

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0010

BETWEEN:

NAM TAI PROPERTY INC

Applicant/1st Defendant

and

ISZO CAPITAL LP

Applicant /Claimant

and

GREATER SAIL LIMITED

Applicant/ 2nd Defendant

and

WEST RIDGE INVESTMENT COMPANY LIMITED

3rd Defendant

Before:

The Hon. Dame Janice Pereira DBE

Chief Justice

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mr. Gerard Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Thomas Plewman, QC with him Ms. Rosalind Nicholson and Mr. Renell Benjamin for the Applicant Nam Tai Property Inc.

Mr. Edward Davies, QC with him Mr. Ben Griffiths and Mr. Nicholas Burkhill for the Applicant IsZo Capital LP.

Mr. Vernon Flynn, QC with him Mr. John Carrington, QC, Mr. Gerard Clarke, Mr. Andrew Emery and Ms. Gurprit Mattu for the Applicant Greater Sail Limited.

2021: November 8.

Commercial Appeal- Application for leave to appeal to her Majesty in Council- Stay of execution pending appeal- Interpretation of principles guiding court's consideration of whether to grant a stay- Whether merits of the appeal should be considered- Balance of Harm- Whether appeal would be

rendered nugatory if stay is not granted- Application to vary directions for convening shareholders' meeting- Whether new record date should be set

REASONS FOR DECISION

[1] **WEBSTER JA [AG]:** On 8th November 2021 the Court heard the following applications:

A. By the applicant / 1st defendant, Nam Tai Property Inc (“NTP” or “the Company”), for:

- (i) Conditional leave to appeal to Her Majesty in Council from the decision of the Court of Appeal delivered on 4th October 2021.
- (ii) A stay until the delivery of the judgment in NTP’s appeal to Her Majesty in Council of paragraphs 4 and 5 of the Certificate of Result of Appeal (“the Order of the Court of Appeal”) that was made consequent upon the judgment of the Court of Appeal dated 4th October 2021 (“the Judgment”) ordering NTP to convene and hold a meeting of its shareholders at 9:00 am Eastern time on Tuesday, 30th November 2021.
- (iii) An order varying the directions ordered by Jack J on 3rd March 2021 for the meeting of shareholders including changing the record date for the said meeting.

B. By the applicant / 2nd defendant, Greater Sail Limited (“GSL”), for:

- (1) Reliefs (i) to (iii) in sub-paragraph A above sought by NTP.
- (2) Directions for the hearing of its appeal in BVIHCMAP2021/0011.

C. By the applicant / claimant, IsZo Capital LP (“IsZo”), for conditional leave to cross-appeal to Her Majesty in Council from the decision of the Court of Appeal delivered on 4th October 2021.

- [2] On 10th November 2021, the Court granted conditional leave to appeal to Her Majesty in Council to NTP and GSL and conditional leave to cross-appeal to IsZo. The Court refused the applications by NTP and GSL for a stay of paragraphs 4 and 5 of the Order of the Court of Appeal and for an order varying the directions ordered by Jack J for the meeting of the shareholders. We promised to give reasons for refusing the stay applications and the applications for varying the directions for the shareholders' meeting and we now do so.¹

Background

- [3] The background to the disputes between the parties is well known and has been documented in previous judgments of the courts of the Virgin Islands but it is necessary to repeat some of the background to fully appreciate the stay and variation applications.
- [4] NTP is a property development and management company incorporated in the Virgin Islands ("BVI"). It is a publicly traded company listed on the New York Stock Exchange. IsZo is an investment fund and limited partnership formed under the laws of the state of Delaware in the United States of America. At the material time it owned approximately 8.8% of the shares in NTP. Before October 2020, GSL owned approximately 23.9% of shares in NTP. Kaisa Group Holdings Limited ("Kaisa") is the beneficial owner of the shares held by GSL.
- [5] On 11th September 2020, IsZo and other shareholders representing more than 30% of the issued shares of NTP served a requisition on NTP to convene a meeting of the shareholders ("the Requisition"). The purpose of the meeting was to remove and replace five of the directors on the board of NTP. NTP did not convene the meeting, neither did it challenge the validity of the Requisition or offer any explanation for not holding the meeting. Instead, on 5th October 2020, the majority of the directors approved a private investment in public equity ("PIPE") and allotted 16,051,219 shares to GSL and 2,603,366 shares to the 3rd defendant, West Ridge Investment

¹ References in this decision to tabs and page numbers are to the tabs and pages in the Hearing Bundle.

Company Ltd. (“West Ridge”). The allotment moved Kaisa’s beneficial ownership of the shares in NTP from 23.9% to 43.9%, and West Ridge now owned 4.5% of the shares. This effectively gave Kaisa voting control of NTP.

