



FROM THE GRAND COURT OF THE CAYMAN ISLANDS
GRAND COURT FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 004 of 2022
(ON APPEAL FROM FSD 005 OF 2020 (MRHJ))

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF VIRGINIA SOLUTION SPC LTD**

BETWEEN

AUGUSTA HEALTHCARE, INC.

Appellant

-and-

VALLEY HEALTH SYSTEM

Respondent

Before:

**The Rt Hon Sir John Goldring, President
The Hon John Martin KC, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal**

Appearances:

**Alex Potts KC instructed by Jonathon Milne and Spencer
Vickers of Conyers Dill & Pearman LLP for the Appellant**

Sam Keogh of Campbells LLP for the Respondent

Date of hearing: 13 September 2023

Draft Judgment Circulated: 19 October 2023

Judgment Delivered: 10 November 2023

JUDGMENT

MARTIN, JA

1. By notice of motion dated 24 July 2023 the respondent ("Valley") applies for a stay of execution of any order which may be drawn up consequent on this Court's judgment, handed down on 28 July 2023, allowing an appeal against a winding up order made by Ramsay-Hale

J (as she then was) on 10 February 2022 in respect of Virginia Solution SPC Ltd (“the Company”). The stay is sought pending resolution of Valley’s proposed appeal to the Judicial Committee of the Privy Council (“the JCPC”).

2. The initial premise of the notice of motion was that Valley was entitled to appeal to the JCPC as of right: see, for example, paragraph 9 of the first affidavit of Mark Nantz supporting the notice of motion. This premise is challenged by the current appellant (“Augusta”). Because this disagreement has obvious implications for the way in which the stay application is approached, we suggested that it was necessary first to determine whether Valley does have a right of appeal and, if not, whether we should grant discretionary leave to appeal – even though, strictly speaking, there is as yet no application before us for leave to appeal. This suggestion was resisted by Mr Keogh on behalf of Valley, who asserted that Valley intended to make a fully-argued application for leave once an order had been drawn up, perhaps with additional material, and that any prior resolution of the question of leave by this Court was premature. I reject that assertion. Valley’s entitlement to leave as of right, or alternatively as a matter of discretion, has been in issue since Augusta’s response to the notice of motion, and has been fully argued in the skeleton arguments on both sides and discussed in the two affidavits of Mr Nantz. The second of those two affidavits exhibits a draft of Valley’s proposed Grounds of Appeal to the JCPC. Anything that Valley thought was relevant to be said in relation to the issue of leave should already have been said. I do not see any point in requiring or allowing a formal application to be made, or any unfairness in resolving the leave issue now. I would treat an application for leave as being formally before us and its outcome as determined by the resolution of the leave issue contained in this judgment.

3. Appeals from this jurisdiction to the JCPC are governed by the Cayman Islands (Appeals to Privy Council) Order 1984 (“the 1984 Order”). So far as relevant, section 3 of the 1984 Order is in the following terms:

“(1) Subject to the provisions of this Order, an appeal shall lie as of right from decisions of the Court to His Majesty in Council in the following cases –

- (a) final decisions in any civil proceedings, where the matter in dispute on the appeal to His Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards; ...

(2) Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to His Majesty in Council with the leave of the Court in the following cases –

(a) decisions in any civil proceedings, where in the opinion of the Court the question involved in the Appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council ...”.

4. Does an appeal lie as of right? There is no doubt that our decision – which dismissed the petition and brought the proceedings to an end – was a final decision in civil proceedings, so the question turns on whether (a) the matter in dispute on the putative appeal to the JCPC is of the value of £300 or more or (b) the putative appeal involves directly or indirectly a claim to or question respecting property, or a right, of the value of £300 or more.
5. Valley contends that both (a) and (b) are satisfied. It says, and I accept, that the value must be looked at from the point of view of the appellant, and that the test is whether the judgment proposed to be appealed against “affected the interest of the party prejudiced by it to an extent not less than the specified amount”: *Walter Fletcher v Income Tax Commissioner* [1972] AC 414, 419. The focus is accordingly on Valley’s interests; and its interests which it says were adversely affected by this Court’s judgment were the right to a winding up order on the just and equitable ground; the right to share in the surplus assets of the Company in the liquidation; the right to retain the amount it received pursuant to the costs orders made at first instance; and the obligation to pay the amount found to be payable on the costs orders made by this Court. All of these are said to exceed the £300 threshold; in particular the amount received by Valley pursuant to the first instance costs orders was US\$2,225,878.33.
6. Before dealing with these matters, I think it necessary to consider the recent decision of the JCPC in *Jacpot Ltd v Gambling Regulatory Authority* [2018] UK PC 16 (“*Jacpot*”) dealing with the approach to be adopted to provisions such as that contained in section 3 of the 1984 Order. *Jacpot* is a decision on appeal from Mauritius, where the statutory provision governing appeals to the JCPC is in substantially identical form to section 3 of the 1984 Order. The case concerned a judicial review of the revocation of *Jacpot*’s gambling licence. The advice of the JCPC was delivered by Lord Sumption. The following points are relevant.

