

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0019

BETWEEN:

ICM SPC

on behalf of Ancile Special Opportunity and Recovery Fund Segregated Portfolio

Appellant/Applicant

and

[1] RYAN PAUL JARVIS

[2] RACHELLE FRISBY

(as Joint Liquidators of Phoenix Commodities PVT Ltd (in liquidation))

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

The Hon. Mde. Esco L. Henry

Justice of Appeal

The Hon. Mr. Reginald T. A. Armour

Justice of Appeal

[Ag.]

Appearances:

Mr. David Alexander, KC with him Mr. Alexander Bryant and Ms. Emily Rivett for
the appellant

Mr. David Chivers, KC with him Mr. Jeremy Child for the respondents

2025: April 9;
2026: February 27.

Company Law – Application for a stay of execution pending appeal – Exercise of judicial discretion – Whether the applicant has provided cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted – Whether the balance of harm test favours a grant of the application for a stay – Whether the applicant will suffer prejudice if the stay is not granted – Whether the appeal has good prospects of succeeding – Whether the learned judge erred in determining that ASOR should be included on the list of members of Phoenix BVI for the purposes of its liquidation

Before the Court was an application made by the applicant ICM SPC (“ICM”) on behalf of Ancile Special Opportunity and Recovery Fund Segregated Portfolio (“ASOR”) pursuant to Civil Procedure Rules (Revised Edition) 2023 (“CPR”) and the Court’s inherent jurisdiction for a stay of execution of: (a) the judgment of Mangatal J (Ag.) dated 30th May 2024 and amended on 11th June 2024 (“the Mangatal Judgment”) as well as the order of Webster J (Ag.) dated 30th May 2024 (“the Webster Order”); (b) the subsequent call made by the respondents by letter dated 5th June 2024 in reliance on the judgment (“the Call”); and (c) any steps taken, or to be taken to enforce any liability arising from shares purportedly held by ASOR in Phoenix Commodities PVT Ltd. (in liquidation (“Phoenix BVI” or “the Company”) or the Call, pending the determination of the ongoing appeal.

The underlying dispute concerns whether ASOR should be included on the list of members of Phoenix BVI for the purposes of its liquidation. A central issue by extension is whether ASOR is liable to be subject to a call made by the respondents as joint liquidators of Phoenix BVI in respect of 440,935 shares purportedly held by ASOR in Phoenix BVI at a price of USD90.72 in the total sum of USD40,001,623.20 (“the Alleged Debt”). ICM maintains that ASOR is not a member of Phoenix BVI and that neither ASOR nor any agent authorised by it agreed in writing to become a shareholder of Phoenix BVI as required by section 49 of the BVI Business Companies Act 2004.

By notice of application filed on 24th February 2022, the applicant on ASOR’s behalf applied to the High Court for an order pursuant to section 193(3) of the BVI Insolvency Act removing ASOR from the list of members of Phoenix BVI, as settled by the respondents. The learned judge dismissed the application having determined inter alia that ASOR acting through Mr. Nabil Marc Abdul-Massih (a director of ICM and an authorized signatory of ASOR) agreed in writing to become and thereby became a shareholder in Phoenix BVI. Accordingly, ASOR had not been removed from Phoenix BVI’s list of members.

On 11th July 2024 ICM appealed against the judgment. If ICM’s appeal succeeds, ASOR would be removed from the register of members of Phoenix BVI. On 25th July 2024 the respondents filed a counter-notice. The notice of appeal identified 13 grounds of appeal. In summary, they are that the judge erred in her construction and application of section 49 of the BCA, made fatal procedural errors, erred in her decision in respect of common mistake and by not taking into account that specific legal documents were required to be in existence and/or steps taken and/or specific conditions precedent satisfied before ASOR would and/or could be treated as having agreed (whether in writing or not) to become a shareholder of Phoenix BVI. In the counter-notice, the respondents contended that the judgment should be upheld on grounds additional to those identified by the learned judge. They also raised the issue as to whether the judge erred in finding that section 49 of the BCA requires that a shareholder’s agreement in writing pre-date the issue of shares.

On 5th June 2024, the respondents issued the Call to ASOR for the sum of USD40,001,623.20 in respect of the 440,935 shares in Phoenix BVI, said to be held by ASOR at a price of USD90.72 per share. ASOR disputed the Call in writing. On 12th November 2024, the respondents caused a statutory demand to be served on ICM in the Cayman Islands (the “Demand”) for payment of the Alleged Debt pursuant to section 93(a)

of the Cayman Islands Companies Act (2025 Revision). The Demand was made on the basis that the judgment, 'established that ASOR is a shareholder in Phoenix BVI and properly recorded on the settled list of members'. It also stated that if no satisfactory response is received within 21 days, the respondents 'will seek to appoint liquidators to [ICM] on the basis of that one of the segregated portfolios, ASOR cannot meet its liabilities as they fall due.'

ICM applied by summons to the Grand Court of the Cayman Islands on 5th December 2024 for an order that the respondents be restrained from presenting or causing Phoenix BVI to present a winding up petition against it based on the Demand ('the Summons'). The Summons was however dismissed by Doyle J of the Cayman court on 26th February 2025. Following the dismissal, ICM applied on ASOR's behalf for an interim stay of the Mangatal Judgment and Webster Order, the Call and any steps taken or to be taken to enforce liability arising from the shares ruled to be held by ICM on Phoenix BVI's account, or the Call pending determination of this application. The interim application was heard by this Court on 10th March 2025 and the Mangatal Judgment and Webster Order were stayed pending the determination of this application. The Court however refused to stay the Call and any further steps that might be taken to enforce the referenced liability and Call. By this application, ICM seeks, pending final determination of the Appeal, a substantive stay of the judgment and order and the related orders in respect of which interim relief was sought.

ICM's principal grounds for the stay is that unless a stay of execution is granted of the Mangatal Judgment and Webster Order, it will suffer serious harm and prejudice should the respondents proceed successfully with the winding up petition, because an insolvency order would (a) lead to irreparable and irreversible harm to ICM, and (b) risk stifling the Appeal and/or rendering it nugatory. Further, AF-KY, its second segregated portfolio, would suffer serious negative consequences including being unable to continue the management of its complex global asset recovery litigation which requires ongoing and strategic legal decision-making processes and steps to be taken in proceedings, which cannot later be reversed if the appeal is successful.

The respondents opposed the application, submitting that the application should be dismissed because it is fundamentally misconceived on several bases. They contended that the applicant has failed to point to (i) any legal effect that would result from a stay of the Mangatal Judgment or Webster Order, without which there can be no legitimate basis for ordering a stay; or (ii) any legal basis for the orders that seek to 'stay' the Call, or restrain the respondents from proceeding with steps to enforce any liability from the shares or Call in that they are wrongly described as 'stays', but are really extraterritorial injunctions; and further that ASOR's Appeal will not be rendered nugatory by the lack of any stay. Thus, the singular issue for the Court's consideration is whether to grant a stay of execution in respect of the Mangatal Judgment and the Webster Order pending the determination of the Appeal.

Held: dismissing the application for a stay of execution of the Mangatal Judgment and the Webster Order and awarding costs to the respondents to be assessed if not agreed within 21 days, that:

1. Jurisdiction to grant a stay of execution is bestowed on the Court by the joint effect of CPR rules 62.24(1) and 26.1(2)(q). The former states that the Court has all the powers and duties of the High Court including the case management powers outlined under Part 26, while the latter expressly empowers the Court to stay the whole or part of any proceedings generally or until a specified date or event. By rule 62.19(1)(b), a single judge of the court, (and by necessary implication the Full Court) is authorised to grant a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal. The court also has an inherent jurisdiction to grant a stay of execution. The governing principles relevant to the determination of an application for stay are well-established. They are: (i) a court must have regard to all the circumstances; (ii) a stay is the exception rather than the general rule; (iii) a party seeking a stay should offer cogent evidence that an appeal will be stifled or rendered nugatory unless a stay is granted; (iv) the court in exercising its discretion applies, what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered; and (v) the Court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong likelihood that the appeal will succeed is shown.

C-Mobile Services Limited v Huawei Technologies Co. Ltd BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) followed; **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited** BVIHMCAP 2020/0006 (delivered 9th July 2020, unreported) followed; **Nam Tai Property Inc v IsZo Capital** BVIHCMAP2021/0010 (delivered 8th November 2021, unreported) followed.

2. In evaluating the prospects of the appeal, it is noted that by the applicant's own admission, the appeal at its highest raises legal questions as to the interpretation and application of section 49 of the Business Companies Act 2004 ('BCA'). The applicant does not challenge the applicable rules of statutory interpretation identified and applied by the judge in construing the provision, namely that the provision ought to be given its ordinary, natural and grammatical meaning. A common thread in the applicant's first five grounds of appeal is that the judge erred by holding that the section does not require the existence of a written agreement between the company and the shareholder in relation to the number of shares agreed to be acquired and the price of the shares. In arriving at her decision, the learned judge considered among other factors, all the evidence including ASOR's representative Mr. Abdul-Massih's testimony about events contemporaneous with and central to the circumstances in which the shares were held to have been acquired. It is noteworthy that she found Mr. Abdul-Massih's account to be inconsistent, incredible and convoluted. She clearly preferred the account of other witnesses. It follows that for an appeal against those findings of fact to be successful, the applicant would need to persuade the appellate court that it is an exceptional case that justifies relaxation of the restraint that characterises the court's settled approach to appeals against findings of fact. The learned judge considered all legal arguments advanced by the parties and gave a

balanced, reasoned and logical assessment of the several authorities cited. It was open to the learned judge to conclude on the construction of section 49 as she did based on the learning on which she relied and to find as she did on the totality of the evidence that section 49 does not require that parties agree in writing the number or consideration for shares being purchased. The applicant has therefore not demonstrated that its strongest grounds of appeal appear to have a realistic chance of success.

3. As to whether the absence of a stay would render the appeal nugatory, even if a winding-up order is made, the liquidators appointed to wind up the company would have several options available to them, including pursuing the appeal if it is considered meritorious and beneficial to those concerned. A number of considerations would inform that decision. ICM's concerns that a winding up order has the potential to adversely impact its reputation and future prospects as well as those of AK-FY and result in irreparable harm to them fall short of showing that any of those fears would actually be realised. ICM has simply not supplied cogent evidence that the appeal would be stifled or rendered nugatory in such an eventuality.
4. Finally, on the balance of harm, the investors and shareholders of Phoenix BVI, represented by the respondents are likely to experience greater harm and prejudice if a stay is granted than the applicant would suffer if a stay is refused. In this regard, the record reveals that they have awaited the completion of the winding up process over several years and have an interest in an expeditious resolution of all related proceedings. It is accepted that the consequences of a winding up order would mean the death of ICM and its inability to conduct the appeal or carry on the business activities of ASOR and AF-KY. It is also recognized that if the petition succeeds, ICM's appeal may be pursued by liquidators appointed to wind it up, in tandem with their other obligations to ICM's creditors, shareholders and to the extent permissible, its clientele, thereby minimizing potential prejudice to all concerned. The balance of harm therefore favours refusing the stay. Being mindful that a stay is the exception and not the general rule and having regard to the circumstances in this case, ICM has not met the threshold for grant of a stay of the Mangatal Judgment and the Webster Order. The applicant has not supplied cogent evidence that its appeal will be stifled or rendered nugatory if the stay is not granted; has not demonstrated that the balance of harm favours a stay or that it has a realistic prospect of success on appeal. For these reasons the application for a stay ought to be refused.