[6] On 13th October 2020, IsZo launched proceedings in the Commercial Court challenging the validity of the PIPE and the allotment of shares to GSL and West Ridge. The essence of IsZo’s claim was that the allotment was made for an improper purpose within the meaning of section 121 of the BVI Business Companies Act 2004 (“the BC Act”). NTP’s response was that the PIPE was made for a proper purpose in that NTP was facing a liquidity crisis and needed the capital input that resulted from the PIPE. The claim was heard by Jack J on an expedited basis over 13 days between 29th January and 24th February 2021. The learned judge delivered his judgment on 3rd March 2021. He rejected the directors’ contention that NTP was experiencing a liquidity crisis and needed capital urgently, and that the PIPE was in any event, for the reasons that he gave, the appropriate way to acquire the urgently needed capital. He found that the directors who voted to approve the PIPE did so for the improper purpose of defeating the Requisition and giving Kaisa de facto control of NTP. He also found that in approving the PIPE, the directors did not act in the best interest of NTP and its shareholders in breach of their duty under section 120(1) of the BC Act. By his order dated 3rd March 2021, Jack J declared that the purported allotments of shares to GSL and West Ridge were ineffective and void and ordered that the said allotments be set aside and the register of members of NTP be rectified to delete the shares allotted under the PIPE. The judge further ordered NTP to convene and hold a meeting of the shareholders of the Company at 9:00am on 26th April 2021 with a record date of 15th March 2021 (“the record date”). He refused NTP’s application for a stay of the order.

[7] By a separate order also made on 3rd March 2021 the learned judge, on an application by IsZo, granted an injunction restraining NTP from dealing with its assets except in accordance with the terms of the injunction until 7 days after the declaration of the results of the meeting of shareholders ordered by the judge.

[8] NTP and GSL appealed against the learned judge's judgment and order. On 6th April 2021, NTP applied to the Court of Appeal for a stay of paragraphs 3 and 4 of the order of Jack J dated 3rd March 2021 directing the holding of the shareholders meeting on 26th April 2021. The Court of Appeal heard the application on 20th April 2021 and ordered that paragraph 3 of the order directing the holding of the meeting "... is stayed and the meeting is adjourned, pending the hearing and determination of the appeal."

[9] The NTP appeal was heard on 14th, 15th and 16th June 2021. The Court of Appeal delivered its judgment on 4th October 2021. The Court dismissed the appeal and affirmed Jack J's finding that the PIPE was for the improper purpose of defeating the Requisition and giving Kaisa de facto control of NTP. The appeal was allowed to the extent of setting aside the finding that the directors had breached section 120(1) of the BC Act. The unanimous judgment of the court was written by Farara JA who did not simply adopt Jack J's analysis of the facts and the law but carried out his own detailed analysis. Farara JA agreed with Jack J that the directors of NTP deliberately delayed action on the Requisition; that NTP had not made out a case that there was a liquidity crisis requiring the urgent injection of cash from the PIPE; and that the directors implemented the PIPE for the improper purpose of keeping the existing directors in place and not for the stated purpose of addressing the liquidity crisis. Farara JA's conclusions on these issues are conveniently summarised at paragraph 277 of the judgment –

"In my view, the evidence is sufficiently clear that the dominant purpose was to defeat the requisition, to give Kaisa control of NTP both at the Board and shareholder level. This was, on the authorities, an improper exercise by these four directors of their powers under section 121 of the Act. The evidence is compelling that these four directors did not act on the Requisition because, were they to do so, the outcome was clear, that Kaisa-connected directors and hence Kaisa would no longer control the Board, and effectively [have] control of NTP. It is clear that in order to ensure that this did not occur, their approach is clearly to delay any action on the requisition, in breach of NTP's articles, while taking steps to put in place and have approved by the Board as then constituted, a PIPE which will give Kaisa de facto control of NTP in circumstances where they did not have such control."

- [10] The Court of Appeal also lifted the stay that it had granted on 20th April 2021 and ordered NTP to convene and hold the meeting of shareholders on Tuesday, 30th November 2021 at 9:00 am to consider the passing of the resolutions proposed in the Requisition. The order also directed NTP to comply with the directions for the meeting in Schedule 1 of the order of Jack J dated 3rd March 2021. These directions include setting 15th March 2021 as the record date for the meeting.

The Stay Applications

- [11] As stated above, both NTP and GSL applied for a stay of paragraph 4 of the Order of the Court of Appeal directing that the meeting be held on 30th November 2021 and paragraph 5 of the said order lifting the stay of proceedings previously granted by the Court on 20th April 2021, pending the determination of the appeals to Her Majesty in Council, conditional leave for which has now been granted to NTP and GSL (together “the Applicants”).
- [12] The grounds of the applications expressed the Applicants’ concerns that if the meeting proceeds before the validity of the PIPE is determined by the Privy Council, this would likely result in a change to the composition and balance of power of the board of directors. The new directors will embark on policies that will adversely affect the Company and these steps would be irreversible in the event that the appeal is successful and the existing board is reinstated. IsZo strenuously opposed the applications for a stay. Details of the irreversible steps and the other ways that the conduct of the shareholders meeting could cause uncertainty and instability are set out in paragraph 24 below under the heading “**Appeal Nugatory**”.
- [13] The starting point in any application for a stay of execution is Rule 62.19 of the Civil Procedure Rules 2000 (“CPR 2000”) which provides that –
- “Except in so far as the court below or the court or a single judge of the court otherwise directs –
- (a) an appeal does not operate as a stay of execution of proceedings under the decision of the court below; and

- (b) Any intermediate act or proceedings is not invalidated by an appeal.”

The Court of Appeal is also empowered by Article 7 of the **Virgin Islands (Appeals to the Privy Council) Order 1967**² when granting leave to appeal to the Privy Council to grant or refuse a stay of execution of the decision appealed “...as to the Court shall seem just.” These provisions allow a successful party to proceed to enforce the judgment or order of the Court forthwith unless the decision is appealed or a further order of the Court says otherwise. The winning party is often described as being entitled to the fruits of victory. The effect of CPR 62.19 and Article 7 of the 1967 Order find their way into the general principles regarding the court’s approach to applications for a stay of execution pending appeal. The principles are well known and are documented in several decisions of this Court. The decision that is most often referred to is **C- Mobile Services Ltd v Huawei Technologies Co Limited**³ where the Court set out the principles as follows:

- “(i) The Court must take into account all the circumstances of the case.
- (ii) A stay is the exception rather than the general rule.
- (iii) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
- (iv) In exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered.
- (v) The court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).”

C-Mobile concerns an application for a stay pending appeal to the Court of Appeal but it was not disputed that the same principles apply when a stay is sought pending an appeal to the Privy Council.

² S.I. No. 234 of 1967.

³ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

- [14] The first two principles are uncontroversial. The Court must consider all the circumstances of the case to see if the facts justify a departure from the general rule that the successful party is entitled to proceed to the execution of the judgment or order. The meaning of the third and fourth principles also appear to be uncontroversial but there was sharp disagreement between the parties as to how they apply to the facts in this case and the conclusions to be drawn. The meaning of the fifth principle was disputed and involves a question of interpretation. We will deal with it first.

Merits of the appeal

- [15] Learned counsel Mr. Thomas Plewman QC and Mr. Vernon Flynn QC for NTP and GSL respectively, submitted that on a proper reading of the fifth principle in **C-Mobile**, the strength of the grounds of appeal and likelihood of success on appeal only come into play if there are strong grounds of appeal or a strong likelihood of success. If so, a stay should be considered and, if appropriate, granted. In all other cases the merits of the appeal do not come into play. Counsel submitted that if the Court were to find that the Applicants have a strong likelihood of success that would enable the Court to grant a stay. Otherwise, the merits of the appeal should not be considered. This, they submitted, is the effect of the fifth principle in **C-Mobile**.
- [16] Learned counsel for Iszo, Mr. Edward Davies QC, disagreed with this interpretation of the fifth principle. He submitted that in any application for a stay of execution the merits of the appeal must be considered with the other factors relating to a stay. It is only by considering the merits will the court know if there are strong grounds of appeal or a strong likelihood of success. If there are strong grounds of appeal or a strong likelihood of success the court should seriously consider whether the stay should be granted and will usually grant a stay. Conversely, if the grounds of appeal or likelihood of success are only arguable the court should not grant a stay unless there are other circumstances that are compelling such as the appeal being rendered nugatory if a stay is not granted. Mr. Davies QC submitted that there is nothing in the judgment in **C-Mobile** that precludes this interpretation.

- [17] Mr. Davies QC also referred to the two judgments that were relied on by the Court in **C-Mobile** in formulating the five principles. **Wenden Engineering Services Co Ltd v Lee Shing UEY Construction Co Ltd**.⁴ is a 2002 decision of Ma J sitting in the High Court of Hong Kong on an application for a stay of execution of a money judgment. Ma J found that the applicant had only an arguable appeal and therefore had to provide additional reasons to justify a stay. The defendant / judgment debtor submitted that in the absence of a stay the appeal would be rendered nugatory. The learned judge found that this had not been established and therefore refused the stay. It is obvious that the judge considered the merits of the appeal even though they did not disclose a strong likelihood of success.
- [18] In **NB v London Borough of Haringey**⁵ Mostyn J referred to the judgment of Ma J in the **Wenden Engineering** case and set out the five principles that were adopted by this Court in **C-Mobile**. The principles in both cases are substantially the same except the fifth principle. Mostyn J set out the principle in two sentences as follows: “The court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown will a stay be considered.” In **C-Mobile** the principle is set out in one sentence joined by the conjunction “but”. In our opinion the difference in wording does not affect the underlying principle that in an application for a stay of execution the court must consider, in a preliminary way, the merits of the appeal. If the appeal is only arguable and does not show a strong likelihood of succeeding, the court will take this into account when considering the other principles such as the balance of harm and whether the appeal will be rendered nugatory if a stay is not granted.
- [19] An illustration of how this Court has applied the **C-Mobile** principles is **Novel Blaze Ltd (in liquidation) v Chance Talent Management Ltd**.⁶ The trial judge in that case made an order appointing liquidators of the applicant company on the ground of insolvency. The company appealed and applied for a stay of the trial judge’s order

⁴ (HCCT No. 90 of 1999) (unreported).

⁵ [2011] EWHC 3544 (Fam) at paragraph 7.

⁶ BVIHMCAP 2020/0006 (delivered 16th April 2021, unreported).

on the grounds that it had good grounds of appeal and the company would be ruined if a stay was not granted. The Court of Appeal found that the applicant did not have strong grounds of appeal or a strong likelihood of success but nonetheless went on to consider the other principles in **C-Mobile** and continued -

“These elements are self-explanatory and apply in virtually all applications in varying degrees. The Court carries out a balancing exercise in considering the elements and no one element is decisive. The degree of importance attached to each element will vary according to the facts of each case.”

The Court of Appeal noted that if a stay was not ordered the liquidators appointed by the trial judge would take over the company and this would have had a devastating effect on the company. However, this had to be balanced against the facts that the company was deemed to be insolvent, had not made any proposals for paying the outstanding debt, and did not have good prospects of success on appeal. The Court carried out the balancing exercise and refused the stay.

[20] Turning to the facts of this case, the Court is mindful that this is an application for a stay pending an appeal to the Privy Council as of right and the applicants are not required at this stage to file grounds of appeal. Therefore, the Court did not have the benefit of the proposed grounds of appeal. However, this does not mean that the Court should not investigate the merits of the appeals. As Mr. Davies QC pointed out, where an applicant for conditional leave to appeal to the Privy Council also wishes the Court to grant a stay of execution of the judgment of the Court of Appeal, it is incumbent on the applicant to include in the application for the stay at least an outline of the proposed grounds of appeal. The Applicants did not do this. However, there was sufficient material before the Court to allow it to form a preliminary view of whether the Applicants have a strong likelihood of success on appeal or only an arguable appeal.

[21] The key finding of the learned trial judge was that the PIPE shares were issued for an improper purpose, and that the improper purpose was to defeat the Requisition and to allow Kaisa to keep de facto control of NTP. These findings were confirmed

by this Court in strong terms.⁷ They are findings of fact based on the evidence that was before the trial judge and this Court. The findings invoke the well-known rule of practice that the Privy Council will not interfere with concurrent findings of fact by the two lower courts except in very limited circumstances. The settled rule of practice was recently confirmed by the Board in **Central Bank of Ecuador v Conticorp SA**.⁸ The advice of the Board was delivered by Lord Mance who stated at paragraphs 4 to 5 -

“[4] In the light of the rejection of IAMF's case in both courts below, IAMF faces a heavy onus in seeking to persuade the Board to reach a conclusion that the respondents were guilty of a lack of probity. First, the Board will as a matter of settled practice decline to interfere with concurrent findings of pure fact, save in very limited circumstances. The well-established position remains as stated in *Devi v Roy* [1946] AC 508 at 508–509, where the Board said:

'(4.) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

...

(6.) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.'

[5] Second, quite apart from the settled rule relating to concurrent findings, any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of

⁷ See paragraph 9 above.

⁸ [2016] 1 BCLC 26 at pages 33- 34.

different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ.”

[22] The Applicants are in no better position than the appellant in the **Central Bank of Ecuador** case. The finding of an improper purpose for a specific reason is a finding of primary fact, or at least, a finding based on the trial judge’s evaluation of the primary facts. This does not mean that the appeals must fail because, as Lord Mance said, the practice is not a “cast-iron one”. Further, the Board departed from the settled practice in the **Central Bank of Ecuador** case itself and upset the concurrent findings of fact by the lower court and the Court of Appeal exonerating a party of a want of probity.

[23] In conclusion, on the issue of merits, we took note of the concurrent findings of fact underpinning the conclusion that the directors acted for an improper purpose and the settled practice of the Privy Council in dealing with concurrent findings of fact, and concluded that the Applicants have, at best, an arguable appeal and not a strong likelihood of success. We therefore considered this finding along with the other principles in the **C-Mobile** test in deciding whether to grant a stay pending the appeals to the Privy Council.

Appeal Nugatory

[24] An appeal is nugatory when success will have little or no value for the appellant because of changed circumstances, usually, but not always, brought about by the respondent. The Applicants in this matter complain that if a stay is not granted, the meeting will be held and the IsZo faction of shareholders will appoint a new board. The new board will take steps in the management of NTP that will be irreversible and damaging to the Company. The alleged irreversible steps are listed as: (1) buying back or redeeming its shares which will result in a loss to NTP; (2) disposing of NTP’s assets; and (3) discontinuing the appeal to the Privy Council. Because these steps are irreversible, the appeal will become nugatory. The Applicants also say that a meeting in the current state of uncertainty regarding the

shareholders of NTP will promote greater uncertainty and instability giving rise to speculative trading and volatility of the price of NTP's shares.

- [25] IsZo's response to the submission that the appeal would be rendered nugatory is that the Requisition was issued by more than 30% of the Company's shareholders and has been sidestepped by the directors thereby denying the then current shareholders the right to vote on the composition of the board. Another delay in holding the meeting will cause more uncertainty for NTP in the marketplace. Further, the PIPE shares were issued for a purpose that has been found to be improper by two courts. In any case, the majority shareholders are successful litigants twice over and are entitled to the fruits of their successes. As to decisions of the new board regarding redemption of shares, the management of NTP's assets and the conduct of the Company's litigation, these are matters that the directors, in their commercial view, treat with from time to time and there is no, or no sufficient evidence, to suggest that any of these matters will have the effect of rendering the appeal nugatory if a stay is not ordered.
- [26] The evidence about the new board buying back the Company's shares must be viewed in context. It is based on statements made by IsZo's principal officer, Mr. Brian Sheehy, at a time when NTP's shares were trading at a low price of \$4.30 per share which was below the Company's net asset value. Mr. Michael Cricenti, an investment officer based in Dallas, Texas, and a witness for IsZo, deposed that by October 2021 the share price had increased dramatically to \$24.86 per share and the new board will have to re-examine whether a share buy-back is still appropriate.⁹ Therefore, the feared repurchase of shares may not materialise.
- [27] The concern about the new board discontinuing the NTP appeal was answered by the fact that this is a matter for the new directors and in any case NTP does not have control over the related appeal by GSL which will continue regardless of what happens with the NTP appeal. GSL's appeal to the Privy Council concerns the

⁹ Hearing Bundle Part II, Tab 23 page 693 at paragraph 48.

validity of the PIPE, not the validity of the requisitioned meeting which is unaffected by the validity of the PIPE. Put another way, a decision on the PIPE does not render the holding of the meeting nugatory. The meeting was properly requisitioned and should be held in any event.

[28] The Court did not find that this is a case where refusing the stay would render the appeal nugatory. This case, as it relates to a stay, is essentially a fight over the convening and holding of a meeting of the shareholders and the control of NTP. It is not a case like **C-Mobile** where the order appealed related to liquidation proceedings against the company and a stay was needed to at least delay the death of the company pending the hearing of its appeal against the trial judge's order. Similarly, in **Wenden Engineering**, the defendant claimed that he would be financially ruined in the absence of a stay (a plea that failed on the facts).

[29] There was no suggestion in the applications before the Court of impending insolvency proceedings or financial ruin. Quite the contrary. The evidence is that NTP is now financially stable and has received credit facilities of \$164 million. NTP will continue to exist after the meeting, but possibly with a new board of directors against whom no wrongdoing has been alleged or found.

[30] The incumbent directors have been and continue to be in control of the Company, albeit with restrictions imposed by the 3rd March 2021 injunction. It is likely that they will be removed at the shareholders' meeting. If the new directors were to act for an improper purpose or in breach of their duties as directors, GSL, as a shareholder, can seek relief from the courts in the same way that IsZo did when the existing board did not act on the Requisition and instead issued the PIPE shares. If it later transpires that the PIPE shares were properly issued, or that the Kaisa faction can command a majority of the votes of the shareholders, then the Kaisa-nominated directors can take back control of the Company. This is how companies operate in the world of commerce, all the more so in relation to a publicly listed company such as NTP.

- [31] We concluded that the matters mentioned by NTP and GSL are not irreversible actions that have the effect of rendering the appeal nugatory.

Balance of Harm

- [32] Implicit in our finding that the appeal will not be rendered nugatory if a stay is not granted is that the balance of harm favours IsZo and the other non-GSL shareholders of the Company. The majority of the shareholders, of which IsZo is only one, requisitioned the meeting over a year ago and the Company has been operating in a state of uncertainty since then. There is no cogent evidence that the holding of the meeting will cause serious harm to NTP or the Kaisa faction and there is no real risk of injustice to NTP if the stay is refused.

Conclusion on the Stay Applications

- [33] Applying the principles in **C-Mobile** as followed in **Novel Blaze** and other decisions of this Court to the applications by NTP and GSL, and as explained above, we found that in all circumstances the Applicants have an appeal that is only arguable, the balance of harm favours IsZo and the majority shareholders who supported the Requisition, and that if a stay is not granted the appeals will not be rendered nugatory. Accordingly, we dismissed the applications for a stay of paragraphs 4 and 5 of the Order of the Court of Appeal that was made consequent upon the judgment of the Court of Appeal dated 4th October 2021.

The Variation Applications

- [34] NTP and GSL applied to vary the directions for the convening and holding of the meeting of shareholders set out in Schedule 1 of Jack J's order dated 3rd March 2021. The proposed changes include deleting the record date of 15th March 2021 and substituting 19th November 2021. It was understood that these applications would be necessary only if the Court did not order a stay of the shareholders meeting. The Court refused the stay and proceeded to consider and make a ruling on the variation applications.

[35] Most of the background to the variation applications is contained in the general background outlined in paragraphs 3-10 above. For the purpose of these applications, it is sufficient to repeat that more than 30% of the shareholders of NTP requisitioned a meeting of the shareholders of the Company as they are entitled to do under the BC Act and the Company's articles of association. NTP's failure to convene and hold the meeting is one of the main issues in the ongoing litigation between the parties. Jack J's order dated 3rd March 2021 following the trial of the action, directed that the meeting be held on 26th April 2021. The learned judge's power to order the meeting is contained in section 86(1) of the BC Act which reads –

“The Court may order a meeting of members to be held and to be conducted in such manner as the Court orders if it is of the opinion that:

- (a) it is impracticable to call or conduct a meeting of the members of a company in the manner specified in this Act or in the memorandum and articles of the company;
- (b) where directors are required to call a meeting of members pursuant to section 82 (2), the directors have failed to do so; or
- (c) it is in the interests of the members of the company that a meeting of members is held.”

There are no provisions in section 86 that limit the Court's power to order directions for a meeting. When a meeting is ordered under the section the court is the convener of the meeting and section 83(4) provides that –

“The convener or conveners of a meeting of members may fix the date notice is given of a meeting, or such other date as may be specified in the notice, as the record date for determining those members that are entitled to vote at the meeting.” (emphasis added)

[36] The Court's powers to call the meeting and fix the record date are therefore statutory and are not limited in any way by NTP's memorandum and articles of association. The reason for setting a record date is obvious and in any case, is apparent from the wording of section 83 itself which provides that it is for “...determining those members that are entitled to vote at the meeting.” The record date can be used for other purposes such as determining dividend entitlements,

but for this Decision the reason set forth in section 83 is the one that matters. When Jack J fixed the record date of 15th March 2021 it was to settle the shareholders who would be entitled to vote at the meeting that was requisitioned in September 2020.

The relevant law and practice

[37] The Applicants submitted that the Court should change the record date both as a matter of law and as a matter of principle. They submitted that a share in a BVI company entitles the holder to vote at meetings of the company. In support of this submission, they relied on section 34(1) of the BC Act which confers on every holder of a share “The right to one vote at a meeting of the members of the company or on any resolution of the members of the company.” Further, NTP’s memorandum and articles of association provide that only members holding shares in the Company are entitled to vote at a meeting of shareholders. Reference was made to paragraph 10 of the memorandum of association which reads–

“At every meeting of members, every holder [of] a share (“shareholder”) shall be entitled to one (1) vote, in person or by proxy, on all matters, including the election of directors, for each share standing in his, her or his name on the register of members. The directors elected by shareholders may be removed, with or without cause, only by a vote of the holders of a majority of the shares then outstanding...”

The Applicants also relied on a passage from **Shackleton on the Law and Practice of Meetings**¹⁰ that–

“A register of members must be kept by the company and every shareholder on the register has the right to vote. The register of members constitutes evidence of the right of a member to vote...”

[38] The Applicants contended that NTP is a publicly traded company on the New York Stock Exchange and the ownership of its shares changes daily. Therefore, persons who acquired shares after the record date and are now shareholders of the Company have the right to vote at meetings of the shareholders by virtue of

¹⁰ (15th Ed.) Chapter 14: Members Meeting and Voting, paragraph 14-05.

section 34 of the BC Act and the memorandum and articles of association. Conversely, persons who were shareholders on the record date on 15th March 2021 but are no longer shareholders should not be allowed to vote at a current meeting of the shareholders, especially one that will have the important result of electing the directors of the Company. This submission is superficially attractive but it does not take into account the fact that the requisitioned meeting is one that was ordered by the Court under section 86 of the BC Act following NTP's deliberate refusal to convene the meeting and a full trial of the issue resulting in adverse findings against NTP, and in accordance with the Court's power under section 83(4) as the convener of the meeting to set a record date. We were not referred to any authority that says that the Court cannot direct a meeting of shareholders at which only persons who were shareholders on the record date can vote at the meeting and we are satisfied that the court can make such a direction. The fact that the power to set the record date in section 86 of the BC Act is not restricted suggests that the drafter was aware that persons will dispose of the shares in the period between the record date and the meeting and there is nothing in the section that says that such persons should not be able to vote at the meeting.

- [39] As a matter of practice, there is no gainsaying that the provisions in the BC Act and the memorandum and articles of association are of general application and shareholders whose names appear on the register of members have an undoubted right to vote at meetings of the shareholders. However, as Mr. Davies QC submitted, this case is not the usual situation. The events leading up to the issue of the Requisition and subsequently, are documented in this decision and in the judgments of the Commercial Court and the Court of Appeal. The directors have never questioned the validity of the Requisition. They simply chose not to act on it and proceeded with the PIPE with a view to entrenching themselves on the board of the Company. Adverse findings were made against them by Jack J and this Court. The findings are set out in paragraph 9 above. The learned judge exercised the Court's powers under section 86 of the BC Act and ordered the Company to convene the outstanding meeting. In doing so, the judge being fully

immersed in the details of the Company and the ongoing dispute between the two factions of the shareholders, fixed the record date of 15th March 2021. The clear intention of the Court was that only shareholders who held shares on 15th March 2021 would be able to vote on the resolutions contained in the Requisition. The applicants did not appeal against the fixing of the record date and the first challenges to the record date fixed by the Court were the applications filed by the Applicants in October 2021.

[40] The Applicants attempted to bolster their position by referring to what they submitted was a shift in the voting power as it relates to the votes to be cast at the meeting. The evidence of Dr. Lai Ling Tam, Executive Chairman of NTP's board, is that between the record date of 15th March 2021 and 6th October 2021, 11,844,515 shares or approximately 30.2% of the shares of NTP changed hands and that this represents an increase in the amount of shares that could vote against the resolutions proposed in the Requisition.¹¹ However, Mr. Cricenti pointed out in his evidence that Dr. Tam acknowledged that of the 11,844,515 shares that changed hands, approximately 5,000,000 were shares owned by IsZo that were transferred between custodians.¹² Ownership of these shares did not change. This meant that only 6,844,515 or 17% of the shares were apparently transferred to the new owners and neither Mr. Cricenti, nor any other witness could say how many of these shares were transferred to persons who would vote against the resolutions. It is also not possible to determine from the evidence how many of the 6,844,515 shares were transferred to new owners or simply transferred between custodians as what happened with the 5,000,000 IsZo shares.

[41] Even if Dr. Tam's hypothesis is correct (subject to the correction by Mr. Cricenti), a 17% shift against the resolutions would not make a difference to the outcome of the voting on the resolutions. Counsel for the Applicants did not dispute this but submitted that the shift discloses a trend that should not be ignored when

¹¹ Hearing Bundle Part I, Tab 5, page 257 at paragraph 11.

¹² Hearing Bundle Part II, Tab 23, page 688 at paragraph 27.

resolutions for deciding on the directors of the Company are being considered. This fallback position is speculative and does not take the Applicants' case for a variation of the record date anywhere.

[42] The Applicants also submitted that the record date set by the Court should not be kept because it means that persons who acquired shares after the record date would be disenfranchised in that they would not be able to vote at the meeting. However, this is an argument that cuts both ways. If the Applicants' position is correct, it means that persons who held shares on the record date would be disenfranchised and their votes would not be counted at the meeting that was requisitioned while they were shareholders and which did not take place only because the directors deliberately delayed the holding of the meeting (as the Courts have found). This has the appearance of NTP attempting to benefit from its own deliberate delays.

[43] Conversely, the new shareholders would have acquired their shares knowing that the record date for the meeting had been set by the Court. The settled practice of the Company and other companies listed on the New York Stock Exchange is that the record date for a meeting is published and brokers advise their clients of the date. This was done in this case and the majority of shareholders lodged proxies with their custodians with their votes on the resolutions. Mr. Cricenti's evidence is that proxies representing more than 60% of the shares in NTP have been lodged with the custodians. Of this amount, 69% are votes in favour of the resolutions. Mr. Cricenti also made the point that if the votes cast by GSL are taken out of the calculation, more than 96% of the proxy votes are in favour of the resolutions. If the record date is changed a significant amount of these votes would not be counted. The evidence of Mr. John Ferguson, a proxy solicitor who gave evidence on behalf of IsZo, is to the same effect as Mr. Cricenti's.¹³

¹³ Hearing Bundle Part II, Tab 25, page 728 at paragraph 28.

- [44] The Court also noted that the unchallenged evidence is that persons who buy shares in the Company have access to detailed information about the Company and its activities and business, including full details of the ongoing litigation in the Virgin Islands. Any investor acquiring shares after the record date would have been aware, either directly or through their broker, that the shares that they were acquiring would not be eligible to vote at the court-ordered shareholders' meeting. Mr. Ferguson's evidence confirms that this is the practice regarding companies listed on the New York Stock Exchange. He deposed that –
- "It is therefore incontrovertible that shareholders who acquire shares after a given record date are not able to vote at the corresponding meeting and should have no expectation of being entitled to vote at such meeting."¹⁴
- [45] This conclusion appears to be completely logical and was accepted by the Court.
- [46] In the circumstances there is no hardship or unfairness to shareholders who acquired their shares after the record date because they took the shares knowing, or are presumed to know, that they would not be entitled to vote at the court-ordered meeting. The entitlement to vote is fully preserved at all other meetings of the shareholders of the Company. We therefore rejected the Applicants' submission that the new shareholders have been disenfranchised.
- [47] The court also took note of the Applicants' complaint that there is a long delay between the record date in March 2021 and the meeting in late November 2021. This is correct. The delay is 280 days. The interval between record date and a meeting is usually about 30 days and the evidence is that it is about 40 days for meetings of NTP. However, there is no rule of law or practice that fixes a maximum period between the record date and the meeting, and we were not referred to any case or situation where the record date was changed as a result of the passage of time. In this case, the Courts have found that the delay in convening and holding the meeting was caused entirely by the directors attempt to push through the PIPE

¹⁴ Hearing Bundle Part II, Tab 25, page 722 at paragraph 6.

with a view to securing sufficient votes to keep them in place as the directors of the Company. The delay in this case was noted and understood and did not materially affect the decision to retain the record date.

- [48] Finally, the applicants submitted that the meeting scheduled for 30th November 2021 is a new meeting and therefore a new record date should be set. This submission was met by reference to the transcript of the hearing before this Court on 20th April 2021 when the Court heard the Applicants' application for a stay of paragraph 3 of Jack J's order dated 3rd March 2021 setting the date for the meeting. The transcript shows that counsel for NTP made it abundantly clear that all that NTP was seeking was a short adjournment of the meeting.¹⁵ There was no attempt to cancel the meeting. It follows that the meeting fixed for 30th November 2021 is a continuation of the meeting that was ordered by the court, and not a new meeting.¹⁶ This is a further reason why a new record date for the meeting is not necessary.

Conclusion on the Variation Applications

- [49] The Court considered the principles outlined in the preceding paragraphs and found that as a matter of law and according to the practice of meetings of shareholders of a publicly traded company, and the evidence, the record date for the meeting on 30th November 2021 should not be changed and the meeting should proceed as ordered by the Court in the 4th October 2021 Order of the Court of Appeal. Therefore, we dismissed the applications to vary the directions for the convening and holding of the said meeting.

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- [50] The Court having granted leave to both NTP and GSL to appeal to the Privy Council against the orders of the Court in the NTP appeal, it followed as a matter of case management that the GSL appeal to this Court should be adjourned pending the

¹⁵ Hearing Bundle Part IV, at page 1765, lines 4-5 of the transcript of proceedings dated 20th April 2021.

¹⁶ Shackleton, supra n.10 at paragraph 14-29.

outcome of the appeals to the Privy Council. Mr. Davies QC readily agreed and accordingly appeal No. 11 of 2021 was adjourned.

Disposal

- [51] For the reasons set out above we refused the applications for a stay of paragraphs 4 and 5 of the Order of the Court of Appeal dated 4th October 2021 ordering NTP to convene and hold a meeting of its shareholders Nam Tai Property Inc at 9:00 am Eastern time on Tuesday, 30th November 2021, and the applications to vary the directions for the meeting ordered by Jack J on 3rd March 2021.

POSTSCRIPT

- [52] All that is left is to thank lead counsel and those assisting them for their very helpful written and oral submissions and to acknowledge the excellent presentation of the electronic hearing bundles.

I concur.

Dame Janice M. Pereira DBE
Chief Justice

I concur.

Hon. Gerard Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar