



IN THE SUPREME COURT OF BERMUDA  
CIVIL JURISDICTION  
(COMMERCIAL COURT)  
2009: 23, 149, & 150

Between:

- (1) KINGATE GLOBAL FUND LTD
- (2) KINGATE EURO FUND LTD

Plaintiffs

-V-

- (1) THE BANK OF BERMUDA LIMITED (HSBC)
- (2) KNIGHTSBRIDGE (USD) FUND LIMITED
- (3) FORTIS BANK (NEDERLAND) N.V.
- (4) STANDARD CHARTERED BANK

Defendant

Interveners/Defendants

And

BETWEEN:

- (1) KNIGHTSBRIDGE (USD) FUND LIMITED
- (2) FORTIS BANK (NEDERLAND) N.V.
- (3) STANDARD CHARTERED BANK

Plaintiffs by Counterclaim

And

- (1) KINGATE GLOBAL FUND LTD
- (2) THE BANK OF BERMUDA LIMITED (HSBC)

Defendants to Counterclaim

## **REASONS FOR REFUSING APPLICATION FOR STAY OF JUDGMENT PENDING APPEAL**

Date of Ruling: September 11, 2009

Date of Reasons: September 18, 2009

Mr. Dennis Dwyer, Wakefield Quin, for  
Kingate Global Fund Limited-in Liquidation (“the Applicant”)  
Mr. Nathaniel Turner and Mr. Rod Attride-Stirling,  
Attride-Stirling & Woloniecki, for Knightsbridge, Fortis  
and SCB (“the Respondents”)

### **Introductory**

1. On August 28, 2009, I gave judgment in favour of the Respondents in respect of their proprietary claims for the repayment of share subscription monies totalling US\$9 million and an Order was entered to give effect to the same (“the Judgment”). I granted an interim stay of execution for 14 days to afford the Applicant a reasonable opportunity to file a formal application for stay pending appeal, if advised so to do. However, I advised the Applicant’s counsel (who was not in a position to make a substantive application for a stay) that this was primarily to ensure due process rather than an indication of any provisional view that a stay was appropriate.
2. The Applicant commenced its own winding-up proceedings in the British Virgin Islands on May 5, 2009, and was under the control of BVI liquidators when the trial of the present actions took place in Bermuda in late August. The Applicant was wound-up in ancillary proceedings in Bermuda on September 4, 2009. A Notice of Appeal was filed on September 9, 2009 and a Summons formally seeking a stay of execution pending appeal was issued the next day. No evidence in support was filed.
3. Both sides filed skeleton arguments in advance of the stay application, which I dismissed after hearing oral argument. I indicated that I would give short reasons for this decision, which are set out below.

### **The Grounds of Appeal**

4. The Notice of Appeal runs to 14 pages and recites multiple grounds of appeal. Although not unarguable, the appeal is not in my judgment obviously strong.
5. The Judgment turned on one pivotal issue (the construction of the Articles and related subscription documents as evidencing the receipt of the subscription monies on terms that they would be repaid in full in the event of insolvency preventing the completion of the subscription process). As the Respondents’ counsel pointed out, I stated at paragraph 48 of the Judgment that this conclusion

was “ultimately obvious on an analytical reading of the relevant documentation”. The Notice Appeal merely asserts in conclusory terms that this construction was wrong without positing an alternative construction of the crucial insolvency-related provisions.

6. This accordingly did not appear to me to be a case where the likelihood of success on appeal was sufficiently strong in and of itself to dilute the starting principle that a successful plaintiff should not be deprived of the fruits of his judgment merely by virtue of the filing of an appeal.

### **Principles governing applications for a stay of execution pending appeal**

7. Order 2 rule 37 of the Rules of the Court of Appeal provides as follows:

“37        *Upon the application of an intending appellant, the Court or a Judge may stay the execution of any judgment of the Supreme Court until the determination or other disposal of the appeal:*

*Provided that no application under this Rule shall be entertained until it is shown to the satisfaction of the Court or a Judge that application for a stay of execution has been made to the Supreme Court and has been refused.”*

8. The applicable principles under this rule were essentially common ground. Special circumstances are required for seeking a stay, and the Court has a broad discretion to take into account the relative risks of injustice to either party. The Applicant invited the Court to take into account the fact that it was in liquidation and if the monies due to the Respondents were paid over and could not be recovered after a successful appeal, the unsecured creditors of the Applicant would all be prejudiced.
9. The most important factor, when considering an application for a stay in cases where there is no suggestion that the applicant/defendant would be ruined by meeting the judgment and/or that the appeal might be stifled, is the risk that the respondent/plaintiff may currently be or may in the foreseeable future become impecunious and unable to repay the judgment proceeds if the appeal succeeds. Ancillary to this concern is the risk that a local and/or foreign respondent/plaintiff might refuse to repay the monies and erect procedural obstacles in the successful appellant’s path. The threshold for justifying a stay may also be lowered where it is clear that the delay involved will be comparatively short.
10. In hostile litigation, it will often be obvious without the need for evidential support that the refusal of the successful party to formally undertake to retain in the jurisdiction or at least to repay the judgment proceeds if the appeal succeeds suggests a serious risk that the stay applicant will be prejudiced if his application is refused. However, where the successful party is admittedly solvent and reputable, has demonstrated no ill-will to the applicant and openly promises to

repay the judgment proceeds if the appeal succeeds, some evidential meat must be added to the bare bones of a submission that the stay applicant will be prejudiced because there is a risk that the judgment monies cannot conveniently be retrieved. This will particularly be the case where the stay applicant admittedly has sufficient funds to both meet the judgment and pursue his appeal.

### **The special circumstances relied upon by the Applicant**

11. The Applicant in its skeleton argument relied on the following eight circumstances as justifying a stay:

- (i) the Respondents have no assets or presence in the jurisdiction;
- (ii) the Respondents have refused to undertake to keep sufficient assets in the jurisdiction or to secure their repayment obligation;
- (iii) there is more of an open discretion to stay applications today compared with a more rigid approach in the past;
- (iv) since interest is accruing at 7% on the judgment debt there is no prejudice to the Respondents if satisfaction of the Judgment is delayed;
- (v) the appeal process will “hopefully” be expedited so that the appeal can be heard in the November session;
- (vi) the funds can be paid to the Respondents on terms that the funds are kept within the jurisdiction or otherwise secured;
- (vii) if the present stay application is refused, the Applicant will have to pay other subscribers whose creditworthiness is uncertain in excess of \$3.4 million;
- (viii) the Court should take into account the fact that the Applicant is seeking the stay to protect the interests of unsecured creditors.

12. Points (i), (ii) and (vi) are based on the implicit premise that that any successful foreign plaintiff should be deprived of the fruits of their judgment if the defendant files an appeal. Mr. Turner submitted, aptly relying by analogy on principles articulated in the context of security for costs applications, that to accede to these submissions would discriminate against the Respondents on the grounds of their foreign residence. I found this submission to be sound, having regard to section 12 of the Bermuda Constitution, the governing principles of which are similar to Article 14 of the European Convention on Human Rights.

13. Section 12(2) of the Constitution provides that “*no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*” Judges of this Court invariably act by virtue of a “*written law*”, most notably the Constitution which creates this Court and its judicial offices. Section 12(3) defines discrimination as follows:

*“(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to*

*their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”*[emphasis added]

14. In my judgment, to treat the absence of assets or a presence in Bermuda on the part of a successful foreign plaintiff as a special circumstance justifying the grant of a stay pending appeal would in more general terms also undermine the ability of the Commercial Court to adjudicate commercial disputes in an efficient manner in accordance with the Overriding Objective. The highly internationalised character of commercial litigation in Bermuda results in a high probability that in the ordinary substantial commercial dispute, the plaintiff may be a foreign entity with no local assets or establishment. If this fact alone justified the grant of a stay of execution pending appeal, the ability of foreign plaintiffs to obtain speedy justice in Bermuda would be potentially undermined. Of course, the absence of local assets or corporate presence may where relevant properly be taken into account in combination with other factors, such as doubtful solvency or bad faith.
15. I accept both points (iii) and (iv) as valid as a matter of broad principle. The Overriding Objective, and the Court’s constitutional duty to have regard to the fair hearing rights of both sides to civil litigation (section 6(8) Bermuda Constitution) require a more flexible justice-focused approach to applications for a stay pending appeal than before. It is true that in raw monetary terms, the accrual of interest on the judgment debt will compensate the Respondents for any delay in the Applicant satisfying the Judgment (assuming the appeal fails). However, the latter point can hardly be a special circumstance because, under the Interest and Credit Charges (Regulation) Act 1975, interest accrues on all judgment debts. And the former point is also a general principle which equally applies to every case. It is inherently prejudicial for a successful litigant to be deprived of the fruits of his judgment, and this Court should not compromise the fundamental right of plaintiffs to speedy justice by an excessively generous exercise of the discretion to grant stays pending appeals.
16. As far as point (v) is concerned, there is no certainty that the appeal can be heard in the November session on an expedited basis. This suggests that listing the Applicant’s appeal on an expedited basis may well entail administrative inconvenience and potential prejudice to other litigants whose appeals have already been fixed in the list. In any event, the shortness of the period of a proposed stay cannot in and of itself justify a stay pending appeal unless the Applicant can further demonstrate a sufficiently cogent risk of prejudice to require an order staying the Judgment pending appeal. As long as Bermuda lacks a Court of Appeal which sits on a full-time basis, last-minute urgent Court of Appeal listings should be reserved for truly urgent cases where there are cogent rather than nebulous grounds for staying the trial judgment.

17. As far as point (vii) is concerned, it is difficult to understand how the refusal of a stay application as regards the Respondents' Judgment and Order can operate in favour of other unsuccessful subscribers not before the Court. This Court has adjudicated an application for a stay of the Judgment and/or Order as against the Respondents. No application has been made for a stay of the Judgment and/or Order as regards any third parties whose interests as regards the merits of the Judgment may be substantially the same as the Respondents, but as regards the question of stay may be materially different. It would be a curiously un-commercial and unjust result for the Respondents to incur the costs of establishing their proprietary claims only to have satisfaction of the Judgment postponed based solely or partly on concerns that any monies paid to other non-litigating subscribers may not be recoverable.
18. The Applicant remains at liberty to apply for a stay of the Judgment and Order as against other subscribers entitled to be repaid their monies in full on the same basis as the Respondents, on notice to the parties affected. There was, in any event, no suggestion that the other seemingly litigation-shy subscribers will threaten litigation let alone institute proceedings should the Applicant with just cause decline to repay them (or insist that they secure their repayment obligations) until the appeal has been concluded. So this point does not raise a special circumstance justifying a stay of execution as against the Respondents.
19. As for point (viii), the mere fact that the Applicant is in liquidation being managed by the liquidators for the benefit of its unsecured creditors is a generic point which applies with equal force to every company in liquidation. This cannot be, without more, a "special circumstance". The fact that the Applicant is in liquidation might well be a special circumstance to be taken into account if there was a real risk that the assets of an insolvent estate might have to be expended to recover the Judgment proceeds in litigation here or abroad. But such a risk has not been shown to be a real one in all the circumstances of the present case.
20. Although it was understandable that the liquidators would decide to "chance their arm" and seek a stay, the application was dismissed.

## **Conclusion**

21. For the above reasons, on September 11, 2009, I (a) dismissed the Applicant's application for a stay of the Judgment and related August 28, 2009 Order, made in favour of the Respondents, pending appeal, and (b) awarded the costs of the stay application to the Respondents in any event to be paid out of the assets of the Applicant on a priority basis.

Dated this 18<sup>th</sup> day of September, 2009

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KAWALEY J