(1) At paragraph 1, he said that “the case provided the occasion for resolving a number of questions concerning the availability of an appeal as of right and the principles on which special leave should be granted” by the JCPC.

- (2) At paragraph 7, he pointed out that discretionary leave could be sought if leave as of right was not available, and said that for that reason “the provisions governing appeals as of right are normally to be strictly construed”.
- (3) At paragraph 11, he stated that the relevant statutory provision “applies the value threshold to any of (i) the “matter in dispute”, (ii) a “claim to or question respecting property”, or (iii) a “right” of any kind. Provisions in substantially this form commonly appear in constitutional provisions or Orders in Council governing appeals as of right to the Judicial Committee. Probably no other condition has given rise to as much difficulty”.
- (4) At paragraph 12, he said this: “The application of the value threshold is straightforward when there is a money claim or a claim to property exceeding the prescribed value. More difficult are cases in which the issue involves property or rights exceeding the threshold value in the broader sense that more than the prescribed sum turns on the outcome, as it almost always will if civil proceedings are to be worth litigating at all”.
- (5) In paragraph 13, he considered *Meghji Lakhamshi & Brothers v Furniture Workshop* [1954] AC 80 and *Becker v Marion City Corpn* [1977] AC 271 (PC), and stated that those decisions were “authority for the propositions (i) that to pass the value threshold, it is not necessary for there to be a money claim; and (ii) that where an appeal will determine the existence of a proprietary right or a proprietor’s right of disposal over the property, there is an appeal as of right if the property’s value exceeds the threshold”.
- (6) At paragraph 14, he stated that “these principles cannot readily be applied to cases where no property is in issue and it is necessary to value the “matter” or “right” at stake on the appeal”. He then considered the JCPC’s decision in *Royal Hong Kong Jockey Club v Miers* [1983] 1 WLR 1049, which he said presented the closest analogy to Jacpot. That case concerned an action by a jockey impugning the decision of the Hong Kong Jockey Club’s stewards not to renew his licence. The JCPC held that there was no appeal as of right. Lord Scarman, delivering the advice of the JCPC, held that it was necessary first to identify the nature of the specific civil right involved in the appeal, and then to determine the value of that right. In that case, the grant of licences being discretionary, there

was no civil right to a licence, only a civil right to a fairly made decision; with the result that the proceedings did not involve directly or indirectly the right to a licence.

(7) At paragraph 15, Lord Sumption said that Jacpot's "gaming licences were not property in any relevant sense, but simply an authority to provide facilities for gaming, which would otherwise have been unlawful. Nor did they have any civil right to receive or retain a gaming licence. Their only relevant right was the right to a fair and lawful decision of the Authority. That right, important as it is, is a public law right which is no different in kind from the right which any person with a relevant interest has to see the law applied. It is incapable of valuation in monetary terms. It follows that the present appeal does not pass the value threshold and is not therefore available as of right".

7. In considering whether or not Valley's rights exceed the statutory threshold, a strict construction of section 3(1)(a) is to be adopted: *Jacpot*, paragraph 7. The matter in dispute on the putative appeal to the JCPC (limb (a) identified in paragraph 4 above) will be whether or not a winding up order should have been made. Valley's interest in that matter does not, in my view, have a value capable of being identified in monetary terms. Even if it had been successful in establishing that all the elements necessary to give the court jurisdiction to make a winding up order on the just and equitable ground were present, Valley would have had no right to such an order – it being always in general terms a matter for the court's discretion whether or not to make such an order, and specifically a matter of discretion in this jurisdiction given the availability of alternative remedies under section 95(3) of the Companies Act. As in the case of the Norwich Pharmacal order addressed in this Court's leave decision in *Essar Global Fund Ltd v Arcelomittal USA LLC* (unreported, CICA, 6 May 2021), Valley's right is to have its application to the court properly determined; and, as in *Jacpot*, that right is no different in kind from the right which any person with a relevant interest has to see the law applied. The right cannot be valued, and so cannot be said to be greater in value than the statutory threshold.

8. Support for this view is to be obtained from the decision of the Eastern Caribbean Court of Appeal (Virgin Islands) in *Sian Participation Corp v Halimeda International Ltd* (unreported, 24 April 2023). That case concerned a creditor's winding up petition based on a debt of approximately US\$226 million. The Court held that an appeal did not lie as of right to the JCPC against the making of the winding up order, since it did not follow from the fact that the petition was based on an unpaid debt exceeding the statutory value that the value threshold

test was met. The fact that the intended appeal related to large sums in general terms was not relevant; and the judge had not been required to determine whether the US\$226 million debt was in fact due or owing, merely whether or not it was disputed on genuine and substantial grounds (which it was not). Since the case involved a creditor's winding up petition the members of the company are unlikely to have retained any interest in the Company's assets, and in that respect the case differs from the present; but I nevertheless regard the case as a persuasive indication that an appeal against a winding up order will not ordinarily involve a dispute capable of quantification in monetary terms.

9. The second limb of section 3(1)(a) – identified in paragraph 4(b) above – looks at whether the putative appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 or more. This limb, too, is to be strictly construed. To establish that it is entitled to leave as of right, Valley must bring its claims concerning surplus assets in the liquidation and costs under this limb. In my judgment, it cannot do so in either case. The focus of the limb is on claims or questions which are directly or indirectly “involved” in the putative appeal. This implies matters which are in dispute, and which will be directly or indirectly resolved by the outcome of the appeal. It does not contemplate peripheral matters which, although not a matter of dispute, may coincidentally be affected by the outcome of the appeal. Nor does it contemplate questions arising solely as a result of the litigation process itself.
10. So far as concerns the right to share in the surplus assets of the Company, the right derives from Valley's shareholding in the Company - which is not in dispute, and which Valley will retain if the company is not wound up. It follows that Valley's entitlement to share in the assets of the Company is not directly or indirectly the subject of a claim or question: the underlying right represented by its shareholding will remain whatever the outcome of the putative appeal.
11. Unless the putative appeal is an appeal against a costs order (which is not the case here), costs will not be directly in issue on the appeal. Questions of costs at all levels will inevitably be decided at the conclusion of the putative appeal, but in my judgment they cannot be said to be a question or claim involved in the appeal. They are not the subject of any dispute existing prior to the litigation, are a product of the litigation itself, are ancillary to the matter in dispute, and cannot be regarded as being a separate matter in dispute or directly or indirectly affected by the resolution of the dispute. If it were otherwise, there could hardly ever be a final decision where the value in terms at least of costs did not exceed £300.

12. In the course of his oral submissions, Mr Keogh suggested further matters which he said would be indirectly determined by the outcome of the putative appeal. These matters, which are addressed by Mr Nantz primarily in paragraphs 10 and 11 of his second affidavit, concern the basis on which dividends were allocated after the commencement of the liquidation. It is said that the liquidators take the view that the allocation should have been made in accordance with the members' respective entitlements as at the date of the petition (when the liquidation is deemed to have commenced), not in accordance with a subsequent agreement between the parties; and that this view, with which Valley agrees, means that Augusta has been overpaid about US\$1.1 million. The outcome of the putative appeal will determine whether there is a liquidation at all, and consequently – so it is said – whether Augusta must make repayment. In my view, these matters do not bring the case within section 3(1)(a). Both the amount of the dividend and the allocation of it were agreed between the parties, so that there is no claim or question about either element. Whether or not Valley can resile from the agreement is a question to be determined in accordance with the rules governing the liquidation, if there is one, not by the outcome of the putative appeal. These matters are purely peripheral to, and not involved in, the putative appeal.
13. For these reasons, I would hold that Valley does not have a right of appeal under section 3(1)(a).
14. Should we then give leave under section 3(2)? Valley addressed this question by reference to what it said were the good prospects of success on its grounds of appeal; but that is not the relevant criterion. Discretionary leave will be given only if we are of the opinion that the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the JCPC. The question involved in the appeal is whether or not the winding up order should have been made. This Court's resolution of that question involved the application of long-established principles to the particular circumstances of this case. The matter may be of great importance to the parties, but in my view it cannot by any stretch of the imagination be said to be of great general or public importance. Nor can I see any other reason why the case ought to be submitted to the JCPC. Mr Keogh submitted that our decision was contrary to the Privy Council's decision in *Chu v Lau* [2020] UK PC 24 (which we cited in our substantive judgment); but that case, too, was one in which established principles were applied to the particular circumstances of the case, and it sets out no new principle. In those circumstances, there is in my judgment no basis on which we could properly give leave under section 3(2) of the 1984 Order. Nor is any purpose served by our considering the proposed Grounds of Appeal: the merits or otherwise of those grounds will be a matter for the JCPC if it gives special leave, not for us.

15. The upshot of what I have said is that leave to appeal will be refused. There can accordingly be no question of a stay of the order embodying our substantive judgment pending resolution by the JCPC of an appeal. However, Valley is entitled to petition the JCPC for special leave to appeal; and the question then is whether we should grant a stay until the JCPC has had an opportunity to consider any application for leave made to it.

16. We were referred to the statement of considerations relevant to the granting of a stay pending an appeal set out by Doyle J in *Re Aquapoint LLP* (unreported, Grand Court, 5 October 2022) and cited with approval by this Court in *Re Trina Solar Ltd* (unreported, CICA, 4 August 2023). That statement, appearing at paragraph 20 of the judgment, is in the following terms:

“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 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 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.”

17. These considerations are appropriate where (as in *Trina Solar*) there is to be an appeal to the JCPC, whether as of right or by discretionary leave granted by this Court; but the last of them, requiring evaluation of the merits of the putative appeal, seems to me to be of limited utility when there is no certainty of an appeal and the question is merely whether there should be a stay during the limited time necessary to allow an application for special leave to be made to the JCPC itself. In such a case, the grounds of appeal and the likelihood of their success are of no relevance: the Court has already decided that there is no justification for an appeal to the JCPC, so there is no putative appeal whose merits fall to be examined. If a stay is to be granted, it will be on the basis that Valley is entitled to seek special leave, that the JCPC may take a different view from that taken by this Court, and that the interests of justice require the position established by the first instance judgment to be maintained while the possibility that it may be upheld by the JCPC remains.

18. Augusta resists the granting of a stay, even on this limited basis. It says that it should not be deprived of the fruits of its success before this Court, and that no good reason or cause for a stay has been demonstrated by Valley. Any appeal which Valley may in the end be allowed to bring will not be rendered nugatory or stifled if a stay is not granted: the position will simply be that in the meantime the company will have reverted to the control of its directors and shareholders, who will take responsibility for the management, run-off or voluntary liquidation of the Company in accordance with the Company's constitutional documents, such control again passing to the liquidators if in the end an appeal is upheld. Valley's assertions that the directors and shareholders cannot work together are, according to Augusta, not supported by the evidence; but mechanisms exist in the Participation Agreement for resolution of disputes, and if this Court's decision stands the parties will in the end have to resolve their difficulties one way or another. If the liquidators are maintained in their position, however, even on a temporary basis, they will be unable to take any substantial decisions without the consent of the parties and will simply be maintaining the company's affairs on a minimal basis at considerable and unnecessary expense.

19. There is much force in Augusta's arguments; but in my view the interests of justice require a stay to be granted. Liquidation has a legal and practical impact on the positions not only of Valley and Augusta, but on those of all persons associated with the Company – including its directors and policyholders. If a stay is not granted, but in the end this Court's decision is overturned, the Company will have been in liquidation since the date of presentation of the petition and any actions of the directors will, subject to the court's ability to make a validation order, be invalid. Moreover, the potential for disagreement between the shareholders and directors, and consequent instability, cannot be ruled out on the evidence. If, on the other hand, the stay is granted but this Court's decision stands, there will have been a further period when the Company has been unjustifiably under the control of the liquidators; but, because they will have been maintained in their appointment by order of the court, their proper actions will be valid. There is no reason to doubt their ability to manage the company's affairs; and the additional costs caused by their continued presence are likely, as before, to have to be borne by Valley. These considerations point to the grant of a stay. Put shortly, it is in my view more consistent with justice that the existing status quo remain until this Court's decision becomes definitive than that the risk should be taken that the Company will turn out to have gone into liquidation, then come out again, then gone in again once more if the JCPC upholds the appeal.

20. For these reasons, I would grant a stay of the order resulting from our substantive judgment until the JCPC determines any application for special leave made to it – any stay thereafter

being a matter for the JCPC if it gives leave. The stay will not apply to any of the costs orders we have made (as Valley accepts), and will be conditional on an application for special leave being made promptly and pursued diligently thereafter. While the stay remains, the parties are agreed that the role of the liquidators should be confined to managing the day-to-day operations of the Company; but I would give the liquidators liberty to apply to the Grand Court for directions if difficulty arises as to the extent of their duties and responsibilities during the subsistence of the stay.

21. My provisional view is that the costs of this application should be determined by the outcome of Valley's application to the JCPC – that is to say, if the JCPC refuses special leave Valley should pay on the standard basis the costs of this application, but if the JCPC grants special leave to appeal the costs of this application should be costs in that appeal. The costs of the liquidators properly incurred during the stay should be paid by Valley if the application for special leave is refused or if leave is given but the appeal fails, but if the appeal succeeds those costs will (subject to any different order the JCPC may make) be part of the costs of liquidation and so payable out of the Company's assets. I would propose that, if either party wishes to seek a different order, they should do so in succinct submissions provided to us and each other within ten working days from the date of our order on the application, if necessary each of them having liberty to produce a written succinct reply within a further seven days. We would then decide the matter on the papers.

MOSES, JA

22. I agree.

GOLDRING, JA (President):

23. I also agree.