JUDGMENT

Introduction

- [1] **HENRY JA:** This is a Notice of Application¹ made by the applicant ICM SPC ('ICM' or 'the applicant') on behalf of Ancile Special Opportunity and Recovery Fund Segregated Portfolio ('ASOR'). The application is made pursuant to **Civil Procedure Rules (Revised Edition) 2023 ('CPR')** rule 62.24 and the Court's inherent jurisdiction. ICM seeks a stay of execution of (a) the judgment of Mangatal J. (Ag.) dated 30th May 2024 and subsequently amended on 11th June 2024 ('the Mangatal Judgment') as well as the Order of Webster J (Ag.) dated 30th May 2024 ('the Webster Order'); (b) the subsequent call made by the respondents by letter dated 5th June 2024 in reliance on the judgment ('the Call') and (c) any steps taken, or to be taken to enforce any liability arising from shares purportedly held by ASOR in Phoenix Commodities PVT Ltd (in liquidation) ('Phoenix BVI' or 'the Company') or the Call, pending the determination of the ongoing Appeal. The applicant also seeks an order that the costs of the application and the costs of a former Interim Stay application for identical reliefs be costs in the appeal.
- [2] The application is supported by the First Affidavit of Emily Rivett² and the First Affidavit of Mr. Nabil Marc Abdul-Massih³. Ms. Rivett's affidavit testimony mirrored the contents of the Notice of Application. Mr. Abdul-Massih's affidavit supplemented her testimony.
- [3] The underlying dispute giving rise to this application concerns whether ASOR should be included on the list of members of Phoenix BVI for the purposes of its liquidation. A central issue by extension, is whether ASOR is liable to be subject to a call made by the respondents as joint liquidators of Phoenix BVI in respect of 440,935 shares purportedly held by ASOR in Phoenix BVI at a price of USD90.72 in the total sum of USD40,001,623.20 (the 'Alleged Debt').
- [4] The main figures in these proceedings are Phoenix BVI, ICM and ASOR. Phoenix BVI was incorporated in the BVI on 25th September 2001. It was part of the

¹ Filed on February 28th 2025.

² Filed on 28th February 2025.

³ Filed on 5th March 2025.

Phoenix group of companies that specialized in commodities trading. It was placed into voluntary liquidation in the British Virgin Islands (BVI) on 20th April 2020 by a qualifying resolution of its shareholders. Ryan Paul Jarvis and Matthew David Smith of Deloitte were appointed joint liquidators on 8th May 2020.⁴ Mr. Smith was replaced as liquidator by Rachelle Frisby on 28th April 2021.⁵ She has since been replaced by a Mr. Johnston who was appointed liquidator on 13th December 2023 pursuant to section 187(1)(a) and (3)(a) of the **BVI Insolvency Act** (the IA’)⁶.

[5] ICM is a segregated portfolio company incorporated in the British Overseas Territory of the Cayman Islands. ASOR is a segregated portfolio created by ICM. ICM has another segregated portfolio known as AF-KY A&SP WD Segregated Portfolio (‘AF-KY’) which is not involved in these proceedings but whose interests ICM considers to be a relevant factor.

[6] ICM maintains that ASOR is not a member of Phoenix BVI and that neither ASOR nor any agent authorised by it agreed in writing to become a shareholder of Phoenix BVI as required by section 49 of the BVI **Business Companies Act 2004** (‘BCA’) in order for such a transaction to be effective.⁷

[7] By Notice of Application filed on 24th February 2022, the applicant on ASOR’s behalf applied to the High Court Commercial Division in the BVI for an order pursuant to section 193(3) of the IA removing ASOR from the list of members of Phoenix BVI, (as settled by the respondents as Joint Liquidators of Phoenix BVI) on the bases that:

- (a) neither ASOR nor any authorised agent of ASOR agreed to becoming a shareholder in writing, as required by section 49 of the **BCA**;
- (b) alternatively, and without prejudice to the first ground, if ASOR did agree, such agreement was subject to conditions precedent contained

⁴ Appointed pursuant to section 179(4)(a) of the BVI Insolvency Act, 2003, (‘IA’).

⁵ Ms. Frisby was appointed pursuant to section 187(1)(b)(iii) of the IA.

⁶ Act 5 of 2003 of the Revised Laws of the Virgin Islands.

⁷ Act 16 of 2004 of the Revised Laws of the Virgin Islands.

within a Memorandum of Understanding dated 1st April 2024 (the 'MoU') and its amendment dated 25th April 2019 (the 'Amendment Agreement');

- (c) if ASOR was a shareholder in Phoenix BVI, its shareholding was temporary or provisional and therefore when the conditions precedent were not fulfilled, any provisional shareholding lapsed; and
- (d) if ASOR was a shareholder in Phoenix BVI, the shareholding was cancelled by way of a notice dated 12th November 2019 (the 'Notice of Cancellation').

[8] The learned judge dismissed the application having determined *inter alia* that ASOR acting through Mr. Nabil Marc Abdul-Massih (a director of ICM and an authorised signatory of ASOR)⁸ agreed in writing, to become and thereby became a shareholder in Phoenix BVI. Accordingly, ASOR had not been removed from the Phoenix BVI list of members. By Notice of Appeal dated 11th July 2024 ICM appealed against the Judgment ('the Appeal'). It is worth noting that if ICM's appeal succeeds ASOR would be removed from the register of members of Phoenix BVI. On 25th July 2024 the respondents filed a counter-notice.

[9] The notice of appeal identified 13 grounds of appeal. In summary, they are that the judge erred in her construction and application of section 49 of the **BCA**, made fatal procedural errors, erred in her decision in respect of common mistake and by not taking into account that specific legal documents were required to be in existence and/or steps taken and/or specific conditions precedent satisfied before ASOR would and/or could be treated as having agreed (whether in writing or not) to become a shareholder of Phoenix BVI. In the counter-notice, the respondents contended that the judgment should be upheld on grounds additional to those identified by the learned judge. The respondents also raised the issue as to whether the judge erred in finding that section 49 of the **BCA** requires that a shareholder's agreement in writing pre-date the issue of shares.

⁸ Also CEO of Inoks Capital S.A., a Swiss asset manager company – the entity that manages ASOR, per paras. [16] and [21] of the Mangatal judgment.

- [10] On 5th June 2024, the respondents, issued the Call to ASOR for the sum of USD40,001,623.20 in respect of the 440,935 shares in Phoenix BVI, said to be held by ASOR at a price of USD90.72 per share. ASOR disputed the Call in writing.
- [11] On 12th November 2024, the respondents caused a statutory demand to be served on ICM in the Cayman Islands (the 'Demand') for payment of USD40,001,623.20 pursuant to section 93(a) of the Cayman Island Companies Act (2025 Revision). The Demand was made on the basis that the Mangatal Judgment, 'established that ASOR is a shareholder in Phoenix BVI and properly recorded on the settled list of members'. It also stated that if no satisfactory response is received within 21 days the respondents 'will seek to appoint liquidators to [ICM] on the basis that one of the segregated portfolios, ASOR cannot meet its liabilities as they fall due.'
- [12] ICM applied by summons to the Cayman Grand Court on 5th December 2024 for an order that the respondents be restrained from presenting or causing Phoenix BVI to present a winding up petition against it based on the Demand ('the Summons'). The Summons argued that the Alleged Debt was subject to a bona fide dispute on substantial grounds, including that the Demand is flawed in that the Alleged Debt which underpins it is not due and payable to the respondents as a matter of BVI law.
- [13] The Summons was dismissed by Doyle J of the Cayman Court (the 'Doyle J Determination') on 26th February 2025 with costs to the Joint Liquidators to be assessed. The applicant contends that the Summons was dismissed partly because the Mangatal Judgment had not been stayed and therefore ASOR was a shareholder for present purposes and liable for a debt that arose from the Call in light of ASOR's status as a shareholder. ICM asserted that it did not previously seek a stay because (i) the judgment does not give rise to any liability on its part to pay USD40 million or any other sum in cash to Phoenix BVI; (ii) the judgment

merely finds that ASOR is presently to remain on the list of members for Phoenix BVI – subject to the Appeal; and (iii) therefore, prior to the Doyle J Determination, which leaves the respondents free to present a winding-up petition, there was, arguably, no basis for a stay; and further, a stay would not be required but for the unrestrained threat and the actual subsequent presentation of a winding up petition.

[14] On 28th February 2025 ICM on ASOR's behalf applied for an interim stay of the Mangatal Judgment and Webster Order, the Call and any steps taken or to be taken to enforce liability arising from the shares ruled to be held by ICM on Phoenix BVI's account, or the Call pending determination of this application. The Interim Application was heard by this Court⁹ on 10th March 2025 on an urgent basis and an order made staying the Mangatal Judgment and Webster Order pending the determination of this application. The Court refused to stay the Call and any further steps that might be taken to enforce the referenced liability and Call. By this application, ICM seeks pending final determination of the Appeal, a substantive stay of the Mangatal Judgment and Webster Order and the related orders in respect of which interim relief was sought.

[15] At the hearing of the stay application, ICM formally withdrew its prayer for a stay of the Call and of any steps taken or likely to be taken by the respondents to enforce related liabilities. This formalized and confirmed its stated intention as signalled at paragraph 21 of its supplemental skeleton argument¹⁰. Accordingly, no further consideration needs to be or is given to that aspect of the application.

[16] ICM's principal grounds for the stay is that unless a stay of execution is granted of the Mangatal Judgment and Webster Order, it will suffer serious harm and prejudice should the respondents proceed successfully with the winding up petition, because an insolvency order would (a) lead to irreparable and irreversible

⁹ Differently constituted.

¹⁰ Filed on 4th April 2025.

harm to ICM, and (b) risk stifling the appeal and/or rendering it nugatory. Further, AF-KY its second segregated portfolio, would suffer serious negative consequences including being unable to continue the management of its complex global asset recovery litigation which requires ongoing and strategic legal decision-making processes and steps to be taken in the proceedings, which cannot later be reversed if the Appeal is successful.

[17] As it turned out, the respondents issued a petition¹¹ in the Cayman Islands Courts on 7th March 2025 to wind up and appoint official liquidators to ICM on behalf of Phoenix BVI. The petition was made on the ground that ICM is unable to pay its debts and it is just and equitable that it be wound up.

[18] The respondents opposed the application for a stay. Their Notice of Opposition was filed on 12th March 2025. The respondents contended that the application should be dismissed by reason that it is fundamentally misconceived on several bases. It was submitted that the applicant has failed to point to (i) any legal effect that would result from a stay of the Mangatal Judgment or Webster Order, without which there can be no legitimate basis for ordering a stay; or (ii) any legal basis for the orders that seek to 'stay' the Call, or restrain the respondents from proceeding with steps to enforce any liability from the Shares or Call in that they are wrongly described as 'stays', but are really extraterritorial injunctions; and further that ASOR's Appeal will not be rendered nugatory by the lack of any stay.

Issue

[19] The singular issue for the Court's consideration is whether this Court should grant a stay of execution in respect of the Mangatal Judgment and the Webster Order pending the determination of the Appeal.

Evidence

¹¹ Pursuant to sections 92(d) and (e) of the Cayman Islands Companies Act (2025 Revision).

- [20] Ms. Rivett and Mr. Abdul-Massih provided useful historical context to the ongoing dispute between the parties. It is helpful to highlight portions of their testimony. For her part, Ms. Rivett indicated that ASOR's legal practitioners wrote unsuccessfully to the respondents' legal practitioners on 26th February 2025 requesting an undertaking not to present a winding-up petition pending determination of the Appeal or at least, to provide an undertaking pending an application for a stay of the Judgment (thereby avoiding the need for the ASOR Interim Stay Application and/or the ASOR Substantive Stay Application).
- [21] It was asserted by Ms. Rivett that the presentation of a winding-up petition would have multiple negative impacts including leading to adverse publicity, including through online publication of filings by 'Offshore Alert'. Further, any public awareness that ICM is subject to a winding up petition on the basis of solvency issues could cause significant reputational harm to ICM and AF-KY that would (i) erode the confidence of AF-KY's active investors, and (ii) embolden any counter-party to litigation, asset recovery and realisation efforts and/or transactions with AF-KY and may result in adverse consequences for ICM and irreparable damage to AF-KY.
- [22] Regarding AF-KY, Mr. Abdul-Massih explained that although it is operational with active investors and has significant interests in active litigation, asset recovery and realisation efforts in several jurisdictions, ASOR has no assets or investors and has never had any assets or investors. He added that ICM continues to have concerns regarding the disclosure of commercially sensitive information regarding the various legal proceedings, asset recovery and realisation efforts in which AF-KY has an interest as an ultimate beneficial owner and sole controller as the claimant in separate litigation in Ukraine, Slovakia and the Czech Republic and the enforcement efforts in Brazil and in the Ivory Coast. He explained further that serious negative consequences would be suffered by AF-KY if ICM enters liquidation.

- [23] Those feared negative consequences were said to include AF-KY being subject to various events of default in the context of ongoing lending relationships, upon the appointment of a liquidator, since such events of default would not be reversible if the appeal was successful; and ICM losing its status as an entity regulated by the Cayman Islands Monetary Authority ('CIMA').
- [24] While acknowledging that AF-KY is not a named party in active litigation in any of the referenced proceedings in which it is said to function as ultimate beneficial owner and sole controller as claimant, Mr. Abdul-Massih asserted that those proceedings have values ranging from USD 4 million to EUR 10 million. He contrasted this position with ASOR which has never traded or accepted subscriptions from investors. He echoed Ms. Rivett's averments regarding the extent and nature of the irreversible and irrevocable harm (including reputational damage and financial loss) and prejudice that would be suffered by ICM and AF-KY if the respondents secure a winding-up petition order in the Cayman Islands proceedings and agreed that the appeal would be rendered nugatory.
- [25] As regards AF-KY's other business activities, Mr. Abdul-Massih averred that the financial documents governing its multiple ongoing lending relationships are commercially sensitive. He exhibited a redacted copy of an example of an AF-KY lending document¹² along with the latest extension of that agreement which evidenced the general pattern (present across all AF-KY's lending documentation) that the appointment of a liquidator over ICM triggers an Event of Default that could impact AF-KY's lending relationships (that contain event of default provisions). He said that together they have a total value in excess of USD 8.5m. He asserted that the declaration of an Event of Default across AF-KY's lending relationships is not a step that could be reversed if the Appeal were to be successful and it ultimately transpires that ICM's entry into liquidation was premature, prior to the determination of the Appeal.

¹² NAM1/1-5.

- [26] Another concern raised by ICM had to do with what was described as potential conflict of interest if servants of the firm of Deloitte were to be appointed liquidators of ICM. It was also pointed out that the respondents are employed by Deloitte who also serves as liquidator of Phoenix Global DMCC, a separate Phoenix entity now in liquidation in Dubai, and as liquidator of Phoenix Pte Limited a Singapore entity despite objections taken to those appointments. ICM expressed concern that Deloitte would likewise seek appointment as liquidator in the extant winding up petition in the Cayman Islands notwithstanding the inherent conflict of interest between that appointment and those of Phoenix BVI and Phoenix DMCC.
- [27] The contention was that in the circumstances, if the stay is not granted and ICM is placed into liquidation, the Appeal would be stifled since through the liquidation, Deloitte would be in a position to access (i) its books and records and, more critically (ii) its privileged communications with its legal advisors across multiple jurisdictions and would then be in the position of needing to continue the Appeal as against other members of the Deloitte team. In such an eventuality, the respondents as appointing creditors, are not likely to fund any liquidator appointed by them to prosecute the Appeal and ASOR does not have the funds from which they could do so.
- [28] Mr. Abdul-Massih accepted that Doyle J found that there was no substantial dispute about the debt purportedly owed by ASOR to the respondents, underlying the Call and the Demand. For his part, Mr. Abdul-Massih said that he considered this finding to be seriously flawed.
- [29] By further affidavit filed on 6th March 2025, Ms. Rivett exhibited a copy of the Doyle J Determination. She also confirmed that ICM had appealed the Doyle J Determination.

[30] The first named respondent Mr. Ryan Paul Jarvis provided an affidavit¹³ in which he set out the position of both liquidators. Essentially, he explained that the respondents settled the list of members of Phoenix BVI and in accordance with section 193 of the IA gave notice to ASOR on 16th December 2021. He stated that the settled list of members records the total number of shares issued to ASOR as 440,935 and the issue price of USD90.72 each.

[31] Mr. Paul confirmed the filing of the winding up petition by the respondents. He expressed the view that any delay to the winding up of ICM and the collection of the Alleged Debt will create serious material difficulties for the continuing liquidation of Phoenix BVI and for the creditors of Phoenix BVI, in that among other things, any interim dividend payments to the creditors of Phoenix BVI's liquidation estate will be further delayed after those same creditors have waited for almost five years. Additionally, the respondents cannot be certain that ICM will have sufficient liquidity (via redemptions or otherwise) to repay the Alleged Debt and the prospects in this regard are unlikely to improve as time passes.

Applicant's Submissions

[32] Citing **C-Mobile Services Limited v Huawei Technologies Co. Ltd.**¹⁴ the applicant rehearsed the guiding principles on which an application for a stay of execution is considered and determined. It was noted that as held in **Novel Blaze Ltd (in liquidation) v Chance Talent Management Ltd**¹⁵, the court is required to carry out a balancing exercise when considering each criterion, none of which is decisive.

[33] **Nam Tai Property Inc v Iszo Capital**¹⁶ was relied on for the proposition that the Court is expected to consider the merits of the appeal preliminarily in arriving at its decision. It was submitted that the points on appeal are largely novel and this was

¹³ Filed on March 17th 2025.

¹⁴ BVIHMAP2014/0017 (delivered 2nd October 2014, unreported).

¹⁵ BVIHMAP2020/0006 (delivered 9th July 2020, unreported).

¹⁶ BVIHMAP2021/0010 (delivered 8th November 2021, unreported).

adverted to by the learned judge in relation to the proper construction of section 49 of the **BCA**. Accordingly, this is an issue ripe for consideration by the Court of Appeal. Moreover, the applicant submitted, the Appeal has strong, alternatively reasonable prospects of success, it being apparent that section 49 of the **BCA** required that there should be a written agreement between Phoenix BVI and ASOR prior to the shares being issued or an agreement in writing with all agreed terms identified in evidence.

[34] It was submitted that grounds 3 to 5 of the appeal in particular are very strong since broadly speaking, they deal respectively with whether (i) on a proper construction of section 49 of the **BCA**, liability may be imposed on a person who agrees to become a shareholder in the absence of a written agreement specifying the number of shares they will take and/or the consideration payable for those shares; and (ii) the judge erred by relying on certain emails from Mr. Abdul-Massih (as ASOR's representative) to Mr. Navandher that pre-date the issue of the shares to ASOR, in which no mention is made of the number of shares to be issued, the consideration to be paid for those shares, and/or signifies that ASOR gave written agreement or assent to either of those specific items.

[35] Another criticism by ICM was that the judge was wrong to conclude that there was 'ample evidence' to demonstrate that ASOR agreed in writing to become a shareholder, that the Amendment Agreement dated 25th April 2019 was an agreement by ASOR in writing which satisfied section 49 of the **BCA**; and that documents after the issuance of the shares in Phoenix BVI could support and/or corroborate that ASOR had previously agreed in writing to become a shareholder. Furthermore, if she was right as to the evidential use of post-issuance documents, she failed to consider and/or take into account facts, documents, and/or events which post-dated the issue of the shares and which suggested that ASOR had not agreed in writing to become a shareholder.

- [36] It was submitted further that the judge was wrong to (i) allow the respondents to challenge the authenticity of documents relevant to the share issuance when the respondents had not served a notice to prove; (ii) permit late disclosure by the respondents in respect of documents relevant to the share issuance but not to allow ASOR to adduce further disclosure and witness evidence in response; and (iii) accept the first respondent's evidence in respect of the reliability of the metadata of documents relevant to the share issuance. Further, it was submitted that the judge erred in failing to take into account that, based on the advice received by ASOR and Phoenix BVI, specific legal documents were required to be in existence and/or steps taken and/or specific conditions precedent satisfied before ASOR would and/or could be treated as having agreed to become a shareholder of Phoenix BVI.
- [37] ICM argued that even if the Court considers that the Appeal is only reasonably arguable, as opposed to strong, a substantive stay of execution of the Mangatal Judgment and Webster Order pending determination of the Appeal would have the effect of suspending the Judgment and Order with the result that the issue of whether ASOR is a shareholder in Phoenix BVI would be unresolved. Likewise, no steps can be taken on the Judgment or Order. This would allow ICM to argue in the Cayman Court that it is not in fact a shareholder of Phoenix BVI pending determination of the Appeal with the result that there will be a continued dispute between the parties in relation to the winding up petition that would have to await determination of the appeal before those proceedings can advance.
- [38] As to the effect that liquidation would have on the Appeal, ICM contended that an appeal liquidator would be unlikely to conclude that the appeal ought to be continued at all costs and would be more inclined to regard ASOR's shareholding status in Phoenix BVI as academic. A further consideration is that such a person would have no funds or other assets with which to carry on the Appeal and would be more inclined than not to discontinue those proceedings.

- [39] ICM contended that in view of the extent of harm that would flow to it and AF-KY if liquidators are appointed over ICM the balance of harm strongly favours granting the stay application in circumstances where ASOR has no assets and has never had any assets. It was said that the respondents by contrast, would suffer no irreversible harm if the stay is granted. In the circumstances, a stay would prevent the harm of a winding up order granted by the court. Furthermore, the Appeal will be stifled or rendered nugatory if the stay is refused.

Respondents' Submissions

- [40] Citing **C-Mobile Services v Huawei Technologies Co Ltd. and Novel Blaze Limited (in liquidation) v Chance Talent Management Limited** the respondents, like the applicant, highlighted the well-established principles governing the grant of a stay. It was submitted further that the applicant cannot be said to have strong grounds of appeal it having failed to identify any obvious mistake or error in the Mangatal Judgment.
- [41] The respondents contended that the supposed 'harm' that the applicant claims might befall it in the absence of a stay does not flow from any refusal to grant a stay. They argued that the applicant would have to show some firm legal basis for contending that a stay would prevent the making of a winding up order. This, it has failed to do. Developing that argument further, the respondents reasoned that since ICM has not been able to point to any legal effect which would result from a stay of the Mangatal Judgment or Webster Order a stay would have no legal effect as to the status quo. In that regard, ASOR legally remained a member of Phoenix BVI after the Judgment and Order as it was before those decisions. Accordingly, the stays being sought of the Mangatal Judgment and Webster Order can have no effect in relation to the legal status, except in relation to the costs order against ICM.

- [42] It was submitted further that ICM has proffered no ‘cogent evidence’ that its appeal will be stifled or rendered nugatory unless the stay is granted. Without such evidence, its application is bound to fail.
- [43] To the extent that ICM intended to place reliance implicitly on its lack of assets to ground its application, **Goldsmith v O’Brien**¹⁷ was cited for the proposition that ICM failed to provide full, frank and clear evidence of its means and income to support its contention that it would be unable to pay the Alleged Debt. The respondents argued that there is no sound evidentiary basis from which the Court could make such a finding.
- [44] In response to the applicant’s contention that its appeal would be rendered nugatory by the appointment of liquidators, the respondents countered that this is not the case. They argued that express provision was made in the Prayer in the winding up petition for the appointment of an Appeal Liquidator ‘for the limited purposes of commencing, continuing, defending or abandoning any action or appeal in the British Virgin Islands arising from or in relation to case number BVIHCMAP2024/0019 in the name and on behalf of the Company (and for the Appeal Liquidator to take such action as may be necessary or desirable to obtain recognition for the purposes of doing so)’. I note in passing that this particular provision of the prayer, even if a winding up order is made, is not guaranteed to result in the appeal progressing, as it includes the option of ‘abandoning’ any such appeal.
- [45] The respondents contended further that any delay to the winding up of ICM and the collection of the Alleged Debt will, as described by Mr. Jarvis, create serious material difficulties for the continuing liquidation of Phoenix BVI and for the creditors of Phoenix BVI. Therefore, contrary to the applicant’s assertions, the respondents will suffer severe harm and prejudice from any such stay.

¹⁷ [2015] EWHC 510 (Ch).

Analysis

- [46] Jurisdiction to grant a stay of execution is bestowed on the Court by the conjoint effect of CPR rules 62.24(1) and 26.1(2)(q). The former states that the Court has all the powers and duties of the High Court including the case management powers outlined under Part 26, while the latter expressly empowers the court to stay the whole or part of any proceedings generally or until a specified date or event. By rule 62.19(1)(b) a single judge of the court, (and by necessary implication the Full Court) is authorised to grant a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal. The filing of a notice of appeal does not operate as a stay – CPR 62.23. The court also has an inherent jurisdiction to grant a stay of execution.
- [47] The governing principles relevant to a determination of an application for stay are well-established and were outlined by Blenman JA in **C-Mobile Services Limited v Huawei Technologies Co., Ltd.** As held in **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited**, it is now accepted that in relation to such applications the court conducts a balancing exercise in considering the relevant factors none of which is decisive, attaching in the process a measure of importance to each based on the circumstances of that case.
- [48] The relevant principles as outlined in **C-Mobile Services Limited v Huawei Technologies Co. Ltd.** are five-fold, namely:
- (i) a court must have regard to all the circumstances of the case;
 - (ii) a stay is the exception rather than the general rule;
 - (iii) a party seeking a stay should offer cogent evidence that an appeal will be stifled or rendered nugatory unless a stay is granted;
 - (iv) the court in exercising its discretion applies, what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered; and

- (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).

[49] As regards the fifth principle, this Court has held that consideration of the prospects of appeal is conducted 'in a preliminary way': **Nam Tai Property Inc v IsZo Capital**. I bear these principles firmly in mind in carrying out the balancing exercise.

[50] The factual matrix is not complex. On the one hand the applicant maintains that ASOR is not a shareholder of Phoenix BVI and on the other hand the respondents have obtained a judgment and order affirming that ASOR is a shareholder to whom shares were issued within the meaning of section 49 of the **BCA**. Having appealed the Mangatal Judgment and Webster Order, ICM has applied for a substantive stay of the Judgment and Order on the basis that its appeal will be stifled or rendered nugatory if the stay is refused. Central to the determination of the appeal is the correct interpretation and application of section 49 of the **BCA** in the circumstances of this case. Another relevant factor is the reality of the winding up petition issued by the respondents in the Cayman Islands in the wake of the Mangatal Judgment and Webster Order.

[51] ICM's contention that the Cayman Islands court will make the winding up order which in turn would bring an end to the Appeal is convincing although the respondents deny that this would be a natural and inevitable consequence of the winding up order. It is noted that ICM has indicated that it intends to strenuously resist the winding up petition and is hopeful that a stay would be a relevant factor for the Cayman court to bear in mind when determining the winding up petition.

[52] It seems to me that while it is possible that the court in the Cayman Islands may grant the winding up petition especially in view of the Mangatal Judgment, the

Webster Order and principally the Doyle J Determination, the grant of a substantive stay by this Court is not likely to be a determinative factor either way in that court's exercise of its discretion when determining the winding up petition. More fundamentally, refusal of the stay to my mind, would have little effect on the Cayman Islands court's evaluation of a critical factor in arriving at its decision (i.e. whether ASOR's legal status is that of shareholder (or not) of Phoenix BVI for purposes of the hearings in the Cayman Islands, and/or whether it is just and equitable to wind up ICM due to its inability to pay its debts. I am of this view simply because the pronouncement in the Mangatal Judgment has no binding force to the Cayman court. At most, it is merely a persuasive ruling and would in the ordinary scheme of things be expected to attract only an acknowledgment of the ruling as a matter of judicial comity but not necessarily or automatically an endorsement that would halt its own proceedings or determination.

[53] Moreover, ICM's stated objective of seeking a stay of the Mangatal Judgment and Webster Order for the purpose of persuading the Cayman Islands court that the stay is a significant factor in its determination of the winding up petition strikes me as an attempt to have this Court's decision on the stay application operate as a coercive measure in extra-territorial proceedings. Apart from the unflattering optics, I am not persuaded that the Court's process should be deployed in this way particularly where the stay application seems in part to be predicated merely on observations made by Doyle J¹⁸ that no stay had been obtained in the BVI proceedings and not on any decisive factor that influenced him in making that determination.

[54] The Doyle J Determination lends force to the foregoing assessment, in particular, the learned judge's pronouncement that 'it is a serious step to restrain a legal entity from exercising a statutory right and applying for a statutory remedy. The court's jurisdiction to grant an injunction restraining the presentation of a winding up petition should be exercised with great circumspection and only in clear cases.'

¹⁸ At paragraph 32 of the Doyle Determination.

I am careful not to characterize the sought after stay as an injunction and note only that it appears that ICM has evinced an intention to deploy it for a like purpose. Significantly, in the several reasons ascribed for dismissing the summons, Doyle J did not include that fact of the absence of a stay of the Mangatal Judgment and Webster Order. The suggestion by ICM that it was a relevant consideration is not borne out by that judgment. I conclude that it did not. I turn next to consider the merits of the appeal.

Merits of Appeal

[55] In evaluating the prospects of the appeal, it is noted that by the applicant's own admission, the appeal at its highest raises legal questions as to the interpretation and application of section 49 of the **BCA**. The section provides:

‘The issue by a company of a share that-

(a) increases a liability of a person to the company; or

(b) imposes a new liability on a person to the company,

is void if that person, or an authorised agent of that person, does not agree in writing to becoming the holder of the share.’ (Emphasis added)

[56] There does not appear to be any challenge by the applicant to the applicable rules of statutory interpretation identified and applied by the judge in construing the provision, namely that the provision ought to be given its ordinary, natural and grammatical meaning. As I understand it, a prime focus and a common thread in the first five grounds of appeal (of which 3 – 5 are said to be the strongest) is that the judge erred by holding that the section does not require the existence of a written agreement between the company and the shareholder in relation to the number of shares agreed to be acquired and the price of the shares.

[57] In arriving at her decision, the learned judge considered among other factors, all the evidence including ASOR's representative Mr. Abdul-Nassih's testimony about events contemporaneous with and central to the circumstances in which the shares were held to have been acquired. Her determination regarding the acquisition of the shares was influenced significantly by the testimony of the witnesses. It is noteworthy that she found Mr. Abdul-Massih's account to inconsistent, incredible and convoluted. She was clearly not impressed by him and preferred the account of other witnesses. It follows that for an appeal against those findings of fact to be successful, the appellant would need to persuade the appellate court that it is an exceptional case that justifies relaxation of the restraint that characterises the court's settled approach to appeals against findings of fact.

[58] The judge was satisfied by her interpretation of section 49 of the **BCA** and the evidence that agreement was reached in regard to the price of and the number of shares. Although she was considering a provision in respect of which no earlier authorities on the point were located by the parties, she considered all legal arguments advanced by the parties and gave a balanced, reasoned and logical assessment of the several authorities cited. It was open to the learned judge to conclude on the construction of section 49 as she did based on the learning on which she relied and to find as she did on the totality of the evidence that section 49 does not require that parties agree in writing the number or consideration for shares being purchased. In my opinion, the applicant has therefore not demonstrated that its strongest grounds of appeal appear to have a realistic chance of success.

Appeal stifled or rendered nugatory

[59] Additionally, as noted earlier, it seems to me that even if a winding up order is made, the liquidator(s) appointed to wind up the company would have several options available to them including pursuing the appeal if it is considered meritorious and beneficial to those concerned. A number of considerations would inform that decision. ICM's concerns that a winding up order has the potential to

adversely impact its reputation and future prospects as well as those of AK-FY and result in irreparable harm to them falls short of showing that any of those fears would actually be realised. ICM has simply not supplied cogent evidence that the appeal would be stifled or rendered nugatory in such an eventuality.

Balance of harm

[60] In my opinion, the investors and shareholders of Phoenix BVI, represented by the respondents are likely to experience greater harm and prejudice if a stay is granted than the applicant would suffer if a stay is refused. In this regard, the record reveals that they have awaited the completion of the winding up process over several years and have an interest in an expeditious resolution of all related proceedings. It is accepted that the consequences of a winding up order would mean the death of ICM and its inability to conduct the appeal or carry on the business activities of ASOR and AF-KY. It is also recognized that if the petition succeeds, ICM's appeal may be pursued by liquidators appointed to wind it up, in tandem with their other obligations to ICM's creditors, shareholders and to the extent permissible, its clientele, thereby minimizing potential prejudice to all concerned. I am satisfied that the balance of harm favours refusing the stay.

Conclusion

[61] Being mindful that a stay is the exception and not the general rule and having regard to the circumstances in this case I am not persuaded that ICM has met the threshold for grant of a stay of the Mangatal Judgment and the Webster Order. The applicant has not supplied cogent evidence that its appeal will be stifled or rendered nugatory if the stay is not granted; has not demonstrated that the balance of harm favours a stay or that it has a realistic prospect of success on appeal. I would for these reasons refuse the stay.

[62] For completeness, it is noted that impecuniosity is not relied on as a basis for the stay. In any event, the respondents are correct in their contention that ICM has not

supplied any cogent evidence of its means to satisfy the Alleged Debt. It suffices to say that the lack of probative evidentiary support of lack of means would irremediably undermine the application if made on that basis.

Costs

[63] The Respondents have prevailed in this encounter. They are entitled to their costs to be assessed pursuant to CPR Part 70.

Disposition

[64] For foregoing the reasons, I would order:

- (1) The application for a stay of execution of the Mangatal Judgment dated 30th May 2024 and amended on 11th June 2024 and the Webster Order dated 30th May 2024 is refused.
- (2) The respondents shall have their costs to be assessed, if not agreed within 21 days of the date of this order; i.e. on or before 23rd March 2026.

Miscellaneous

[65] Regrettably, completion and delivery of this judgment has been protracted over an extended period. The parties are entitled to an explanation for the delay. Unfortunately, in the initial weeks and months following the hearing of the application the usual protocols regarding assignment were missed. Thereafter, a combination of factors including competing priorities and medical issues experienced by the author militated against the expeditious determination of the application. The Court sincerely apologizes for the inconvenience caused to the parties.

I concur.

Vicki Ann Ellis
Justice of Appeal

I concur.
Reginald T. A. Armour
Justice of Appeal (Ag.)

By The Court

Chief Registrar