

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

ST. CHRISTOPHER AND NEVIS

SKBHCVAP2024/0002

BETWEEN:

[1] **HERITAGE PLANTATION CONDOMINIUMS LTD.**
[2] **HERITAGE PLANTATION INC.**
[3] **MERVIN GRANT**

Appellants/Respondents

and

DOCHE AND DOCHE INC.

Respondent/Applicant

Before:

The Hon. Mr. Mario Michel

Chief Justice [Ag.]

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

Appearances:

Dr. Henry Browne, KC for the Appellants/Respondents

Mr. Anthony Astaphan, SC and Mr. Sylvester Anthony, and Ms. Renal Edwards for the
Respondent/Applicant

2024: June 17;

2025: July 23

Re-issued: August 20

Interlocutory application – Application to discharge order of single judge of the Court of Appeal granting a stay of execution pending appeal – Rule 62.20(1) of the Civil Procedure Rules, 2023 (“CPR”) – Notice of hearing – CPR 62.18(4) - Whether the failure by the appellants to give the respondent 7 days’ notice of the hearing was procedurally unfair – Factors to be considered in granting or refusing a stay of execution – Whether the appeal would be stifled or rendered nugatory – Balance of harm - Likelihood of appeal succeeding – Whether the principles of res judicata or issue estoppel apply – Ownership of shares in the first appellant company already determined in previous decisions of the court

In an amended fixed date claim form filed on 12th May 2021 (“the Claim”), the respondent/applicant contended that it has an existing legal right to be issued and allotted 90% of the shareholding in the first appellant while the second appellant has an existing

legal right to be issued and allotted 10% of the shareholding in the first appellant pursuant to a Shareholders' Agreement dated 20th November 2014 between respondent/applicant and the second appellant. Consequent to this, the respondent/applicant sought an order of the court compelling the second appellant, as the registered shareholder of the one common share in the first appellant, to rectify the first appellant's register to reflect the respective shareholdings of the respondent/applicant and second appellant. When the matter came on for hearing, the respondent/applicant made an oral request to treat the first hearing as the trial of the Claim pursuant to rule 27.2(4) of the Civil Procedure Rules, 2023 ("CPR") on the ground that the issue of its entitlement to 90% of the shareholding in Heritage Plantations Condominiums Ltd. ("HPC") had been settled. The respondent/applicant contended that the only issue left for judicial determination was whether the court should order the rectification of the first appellant's register of members which is essentially a summary remedy. In a written judgment delivered on 21st November 2023 the learned judge determined that the claim ought to be dealt with summarily and ordered the parties to file affidavit evidence.

By an order dated 11th December 2023, Gill J ordered (at paragraph 1 of the order) that the respondent/applicant has an existing legal right to be issued and allotted 90% shareholding in HPC and to be registered as a member of HPC with retrospective effect from 20th November 2014 while Heritage Plantation Inc. ("HPI") has an existing legal right to be issued and allotted 10% of the shareholding in HPC and has a right to be registered as a member of HPC with retrospective effect from 20th November 2014. The learned judge also made orders for the holding of a general meeting of HPC to pass certain resolutions and for the said resolution to be delivered to the Registrar of Companies within 14 days of the date of the order. Costs were also awarded to the respondent/applicant against the 2nd and 3rd appellants.

Being dissatisfied with the learned judge's order, the appellants filed a notice of appeal on 15th January 2024, against the entire order of Gill J, in particular paragraph 1 thereof. On 17th January 2024, the appellants filed an application for stay of execution of the order of Gill J until the final determination of the appeal. The application was heard on paper on 23rd April 2024 and a single judge of the Court of Appeal granted the application for a stay of execution of the judgment of Gill J pending the hearing and determination of the appeal.

Thereafter the respondent/applicant filed the current application before the Full Court seeking an order that the decision of the single judge granting a stay of execution of the judgment of Gill J be discharged or in the alternative revoked. The respondent/applicant contends that the decision of the single judge ought to be discharged on the ground that the respondent/applicant was not given proper notice pursuant to CPR 62.18(4), or in the alternative, set aside or revoked on the ground that the appellants' appeal does not have any realistic prospect of success because: i) the issues sought to be appealed by the appellants have been litigated and determined by the courts including the Court of Appeal on a number of occasions over the years, and on each occasion the appellants lost; and/ or; ii) the issues are now res judicata.

Held: granting the application to revoke, vary or discharge the order of the single made on 23rd April 2024; setting aside the said order granting a stay of execution of the judgment of Gill J dated 11th December 2023 pending the hearing and determination of the appeal;

dismissing the application for a stay of execution; and ordering costs to the respondent/applicant to be assessed if not agreed within 21 days of the date of this judgment, that:

1. Where the Full Court is asked to review and reconsider a decision taken by the single judge of appeal, the Court applies the principles articulated in **Dufour and Others v Helenair Corporation Limited and others** as to the basis upon which an appellate court would interfere with the exercise of a judicial discretion by a trial judge. The jurisdiction of the Full Court to review an order made by a single judge is captured by rule 27 of the **Eastern Caribbean Supreme Court, Court of Appeal Rules** and rule 62.20(1) of the **Civil Procedure Rules 2023**.

Rule 62.19 and 62.20(1) of the **Civil Procedure Rules, 2023** applied; Rule 27 of the **Eastern Caribbean Supreme Court, Court of Appeal Rules** applied; **Danone Asia PTE Limited et al v Golden Dynasty Enterprise Limited et al** BVIHCVAP2009/0002 (delivered 28th September 2009, unreported) followed; **Dufour and Others v Helenair Corporation Limited and others** (1996) 52 WIR 188 followed.

2. CPR 62.18(4) provides that the court office must give the parties to the appeal at least 7 days' notice of any hearing, unless the court otherwise directs. The requirement for notice is a fundamental element of due process, guaranteeing that parties are not unfairly disadvantaged by sudden or unexpected court proceedings. It ensures that all parties are aware of the hearing and have sufficient time to prepare their arguments, evidence, and legal strategy and otherwise affords a reasonable opportunity to prepare for the hearing. The case at bar does not present a situation where a judgment/decision would have been granted without any notice to the litigant and in breach of the rules of natural justice. While the notice of hearing was served (by hand delivery) on 20th April 2024 for a hearing (on papers) on 23rd April 2024, the Court's Office would have issued a notice of hearing dated 18th March 2024 to both sides indicating that the application would come up for consideration on paper before a single judge of the Court on Tuesday, the 23rd day of April 2024 at 10 o'clock in the forenoon. This notice would have been uploaded in the E-Litigation Portal (to which the respondent/applicant would have due access) on 19th March 2024. The respondent/applicant would therefore have had a more than adequate opportunity to advance representations in opposition to the stay application. The affidavit of service which was before the single judge reflected that the application for the stay of execution as well as the notice of appeal were served on the respondent/applicant on 19th January 2024 along with the authorisation code. Thereafter skeleton submissions in support of the stay application would have been filed and served by the appellants via the Electronic Litigation Portal ("E-Litigation Portal") on 1st March 2024. The respondent/applicant did not file any notice of opposition or evidence in response to the application. The respondent/applicant therefore cannot now complain of a want of due process. Moreover, the respondent/applicant has not attempted to advance any plausible account to explain why it would not have been possible to advance submissions

in opposition even in the abridged timeframe, or alternatively, why there was no attempt to communicate any concerns about the lack of fairness occasioned by the short notice, to request an adjournment of the hearing. The respondent's/applicant's procedural challenge lacks merit and would not warrant the discharge or revocation of the single judge's order.

Rules 62.18(4) of the **Civil Procedure Rules, 2023** applied; Rule 15(1) of the **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019** applied.

3. A 'stay of execution' order temporarily halts the enforcement of a judgment, allowing the party appealing the judgment to challenge the decision without immediate consequences. A single judge's decision to grant a stay is discretionary. In exercising the discretion to grant a stay, ultimately, the court aims to make an order which best accords with the interest of justice. The principles which accord with that determination are well documented in the seminal decision of **C-Mobile Services Limited v Huawei Technologies Co. Limited** which include the consideration of various factors such as the likelihood of the appeal succeeding. 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 would generally 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. The Court must however bear in mind that an application for a stay of execution is an interlocutory application and the Court in hearing that application is therefore not expected to come to a determination of the merits of the appeal or conduct a full hearing of the appeal.

Marguerite Desir et al v Sabina James Alcide SLUHCVP2011/030 (delivered 14th December 2011, unreported) followed; **C-Mobile Services Limited v Huawei Technologies Co. Limited** BVIHCP2014/0017 (delivered 2nd October 2014, unreported) followed; **Nam Tai Property Inc et al v West Ridge Investment Company Limited** BVIHCP2021/0010 (delivered 8th November 2021, unreported) followed.

4. At the heart of the appeal are the findings made by Gill J in her order dated 11th December 2023, particularly paragraph 1 of the order which concerns the allocation of shares to the respondent/applicant and HPI in HPC and both their entitlement to be registered as members of HPC. This issue was canvassed and determined in previous determinations, namely the orders of Ventose J in a High Court judgment dated 27th January 2020 and the Court of Appeal's decision authored by Webster JA [Ag.] dated 29th April 2021. In both decisions, the courts have found that the respondent/applicant is entitled to and is the unregistered shareholder of 90% shareholding in HPC and that HPI is entitled to 10% shareholding in HPC. The findings of the Court of Appeal's 2021 judgment were correctly and definitively interpreted by Ward J in a judgment

dated 11th April 2022, no appeal having been successfully launched against the latter judgment. The reality is that the issue of the ownership of the shares in HPC is a settled matter which has not been successfully appealed. Although the appellants seek to frame the issue on the appeal as one concerning the payment of shares, this was also addressed by Webster JA [Ag.] in his judgment where he observed that the respondent's/applicant's entitlement to its shares came about as a result of its financial contribution to and participation in the joint venture project and its ownership is reflected in the 2014 Shareholder's Agreement. The principles of *res judicata* therefore apply. Given the state of affairs, the appellants' appeal does not have a strong likelihood of success. These previous decisions informed the order of Gill J and yet they were largely untrammelled before the single judge. This is a critical factor which a court considering the stay of execution would have been compelled to take into account. This finding would have had to have been weighed by the single judge along with the other principles in the **C-Mobile** test in deciding whether to grant a stay pending the hearing and determination of the appeal. The order of the single judge does not disclose that this would in fact have been weighed and on that basis warrants interference by the Full Court.

Henderson v Henderson (1843) 67 ER 313 considered; **Arnold v National Westminster Bank plc** [1991] 2 AC 93 applied.

5. 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. There must be cogent, full, and frank evidence in support of an application for a stay. The onus is on the applicant to make its position clear, and it should not leave the Court speculating or trying to fill the gaps. The appellants relied on affidavit evidence filed in support of the stay application. Having reviewed the affidavit, it is immediately apparent that rather than raising any irremediable consequences of the rectification order, the consistent concern appears to be the purported failure of the audited financial accounts of HPC to make clear all of the financial contributions of the respondent/applicant. The appellants are principally concerned about payment or proof of payment. This averment does not provide any basis upon which one can conclude that the appeal would be rendered nugatory if a stay is not ordered. Even if the appellants are successful in their appeal, the remit of this Court's powers would negate the possibility of a nugatory appeal.
6. Another of the factors the court ought to consider is whether there is a risk of harm to one or other or both parties if the court grants or refuses a stay. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is the least likely to cause injustice. No evidence was filed by the parties on this factor. However, there can be no doubt that the respondent/applicant would be deprived of its judgments (having had the benefit of two judicial rulings pronouncing ownership of the shares) if a stay is granted and the appeal fails and deprived of its ownership and right to participate in the affairs of HPC. These factors reinforce

the position that the order of the single judge ought to be set aside.

JUDGMENT

Introduction

- [1] **ELLIS JA:** Before the Court is an application by the respondent/applicant to discharge or in the alternative revoke the decision of a single judge dated 23rd April 2024 in which she granted the application filed by the appellants for stay of execution of the judgment of Gill J pending the hearing and determination of the appeal.

Background

- [2] By application filed on 17th January 2024, the appellants, Heritage Plantation Condominiums Ltd. (“HPC”), Heritage Plantation Inc. (“HPI”) and Mervin Grant (“Mr. Grant”) applied for a stay of the order of Gill J. dated 11th December 2023. The application was heard on paper on 23rd April 2024. A single judge of the Court of Appeal considered and granted the application for a stay of execution of the judgment of Gill J pending the hearing and determination of the appeal. The salient terms of the said order are as follows:

“UPON READING the notice of application for a stay of execution (“the stay application”) of the order of Gill J dated 11th December 2023, with the affidavit in support, filed on 17th January 2024;

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UPON READING the skeleton arguments of the applicant filed on 1st March 2024;

UPON NOTING that the respondent has not filed any skeleton arguments or other document opposing the grant of a stay of execution;

UPON CONSIDERING the principles governing the grant of a stay of execution elucidated in **C-Mobile Services Ltd. v Huawei Technologies Co. Ltd. BVIHCMAP2014/0017** (delivered 2nd October 2014, unreported), that – (i) the Court should take into account all the circumstances of the case; (ii) a stay is the exception rather than the general rule; (iii) the party

seeking a stay must 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; and (v) the prospect of the appeal succeeding, but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown.

UPON THE COURT BEING OF THE VIEW that having regard to the nature of the order of Gill J, there is a real possibility of the applicant's appeal being stifled, if the stay of execution is not granted;

AND UPON THE COURT BEING OF THE VIEW that having regard to all the circumstances, particularly the possibility of the appeal being stifled and the likely prejudice which may be caused, the applicant has met the threshold for the grant of a stay of execution;

IT IS HEREBY ORDERED THAT:

The application for a stay of execution of the judgment of Gill J pending the hearing and determination of the appeal is granted."

- [3] The respondent/applicant now applies to the Full Court pursuant to the **Civil Procedure Rules (Revised Edition) 2023 ("CPR")** 62.20(1) and (4) and/or the Court's inherent jurisdiction for an order that the decision of the single judge, be discharged on the ground that the respondent/applicant was not given proper notice, or in the alternative, set aside or revoked on the ground that the appellants' appeal does not have any realistic prospect of success for the following reasons:

- i. The issues sought to be appealed by the appellants have been litigated and determined by the courts including the Court of Appeal on a number of occasions over the years, and on each occasion the appellants lost; and/ or
- ii. The issues are now res judicata.

Background and judgment in the court below

- [4] By an amended fixed date claim form filed on 12th May 2021 ("the Claim"), the respondent/applicant sought an order that it has an existing legal right to be issued and allotted 90% of the shareholding in the first appellant while the second appellant

has an existing legal right to be issued and allotted 10% of the shareholding in the first appellant pursuant to a Shareholders' Agreement dated 20th November 2014 between respondent/applicant and the second appellant. Consequent on this, the respondent/applicant sought an order that the second appellant, as the registered shareholder of the one common share in the first appellant, shall rectify the first appellant's register to reflect the respective shareholdings of the respondent/applicant and second appellant. The third appellant, Mr. Mervin Grant is the managing director of first appellant and the sole shareholder and managing director of second appellant.

- [5] The claim was brought pursuant to sections 25, 42(1) and (2) and 47 of the **Companies Act** ("the **Act**").¹ Section 47 of the **Act** gives the court the power to order the rectification of a company's register. In the alternative, the respondent/applicant relied on the court's equitable jurisdiction pursuant to section 23 of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act** (the "**Supreme Court Act**").²
- [6] Following several interim applications, the first hearing of the Claim was scheduled for 24th July 2023. When the matter came on for hearing, the respondent/applicant made an oral request to treat the first hearing as the trial of the Claim pursuant to **CPR 27.2(4)** on the ground that the issue of its entitlement to 90% of the shareholding in HPC has been settled. The respondent/applicant contended that the only issue left for judicial determination was the procedural or summary requirement of the rectification of the first appellant's register of members.
- [7] In support of its claim and its application, the respondent/applicant relied on the findings in previous judgments in the High Court and the Court of Appeal. After considering the parties' written and oral submissions as well as the law, Gill J in a written judgment delivered on 21st November 2023 determined that the matter ought

¹ Cap 21.03 of the Laws of Saint Christopher and Nevis.

² Cap 3.11 of the Laws of Saint Christopher and Nevis.

to be dealt with summarily and ordered the parties to file affidavit evidence on the state of HPC's register in order to satisfy the court that the procedural and summary remedy of rectification that is sought by the respondent/applicant was required.

[8] In an order dated 11th December 2023, Gill J ordered that:

- (1.) "Doche & Doche Inc. has an existing legal right to be issued and allotted 90% shareholding in Heritage Plantation Condominiums Ltd. and to be registered as a member of Heritage Plantation Condominiums Ltd. accordingly and with retrospective effect from November 20, 2014 while Heritage Plantation Inc. has an existing legal right to be issued and allotted 10% of the shareholding in Heritage Plantation Condominiums Ltd. and to be registered as a Member of Heritage Plantation Condominiums Ltd. accordingly with retrospective effect from November 20, 2014.
- (2.) Heritage Plantation Inc., as the registered shareholder of Heritage Plantation Condominiums Ltd's one common share, shall within seven (7) days of this order, hold a general meeting of Heritage Plantation Condominiums Ltd. or otherwise pass the following resolutions:
 - (a) That 90 common shares of US\$1.00 each, fully paid, be issued and allotted to Doche & Doche Inc. with retrospective effect from the November, 20 2014;
 - (b) That 9 common shares of US\$1.00 each, fully paid, be issued and allotted to Heritage Plantation Inc. with retrospective effect from the November, 20 2014;
- (3.) Heritage Plantation Condominiums Ltd. shall cause the relevant acts required by the Orders of the Court above to be delivered to the Registrar of Companies within fourteen (14) days of this order;
- (4.) Prescribed costs pursuant to CPR 65.5(2)(d) to the Claimant against the Second and Third Defendants in the sum of \$10,000.00."

The Appeal

[9] Being dissatisfied with the learned judge's order, the appellants filed a notice of appeal on 15th January 2024, against the entire order of Gill J, in particular paragraph 1 thereof. For ease of reference, I have listed the grounds of appeal advanced below:

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- i. There was no or no proper trial before the impugned Order was made. The summary trial hearing, so-called was not a hearing in law within our adversarial system of justice.
- ii. The Appellants/Defendants were denied due process of the law.
- iii. The Learned Judge erred in law in holding that the Respondent/Claimant Doche & Doche Inc. "has an existing legal right to be issued and allotted 90% shareholding in Heritage Plantation Condominiums Ltd. and to be registered as a Member of Heritage Plantation Condominiums Ltd. accordingly and with retrospective effect from November 20, 2014..." without any evidential basis.
- iv. The Learned Judge misinterpreted the effect of the Orders of Ventose J in his Judgement dated 27th January 2020 in the underlying consolidated claims SKBHCV2017/0343, Mervin Grant and Heritage Plantation Inc. v Heritage Plantation Condominiums Ltd. et al and SKBHCV2018/0186 Heritage Plantation Inc. v Doche & Doche Inc. and of the Orders of the Court of Appeal in its Judgement of 29th April 2021 in appeal number SKBHCVAP2020/0006.
- v. The Learned Judge in effect made an order for Specific Performance without a Trial on the merits of whether the Respondent/Claimant was entitled to such relief.

- vi. The Learned Judge erred in Law in proceeding to make the impugned Orders despite her failure to give any or any adequate reasons for the said Orders (dated 11th December 2023.)
- vii. The Learned Judge erred in law in failing to appreciate that the parties and indeed this Honourable Court are entitled to know the processes she mentally deployed in arriving at the “Order” she made.
- viii. The Learned Judge erred in law in failing to appreciate that failure to give adequate reasons for the making of the impugned Order robs this Honourable Court (this appellate Court) the (sic) opportunity to make its own findings of fact if appropriate and/or arrive at conclusions of law based on those findings.
- ix. The Learned Judge was under a duty to give reasons for her Order of 11th December 2023 and did not do so. And without such reasons the impugned Order is not transparent, and thus the Appellants do not know whether the Learned Judge had adequate or inadequate reasons for the Order she ultimately made.
- x. The Learned Trial Judge erred in making findings without evidential support resulting in a grave injustice to the Appellants.
– See paragraphs 6 and 9 of the Order in particular.
- xi. The Learned Trial Judge erred in failing to appreciate that the Respondent Doche & Doche Inc. on its own evidence made no Capital Investment in the Joint Venture Project (as was required) under the 2014 Agreement between Appellant HPI and Doche &

Doche Inc. the Respondent....

- xii. The failure by the Respondent/Claimant Doche & Doche Inc. to deliver the Audited Financial Accounts as directed by the Court of Appeal at paragraph [70] of its Judgment of 29th April 2021 constitutes an/or (sic) a collateral estoppel within the comprehension on Section 36 of the Supreme Court Act Cap 3.11 with the consequence that Doche & Doche Inc. is barred from asserting a claim or right to the 90% shareholding in HPC.
 - a) Up to the date and time of the Order of 11th December 2023 an outstanding application for Specific Disclosure (for Audited Financial Accounts of HPC) filed on 8th December 2023 was not disposed of:-
 - b) On said 11th December 2023 it was drawn to the Court's attention that an application dated 8th December 2023 for Leave to file an Appeal against the Court's Decision dated 21st November 2023 in this matter had been filed, but to not avail. ”

[10] On 17th January 2024, pursuant to section 33(1)(b) of the **Supreme Court Act** and or rule 62.3 of the **CPR** and/or the Court's inherent jurisdiction the appellants filed an application for stay of execution of the order of Gill J until final determination of the appeal.

[11] The appellants asserted that the primary purpose of the stay application was to preserve the status quo between the parties and in particular for the respondent/applicant to produce the audited financial accounts of Heritage Plantation Condominiums Ltd. as directed by the Court of Appeal. Further it was necessary to ensure that the 90% shareholding is not transferred to the respondent/applicant without a fair valuation of the 90% shareholding and payment therefor. The appellants also averred that the stay was necessary to avoid irreparable harm to the appellants and that if a stay was not granted a successful

appeal may be rendered nugatory.

- [12] The appellants further stated that unless the status quo was maintained there was a real risk of dissipation of the funds in the bank accounts of HPC which are in excess of US\$10 million dollars and of which account Victor Doche and Rafik Doche, owners of the respondent/applicant Doche & Doche Inc. are the only signatories jointly and severally and who continue to work these accounts. They also contended that if a stay was not granted, even the 10% shareholding which the respondent/applicant Doche & Doche Inc. insists that the appellant HPI is entitled to, risks diminution by Doche & Doche Inc. and that the appeal has good prospects of success.

The parties' submissions

The respondent's/applicant's submissions

- [13] The respondent/applicant contends that **CPR** 62.18(4) provides that the court office must give the parties at least 7 days' notice of any hearing of interlocutory applications to the Court, unless the court otherwise directs. The respondent/applicant contends that it was not given the required 7 days' notice of the hearing and relied on the evidence of Rafik Doche who averred that the notice of hearing was served on 20th April 2024 for the hearing on 23rd April 2024.
- [14] Counsel submitted that there is no automatic right to a stay of proceedings pending appeal as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, only in exceptional circumstances should a stay be granted. Counsel pointed the Court to the five relevant principles that a court should apply when deciding whether to exercise its discretion to stay proceedings pending appeal including: (i) the court should take into account all the circumstances of the case; (ii) a stay is the exception rather than the general rule; (iii) the party seeking a stay must 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 and; (v) the court should also take into account the prospect of the appeal succeeding, but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which would usually enable a stay to be granted).

[15] Counsel noted that the important critical factor to be taken into account and considered by a judge in considering whether an application for a stay of execution ought to be granted or refused is whether there exist good or strong prospects of the appeal succeeding. The respondent/applicant argued that it does not appear that this factor was properly considered by the single judge.

[16] Counsel further argued that the appellants may not have disclosed all of the facts and previous judgments on the very issues which are again being raised by the appellants in the appeal at bar. The respondent/applicant also contended that it was the appellants' duty to adduce evidence in a full, frank and clear way to satisfy the Court that a stay should be granted. In addition, the burden placed on the appellants required them to fully disclose the history of the litigation and the many decisions against them on the very issues now being appealed. The respondent/applicant further argued that had the history been disclosed, a stay would not have been granted by the single judge.

[17] It is apparent that the parties in this application have a storied history. Counsel for the respondent/applicant asserted and submitted that the purported issues in this appeal have been litigated for several years and that they have lost on the same issues in a number of decisions of the High Court and Court of Appeal. The respondent/applicant provided a comprehensive summary of the various decisions in the submissions filed in support of the application. The relevant portions are summarised in the following paragraphs:

- i. The dispute between the parties was first decided by Ventose J. (as he then was) in his decision dated 27th January 2020 in SKBHCV2018/0186

Heritage Plantation Inc. v. Heritage Plantation Condominiums Ltd. and Doche & Doche Inc. In that judgment, Ventose J. held that the parties intended as evidenced in their 2014 Agreement that the shareholding in HPC should be 90% to the respondent and 10% to Heritage Plantation Inc. Ventose J. further found that the respondent had carried out its obligations under the respective Shareholders' Agreements which entitled it to 90% shares in HPC. Ventose J. concluded that the shares were not validly issued and ordered HPI as the shareholder of record to issue the shares in accordance with the 2014 Agreement.

- ii. The appellants appealed Ventose J's decision in SKBHCVAP2020/0006 **[1] Mervin Grant and [2] Heritage Plantation Inc. v. [1] Heritage Plantation Condominiums Limited and [2] Doche and Doche Inc.** The Court of Appeal in its judgment dated 29th April 2021 dismissed the appeal and made findings which are critical to the outcome of this appeal.
- iii. A further claim in the court was commenced in which the respondent/applicant sought an order that it had an existing legal right to be issued and allotted 90% of the shareholding in HPC while HPI had an existing legal right to be issued and allotted 10% of the shareholding in HPC pursuant to a Shareholders' Agreement dated 20th November 2014 between the respondent/applicant and HPI. Consequent on this, the respondent/applicant asked the Court to order HPI, as the registered shareholder of the one common share in HPC, to rectify HPC's register to reflect the respective shareholdings of the respondent/applicant and HPI.
- iv. The respondent/applicant submitted that the appellants filed an application to strike out the claim on the basis of res judicata which was heard by Ward J. (as he then was). The appellants specifically argued that despite Ventose J granting a declaration that the respondent/applicant owns or is entitled to 90% of the shareholding in HPC and agreed that the respondent/applicant

should be registered as 90% owners of the shares, the Court of Appeal's order dated 29th April 2021 had set aside that order by Ventose J. They submitted that the matter of the allocation of shareholding in HPC could not be re-litigated as it was finally decided by this Court in the order dated 29th April 2021, making the amended claim for rectification an abuse of process. Ward J. dismissed the application in his judgment dated 11th April 2022³ and found that the issue of the respondent's/applicant's entitlement to 90% of the shares was determined in its favour by the High Court and the Court of Appeal which have found that it is the unregistered shareholder of 90% of the shares in HPC.

- v. The appellants attempted to appeal Ward J.'s decision in SKBHCVAP2022/0006 [1] **Heritage Plantation Condominiums Ltd.**, [2] **Heritage Plantation Inc** and [3] **Mervin Grant v. Doche and Doche Inc.** The Court of Appeal in its judgment dated 25th November 2022 struck out the notice of appeal (filed out of time) but determined that Ward J. accurately found that Ventose J. and Webster JA [Ag.] had decided that the respondent/applicant as a matter of law was entitled to 90% of HPC's shares and that rectification was necessary to reflect this shareholding.
- vi. The respondent/applicant contended that based on the abovementioned findings of the High Court and the Court of Appeal, the only issue left for judicial determination was the procedural or summary requirement of the rectification of HPC's register of members.
- vii. The appellants then applied for an unless order. This application was heard and dismissed by Gill J. who held in her judgment dated 15th June 2023 that she was satisfied that the issue of HPC's shareholding had been determined in previous judgments of the High Court and Court of Appeal.

³ See judgment in SKBHCV2021/0088 (delivered 11th April 2022, unreported).

[18] The respondent/applicant contends that the inevitable effect and consequence of the decisions of the respective courts, is that the respondent/applicant is legally and beneficially entitled to 90% of the shares in HPC, and to rectification. The learned trial judge was therefore entitled to try this matter summarily and make the orders she did on 11th December 2023. On this basis, the respondent/applicant submitted that there is no real prospect of the appeal succeeding and therefore the stay of execution ought not to have been granted by the single judge.

The appellants' submissions

[19] The appellants in reply submit that the application to the Full Court by the respondent/applicant is totally misconceived. They assert that the single judge in the proper exercise of her discretion granted the stay application. Further, to fault the exercise of her discretion the respondent/applicant must show that the learned single judge made a grave error of law; and this has not been shown. In addition, the appellants submitted that in order to succeed, the respondent/applicant must show that: (i) the single judge had no jurisdiction over the matter; and/or (ii) abused her discretionary power; and/or (iii) exercised it arbitrarily; and/or (iv) took into account irrelevant matters; and/or (v) failed to take into account relevant matters.

[20] Counsel further argued that the learned single judge undeniably possessed the legal authority to issue the order; that the single judge exercised sound judgment and discretion in reaching an informed decision given the circumstances; and that the terms of the order clearly demonstrate that she applied judicial prudence when exercising her discretionary power and therefore exercised her discretionary power judiciously, within the ambit of the law.

[21] Further, the respondent/applicant has identified no error of law made by the single judge which is the basis upon which this Court should set aside the impugned order. The appellants assert that this Court should restrain itself in intervening in this order involving the exercise of a discretionary power. They contended that the order to grant the stay was just and equitable, after the appropriate assessment of the

circumstances.

- [22] Consequently, it was submitted that without the existence of an error in law on the part of the single judge, there is no justification in interfering with her order. Counsel argued that this Court should consider whether the order of the single judge was unreasonable or plainly unjust, and if so, how? They assert that in the absence of the identification of a specific error, the order cannot be regarded as unreasonable or clearly unjust.
- [23] The appellants were of the view that the single judge gave adequate consideration to the essential question- that is "whether there is a risk of injustice to any or both of the parties if it granted or refused the stay?" In particular, she would have considered whether if a stay is refused what are the risks of the appeal being stifled? Conversely, if a stay is granted and the appeal fails, what are the risks that the respondent/applicant will be unable to enforce the order of Gill J? On the other hand, if a stay is refused and the appeal succeeds but the order of Gill J was enforced in the meantime (for example alienating the 90% shares to a bona fide purchaser for value without notice) what are the risks of the respondent/applicant being able to recover the value of its 90% share?
- [24] The appellants argued that there was no significant or any risk to the respondent/applicant if the stay remained in place. On the contrary, to remove the stay would be to give respondent/applicant the green light to take ownership and dispose of shares without paying 'one cent' for them. With the stay in place this may encourage the respondent/applicant to produce the audited financial accounts of HPC to HPI which said accounts would show one way or the other whether the respondent/applicant gave consideration for the shares.
- [25] The appellants contended that having regard to the nature of the order of Gill J and to all the circumstances, particularly the possibility of the appeal being stifled and the likely prejudice which may be caused, the single judge was clearly satisfied that,

"the appellants had met the threshold for the grant of a stay of execution", or the conditions underlining the principles governing the grant of a stay of execution in this case had been met. The appellants conclude that this finding was well grounded and cannot be faulted.

- [26] The appellants also submitted that this Court must clearly note that the respondent/applicant did not file any opposing affidavit, submissions or response to the appellants' application for the stay of execution. The respondent/applicant did nothing for over three (3) months and therefore there is now no basis for their complaint. Thus, in all the circumstances there is no judicial or prudent basis to objectively disturb the order of the single judge and this application to revoke or vary should be refused with costs.

Analysis and Conclusion

The power of review of the order of a single judge

- [27] The jurisdiction of the Full Court to review an order made by a single judge of the Court has been settled in the Court's decision in **Danone Asia PTE Limited et al v Golden Dynasty Enterprise Limited et al**⁴ in which this Court considered the relevant legislative matrix commencing with the ambit of rule 27 of the **Eastern Caribbean Supreme Court, Court of Appeal Rules**, which provides that:

"27. (1) In any cause or matter pending before the Court, a single judge of the Court may upon application make orders for –

- (a) giving security for costs...;
- (b) leave to appeal in *forma pauperis*;
- (c) a stay of execution on any judgment appealed from....;
- (d) an injunction...;
- (e) extension of time;

and may hear, determine and make orders on any other interlocutory application.

(2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by any Judges of the Court having power to hear and determine the appeal."

⁴ BVIHCVAP2009/0002 (delivered 28th September 2009, unreported).

[28] This rule must be read in conjunction with **CPR 62.19** which deals with the power of a single judge of the court. It provides:

“(1) A single judge of the court may make orders for –
(a) an injunction
(b) a stay of execution on any judgment
(c) an extension of time.....
(d) the giving of security for any costs.....

(2) The Chief Justice may designate a master or the Chief Registrar to make orders for –
(a) extension or abridgement of any time limit
(b) the giving of security for any costs

(3) An order made by a master or the Chief Registrar may be varied or discharged by a single judge.

[29] The final part of the legislative matrix would be **CPR 62.20(1)** which empowers the Full Court to vary, discharge, or revoke the order or direction of a single judge in the following terms:

“Any order, direction or decision made or given by a single judge may be varied, discharged or revoked by two judges where the order, direction or decision relates to an appeal of a class which may be heard and determined by two judges and by the full court in any case.”

[30] The order which is the subject matter of this application mandated a stay of execution of the judgment of Gill J pending the hearing and determination of the appeal. A ‘stay of execution’ order temporarily halts the enforcement of a judgment, allowing the party appealing the judgment to challenge the decision without immediate consequences. A judge’s decision to grant a stay is discretionary, meaning they have the power to decide whether or not to grant it based on the specific circumstances of the case and after considering various factors including the merits of the case, balance of convenience, and potential hardship to parties.

[31] In **Dufour and Others v Helenair Corporation Limited and others**⁵ Sir Vincent

⁵ (1996) 52 WIR 188.

Floissac CJ articulated the basis on which an appellate court would interfere with the exercise of a judicial discretion by a trial judge. He said:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

The first condition was explained by Viscount Simon LC in *Charles Oseinton & Co v Johnston* [1941] 2 ALL ER 245 page 250. There, the Lord Chancellor said:

‘The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.’

The second condition was explained by Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 ALL ER 343 in language which was approved and adopted by the House of Lords in *G v G* [1985] 2 ALL ER 225 and which I have gratefully adopted in this judgment. Asquith LJ said ([1948] 1 ALL ER at page 345):

‘...We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact plainly wrong, that an appellate body is entitled to interfere.’⁶

[32] I am satisfied that a similar approach is mandated when a Full Court is asked to review and reconsider a decision taken by the single judge of appeal.

⁶ (1996) 52 WIR 188 at 190 -191.

Stay of Execution

- [33] The general position is that a successful party is entitled to enjoy the fruits of his judgment notwithstanding that the unsuccessful litigant has appealed such judgment. **CPR** 62.23 fortifies that position. It provides that an appeal does not operate as a stay of execution or of proceedings under the decision of the court below. It further provides that any intermediate act or proceeding is not invalidated by an appeal. **CPR** 62.19 however gives the Court a discretion to grant a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal.
- [34] In exercising that discretion the judge must not act arbitrarily. The exercise of judicial discretion should be performed having regard to all the circumstances of the case and applying the settled legal principles which have been prescribed in the case law.
- [35] The respondent's/applicant's application is advanced on two main limbs. First, it contends that the order was procedurally unfair because it was not given the required 7 days' notice of the hearing and so the application would have been determined without the benefit of 'skeleton arguments or other document opposing the grant of a stay of execution'. Secondly, the respondent/applicant takes issue with the substantive reasoning which would have informed the order. These limbs will be considered in turn.

Procedural challenge

- [36] The evidence filed on behalf of the respondent/applicant⁷ indicates that the notice of hearing was served (by hand delivery) on 20th April 2024 for a hearing (on papers) on 23rd April 2024. The complaint is that it was not given the required 7 days' notice of the hearing. The relevant rule upon which the respondent/applicant relies is **CPR** 62.18(4) which regulates the hearing of interlocutory applications, and which

⁷ Affidavit of Rafik Doche filed on 8th May 2024.

provides that the court office must give the parties to the appeal at least 7 days' notice of any hearing, unless the court otherwise directs.

[37] The requirement for notice of interlocutory hearings is an important component of the right to a fair hearing. It ensures that all parties are aware of the hearing and have sufficient time to prepare their arguments, evidence, and legal strategy and otherwise affords a reasonable opportunity to prepare for the hearing. The notice requirement is a fundamental element of due process, guaranteeing that parties are not unfairly disadvantaged by sudden or unexpected court proceedings.

[38] However, the Court must consider the operating chronology of events in this case. It is apparent that the notice of appeal was filed on 15th January 2024. The application for the stay of execution was filed on 17th January 2024. The affidavit of service which was before the single judge reflected that the application for the stay of execution as well as the notice of appeal were served on the respondent/applicant on 19th January 2024 along with the authorisation code.

[39] Thereafter skeleton submissions in support of the stay application were filed by the appellants on the Electronic Litigation Portal ("E-Litigation Portal") on 1st March 2024.

[40] In the wake of this, the respondent/applicant would not have filed any notice of opposition setting out succinctly the grounds on which the application would be opposed (usually done within 7 days of the date of service). The respondent/applicant similarly would have declined to file evidence in response to the application (usually done within 14 days after the date of service of the application).⁸ Certainly, no submissions would have been filed in response to those filed by the appellants on 1st March 2024 and which would have been deemed to have been served on the date and time that the document was submitted to the E-Litigation Portal.⁹

⁸ CPR 11.12 (1).

⁹ Rule 13 (9) of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019.

- [41] Indeed, a critical factor which must be considered in this context is that this appeal was filed on the E-litigation Portal and would have proceeded in accordance with the relevant procedural rules which govern the same. These rules, termed the **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019** prescribe that the Court may, by electronic means, serve a notice, order, judgment, or other document issued by the Court on a party to proceedings by delivering the document to the electronic mail address of that party.¹⁰
- [42] The Court's Office would have issued a notice of hearing dated 18th March 2024 to both sides indicating that the application would come up for consideration on paper before a single judge of the Court on Tuesday, the 23rd day of April 2024 at 10 o'clock in the forenoon. This notice would have been uploaded in the E-Litigation Portal (to which the respondent/applicant would have due access) on 19th March 2024.
- [43] I do not accept that the respondent/applicant would have had two (2) days' notice of the hearing of the stay application. In my judgment, the respondent/applicant would have had a more than adequate opportunity to advance representations in opposition to the stay application. It clearly did not act with alacrity or diligence and in my judgment cannot now complain of a want of due process.
- [44] Even if it is accepted that the respondent/applicant would effectively have had only two (2) days' notice of the hearing, in my view the appropriate course would have been to immediately alert the Court Office of its concerns, inviting the Court to adjourn the hearing in order to facilitate the filing of submissions and/or evidence. It does not appear that any such efforts were made and so the single judge would have been entitled to proceed to consider and determine the application secure in the knowledge that the application and submissions in support would have been duly served on the

¹⁰ Rule 15(1) of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019; and see Rule 5A.15 of the CPR 2023 which provides that: "The Court may, by electronic means, serve a notice, order, judgment, decree or other document issued by the court on a party to the proceedings by uploading the document to the Electronic Litigation Portal."

respondent/applicant, who would not have filed any skeleton arguments or other documents opposing the grant of a stay.

- [45] In my judgment, this is not a case where a judgment/decision would have been granted without any notice to the litigant and in breach of the rules of natural justice. Moreover, the respondent/applicant has not attempted to advance any plausible account to explain why it would not have been possible to advance submissions in opposition even in the abridged timeframe, or alternatively, why there was no attempt to communicate any concerns about the lack of fairness occasioned by the short notice, to request an adjournment of the hearing. The respondent's/applicant's procedural challenge lacks merit and would not warrant the discharge or revocation of the single judge's order.

Substantive Challenge

- [46] In **Marguerite Desir et al v Sabina James Alcide**¹¹ this Court explained the principles which informed the exercise of the discretion to grant a stay. At paragraph 3 of the judgment, Edwards CJ (Ag) noted that:

“...our jurisdiction to grant stay (sic) is based on the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refuses a stay; and the evidence in support of the application should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting stay (sic). The court must hold a balance and give full and proper weight to the starting principle that there must be a good reason to deprive a successful claimant of the right to enforce her judgment. The mere existence of arguable grounds of appeal is not enough, by itself, a good reason.”

- [47] The court considering the application for the stay must therefore consider whether there is a risk of harm to one or other or both parties if the court grants or refuses a stay. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is the least likely to cause

¹¹ SLUHCVP2011/030 (delivered 14th December 2011, unreported).

injustice. In other words, the court should make the order that causes the least harm or poses the least risk of injustice.

[48] Ultimately, the aim is to make the order which best accords with the interests of justice. The principles which accord with that determination are well documented in several decisions of this Court. The seminal decision is **C-Mobile Services Limited v Huawei Technologies Co. Limited**¹² 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).”

[49] There is no dispute between the parties as to these governing legal principles. However, there is disagreement between the parties as to how they are to be applied to the facts in this case and the conclusions to be drawn. The gravamen of the respondent’s/applicant’s challenge is that had the single judge properly considered the strength of the grounds of appeal and likelihood of success on appeal, then she would not have granted the stay of execution.

[50] Counsel for the respondent/applicant cited the dictum of Blenman JA in **C- Mobile Services Limited v Huawei Technologies Co. Limited** in which she observed that ‘only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown that a stay ought to be granted’. He argued that this factor was not properly considered by the single judge, and he places the blame squarely at the feet of the appellants who he contends were compelled to show strong grounds of appeal or

¹² BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) at paragraph 30.

strong likelihood of success of the appeal and fully and frankly disclose the history of the litigation.

[51] It is clear that 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 would generally 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.

[52] This Court has recently confirmed the proper approach to be adopted in **Nam Tai Property Inc et al v West Ridge Investment Company Limited**.¹³ At paragraph 19 of the judgment, Webster JA [Ag.] applied the dictum in **Novel Blaze Ltd (in liquidation) v Chance Talent Management Ltd**.¹⁴ pointing out that:

“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 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.”

¹³ BVIHMAP2021/0010 (delivered 8th November 2021, unreported).

¹⁴ BVIHMCAP 2020/0006 (delivered 16th April 2021, unreported).

[53] It follows that there cannot be a stay of execution unless the appeal has a good prospect of success.¹⁵ But if the appeal does have a good prospect of success, the Court must consider whether there are other special circumstances warranting a stay of execution. Further, in considering whether an appeal has a good prospect of success, it must be borne in mind that an application for a stay of execution is an interlocutory application. The Court in hearing that application is therefore not expected to come to a determination of the merits of the appeal or conduct a full hearing of the appeal.

[54] In this appeal, the respondent/applicant contends that had the history of the proceedings been disclosed, a stay would not have been granted because the history would have conclusively revealed that the appeal had no real prospects of success. This is because the purported issue of this appeal has been litigated for several years and there have been definitive and conclusive pronouncements repeatedly made in regard to matters which the appellants are intent on continuing to litigate. The respondent/applicant therefore relies on the legal principle of *res judicata*.

[55] In reviewing the grounds advanced in support of the Notice of Application for the stay filed on 17th January 2024, it is apparent that the appellants would have indicated the following:

- “(g) The primary purpose of the Stay is to preserve the status quo between the parties and in particular for the Respondent to produce the Audited Financial Accounts of Heritage Plantation Condominiums Ltd. (HPC) as directed by the Court of Appeal.
- (h) To ensure that the 90% shareholding is not transferred to the Respondent\Claimant without a fair valuation of the 90% shareholding and payment therefor.
- (i) To avoid irreparable harm to the Appellants/Defendants.

¹⁵ In fact, in **Rodrigues Architects Ltd v New Building Society Ltd (2018) 93 WIR 339**, the Caribbean Court of Justice identified a good prospect of success as a threshold question and stated expressly that if the applicant did not establish a good prospect of success then no stay of execution should be granted (see paragraph 23).

- (j) If a Stay is not granted a successful appeal may be rendered nugatory thus rendering in loss of the benefits of the Appeal (if Stay is not allowed.)
- (k) Unless the status quo is maintained there is a real risk of dissipation of the funds in the bank accounts of HPC which are in excess of US\$10 million dollars and of which account Victor Doche and Rafik Doche, owners of the Respondent/Claimant Doche & Doche Inc. are the only signatories jointly and severally and who continue to work these accounts.
- (l) If a Stay is not granted, even the 10% shareholding which the Respondent Doche & Doche Inc. insists that the Appellant HPI is entitled to risks diminution by the Respondent\Claimant Doche & Doche Inc.
- (m) The Appeal has good prospects of success.”

[56] The evidence of Mervin Grant filed 17th January 2024 in support of the application would have essentially been repeated in the legal submissions filed in support of the substantive appeal on 1st March 2024. Counsel for the appellants addressed all of the grounds of appeal. These grounds are myriad, ranging from allegations of procedural unfairness and want of due process, to challenges to findings of fact which lack evidential support, to errors of law resulting from a misapprehension of previous appellate rulings and from a lack of evidential basis.

[57] These submissions were before the single judge and were clearly considered in arriving at her determination.¹⁶

[58] At the heart of this appeal are the findings made by Gill J at paragraph 1 of her order. The learned judge ordered that:

“Doche &Doche Inc. has an existing legal right to be issued and allotted 90% shareholding in Heritage Plantation Condominiums Ltd. and to be registered as a Member of Heritage Plantation Condominiums Ltd. accordingly and with retrospective effect from November 20, 2014 while Heritage Plantation Inc. has an existing legal right to be issued and allotted 10% of the shareholding in Heritage Plantation Condominiums Ltd. and to be registered as a Member of Heritage Plantation Condominiums Ltd. accordingly with retrospective effect from November 20, 2014.”

¹⁶ See recitals in the Order of 23rd April 2024.

- [59] That finding would have been made on the basis that "...the issue of the shareholding in Heritage Plantation Condominiums Ltd. being 90% to the Claimant and 10% of Heritage Plantation Inc. being previously determined...".
- [60] The appellants impugn these findings on the basis that the learned judge misinterpreted the effect of these previous determinations, i.e. the orders of Ventose J in his judgment dated 27th January 2020 in the underlying consolidated claims SKBHCV2017/0343, **Mervin Grant and Heritage Plantation Inc. v Heritage Plantation Condominiums Ltd. et al** and SKBHCV2018/0186 **Heritage Plantation Inc. v Doche & Doche Inc.** and of the orders of the Court of Appeal in its judgment of 29th April 2021 in appeal number SKBHCVAP2020/0006.
- [61] Both sides advanced opposing claims of res judicata with the appellants contending that under the principle of res judicata, matters litigated before the High Court may not be re-litigated before it a second or subsequent time by the same parties on the same subject matter in controversy. The appellants specifically argued that although Ventose J granted a declaration that the respondent/applicant owns or is entitled to 90% of the shareholding in the first appellant and agreed that the respondent/applicant should be registered as 90% owner of the shares, the Court of Appeal's order dated 29th April 2021 had set aside that order by Ventose J. They submit therefore that the matter of the allocation of shareholding in the first appellant cannot be re-litigated as it has already been finally decided by this Court in the order dated 29th April 2021, making the amended claim for rectification an abuse of process.
- [62] In written submissions filed in support of the appeal they argue that:
- "45. The Respondent Doche & Doche Inc. is prevented from re-litigating findings and Orders made by the Court of Appeal on 29th 2021. When the Court of Appeal delivered its Judgment:-
 - (a) Heritage Plantation Inc. owned by Mervin Grant was restored as Sole shareholder in Heritage Plantation Condominiums Ltd. (HPC)
 - (b) The Court of Appeal found that there was no documentary evidence of investment by the Respondent D&D in HPC.

- (c) The Court Of Appeal took back the 90% shares- given to D&D by Ventose J. **There was no appeal. The result is that D&D is prevented from trying to litigate the issue before Gill J in another legal action.**
- (d) The Collateral Estoppel doctrine prevents D&D from re-litigating the issue of ownership of shares in HPC given the findings of the High Court and the findings and actions of the Court of Appeal [implied subject to verification of Audited Financial Accounts of HPC].
- (e) No shares were ever allotted to Doche & Doche Inc. - and the reason for this is obvious- The Respondent Doche & Doche Inc. did not pay for any shares.

46. The Court of Appeal through Webster JA was abundantly right and in its judgement the Court went the furthest it could have gone in the absence of the accounts. By its Judgment HPI /Mervin Grant was restored as sole shareholder of HPC: for in the absence of the audited financial accounts the Court of Appeal could not properly do anything more. And nothing has changed since to undermine that Order.” [Emphasis as in original] ¹⁷

[63] The respondent/applicant however complains that the appellants have deliberately ignored more recent determinations which speak definitively on these issues, and which are equally and finally determinative of the same. In particular, the judgment of Ward J in which he was obliged to review both the judgments of Ventose J and the Court of Appeal (judgment written by Webster JA [Ag.]). At paragraph 29 of his judgment, Ward J made plain his remit when he stated:

“This is not a question of reviewing or reversing any finding of the Court of Appeal (which I clearly cannot do) but merely of interpreting the statement of the Court of Appeal in light of the material before me.”

[64] Ward J ultimately dismissed the application and found that the issue of the entitlement to 90% of the shares was determined in the respondent’s/applicant’s favour by the High Court and the Court of Appeal which have found that it is the unregistered shareholder of 90% of the shares in HPC.

[65] It is not surprising that the appellants sought to appeal the judgment of Ward J alleging that: (i) the learned judge erred when he failed to find that the issues raised in the rectification claim brought by the respondent/applicant were res judicata; (ii) the

¹⁷ Skeleton Arguments in support of the Appeal filed on 1st March 2024, paragraphs 45 and 46.

learned judge was plainly wrong to extend the interim reliefs imposed on the appellants; and (iii) the learned judge was plainly wrong when he found that there was no continuous breach by the respondent/applicant of paragraph 70 of the judgment of the Court of Appeal dated 29th April 2021 which provided that proper financial accounts were to be produced and delivered to the second appellant, a shareholder of the first appellant, without delay.

[66] What is surprising however is that the appellants chose to do so outside the time prescribed by law. Consequently, a preliminary point was taken that the notice of appeal was filed out of time and was therefore a nullity, no application for an extension of time having been filed by the appellants. The Full Court heard arguments on the issue and delivered a judgment dismissing the oral application for an extension of time, striking out the notice of appeal as having been filed out of time and awarding costs to the respondent/applicant.

[67] In considering whether to exercise its discretion to extend time for filing the appeal, the Court of Appeal considered the usual principles which a court must apply which included the prospects of success of the appeal. It is there that this Court made critical findings which essentially affirmed the findings of Ward J. At paragraphs 40, 43 and 50 the Court concluded:

“[40] The trial judge accurately found that both Ventose J and Webster JA [Ag.] had in fact decided that the respondent was, as a matter of law, entitled to 90% of the first appellant’s shares. This review in no way re-litigated the issues already decided between the parties nor attempted to overturn the decisions made by the previous tribunals. The trial judge was interpreting the decisions, not overruling them or deciding them afresh.

[43] Ward J’s decision simply gives effect to the findings of fact in Ventose J and Webster JA’s judgments on the allocation of shares in the first appellant company. He correctly found that rectification to reflect 90% ownership in the first appellant to the respondent, and the remaining 10% to the second appellant, was required. Accordingly, the trial judge did not err in dismissing the application to strike out the claim.

[50] In reviewing the grounds of appeal, I find that nothing has been put forward to the Court by the appellants which demonstrates a realistic prospect of success on appeal.”

- [68] That decision has not been discharged, set aside or revoked.
- [69] It therefore follows that as it relates to the question of the allocation of shares in HPC, the decision of Ward J is critical in that it correctly and definitively interpreted the findings of the Court of Appeal's 2021 judgment in the respondent's/applicant's favour. The appeal against that decision failed to launch and cannot be now advanced.
- [70] These are judgments upon which the respondent/applicant is entitled to rely with some security. They informed the order of Gill J and yet they were largely untrammelled before the single judge. This is astounding given the critical impact which they would have in assessing the prospects of success of the appeal.
- [71] These judgments also no doubt informed the legal proceedings which are the subject of this appeal. The appellants' defence of the current High Court proceedings would effectively erode the fruits of the judgment afforded by Ward J and the Court of Appeal and unravel the respondent's/applicant's success on appeal through a veritable back door. The reality is that the issue of the ownership of the shares in HPC is a settled matter which has not been successfully appealed. This is a critical factor which a court considering the stay of execution would have been compelled to take into account. Because, ultimately, '*shorn of all the trappings*' it is this issue which is the kernel of the dispute between the parties. It remains the central issue upon which this Court is again invited to pronounce.
- [72] Counsel for the appellants has sought to frame the appeal in a different way, contending that the appeal has all been about the payment for the shares. He contends that there is a hard fact which thus far his clients have been prevented from ventilating i.e. whether the respondent/applicant can prove that they paid for the shares. He complains that despite repeated requests, the respondent/applicant has

failed or refused to produce the relevant accounts which will finally put this matter to rest.

[73] However, this contention was robustly disputed by counsel for the respondent/applicant who referred this Court to the judgment of Webster JA [Ag.] and the critical findings which convincingly demonstrate that this issue was in fact considered. He cited paragraph 59 of the judgment where Webster JA [Ag.] observed that “D&D’s entitlement to its shares came about as a result of its financial contribution to and participation in the joint venture project. Its ownership is reflected in the Agreements, all of which were prepared by Mr. Grant. There is no suggestion that he did not understand what he was agreeing to” and paragraphs 35 - 41 where the following is noted:

[35] ...By the time the 2014 Agreement was signed in November 2014, the parties agreed that the amount that had been invested into the project for the construction of the units had risen to \$2.8 million. The dispute between the parties is that D&D says that it raised the \$2.8 million as it was required to do by clause 9 of the 2010 Agreement and invested it into the construction of the units through companies that it controlled. D&D did not provide the court with documentary evidence of the amounts that it invested. However, there is other evidence showing that D&D put up the initial construction costs. Construction started in 2011 and there is evidence that D&D made payments towards the construction of the units. For example, in an email dated 15th September 2011 from Victor Doche to Mr. Grant, Mr. Doche complained that:

You already took to date 112,000.00 plus a fortune we spent on the site infrastructure that is still owed to us, all we do is pay bills and yet to see one penny. Every week we have at least 6,000 to 10,000.00 in payroll and the last couple of months we paid 60k USD for windows, 24k USD for 12000 sf of tiles plus 36000.00 in material to finish the interior, doors, sheet rock, electrical and plumbing materials etc etc etc. And another 45k to be paid next week for the air conditions., 20 k for windows and god knows what else.’

[36] In paragraph 10 of his witness statement Rafik Doche confirmed that D&D had paid the \$1.5 million into the project by September 2011. And in cross examination he testified that D&D had invested substantial amounts of money into the construction of the units and that the monies were paid using companies controlled by D&D.

[37] Dr. Browne challenged D&D’s assertion that it had invested the \$2.8 million or any other sum into the construction of the units. He submitted

that D&D breached the Agreements because it had not paid any money whatsoever into the project. Therefore, D&D was not entitled to any benefits under the Agreements including the agreement for D&D to own 90% of the shares of HPC. Dr. Browne supported his submission on two bases. Firstly, that there was no evidence that D&D itself paid any monies into the project. This submission is easily disposed of. D&D's obligation under the 2010 Agreement was to raise \$1 million and pay it into HPC to fund the early construction costs. There is no requirement, contractual or otherwise, that D&D itself had to pay the monies into HPC. D&D's obligation was to raise the money and loan it to HPC to be used for the construction of the units, which is what it did. There is no evidence that the cash that was used to construct the units starting in 2011 came from any other source. D&D discharged its obligation of paying up to \$2.8 million into the project using companies that it controlled.

[38] Dr. Browne's second reason for challenging D&D's position on the payment of the \$2.8 million was that the monies came from pre-sales of units. Specifically, that HPC entered into an agreement with Globelink, a Chinese company, on 24th September 2013 for the sale of 75 units ("the Globelink agreement"). Deposits on some of the units were paid to HPC after the signing of the Globelink agreement and that is the money that was used to fund the construction. The flaw in this argument, as pointed out by learned counsel for the respondents, Mrs. Angelina Gracy Sookoo-Bobb, is that construction of the units started more than two years earlier in 2011 – see for example paragraph 37 above showing that substantial amounts of money were being expended on the project from and before September 2011, and that these funds were being paid by entities controlled by D&D or the Doches. The Globelink agreement was made in September 2013, two years after construction had started, and the payment of deposits started in December 2013. This is borne out by the credit advices in the record that show that the deposits were paid into HPC's bank account between December 2013 and October 2015.²² In short, the deposits from the Globelink agreement could not have been the source of funds for the construction of the units which was far-advanced when the agreement was signed in September 2013 and when the payments of the deposits started in December 2013.

[39] While the trial judge did not make an express finding that D&D invested the \$2.8 million, it is clear from the judgment that he treated the \$2.8 million as having been paid by or on behalf of D&D. At paragraph 48, he found that: '[t]he Claimant has failed to provide any evidence that D&D did not carry out its obligations under the 2010, 2012 or 2014 Agreements. They have also failed to substantiate any of the allegations made against the defendants.' More specifically, the trial judge found at paragraph 50, that: 'D&D was to be refunded its capital injection of US\$1m and an additional sum of US\$1m as its share of the 'profits.'

[40] The reference to a \$1 million capital injection is to the \$1 million mentioned in clause 9 of the 2010 Agreement and an obvious rejection of the appellants' position that D&D did not pay any cash into the project. The judge returned to D&D's capital injection in paragraph 52 when he noted that: '...the initial amount of US\$1m for construction increased to US\$2.8m to reflect the loans and payments made by D&D on behalf of or to Mr. Grant and HPI.'

[41] This is effectively a finding by the judge that D&D invested \$2.8 million into the construction of the units, and, by implication, a rejection the appellant's case that the construction money came from deposits or pre-sales of units. The finding is amply supported by the evidence and there is no basis on which this court should interfere with the trial judge's conclusions. The finding effectively disposes of the appellants' position that the D&D breached clause 9 of the 2010 Agreement."

[74] Since Wigram V-C's statement of principle in **Henderson v Henderson**¹⁸ the rule of res judicata has formed part of the fabric of civil jurisprudence. The rule was later fully considered by the House of Lords in **Arnold v National Westminster Bank plc**.¹⁹ Lord Keith of Kinkel in that case distinguished between cause of action estoppel and issue estoppel in the following terms:

"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. **In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.** The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened..."

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue.... The name "issue estoppel" was first attributed to it by Higgins J in the High Court of Australia in *Hoysted v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537, 561. It was adopted by Diplock, L.J., in *Thoday v. Thoday*, [1964] P. 181. Having described cause of action estoppel as one form of estoppel **per rem judicatam**, he said, at p. 198:

"The second species, which I will call 'issue estoppel', is an extension of the

¹⁸(1843) 67 ER 313 at page 319.

¹⁹ [1991] 2 AC 93 at pages 104 -106.

same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. **If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.**” [Emphasis added]

[75] The subject proceedings in the High Court seek rectification of the share register, a claim which is summary in nature.²⁰ The Board in **Nilon Limited v Royal Westminster Investments S.A.** made plain at paragraph [51] of that judgment that proceedings under s.43(1) of the **BVI Business Companies Act** for rectification of a BVI company’s share register “can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependant on the conversion of an equitable right to a legal title by an order for specific performance of a contract”. The Board found in that case that the claimants had, at most, acquired an equitable right to the claimed shares under the alleged contract with Mr. Varma. However, unless and until Mr. Varma was ordered to procure the allotment or transfer of shares in Nilon Ltd. to them, the claimants had no present legal right to have their names included in Nilon Ltd.’s register of members. Accordingly, the claim for rectification was bound to fail.

[76] The obvious point of distinction in this matter is that the respondent/applicant has the benefit of judicial pronouncements on the question of title to the shares. Its claim cannot be said to be prospective. Having reviewed paragraph 36-52 of her judgment it is apparent that there was clearly sufficient material before the Gill J to substantiate

²⁰ Nilon Limited v Royal Westminster Investments S.A. (2015) UKPC 2.

her judgment and order. The learned judge was essentially giving effect to the judgments which speak clearly, and which are extant.

[77] Given the state of play, I can only conclude that on the issue of merits, the appellants' appeal does not have a strong likelihood of success. This finding would have had to have been weighed by the single judge along with the other principles in the **C-Mobile** test in deciding whether to grant a stay pending the hearing and determination of the appeal. The order does not disclose that this would in fact have been weighed and on that basis warrants interference by the Full Court.

[78] This position is further reinforced when one turns to consider other factors which must be weighed.

Would the appeal be stifled or rendered nugatory?

[79] The subject proceedings in the High Court seek rectification of the share register. There can be no doubt that rectifying a share register can have significant implications for a company and its members. In such circumstances, seeking a stay of execution means requesting the court to temporarily postpone or suspend the enforcement of that order. The appellants in this matter complain that if a stay is not maintained then the respondent/applicant would have a green light to take ownership and dispose of shares without paying 'one cent' for them. Moreover, with the stay in place that would encourage the respondent/applicant to produce the audited financial accounts of HPC to HPI which would demonstrate whether it had given consideration for the shares (described as a persistent issue).

[80] However, given the status quo (which sees the respondent/applicant with the benefit of two judicial rulings pronouncing on the ownership of the shares); the appellants are unable to demonstrate good prospects of success. The respondent/applicant is a successful litigant twice over and is entitled to the fruit of its success.

[81] A stay of execution is the exception not the rule and the onus is firmly on an applicant to make out the case for a stay. There must be cogent, full, and frank evidence in support of an application for a stay. The onus is on the applicant to make its position clear, and it should not leave the Court speculating or trying to fill the gaps. In this matter, the appellants relied on the affidavit evidence of Mervin Grant filed in support of the stay application. Having reviewed that affidavit it is immediately apparent that rather than raising any irremediable consequences of the rectification order, the consistent concern appears to be the purported failure of the audited financial accounts of HPC to make clear all of the financial contributions of the respondent/applicant.²¹ He concludes at paragraph 24 that if a stay is not granted, his attempts to be compensated for all the capital in HPC would amount to nothing.

[82] 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. I am not satisfied that this averment provides any basis upon which one can conclude that the appeal would be rendered nugatory if a stay is not ordered. The appellants are principally concerned about payment or proof of payment. In the event that they are successful in their appeal, the remit of this Court's powers would negate the possibility of a nugatory appeal.

[83] Applying the principles in **C-Mobile**, I find that in all circumstances the appellants have an appeal that is only arguable and that on the evidence presented if a stay is not granted the appeals will not be rendered nugatory.

Balance of Harm

[84] It is apparent that the appellants did not file any evidence before the single judge which would address the question of harm or prejudice. The evidence filed in support of this application is also silent on this issue. However, there can be no doubt that the respondent/applicant would be deprived of its judgment if a stay is granted and the

²¹ See paragraphs 18 – 23 of the Affidavit of Mervin Grant in support of the application for a stay filed on 17th January 2024.

appeal fails. The respondent/applicant would have been deprived of its ownership and right to participate in the affairs of HPC.

[85] Accordingly, I am satisfied that the respondent/applicant has discharged its burden and that the order of the single judge should be revoked or set aside.

Disposition

[86] For the reasons given, I find that:

- (i) The application to revoke or discharge the order of the single judge made on 23rd April 2024 in which she granted a stay of execution of the judgment of Gill J pending the hearing and determination of the appeal is granted and that order is accordingly set aside.
- (ii) The application for a stay of execution is accordingly dismissed.
- (iii) The respondent/applicant will have its costs to be assessed if not agreed within 21 days of the date of this judgment.

I concur.
Mario Michel
Chief Justice [Ag.]

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar