



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**FSD 157 of 2021 (DDJ)**

**IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021  
REVISION)**

**AND IN THE MATTER OF AQUAPOINT L.P. (IN OFFICIAL LIQUIDATION)**

**Appearances:** Tom Smith KC, Rupert Bell and Chris Keefe of Walkers on behalf  
of AquaPoint L.P. (in Official Liquidation) (acting by GenScript  
Corporation, as general partner)

Bhavesh Patel and Bryan Little of Travers Thorp Alberga on behalf  
of Xiaohu Fan

**Before:** The Hon. Justice David Doyle

**Heard:** 29 September 2022

**Ex Tempore Judgment  
delivered:** 29 September 2022

**Draft Transcript of  
Ex Tempore Judgment  
circulated:** 29 September 2022

**Transcript of Ex Tempore  
Judgment Approved:** 5 October 2022

**HEADNOTE**

*Refusal of a stay of a winding up order pending an appeal*

**JUDGMENT****Introduction**

1. On 13 June 2022, for the reasons stated in a judgment delivered on 10 June 2022, I made an order (the “Order”) that AquaPoint LP (the “Partnership”) be wound up.
2. By notice of appeal dated 22 June 2022 (and amended on 2 August 2022) the Partnership, acting by GenScript Corporation its general partner (the “General Partner”), appealed against the Order.
3. By summons dated 20 July 2022 the Partnership (acting by the General Partner) applied for a stay of execution of the Order (the “Stay Application”).
4. A mass of material has been filed in respect of the Stay Application. A lot of the affidavit evidence does not limit itself to facts. It trespasses into areas of comment, argument and submission. The attorneys drafting such evidence and those swearing such affidavits should exercise more restraint. I have however considered all the evidence presented.
5. I record that I have considered:

- (1) the hearing bundle, including the evidence and the grounds of appeal;
- (2) the skeleton argument of the Partnership dated 23 September 2022 and the accompanying authorities;
- (3) the skeleton argument of Xiaohu Fan (the “Petitioner”) dated 23 September 2022 and the accompanying authorities; and
- (4) the oral submissions put before the court by Tom Smith KC for the Partnership acting by its General Partner and Bhavesh Patel for the Petitioner.

6. I am grateful to both counsel for their assistance to the court.

#### **The relevant law**

7. It is common ground between the parties that a stay should not be granted unless “good cause” is shown (section 19 (3) of the Court of Appeal Act (2011 Revision) (the “Act”). Rule 20 (1) of the Court of Appeal Rules (2014 Revision) provides in effect that except so far as the first instance court or the Court of Appeal may direct, an appeal shall not operate as a stay of execution or of the proceedings under the decision of the first instance court.
8. The Court of Appeal (Goldring P, Field and Morrison JJA) in *Deputy Registrar and Attorney General v Day and Bush* 2019 (1) CILR 510, as a matter of some urgency, granted a stay in the particular circumstances of that well-known appeal. The court considered *Frank v Canada (Attorney General)* 2014 ONCA 485 and referred to *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474 and *NB v LB of Haringey* [2011] EWHC 3544 (Fam).

9. President Goldring at paragraph 15 helpfully set out the legal position concisely as follows:

“...a stay may be granted for good cause ... As the cases make plain, a successful litigant is *prima facie* entitled to the fruits of his success. There must be good reason for the court to prevent that. In deciding whether or not to impose a stay, the court will consider the grounds of the appeal, their likelihood of success and the balance of convenience having regard to the interests of both parties. The overriding feature is the interests of justice in any given case.”

10. At paragraph 24 President Goldring added:

“Provided the grounds are arguable, and the balance of convenience on the facts of the case in question lies in favour of a stay, the court may grant one.”

11. It is trite that in the law as in life context is important and each case must depend on its own facts and circumstances.

12. The following note appears as note 4 to 1988-1989 CILR:

“STAY OF EXECUTION – appeal against repossession of business premises  
Although the purpose of r.20(1) of the Court of Appeal Rules, 1987 is to prevent the automatic invalidation of intermediate acts or proceedings on the filing of an appeal, the rule is no restriction on the power of the Court of Appeal to restore the status quo which existed prior to a Grand Court order. If, therefore, on the basis of such an order tenants repossessed premises, the court had the power to order the re-

delivery up of possession to the landlord if he were successful on appeal. In these circumstances a stay of execution would not be necessary to prevent the appeal from being rendered nugatory. Moreover, the probability of the tenant continuing with renovations to the premises and the fact that they would be of no use to the landlord did not outweigh the hardship that would be caused to the tenant if a stay were granted and he were prevented from reopening and operating his business as a profitable venture pending the appeal. The court was therefore entitled to refuse a stay of execution to the landlord. *S Ltd. v. A Ltd.* (C.A.: Collett, C.J.), July 14<sup>th</sup>, 1989.”

13. In *Imbar Maritima S.A. v Gabon* 1988-89 CILR 286 the Cayman Islands Court of Appeal dismissed an appeal against the refusal by Collett CJ at first instance to grant an injunction pending an appeal. The headnote states that it was held that the court would not grant the appellants an injunction pending appeal. It would normally make an order staying proceedings under the judgment appealed from if it would thereby prevent a successful appeal from being nugatory. However there were circumstances which could justify the court not granting an injunction; in each case it would have to consider where the balance of convenience lay and the trial judge, given his particular knowledge of the case, was best able to weigh the relevant factors and so decide appropriately. The headnote confirms that in that case the balance of convenience was in the respondent’s favour since the court had found that allowing the winding up to proceed would cause no detriment to the appellants who were deliberately attempting to delay the proceedings, whereas the respondent would be seriously prejudiced if they were deferred. Kerr J.A. at page 293 referred to counsel’s reliance on *Wilson v Church* (No2) (1879) 12 Ch. D. 454 and the headnote:

“Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the court will not interfere if the appeal appears not to be *bona fide*, or there are other sufficient exceptional circumstances.”

Kerr, J.A. at page 293 expressed his view that the statements in *Wilson* “laid down no hard and fast rule.”

14. The following note appears as note 4 to 1997 CILR:

“Execution – stay of execution pending appeal

An unsuccessful defendant who applies for a stay of execution against him pending his appeal must show good reason for depriving the plaintiff of the fruits of his judgment (*Winchester Cigarette Machinery Ltd. v. Payne (No2)*, [1993] T.L.R. 647, observations of Ralph Gibson, L.J. applied). Whilst the court has a duty to ensure that the defendant’s right of appeal is not rendered nugatory by the dissipation of the award, it must be satisfied before ordering a stay, that the defendant has a real prospect of success on appeal (*Linotype-Hell Fin. Ltd. v. Baker*, [1992] 4 All E.R. 887, applied), that his appeal is taken *bona fide* and that the balance of convenience favours a stay. Accordingly, if the successful plaintiff would be unable to conduct his business or fund legal representation at the appeal if deprived of the proceeds of his judgment but has alternative assets against which judgment could be enforced if the defendant were to succeed on appeal, the court may refuse to order a stay.

*Quintin and Westphal v. Phillips Petroleum Co. and CIBC Bank & Trust Co. (Cayman) Ltd.* (Grand Ct.: Smellie, J.), November 17<sup>th</sup>, 1997...”

15. Deborah Barker Roye in *Civil Litigation in the Cayman Islands* (Third Edition, 2016) at 25.3.10 on pages 419 to 420 states (footnotes and references omitted):

“The Court is likely to grant a stay pending appeal if there is a risk that a successful appeal would be rendered nugatory. However, the applicant must show good reason for depriving the respondent of the fruits of the judgment, as no stay will be granted if the respondent is unfairly prejudiced by being deprived of the proceeds of the judgment. To this end, the applicant will need to demonstrate that he has a *bona fide* ground of appeal and a real prospect of success on the appeal in addition to demonstrating to the satisfaction of the court that the balance of convenience favours the stay ....”

16. Sir Richard Field J.A. (with whom Sir Bernard Rix J.A. and President Sir John Goldring agreed) in his judgment in *Ennismore Fund Management Limited v Fenris Consulting Limited* (CICA) 2020 (2) CILR 147, in the context of an appeal against an award pursuant to a cross-undertaking in damages given in respect of a freezing order, as an aside to the main points in the appeal commented as follows at paragraph 107:

“What the unsuccessful defendant can do after a trial is to apply for a stay of execution which the court might grant if his grounds of appeal have merit, there is a real risk that, if there be no stay, the defendant would be unable to recover sums paid to the plaintiff under the judgment if the appeal succeeds, and the defendant is willing to pay the judgment sum into court ...”

17. Both sides make detailed reference to *Heriot African Trade Finance Fund Limited v Deutsche Bank (Cayman) Limited* 2011 (1) CILR 34 where Cresswell J refused to grant a stay of execution of a winding up order pending the disposal of an appeal. Cresswell J helpfully set out the relevant legal principles at first instance as follows:
- (a) section 19 (3) of the Act provides no stay of execution shall be granted upon any judgment appealed against save upon good cause being shown;
  - (b) the critical test is whether good cause has been shown;
  - (c) the onus is upon an appellant to show good cause (i.e. good reason) for the imposition of a stay pending appeal;
  - (d) in considering whether good cause has been shown, the court will have regard to all the circumstances of the case, including without limitation (i) whether the appeal would be rendered nugatory if a stay is not granted; (ii) whether the appellant can show a good arguable case; (iii) whether the appeal is in exercise of a true right of appeal and not for some collateral purpose; (iv) the balance of convenience; and (v) (where appropriate) regard should be had to the reasons given by the first instance judge for refusing a stay;
  - (e) a stay of an order for the winding up of a company will generally not be granted where a stay:



“would probably make it very difficult for a liquidator to investigate the affairs so as to be able in a timely and efficient manner to ascertain the company’s liabilities and assets and so take steps to recover those assets for the benefit of the creditors and, if a solvent estate, for the benefit of shareholders as well” (*Parmalat Capital Fin. Ltd* 2007 CILR 1 at paragraph 3);

- (f) the question whether or not to grant a stay is entirely in the discretion of the court; and
  - (g) indications in past cases do not fetter the scope of the court’s discretion.
18. Jonathan Crow KC, JA sitting in the Court of Appeal of Jersey with Lord Anderson of Ipswich KBE, KC and David Perry KC, in *Camilla de Bourbon des Deux Siciles v BNP Paribas Jersey Trust Corporation* [2021] JCA 043 at paragraph 15 stated that the starting point was to recognise that an appeal did not operate as a stay:

“In order to persuade the court to order a stay, the losing party must accordingly present a sufficiently persuasive case to justify a departure from that default position.”

Crow JA at paragraph 16 stated: “It is often said...that a successful litigant should not be deprived of the fruits of his victory without good reason” and “an unsuccessful litigant should not generally be relieved of the burden of complying with a court order without good reason.” Crow JA at paragraph 17 rejected the approach of applying the test of “good arguable grounds of appeal” because: “It would be a rare case where the pleaded grounds

of such an appeal did not disclose even an arguable case. If the threshold test for granting a stay were pitched so low, it would result in stays being granted in the majority of such appeals, which would reverse the prescription enshrined in rule 15 [an appeal does not operate as a stay].” Crow JA felt that “the onus is on the party seeking the stay to persuade the court that there are sufficiently compelling reasons to grant one”. At paragraph 18 Crow JA added:

“...the court will take into account the overall circumstances of the case, applying common sense, and balancing the competing interests at stake.”

19. Some of the English authorities (see for example Potter LJ in *Leicester Circuits Ltd v Coates Brothers Plc* [2002] EWCA Civ 474 at paragraphs 12-13; Sullivan LJ in *Department for Environment, Food & Rural Affairs v Downs* [2009] EWCA Civ 257 at paragraphs 8-9) indicate that if solid grounds for a stay are established by the appellant the court may then undertake a balancing exercise of weighing risks of injustice to each side if a stay is or is not granted. These authorities also suggest that the appellant will have to show some irremediable harm if a stay is not granted rather than just some inconvenience. If a stay is granted it may be subject to conditions.
20. It can be seen from the local Cayman authorities that:
  - (1) an appeal does not operate as a stay;
  - (2) the starting point is that there should be no stay and a successful party at first instance should not be deprived of the fruits of that success;

- (3) there must be “good cause” or “good reason” for a stay. In some of the English authorities there is reference to “solid grounds”;
- (4) the court is likely, all other things being equal, to grant a stay where the appeal could otherwise be rendered nugatory or deprived of much of its significance; and
- (5) in deciding whether or not to impose a stay the court will consider the grounds of the appeal, their likelihood of success and the balance of convenience having regard to the interests of the relevant parties. The overriding feature is the interests of justice.

### **Determination**

21. Having considered the facts, the submissions and applying the relevant legal principles as outlined in the local Cayman authorities, especially the Court of Appeal’s helpful guidance in *Deputy Registrar v Day and Bush*, I refuse a stay for the following reasons:

- (1) despite all that Tom Smith KC has eloquently written and said on behalf of the Partnership acting by its General Partner, good cause has not been established;
- (2) even if I assume in favour of the Partnership that the grounds of appeal represent a good arguable case, the balance of convenience in this particular case plainly lies against a stay. The appellant and the other limited partner are unlikely to suffer financial hardship. I accept that the evidence as to delay having “an acute deleterious impact on the Petitioner’s financial position” is by way of generalised

assertions (see paras 5 and 6 of Fan 6) and lacking any real detail but still in my judgment the balance of convenience strongly militates against imposing a stay. The joint official liquidators (“JOLs”) properly take a neutral stance and it is their present intention not to make any distribution pending the hearing of the appeal in May 2023. There is some considerable force in Mr Patel’s submission that if and when the appeal is dismissed, the JOLs will be in a position to distribute the assets of the Partnership to the limited partners more swiftly by having continued their work in the interim period (including, for example, having ascertained any creditor claims and verified any tax liability). Moreover, as stated at paragraph 183 of my judgment delivered on 10 June 2022, the Partnership and the General Partner have already dragged these proceedings out for far too long;

- (3) the appeal would not be rendered nugatory or deprived of much of its significance if a stay is not granted. If the winding up order is reversed on appeal, the winding up can be reversed and where necessary appropriate costs and financial compensation can be paid;
  - (4) I am not persuaded that the Partnership will suffer any irreparable harm if a stay is not granted; and
  - (5) the potential tax liability, apparently, in the sum of over US\$250 million belatedly referred to by the Partnership, does not justify the granting of a stay.
22. I have considered the interests of all concerned and have concluded that the interests of justice plainly favour the refusal of a stay.

23. I dismiss the Stay Application and am minded to make an order for costs against the General Partner such costs to be taxed on the standard basis in default of agreement.

*David Doyle*

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**The Hon. Justice David Doyle**  
**Judge of the Grand Court**