persons to make it just to hold that decision to which one is party should be binding in the proceedings to which the other is party: Gleeson v Wippell [1977] 1 WLR 510…*

    …

    iii) A direct commercial interest in the outcome of the litigation is insufficient to make someone a privy

    iv)Whether members of the same group of companies are privies or not depends on the facts: Special Effects Ltd v L'Oreal SA [2007] RPC 15 [per Lloyd LJ at paras 181-82, EWCA]."

44. The doctrines of privity and mutuality are paramount, as a condition of *res judicata*. This means that an *issue estoppel* will not arise unless the parties or privies to the earlier proceedings

identically match the parties or privies to the current proceedings. A third party i.e. a stranger, has no entitlement to rely on the benefit or the burden of the first judgment. On the subject of privity of interest, I am narrowly concerned with whether the Defendant was, on the facts of this case, privy to the arbitration or whether Afiniti Inc. instead proceeded independently like a shield protecting the Defendant from liability. This calls for a closer examination of the Defendant's relationship with its wholly owned subsidiary.

45. A subsidiary company, as a matter of legal principle, has its own distinct legal personality. In theory, at least, it is autonomous from its parent company in the sense of corporate governance, regulatory controls and liabilities. So, in assessing the true relationship between a parent company and its subsidiary one must carefully consider the extent of influence and operational entanglement between the two entities. Corporate governance will likely be a strong indicator. For example, a subsidiary's independence is plausibly measurable by an examination of the constitution of its board of directors. Significant board-member overlaps or a system by which the parent company has *de facto* control over the selection process of the subsidiary's directors may be telling.

46. Building his case on privity of interest, Mr. Zellick KC opened up to Mr. Chishti's second affidavit to show that the Plaintiff referred to Afiniti Limited i.e. the Company, and Afiniti Inc. synonymously, making no distinction between the two entities for the purpose of the Arbitration. In Mr. Chishti's summary explaining his District Court proceedings against Ms. Spottiswoode, he stated [7]:

"…*The proceedings relate to a Protective Order entered into between Ms. Tatiana Spottiswoode, Afiniti, the Directors and Officers of Afiniti including myself in an Arbitration*."

47. As highlighted by Mr. Zellick KC, Mr. Chishti decidedly employed the term "Afiniti" when referring to the parent company and/or the subsidiary. This collective description for the two companies for the purpose of the Arbitration is repeated in Mr. Chishti's evidence [10]:

"*I am seeking to enforce the provisions of the Protective Order which directly relate to allegations made against me in my capacity as an officer of Afiniti. Again, I would emphasize that Afiniti and all of its directors at the time were parties to the arbitration and the Protective Order*…."

48. In this case, the most cogent evidence supporting the privity of interest asserted by the Defendant is the evidence which came directly from Mr. Chishti. From his affidavit evidence, I accept that directors of the Company actively participated in the arbitration proceedings. This leads me to only one reasonable conclusion; the Defendant was party to the Arbitration via its

privy, Afiniti Inc. That being the case, it follows that the *Hollington v Hewthorn* rule does not apply to the circumstances of this case.

49. Refusing to leave any stone unturned, Mr. Potts KC submitted, as an alternative position, that there can be no *res judicata* or issue estoppel arising from a previous case involving co-defendants who were represented by the same attorneys. Citing the English Court of Appeal judgment in *Sweetman v Nathan* [2003] EWCA Civ 1115, Mr. Potts KC argued that even where I find that the Company may be properly regarded as being privy to the Award, the doctrines of *res judicata* and *issue estoppel* could only be engaged under the following circumstances:

    (i) Where there was a conflict of interest between the Defendants in the previous case;

    (ii) Where it was necessary to decide the conflict in order to give the plaintiff in the previous case the relief claimed; and

    (iii) Where that conflict between the Defendants was judicially decided

50. These three conditions were recited by Stanley Burnton J [48], sitting in the original jurisdiction of the *Sweetman v Nathan* proceedings. Burnton J was quoting a passage referred to him by Counsel which had been lifted from Spencer Bower, Turner & Handley, the Doctrine of Res Judicata (Third Edition 1996).

51. Lord Justice Schiemann of the English Court of Appeal endorsed this three-prong test as follows [44-46]:

    "…

    44. The Judge had correctly stated the test in relation to issue estoppel between defendants in his paragraph 48 where he cited Munni Bibi. In Cottingham v Earl of Shrewsbury (1843) 3 Hare 627 Sir James Wigram V-C said at page 638

    > *"If a plaintiff cannot get at his right without trying and deciding a case between Co-defendants the Court will try and decide that case, and the Co-Defendants will be bound. But if the relief given to the Plaintiff does not require or involve a decision of any case between Co-defendants, the Co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the Plaintiff obtains."*

    45. In all the cases cited by the Judge the 3 conditions in Munni Bibi cited at paragraph 48 of his judgment were satisfied.

46. In the present case in the original suit both parties were defendants. The only issue which was decided judicially was that Mr. Sweetman had obtained the Second Loan by a misrepresentation made by him and Nathan jointly…In relation to that issue there was no conflict of interest between Mr. Sweetman and the present defendants. On the contrary: it was in the interest of each of them to defeat the claim that the Second Lona had been obtained by misrepresentation."

52. Mr. Zellick KC relied on the earlier decision of the Queen's Bench Division of the English High Court in *N Water Ltd v Binnie & Partners* [1990] 3 ALL ER 547, a case which was not cited by Schiemann LJ in *Sweetman v Nathan*.

53. In *N Water Ltd v Binnie & Partners* family members of six victims who were killed in a methane gas explosion brought claims for personal injury against various defendants. Those defendants comprised members of the water authority, contractors and consultant engineers. The defences were cut-throat in that the water authority claimed that the explosion was caused by the negligence of the consultant engineers. At trial, all three classes of defendants were held liable. However, after appeal to the Court of Appeal it was held that only the consultant engineers were liable. In a subsequent action the water authority sued the consultant engineers and relied on the doctrine of *res judicata* on the grounds that the issue of negligence had been decided as between them and the consultant engineers.

54. In the ruling on the question of estoppel as a preliminary issue to the second trial, Drake J found that the issue of negligence had already been determined by a Court of competent jurisdiction as between the water authority and the consultant engineers. The consultant engineers were therefore estopped from denying the negligence.

55. Notably, the High Court decision in *N Water Ltd v Binnie & Partners* preceded the judgment of the English Court of Appeal in *Sweetman v Nathan*. However, Drake J's ruling did not offend the three prong test outlined in *Sweetman v Nathan*. Clearly, there was a conflict of interest between the water authority and the consultant engineers in the first trial and that conflict had to be decided in order to settle the outcome of the case. Finally, there can be no doubt that these issues were decided by a Court of competent jurisdiction.

56. *Sweetman v Nathan* is persuasive authority. In the present case, the previous decision, i.e. the Award, is a judgment *in personam*. It concerns an action against both Mr. Chishti and Afiniti Inc. Following the *Sweetman v Nathan* test and principles stated by the English Court of Appeal, I find that the Award in this case does not pass the requisite hurdles. For that reason, there can be no *issue estoppel* as between the Company and Mr. Chishti. They had no conflict of interest to be resolved between one another at the arbitration; in fact, Mr. Chishti and Afiniti Inc. were represented at the arbitration proceedings by the same Counsel. So there is no *res*

judicata between them and no resulting *issue estoppel*. The same would not be so if the parties to the present proceedings were instead Mr. Chishti and Ms. Spottiswoode.

57. The Plaintiff requested to file supplemental written submissions to address the Privy Council's decision in *AEGIS v European Re* [2003] 1 WLR 1041, whereby the Bermuda Court of Appeal's decision was upheld. This authority was first cited by Mr. Zellick KC at the hearing before me as an attempt to solidify his submission that an arbitral award could indeed give rise to an issue estoppel.

58. Both parties in *AEGIS v European Re* were insurance companies privy to a reinsurance agreement ("the reinsurance agreement") providing for disputes between them to be resolved in accordance with a Bermuda situs arbitration clause. Two disputes arose out of the question of the defendant's liability to indemnify the plaintiff under the reinsurance agreement. Those disputes, instead of being decided by the same arbitration panel, were bifurcated by separate proceedings and arbitrators.

59. In the earlier arbitration (the "first arbitration"), a "first partial award" (the "first award") was made in favour of the Defendant, effectively bringing an end to the critical issue on the first of the two disputes. Relying on the doctrine of *issue estoppel*, the Defendant sought to introduce evidence of the first award into the subsequent arbitration (the "second arbitration"). However, the Plaintiff sought injunctive relief against the Defendant's disclosure of the first award under the general principle of privacy in arbitration proceedings, citing *Dollington-Baker v Merrett* [1990] 1 WLR 1205. The Plaintiff also grounded its application on an express provision of confidentiality which had been formed and agreed on the procedural directions issued in the first arbitration.

60. In addition to the issue of confidentiality, the merits of an estoppel plea were considered by the Judicial Committee. Noting that there was no suggestion from the plaintiff that the plea was raised in bad faith, the Privy Council found that if the plaintiff failed on the confidentiality argument, the defendant would necessarily succeed on the enforcement of the first award as an issue estoppel.

61. Two points about *AEGIS v European Re* warrant emphasis. Firstly, both arbitrations involved precisely the same parties, so the *Hollington v Hewthorne* rule would not have applied. Secondly, the scope of the appeal was most largely concerned with the construction and application of the confidentiality clause as agreed between those same parties. No real dispute arose as to whether the first award could, as a matter of legal principle, putting aside the arguments confidentiality, give rise to an issue estoppel.

62. The plea of issue estoppel was a necessary means of enforcement of the first award. To put it in the reverse, the defendant *European Re* would have been disabled from enforcing its rights declared by the first award if the plaintiff's injunction for its non-disclosure in the second arbitration remained. These facts, being materially different from the case before me, do not ignore or offend the *Sweetman v Nathan* test for the following reasons:

    (i) AEGIS and European Re were the parties to both the first and the second arbitration proceedings;

    (ii) They were adversaries in both arbitrations as opposed to co-defendants represented by the same Counsel; and

    (iii) The first award was dispositive of their conflict.

63. Mr. Zellick KC also referred to Foxton J's following remark in *PJSC National Bank Trust v Mints* [2022] EWHC 871 (Comm) [22]:

    "*… … I do not accept, however that it follows from the AEGIS decision that the capacity for an award to generate an issue estoppel in subsequent proceedings is limited to the parties to the arbitration agreement pursuant to which the award was rendered*."

64. From the several passages in the judgment which follow, it is evident that Foxton J was envisaging the differing approaches which might be employed according to the law of the proceedings on the current dispute wherein issue estoppel is pleaded, rather than the law relevant to the earlier foreign proceedings. So, as a matter of English law (post the passing of section 11 of the Civil Evidence Act 1968 which displaced the *Hollington v Hewthorn* rule) the earlier award may likely be admitted notwithstanding any foreign law position binding the earlier arbitration proceedings involving the parties' privies.

65. So, in *PJSC National Bank Trust v Mints* Foxton J was not concerned with the application of the *Hollington v Hewthorn* rule. However, the *Hollington v Hewthorn* rule remains the binding law on this jurisdiction Court, notwithstanding its non-applicability to the facts of this particular case.

66. Mr. Zellick KC cleverly explored an alternative route to admissibility. He invited this Court to treat the Award and the Determination as expert opinion evidence. In doing so, he relied on *Rogers v Hoyle* [2014] EWCA Civ 257, a decision to which this Court was also referred by Mr. Potts KC.

67. In *Rogers v Hoyle*, the Court was examining the admissibility of an expert report on the cause of an air accident which occurred when a vintage bi-plane crashed and killed a passenger. Although competing submissions were made on the rule against the admissibility of the previous factual findings of other court tribunals and inquiries, the Court of Appeal found that an expert report containing statements of facts and opinions did not engage this legal principle. The Court also found that it was immaterial whether the report contained primary or secondary hearsay since it was ultimately a matter for the Court (as a trier of fact) to disregard any inadmissible portions and to decide on the weight to be attached to the relevant factual evidence.

68. Mr. Zellick KC invited this Court to find that the impugned Determination and Award could be properly admitted and treated with the same approach as given to the expert report in *Rogers v Hoyle*. Effectively, Mr. Zellick KC pushed for Mr. Duncan KC and the Arbitrator to be accepted as expert witnesses entitled to express their opinions on the factual and legal issues before this Court.

69. Quite rightly, Mr. Potts KC pointed out that expert opinion evidence on matters of Bermuda law is not admissible. The legal issues on which Mr. Duncan KC opined in the Determination are the very same legal issues with which this Court is now seized ie. the question of eligibility for indemnification in accordance with the Deed. These are all questions of Bermuda law, which neither require nor allow for expert opinion evidence.

70. As for the call for expert evidence from the Arbitrator on the factual matters determined on the Award, the Defendant is again confronted with insurmountable difficulty in that these are not questions for expert opinion evidence. Whether a sexual assault was committed is simply a factual issue on which only direct evidence or circumstantial evidence could be properly admitted.

71. For these reasons, I am bound to reject any proposition that the Award or the Determination falls within the scope of admissible expert opinion evidence.

72. In summary, I have thus far found that the *Hollington v Hewthorne* rule has no application to the facts of this case on the basis that the parties and/or privies were one and the same in both the earlier and the present proceedings. However, I also found that there is no issue estoppel in relation to the Award because it falls short of the *Sweetman v Nathan* test. As for the Determination, it does not qualify as a *res judicata* because the parties contracted that Mr. Chishti would be entitled to commence these proceedings after the finality of the internal proceedings.

73. Having found that the Award must be excluded only to the extent that the findings of the arbitrator are inadmissible, I now consider the Defendant's entitlement to prove the issue of sexual harassment and assault in these proceedings. This analysis is in answer to the procedural objections taken by Mr. Potts KC.

The Procedural Objections

74. Beyond the Plaintiff's complaint that the Defendant breached the timelines imposed by Mussenden J's directions, Mr. Potts KC took issue with the prospect of the parties engaging in any substantial factual disputes. Having plunged away at various procedural irregularities, Mr. Potts KC criticized the Defendant for having tainted these proceedings with factual dissension by its assertions that Mr. Chishti sexually assaulted and harassed Ms. Spottiswoode, notwithstanding his denials.

75. Whether there are material factual disputes to be decided, the proceedings ought not to be begun by an originating summons. RSC O. 5/4 provides:

"***5/4 Proceedings which may be begun by writ or originating summons***

(1) Except in the case of proceedings which by these Rules or by or under any enactment are required to be begun by writ or originating summons or are required or authorised to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.

(2) Proceedings—

a. in which the sole or principal question at issue is, or is likely to be, one of the construction of any enactment or of any instrument made under any enactment or of any deed, will, contract or other document, or some other question of law, or

b. in which there is unlikely to be any substantial dispute of fact,

(3) are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ."

76. RSC O. 5/4 does not bar the parties from ventilating serious factual issues to be determined. It is procedural guidance. The question for the Court is whether the factual issues are sufficiently relevant and material to warrant further procedural directions as to how they might be addressed at a trial. This brings me to Mr. Potts KC's alternative objection to the admission of the Award on the grounds of relevance. This was not forcefully argued and for good reason. Clearly the question of Mr. Chishti's sexual misconduct is relevant to the question of whether

Mr. Chishti was party to the impugned proceedings "by reason of the fact" of his having been an officer of the Company and having acted in that capacity. It is also relevant to the questions arising under sections 3(b) and 4(b) of the Deed as to whether the underlying proceedings fail the good-faith test and the reasonable-belief conditions. For these reasons, I find that the factual statements made by the arbitrator in the Award are indeed relevant to these proceedings.

77. So the Defendant is not only keen but entitled to attempt to establish the truthfulness of the allegations of sexual assault. So, I must now consider the admissibility of the facts asserted by (i) Mr. Logan and (ii) the Arbitrator.

78. Mr. Potts KC relied on the provisions under Part IIA of the Evidence Act and contended that neither Mr. Logan nor the Arbitrator could properly give evidence as to the truth of the content of Mr. Chishti's encounters with Ms. Spottiswoode. In that sense, Mr. Potts KC submitted that what the Arbitrator has to say about the allegations of sexual assault is mere hearsay evidence.

79. As a matter of general legal principle, judgments are deemed to be a public and accurate record of its existence. Even where there is no *issue estoppel*, the effect of a judgment is conclusive, particularly for judgments *in rem*. So, whether or not the findings and decision made in a judgment are binding, a previous judgment may nevertheless be admissible as evidence received in those proceedings. The authors of Phipson say [43-02]:

"*Judgments being public transactions of a solemn nature are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence, date and legal effect, … as distinguished from the accuracy of the decision rendered. In other words, the law attributes unerring verity to the substantive, as opposed to the judicial, portions of the record.*"

80. On the subject of hearsay, section 27B (1) of the Evidence Act 1905 provides:

"*In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to the rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.*"

81. So, in civil proceedings evidence will not be excluded merely on the grounds that it is hearsay evidence. Section 27B allows for the admission of what is often described as "first-hand hearsay". By way of illustration:

Person A speaks to a matter within his/her direct knowledge e.g. something directly observed and of which Person A would be entitled to give evidence in Court. However, Person A does

not come to Court as a witness but reports his/her direct observations to Person B, who is a witness before the Court.

82. Person B's evidence of Person A's out-of-court statement would not be excluded as hearsay evidence by virtue of section 27B.

83. So, in the present case, any statements made by Mr. Logan about allegations of sexual assault would be inadmissible as his knowledge was not derived directly from Ms. Spottiswoode or Mr. Chishti. The same is not so for the Arbitrator who received direct oral evidence from both Ms. Spottiswoode and Mr. Chishti. So, as a matter of legal principle, what the Arbitrator might say about the facts reported directly to him by Mr. Chishti and Ms. Spottiswoode is admissible hearsay evidence in civil proceedings. That does not address, of course, the confidentiality restrictions under which the Arbitrator may be contractually bound, a matter which is not to be governed by this Court.

84. In *Ivanishvili v Credit Suisse* [2022] SC (Bda) 19 Civ, Hargun CJ opined in favour of allowing a party to adduce evidence of the underlying facts rather than producing evidence of the conclusions drawn in a previous proceeding. Mr. Potts KC contends that this could only be properly achieved via a trial with witnesses who are made available for cross-examination. That said, Mr. Potts KC cautioned that the allowance of a trial of this kind would be significantly more costly and time-consuming, thereby provoking further expense and delay. Be that as it may, I find that the disputed facts as to the occurrence of a sexual assault are so relevant and material to the Defendant's case that it would be grossly unfair to prevent the Defendant from calling any witness who is willing and able to give admissible evidence about those allegations, so long as the resulting delay is not particularly excessive in the opinion of this Court.

85. The real question here is whether the Award can be admitted by the Defendant as evidence of the statements sworn before the Arbitrator. In my judgment, the law does in fact allow for admission on this basis. It is then a question for the trial judge as to what weight can be properly attached to the value of that evidence. In this case, I see no reason to exclude the Arbitrator's record of what Mr. Chishti or Ms. Spottiswoode or any other witness stated under oath if it is relevant to and/or probative of the allegations of sexual assault. Whether or not those statements are to be tested by cross-examination may impact on the weight given to that evidence. For these reasons, I would allow admission of the sworn factual evidence, as recorded in the Award.

Decision on the Confidentiality Application

86. As a matter of Bermuda law, Mr. Potts KC accepted that there is a constitutional protection of open justice. However, he invited this Court to consider select provisions contained in Part V of the Bermuda International Conciliation and Arbitration Act 1993 (the "1993 Act"). Section 45 of the 1993 Act provides:

"*Subject to the Constitution, proceedings in any court under this Act shall on the application of any party to the proceedings be heard otherwise than in open court*."

87. Section 46 empowers the Court to issue various directions as a measure of restricting the reporting of any such matter heard under the 1993 Act.

88. Mr. Potts KC also maintained that the making of the Confidentiality Application was a stride necessary to preserve the stance taken by the Plaintiff in the foreign law proceedings in which he is also seeking to protect the confidentiality of the Award.

89. Mr. Zellick KC, on the other hand, pointed out that a Confidentiality Order could serve no real purpose since the same Award has now been reported on by foreign media outlets and is also accessible via the internet. Without having made any formal objection, Mr. Zellick KC cautioned this Court against compromising the Constitutional principles of open justice for the sake of concealing a document which has already transcended into the public domain.

90. I agree with Mr. Zellick KC and reject the Plaintiff's invitation for this Court to govern or enforce any foreign law obligations for the Award to be kept confidential when the desired effects of those protections have already been lost. Here, the need for open justice prevails and so I refuse to make a Confidentiality Order in these proceedings.

Conclusion

91. On the Plaintiff's strike-out application I have found:

    (i) There is no issue estoppel. However, the Award may be admitted as evidence of relevant facts stated under oath. The judicial portions of the Award are inadmissible.

    (ii) The Determination is inadmissible opinion evidence.

    (iii) Any statements made by Mr. Logan as to the alleged sexual assault shall be excluded on the grounds that they are inadmissible hearsay evidence.

92. I have also refused the Plaintiff's application for a Confidentiality Order.

93. The parties may be heard on any application as to costs.

Dated this 19th day of December 2023

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT