

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2025/0001

BETWEEN:

**MING, BO TING ALICE
(Personal Representative of the Late Ming Shui Sum)**

Applicant/Appellant

and

**[1] MING SIU HUNG, RONALD (Deceased)
[2] SHAW SIU KEN, BERTHA
[3] REGINA MING (Personal Representative of the Estate of the
Late Ming Shiu Tong)**

Respondents

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Gerard St. C. Farara

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Blair Leahy, KC and Ms. Sophia Christodoulou for the Applicant/Appellant
Mr. Joshua Folkard and Mr. Andrew Gilliland and Mr. Malcolm Arthurs for the
Respondents

2025: April 8
July 22.

Application for stay pending determination of the appeal - Rule 62.19(1)(b) and Rule 26.1(2)(q) of the Civil Procedure Rules (Revised Edition) 2023 – Principles for the grant of a stay of execution pending appeal – Whether the appeal would be rendered nugatory if a stay is not granted - Whether the balance of harm lies in favour of staying execution of the Judgment - Whether there are strong grounds of appeal

By notice of application filed on 6th February 2025, the applicant sought a stay of execution of the order of the court below that is proposed to be made consequent upon the judgment of a learned judge (Mangatal J) of the Commercial Court in the Territory of the Virgin Islands ("BVI"), delivered on 20th November 2024 and subsequently amended on 12th December 2024 ("the judgment") after the Phase 2B trial in Claim No. BVIHC(COM) 53 of 2014 ("the Stay Application"). The Stay Application was supported by the affirmation of the applicant sworn and filed on 6th February 2025. The Stay Application was filed consequent upon an

appeal filed on 2nd January 2025 by Ming Bo Ting Alice (“the applicant/appellant”) as the Personal Representative of the Estate of the Late Ming Shui Sum (“Lawrence”) appealing the judgment.

The proceedings in the Commercial Court involved four siblings, the three respondents as claimants and the appellant as defendant. At the core of these proceedings were their respective shareholding in JF Ming Inc. (“JFM”), a property holding company incorporated under the laws of the BVI. JFM owns certain properties in Hong Kong (“the HK Properties”) through several subsidiary companies incorporated under the laws of Hong Kong. Lawrence, JFM’s director and majority shareholder, had been removed as a director in 1994, but reinstated in 2006 by the Hong Kong Court of Final Appeal after his three siblings, Ronald, Bertha and Tong (collectively “the claimants”) unsuccessfully challenged his shareholding. In May 2014, the said three siblings as claimants filed an unfair prejudice claim in the Commercial Court under section 184I of the BVI Companies Act, alleging that Lawrence had treated them unfairly as minority shareholders in JFM. The case proceeded as a split trial in three phases: Phase 1 concerned liability only. If the claimants/respondents were successful and a Buy-Out Order made, Phase 2A would follow whereby the court would determine the “valuation date” for the purposes of determining the Buy-Out Price for the claimants’ shares in JFM. This would then be followed by the Phase 2B trial for the court to assess and determine the final Buy-Out Price for the shares of the claimants.

At the conclusion of Phase 1, Leon J in a judgment delivered on 16th August 2016, found for the claimants on their unfair prejudice claim, holding that Lawrence had unfairly conducted JFM’s affairs regarding the claimants and their shareholding in the said company. Consequent upon this finding, the court ordered Lawrence to buy out the claimants’ shares in JFM (“the Buy-Out Order”). On appeal, the Court of Appeal upheld Leon J’s finding of unfairly prejudicial conduct but set aside the Buy-Out Order. However, on further appeal to the Judicial Committee of the Privy Council, the Board reinstated the Buy-Out Order. Following the proceedings in the Privy Council, the third claimant, Tong, died on 10th October 2020, and Regina Ming was subsequently appointed administrator ad litem of his estate in September 2021 for the purpose of these proceedings.

At the conclusion of the Phase 2A trial, Jack J in a judgment delivered on 23rd August 2022 in the Commercial Court, dismissed the claimants’ additional claims for equal shareholding, fiduciary breaches, and missing dividends, and confirmed that the past payments were dividends, not loans. Crucially, the said judge set 31st March 2017 as the “valuation date” for the purposes of assessing and calculating the Buy-Out Price for the claimants’ shares in JFM. However, Lawrence, who had contended for a valuation date of 31st March 2021, did not appeal the finding of the operative “valuation date”.

The Phase 2B trial took place before Mangatal J from 1st to 10th May 2023 in the Commercial Court to determine the Buy-Out Price for the respondents’ shares in JFM as at the valuation date. Prior thereto directions were made at a case management conference for Lawrence and the claimants to file and exchange expert evidence as to the fair value of the respondents’ shares in JFM. The learned judge in a reserved judgment delivered on 20th November 2024, some 18 months after the conclusion of the Phase 2B trial, found that (i) the value of the claimants’ shareholding at the valuation date is HK\$342,948,353.29; (ii) no

minority discount or allowance for sales costs with respect to the Hong Kong properties of JFM (held through its subsidiaries) should be applied to the Buy-Out Price; (iii) quasi-interest at 1% over Hong Kong best lending rate in the sum of HK\$162,403,611.52 (US\$21 million) should be paid on the Buy-Out Price from the valuation date to the judgment date of 20th November 2024; and (iv) the cost of the proceedings should be subject to a future hearing before a different judge (Mangatal J having by then demitted office). It is with respect to this judgment that the applicant/appellant has appealed and seeks a stay of execution.

However, while the Phase 2B judgment was reserved, the appellant entered into a Consent Order with the first and second respondents, Ronald and Bertha, setting an agreed timetable for the payment of the Buy-Out Price by instalments and for the execution of the relevant share transfers for their respective shares in JFM ("the Consent Order"). The third respondent, Ming Shiu Tong ("Tong"), was not a party to the Consent Order. Pursuant to and in partial compliance with the terms of the Consent Order, the appellant paid a total of HK\$46,666,666.66 to Ronald and Bertha between 7th and 15th August 2024, and HK\$60,000,000 to Bertha between 31st December 2024 and 9th January 2025. No second instalment was paid by the appellant to Ronald as required under the Consent Order. However, Ronald died in early September 2024. Importantly, by clause 3 of the Consent Order the appellant was required to pay in full the balance of the judgment Buy-Out Price due to Ronald and Bertha within six months of the Phase 2B judgment, that is, by 20th May 2024. These payments remain unpaid in breach of the Consent Order.

At the Consequentials Hearing before Mithani J on 6th February 2025 in the Commercial Court, it was ordered that (i) the appellant must pay to Ronald what was owed under the Consent Order; and (ii) the parties are to agree a payment schedule for what is due and owing to the third respondent (the estate of Tong), ensuring that final payment is also made to his estate by 20th May 2025 (the same date on which final payment are due to Ronald and Bertha under the Consent Order). At the hearing of the appeal, the Court was informed that the parties had agreed that an initial payment be made to the third respondent by 28th February 2025 and the balance by 20th May 2025. However, as of said date neither of these payments had been made by the appellant.

By the Stay Application, the appellant sought a full stay of execution of the Phase 2B judgment, including the Buy-Out Price and quasi-interest. However, during oral argument, counsel for the appellant proposed to the Court that it adopt a "fairer" approach and only grant a stay of execution of the difference between what would be owed if the appeal succeeds and the balance unpaid of the full judgment Buy-Out Price, excluding post-judgment interest.

In support of the Stay Application, the applicant relied on three principal grounds. These are: (i) there are cogent and strong grounds (potential adverse consequences flowing to the detriment and prejudice of the appellant and the estate) to demonstrate that the appeal if successful, will be rendered nugatory if a stay is not granted; (ii) the balance of harm test favours the grant of a stay as the appellant and JFM will suffer the greater prejudice if the stay is not granted and the appeal is successful, in circumstances where the JFM properties are sold at much greater discounted prices in the present Hong Kong property market, necessitating the sale of significantly more of the said properties up to as much as

approximately 90 percent of JFM's assets; and (iii) the appellant has strong grounds or very strong grounds of appeal such that the appeal is very likely to succeed in whole or in part. The Stay Application was stoutly opposed by the respondents who contend that it ought to be refused and an order for costs made in the respondents' favour.

Held: dismissing the Stay Application filed on 6th February 2025 by the appellant for a stay of execution, with costs to the respondents, such costs to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days from the date of delivery of this judgment that:

1. A litigant should not be deprived of the fruits of their judgment pending appeal save in exceptional circumstances. Thus, an applicant for a stay must make out a proper case for the grant of a stay since a stay is the exception rather than the rule. An applicant does so by providing cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. The applicant has failed to establish by cogent evidence that the appeal would be rendered nugatory in the absence of a stay. The concerns raised regarding the potential forced sale of JFM's properties at discounted prices and the resulting depletion of assets are speculative, unsupported by detailed or documentary evidence, and amount to no more than the ordinary consequences faced by a judgment debtor who is unable to pay the judgment debt. Moreover, the current financial predicament with JFM stems from the misconduct of Lawrence, including the findings of unfair prejudice, withholding financial information, and attempting to acquire shares at undervalued prices, which led to the judgment now under appeal. The applicant's non-compliance with the terms of a binding Consent Order and the agreed deadlines for payment therein to the respondents, further undermines the application. In these circumstances, the stay sought appears to be an attempt to delay enforcement rather than to prevent the appeal from being rendered nugatory.

C-Mobile Services Ltd v Huawei Technologies Co Limited BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) applied; **Lunan Pharmaceutical Group Corporation v Zhao Long** BVIHCVAP2021/0007 (delivered 27th April 2023, unreported) applied.

2. In exercising its discretion for the grant of a stay, 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. The applicant has failed to demonstrate, by cogent evidence, that the balance of harm favours the grant of a stay. The core of the applicant's submissions rests on the contention that enforcement would necessitate the sale of additional JFM properties in a depressed Hong Kong property market, thereby reducing the value of Lawrence's estate. However, this financial predicament is a direct consequence of Lawrence's own misconduct. Critically, the applicant is contractually bound by the terms of the Consent Order to pay the first and second respondents in full by 20th May 2025 and granting a stay would undermine that agreement to the detriment of these respondents. Similar considerations also apply to the third respondent pursuant to the order of Mithani J made on 6th February 2025 and the subsequent agreement reached by the appellant and the third respondent

that the latter should be paid in full also by 20th May 2025. The respondents face ongoing prejudice from delayed payments despite the first and second respondents already having received partial sums, and the third respondent having not been paid any portion of the buy-out sum for his shares in JFM. In these circumstances, the balance of harm clearly favours the respondents.

C-Mobile Services Ltd v Huawei Technologies Co Limited
BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) applied.

3. 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. The grounds raised by the applicant relating to the trial judge's preference for the respondents' expert valuation, the application of no minority discount, the award of quasi-interest, the refusal to deduct transactional costs from the Buy-Out Price, and alleged procedural irregularity due to delay in delivering judgment, do not meet the high threshold required. While the delay in judgment delivery is concerning, the applicant has not shown that it rendered the judgment unsafe or undermined the judge's reasoning to such an extent as to constitute strong grounds of appeal. Similarly, the trial judge's acceptance of the respondents' expert evidence, having provided reasons for doing so, falls within the realm of factual findings to which appellate courts will ordinarily defer to the trial judge. The remaining grounds, while arguable, lack sufficient weight or clarity to be characterized as strong. Accordingly, the applicant has not demonstrated strong grounds of appeal or a strong likelihood of success on appeal sufficient to support the grant of a stay.

C-Mobile Services Ltd v Huawei Technologies Co Limited
BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) applied.

4. A court may also grant a stay of execution if, in the round, the interest of justice would be best served. In these circumstances, a stay would unjustifiably impede enforcement and contravene the interests of justice. Taking all relevant circumstances into account, including the prolonged nature of the litigation, the findings and judgments already delivered in favour of the respondents at all three phases, and the binding nature of the Consent Order and agreement reached, the Court is satisfied that justice lies in permitting the respondents to proceed with enforcement and not granting a stay of the judgment, in whole or in part. The respondents (or their estates) should not be further delayed in receiving full payment of the judgment debt/But-Out Price, particularly after years of litigation and given the death of two of the original claimants and the original defendant Lawrence. Any non-compliance by the applicant with the agreed terms must be remedied by taking the necessary steps, including selling JFM properties, rather than by imposing a stay.

C-Mobile Services Ltd v Huawei Technologies Co Limited
BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) applied.

JUDGMENT

- [1] **FARARA JA [AG.]:** By notice of application filed on 6th February 2025, the appellant, Ming, Bo Ting Alice (“Alice/the applicant”), in her capacity as Personal Representative of the Estate of the Late Ming Shui Sum (“Lawrence”) the second defendant in the court below, applied pursuant to rules 62.19(1)(b) and 26.1(2)(q) of the Civil Procedure Rules (Revised Edition) 2023 (“the CPR”) and the inherent jurisdiction of the Court, for an order staying the order of a learned judge of the Commercial Court in the Virgin Islands (Mangatal J) ‘that is proposed to be made consequent upon the judgment handed down on 20th November 2024 and subsequently amended on 12th December 2024’, pending determination of the appeal (“the Stay Application”). The first defendant in the court below, JF Ming Inc (“JFM”), a company incorporated and registered under the laws of the British Virgin islands (“BVI”) took no active part in the proceedings below (or the appeal), albeit the claim and reliefs sought in the proceedings before the Commercial Court relate directly to the individual parties shareholding in JFM and the manner in which the second defendant in the court below and applicant herein, carried out his fiduciary duties as a director of JFM and how he treated with the interests of the respondents, as shareholders in JFM.
- [2] The genesis of the relief sought by the Stay Application is couched in those terms because, up to the time of filing the Stay Application in the appeal, the order made consequent upon delivery of the judgment had not been finalized or settled and sealed by the court below. The apparent reason for this was that the legal practitioners for the appellant and respondents had not agreed or settled the wording and precise terms of the said order.
- [3] Regrettably, it is happening too often whereby orders of the Commercial Court, the subject of an appeal before this Court are not settled and sealed shortly after the conclusion of contested proceedings or by when the notice of appeal or some urgent

application to his Court has been filed. This practice certainly ought, in my respectful view, to be deprecated. These occurrences (hopefully not a common practice) are not in keeping with the spirit and tenor of the CPR and the imperative of the Court of Appeal hearing appeals from orders of the lower courts. Moreover, it cannot be gainsaid that the orders of the courts are the bedrock of the judicial system. They are the most poignant means through which courts speak. Moreover, it is on the basis of sealed and served orders that a party's failure to comply with its terms are addressed, and the order enforced with, as appropriate, necessary and proportionate sanctions.

- [4] It is important to underscore that pursuant to the applicable civil and commercial rules of the court, the responsibility for ensuring that orders made are promptly settled and sealed lies with the court or presiding judge. It is impermissible to allow the parties or their legal practitioners to delay, or worse, to stall the finalizing of court pronounced orders. Any significant delay in this process can lead to uncertainty and to disputes over the precise terms of the order as pronounced, and to allegations (founded or unfounded) of non-compliance. Delays of this type also serve to undermine the integrity of the judicial and court system in the eyes of parties and the public at large. This practice, to the extent that it does exist, is unsatisfactory and steps must be taken by judges to put a stop to it, except where there is some very good reason why the final settlement of the order of the court is understandably delayed.

Appellant's Stay Application

- [5] In her application, the applicant/appellant, Alice, sought a stay of execution of the Phase 2B judgment of Mangatal J. As filed, this is an application to stay the entirety of the said judgment and monetary awards. However, as is dealt with later, counsel for the applicant, Ms. Leahy KC, accepted in oral argument that a stay of execution of the entire judgment and award would not be fair, and has argued for a stay of the difference between the balance to be paid to the respondents under the said judgment and the amount conceded by the applicant as the minimum sum or sums

which the judge ought to have found to be paid to the respondents for their shares in JFM less the sums already paid by the appellant to the first and second respondents on account of the judgment sums to be paid to each of them.

[6] In support of the Stay Application, the applicant relied on three principal grounds. These grounds are: (i) there are cogent and strong grounds (potential adverse consequences flowing to the detriment and prejudice of the appellant and the estate) to demonstrate that the appeal if successful, will be rendered nugatory if a stay is not granted; (ii) the balance of harm test favours the grant of a stay as the appellant and JFM will suffer the greater prejudice if the stay is not granted and the appeal is successful, in circumstances where the JFM properties are sold at much greater discounted prices in the present Hong Kong property market, necessitating the sale of significantly more of the properties up to as much as approximately 90 percent of JFM's assets; and (iii) the appellant has strong grounds or very strong grounds of appeal such that the appeal is very likely to succeed in whole or in part. The appellant sought to further expand on each of these principal grounds in her affirmation filed on 6th February 2025, and in her skeleton arguments filed in support of the Stay Application.

[7] Specifically in relation to whether there are 'strong' grounds of appeal, the applicant submitted that the appeal 'would be upheld'. The applicant's/appellant's grounds of appeal may be summarized as follows:

(i) **Serious procedural and other irregularities concerning the judgment below:** There have been an inordinate delay of approximately 18 months before delivery of the judgment appealed, which delay, it is contended, has the effect of significantly hindering the judge's recollection of the submissions and the expert evidence, and resulted in the judge failing to properly evaluate the evidence and submissions, and to give adequate (or sound) reasons for her conclusions, including the 'unjust' decision to award quasi-interest.

(ii) **Valuation Evidence:** It is contended that the judge was wrong to prefer the evidence of the respondents' expert ("KF Expert") over the evidence of the appellant's (Lawrence) expert witness ("Kroll Expert").

(iii) **Minority Discount:** That the judge erred in law and in fact, and/or in principle, and/or in the exercise of discretion, in holding that no minority discount should be applied to the valuation of the respondents' shareholding in JFM. More specifically, in holding that in non-quasi partnership cases: (a) there is a 'general rule' that no minority discount should be applied; and (b) it is only in 'exceptional' cases that such a discount should be brought into play. These conclusions or findings of law are said to be contrary to BVI, English, and Cayman law, and not supported by Commonwealth case law, on which the judge relied.

(iv) **Quasi-Interest:** The judge was wrong to hold that the respondents are 'entitled to interest at a normal commercial rate which is 1% over the Hong Kong lending best rate'.

(v) **Allowance for Selling Costs:** The judge was wrong to refuse to order that the "selling costs" – the cost of selling any of the JFM Properties to buy out each of the respondent's respective shares in JFM - ought properly to have been deducted from the Buy-Out Price.

[8] The Stay Application is stoutly opposed by the respondents who filed their skeleton arguments in opposition on 21st February 2025 and a further or additional skeleton arguments on 14th March 2025 in reply to the applicant's skeleton arguments which had been filed after the respondents' first skeleton arguments had been filed. In the respondents' skeleton arguments, they address directly each limb or ground of the Stay Application, seeking to show why they lacked evidential cogency and merit, and why they submit the appeal itself lacks merit, is weak and not likely to succeed. These arguments in opposition to the Stay Application were further expounded on before this Court in the oral submissions of Mr. Folkard, learned counsel for the respondents. It is the submission of the respondents that the Stay Application ought to be refused, and an order for costs made in the respondents' favour.

The proceedings below - split trial and orders sought to be stayed
The Hong Kong proceedings – 1999-2006

- [9] The proceedings in the Commercial Court in the BVI are not the first court proceedings involving the four siblings, Lawrence and the respondents, with respect to their respective shareholding in JFM, a property holding company through certain subsidiary companies in Hong Kong. The first such proceedings were before the court of Hong Kong. Lawrence was a director of JFM and its majority shareholder. In 1994 he was removed as a director. However, after proceedings brought before the courts of Hong Kong between 1999 and 2006 by which the respondents unsuccessfully challenged Lawrence's majority shareholding in JFM, he was reinstated in May 2006 as a director by the Hong Kong Court of Final Appeal.

The BVI unfair prejudice claim - 2014

- [10] Several years later in May 2014, Ming Siu Hung, Ronald ("Ronald"), Shaw Siu Kuen, Bertha ("Bertha") and Ming Shiu Tong ("Tong") as claimants, commenced unfair prejudice proceedings in the BVI Commercial Court pursuant to section 184I of the BVI Companies Act, against JFM, as the first defendant, and Lawrence as the second defendant. The claim concerned their shareholding in JFM and Lawrence's unfair treatment of them and their interests as minority shareholders. The claimants and Lawrence are four of the seven children of the late Ming John Fook. Lawrence was a director of JFM. As matters unfolded over a period of some years, the claim was proceeded with before the Commercial Court by way of a split trial, divided into three distinct phases: Phases 1, 2A and 2B. Phase 1 concerned the trial of the unfair prejudice claim itself, whereby the question of liability would be determined. If the claimants were successful and a buy-out order was made by the court of the claimants' shares in JFM, then Phase 2 would be proceeded with. This phase concerned two issues (i) the determination of the 'valuation date' for the purposes of assessing the Buy-Out Price – Phase 2A; and Phase 2B, the determination of the Buy-Out Price itself and the payment of the sums ordered to be paid to each of the respondents for their shareholding in JFM.

Phase 1 Trial

- [11] Leon J dealt with Phase 1. In a judgment dated 16th August 2016, the learned judge held that Lawrence had unfairly and prejudicially conducted the affairs of JFM without reference to the interests of the respondents. He gave judgment for the respondents on the unfair prejudicial claim against Lawrence and ordered that Lawrence buy-out the shares of each of the respondents in JFM. Lawrence's appeal to this Court against the order of Leon J was successful, and the buy-out order was set aside.¹ On appeal to the Privy Council, the buy-out order made by Leon J was reinstated on 14th January 2021².
- [12] However, by then the third claimant, Tong, had died on 10th October 2020. It was not until September 2021 that Regina Ming (the third respondent) was appointed administrator *ad litem* of Tong's estate for the purposes of the proceedings before the BVI Commercial Court. This meant that Phase 2 of the proceedings in the court below did not commence until late 2021.

Phase 2A Trial

- [13] Phase 2A of the proceedings was dealt with by Jack J. By a written judgment and order dated 23rd August 2022, Jack J dismissed or disallowed the new claims brought or sought to be brought by the respondents for (i) an equal shareholding in JFM; (ii) breach of fiduciary duty on the part of Lawrence dating back to 1993; and (iii) "missing" dividends. These claims were dismissed for the reasons set out in the written judgment of that court. For the purposes of the Stay Application, these new claims and reasons for their dismissal are of no relevance whatsoever to the appeal and to the question of whether a stay of execution of the judgment ought to be granted. Likewise, the issue raised by Lawrence in his pleadings as to whether past payments made by JFM to the respondents ought to be classified as dividends or loans, which was also rejected by Jack J, the learned judge having decided that

¹ BVIHMAP2015/0016 (delivered 12th February 2016, unreported).

² [2021] UKPC 1.

they were dividends and thus could not be set-off against the Buy-Out price, is of no moment, the said judgment having not been appealed.

[14] However, important and most relevant to the issue of the Buy-Out price, was the determination by Jack J in that judgment that the 'valuation date' for the purposes of assessing a Buy-Out price for the respondents' shareholding in JFM, is 31st March 2017. This was the date or accounting year-end closest to the handing down of the Phase 1 judgment of Leon J, as had been contended for by the respondents. This order was not appealed and is binding on the parties as the effective date from which the valuation of the Buy-Out price ought to be made.

[15] Suffice it to be said, at this juncture, that the applicant, considers this to be an important factor to be taken into account in support of granting the Stay Application, and has factored it into her argument in this way when addressing the balance of harm test. She argues that the valuation date as determined by Jack J was a time and period when the Hong Kong property market was at its peak. As the argument goes, this underscores or compounds the particular difficulties she is now facing, since the JFM properties have since reduced in value by 40%, and the upshot is that JFM will have to realise significantly more of its assets/properties than would have been the case in 2017 to pay the Buy-Out Price ordered by the court. Additionally, she and JFM will have to incur significant additional transactional costs in doing so, and when you factor into the calculation the quasi-interest of US\$21 million ordered by the judge to be paid, the absurd effect is that the appellant will need to sell off approximately 90% of JFM's current value to pay to the respondents the Buy-Out Price ordered in the judgment (Mangatal J) under appeal³. I shall return to this point and argument later in this judgment.

Phase 2B Trial

[16] The Phase 2B trial, concerned solely with the determination of the Buy-Out Price, was presided over by Mangatal J. It took place during the first 10 days of May 2023,

³ Paragraph 7.14 of the applicant's skeleton arguments.

and the judge's decision was reserved. At this phase of the trial, there was significant disagreement between the parties' property valuation experts as to the true value of the JFM properties. The parties differed as well on the issues of minority discount, quasi-interest on the Buy-Out price, and whether the transaction costs of selling the JFM properties ought to be deducted from the Buy-Out price.

[17] Mangatal J's judgment was handed down on 20th November 2024, 18 months after the Phase 2B trial was concluded on 10th May 2023. The judgment was amended and reissued on 12th December 2024, after correcting some (but not all) of the errors identified and made known to the learned judge by the parties. By the judgment (as amended), the learned judge awarded each of the respondents the sum of HK\$168,450,654.93 including quasi-interest (an aggregate sum of HK\$505,351,964.81) to be paid to the respondents by Lawrence and JFM as the Buy-Out Price.

[18] This judgment and award (as amended) has been appealed by Alice on behalf of the Estate of Lawrence to this Court. The appellant has appealed all aspects of the learned judge's decision. It is the appellant's position that, if successful, the total amount payable by the appellant to the respondents would be reduced from US\$65 million to US\$32 million. If she is successful only on the minority discount issue, the Buy-Out price would be reduced by 17.8% (i.e. US\$7.7 million) and if she were to succeed solely on the quasi-interest issue, the amount payable to the respondents would be reduced by just over US\$21 million. Also, it is with respect to this judgment and award that the applicant, as the personal representative of the Estate of Lawrence, seeks a stay of execution pending the hearing and determination by this Court of the Appeal.

The Consent Order and Share Repurchase Agreement

[19] However, after the Phase 2B trial but prior to delivery of the judgment and award of the Buy-Out Price by Mangatal J, certain important developments took place between some of the parties in the proceedings before the Commercial Court. First,

the appellant/applicant accepted that the minimum sum owing is HK\$144,485,179. Second, and most important, in August 2024 the appellant proposed, and she and JFM on 8th August 2024 entered upon a consent order in substantive proceedings below with the first and second respondents, Ronald and Bertha (“the Consent Order”)⁴. The consent order, inter alia, sets out an agreed timetable for the payment of the Buy-Out price and the retransfer to JFM of their respective shares in the said company⁵. By the terms of the Consent Order, JFM and Alice were given until 31st December 2024 to pay part of the price for the shares of the first and second respondents, and the balance was to be paid to them 6 months after the handing down of the Phase 2B judgment determining the precise amount of the Buy-Out Price.

[20] Third, pursuant to the Consent Order, the appellant paid a total of HK \$46,666,666,66 to the first and second respondents between 7th and 15th August 2024; and a further HK\$60,000,000 to the second respondent between 31st December 2024 (after delivery of the judgment) and 9th January 2025. It is common ground that the appellant failed to make any other payments to the first and second respondents by the agreed dates under the terms of the Consent Order. This includes a second instalment to the first respondent. In the meantime, the second respondent died during the week commencing 2nd September 2024. This second payment remains overdue under the terms of the Consent Order.

[21] It is the appellant’s case that taking these payments into account, the balance due to the first and second respondents in respect of the Buy-Out Price as ordered in the judgment are HK\$145,117,321.60 and HK\$85,117,321,60 respectively⁶. Also, it is not contentious that pursuant to clause 3 of the Consent Order, the balance of the Buy-Out Price to be paid to the first and second respondents must be paid to them within 6 months of the date of the judgment in the court below, that is, by 20th May

⁴ Page 83 of the hearing bundle.

⁵ Page 270 of the hearing bundle.

⁶ Paragraph 15 of the applicant’s skeleton arguments.

2025 (which date has now passed). Accordingly, the applicant, is now in breach of that stipulation of the Consent Order.

- [22] The third respondent, Tong, who died on 10th October 2020, was not a party to the Consent Order, and no payments have been made by Lawrence or his personal representative or JFM to Tong or his estate towards the Buy-Out sum ordered to be paid for his shareholding in JFM. This is so notwithstanding that the applicant has accepted that a certain minimum sum must be paid to each of the respondents, including Tong's estate. In September 2021 Regina Ming, the widow of Tong, was appointed administrator *ad litem* of Tong's estate for the purposes of the proceedings in the BVI Commercial Court, and by extension, the appeal and proceedings before this Court. The applicant's reason for this failure as expressed in her affidavit evidence and in her skeleton argument, is a lack of liquid funds presently in the estate of Lawrence deceased or in JFM to pay the full amount due to Regina Ming (as personal representative of the estate of Tong). Also, as an alternative to a cash payment, she has offered to transfer her (Alice's) property worth HK\$128 million to Regina, in satisfaction of the principal due to the third respondent and a significant part of the quasi-interest. However, this offer has not been accepted by the third respondent⁷.

Applicant's submissions

- [23] As mentioned above, the applicant applied for a stay of execution of the entire judgment and award. This includes the total Buy-Out Sum determined by the learned judge to be paid by the appellant to the respondents and the amount awarded as quasi-interest. However, during oral argument before this Court counsel for the applicant accepted that having taken into account the payments already made to the first and second respondents, the "fairer" position would be for this Court to stay the execution of only that sum which represents or amounts to the difference between the balance of the amount if the appeal is fully successful and the total sum awarded to the respondents by the judge in the Phase 2B judgment,

⁷ Paragraph 17 of the applicant's skeleton arguments.

but not including any post judgment interest. This represents the ‘differential’ between the two competing positions and amounts, in the appellant’s estimation, to the sum of US\$32.5 million⁸. This ‘fairer’ position is not the same as the “secondary” position contended for by the applicant at paragraph 24 of her skeleton submissions. There the applicant sought, in the alternative, a stay of the payment of the difference between the Competing Price (the appellant’s minimum) and the Judgment Price, as determined by Mangatal J.

[24] This Court cannot, as a matter of principle and common sense and for several cogent reasons, stay the execution of the Phase 2B judgment award *in toto*. The first is an obvious one. A stay of the full award cannot now incorporate the sums already paid by the appellant to the first and second respondents amounting in aggregate to HK \$106,666,666.66. Second, the sums already paid to these parties are part payments and do not amount to the minimum sum contended for and conceded by the appellant as payable to the respondents in any event for their shareholding in JFM. It is accepted by the appellant that each of the first and second respondents are, on the appellant’s case, entitled to further payments, and that the third respondent Tong has not received any payment thus far from the appellant on account of the purchase of his shareholding in JFM. Accordingly, it would clearly be wrong on any sensible basis to stay the execution of the judgment in relation to the balance of the minimum sum accepted by the appellant as the Buy-Out sum for the respondents’ shareholding in JFM. On the applicant’s calculations, this is US\$18.5 million⁹. This latter sum was arrived at on the basis that the appellant will be entirely successful in the appeal. However, if the appellant failed entirely in the appeal the balance would be US\$51.3 million, a ‘difference’ of US\$32.8 million.

[25] The applicant argues that to pay that ‘difference’ of US\$32.8 million the appellant will have to effect sales of substantially more of JFM properties than she would be required to sell to pay the balance of US\$18.5 million, being the balance she

⁸ Paragraph 22.3 of the applicant’s skeleton arguments.

⁹ Ibid at paragraph 22.2.

contends for. As this argument goes, if forced to realize those additional JFM properties now, instead of later when the property market in Hong Kong (hopefully) improves “will potentially crystallize a significant loss to JFM and consequently the deceased estate which will not be recouped from the respondents if the appeal is upheld.”¹⁰ This potentially disastrous situation submitted by the applicant, is compounded by the fact that the Buy-Out Price was calculated based on March 2017 property values (Phase 2A judgment) when the real estate market in Hong Kong was very buoyant. However, this market has dropped by 40% since then, but JFM anticipates it may significantly improve in the coming years. I would simply remark here that all this is highly speculative and fraught with uncertainty. The applicant also contends that to sell sufficient JFM properties to pay the balance of the Phase 2B judgment in full “would mean having to sell over 90% of JFM’s property portfolio to pay just 3/17th of the shares in the company.”

[26] The applicant relies on her evidence that she has not been sitting on her laurels but has been actively marketing the JFM properties since May 2023 to raise cash to pay the Buy-Out price, having depleted the cash reserves of JFM in making the partial payments to the first and second respondents under the Consent Order. To date she has agreed to the sale of 5 commercial properties. However, these sales are legally complex and can take up to 6 months to complete and realize the funds.¹¹ She is also actively marketing other properties and have lowered the prices significantly in an attempt to achieve faster sales.¹²

[27] This line of argument by the applicant is also being advanced in support of her primary submission that the balance of harm in this matter favours the grant of a stay of execution of the judgment, albeit now limited to the ‘difference’ of US\$32.8 million (and not to the entire Phase 2B judgment balance of US\$51.3 million).

¹⁰ Ibid at paragraph 22.3

¹¹ Applicant’s affirmation filed on 6th February 2025 at paragraphs 24-27.

¹² Ibid at paragraph 27.

[28] The prospects of success of the appeal is one of the factors to be considered in deciding whether to grant a stay. However, as is clear from the authorities, this factor should only be taken into account where there are strong grounds of appeal or a strong likelihood that the appeal will succeed, which would usually enable a stay to be granted¹³

[29] The applicant contends that there is a strong or very strong likelihood that her appeal of the judgment will succeed. Unsurprisingly, this contention is rooted in what she perceives to be strong grounds of appeal making it very likely that her appeal will succeed in full, but at least in part, resulting in significant reductions in the actual balance to be paid to the respondents. The first ground is that as a consequence of the learned judge having taken 18 months to deliver her Phase 2B judgment, it contained certain serious procedural errors and other irregularities. These include not just typographical errors and drafting notes which resulted in amendments having to be made to the judgment and it being redelivered on 12th December 2024. More significantly, it is submitted, this inordinate delay in delivery of the judgment hindered the learned judge's recollection of the expert evidence adduced and the submissions made by the appellant at the Phase 2B stage of the trial, but yet the learned judge did not request any transcripts of the opening and closing submissions so as to more fully inform her recollection of the pertinent issues and submissions. Further, the expert evidence was not accurately or fully transcribed. The applicant also submits that the consequence of all this is that the learned judge failed to evaluate or to properly evaluate the evidence and submissions and did not give adequate reasons for the conclusions which she reached, thereby rendering the judgment and the outcome of the Phase 2B trial unsafe.

[30] The significant errors of law and fact identified by the appellant in her notice of appeal and submissions are: (i) the judge not accepting the expert evidence of the appellant's witness on the issue of the valuation; (ii) her refusal to apply a minority

¹³ C-Mobile Services Ltd v Huawei Technologies Co Limited (BVIHCMAP2014/0017 delivered 2nd October 2014, unreported).

discount (US\$7.7 million) to the value of the respondents shareholding in JFM, having regard to the particular facts of the case; (iii) her decision to award quasi-interest of US\$21 million was unjust and plainly wrong; and (iv) not allowing for the normal transactional costs pertaining to the sale of the properties to be deducted from the Buy-Out Price.

[31] The applicant also submits that a stay of execution would not cause any irreversible harm to the respondents, and the only prejudice to them would be the delay in receiving payment or payment of the balance in the case of the first and second respondent. Any such prejudice will be compensated by post judgment interest of 5% per annum. Also, in relation to the third respondent, she has been offered by the applicant a valuable property in Hong Kong in lieu of a cash payment. Furthermore, the applicant has not been idle but has been making strenuous efforts to pay the Buy-Out Price in full, as disclosed in her affidavit evidence.

[32] Finally, the applicant submits that the terms of the Consent Order do not prevent this Court from granting the stay of execution sought in the Stay Application, or as revised in oral argument before this Court. In support of this submission, the applicant referred to the two meanings of an order made “*By Consent*” elucidated by Lord Denning MR in **Seibe Gorman and Company Limited v Pneupac Limited**¹⁴, cited with approval by Lord Justice Tomlinson in **Pannone LLP v Aardvark Digital Limited**¹⁵. One meaning of this expression is that it evidences a real contract between the parties to the consent order, such that the court will only interfere with it on the same grounds as it would with any contract. In short, such an order has contractual force and is binding as between the parties to the said order and the court can only interfere with its terms in limited circumstances. The second or other meaning does not accord contractual force to the order and its terms. This is where the words “by consent” means or is interpreted to mean “*the parties hereto not objecting*”. In this instance, the order can be altered or varied by the court in the

¹⁴ [1982] 1 WLR 185.

¹⁵ [2011] EWCA Civ 803.

same circumstances as any other order that is made by the court, and without the actual consent of the parties thereto being an essential requirement or predicate. It follows that in each case it falls to the court to consider which of these two meanings is to be accorded to the particular ‘by consent’ order under consideration.

- [33] Does the order have contractual force or was it simply an order of the court consented to by the parties thereto in the sense of each of them “not objecting”? I am of the firm opinion that the Consent Order entered into in the proceedings below on 8th August 2024 (prior to and in anticipation of delivery of the Phase 2B reserved judgment) by and between Lawrence (on the one hand) and the first and second respondents (on the other) does have and was intended to have contractual force as a binding and enforceable consent order of the court. However, that still leaves the issue of whether the terms of the said Consent Order preclude this Court from staying the execution of the Phase 2B judgment, the effect of which would be to delay payment of the balances to the first and second respondents under the Phase 2B judgment and to thereby vary the terms of the Consent Order without the consent or concurrence of the first and second respondents or either of them. This latter issue will be addressed later in the judgment. Moreover, as the third respondent was not party to the Consent Order, it is unsustainable on any basis that its terms had any contractual application or force whatsoever to the third respondent’s entitlement to be paid for her shares in JFM or the terms upon which such payment is to be made by the applicant/appellant.

Respondents’ Submissions

- [34] As mentioned above, the respondents filed two skeleton arguments in opposition to the Stay Application. The first on 21st February and the second on 14th March 2025 addressing issues raised in the applicant’s skeleton arguments¹⁶ and not addressed or fully addressed in their first skeleton.

¹⁶ Applicant’s skeleton arguments filed on 27th February 2025.

- [35] In relation to the Consent Order, the respondents observed that it did not provide that the agreed upon dates for payment of the Buy-Out price for the second and third respondents' shares was subject to any appeal of the Phase 2B judgment. Moreover, it expressly provided that any variation in the payment dates had to be by agreement signed by the parties thereto. Further, the respondents stress that pursuant to the Share Repurchase Agreement and paragraph 3 of the Consent Order, the applicant, agreed to pay "the balance of any judgment sum awarded ... to the First and Second Claimants ... within 6 months of the date on which the Reserved Judgment [defined as "the judgment of Mangatal J"] is handed down."
- [36] It is the respondents' submission that the dates for payment of the balance of the Buy-Out price to the first and second respondents (taking into account the part payments made to date) which the applicant/ appellant is in effect asking this Court to relieve her of by granting the Stay Application, are dates that were agreed and are terms of the Consent Order which have binding contractual force as between the appellant on the one hand and the first and second respondents on the other. These dates are not dates imposed on these parties by the court, but are payment dates which the parties agreed between them as binding terms of the Consent Order, and intended to have contractual force. It is the respondents' submission that the payment dates, including the provision for the payment of the balance of the Buy-Out price determined by the judge below to the first and second respondents 6 months from the date of delivery of the Phase 2B judgment, are binding on the parties to the Consent Order. Furthermore, the respondents submit, on well-established principles, these dates and terms of payment cannot be varied, changed, or postponed by this Court by way of the appellant's application for a stay of execution of the Phase 2B judgment. Moreover, the applicant has acted pursuant to the terms of the Consent Order in making the first payment thereunder to each of the first and second respondents and a second, albeit late payment, to the second respondent.

[37] To further buttress this line of argument, the respondents point to another important development post-delivery of the Phase 2B judgment. This relates to the payment of the purchase price for the third respondent's shares in JFM. At paragraph 18 of their first skeleton arguments in opposition to the Stay Application, the respondents refer to the order made 6th February 2025 at the Consequential Hearing before Mithani J in the Commercial Court in these proceedings. Mithani J ordered, inter alia, that the first respondent, Ronald, should be paid by the appellant and JFM what is currently owed to his estate under the Consent Order; and that the parties should seek to agree to a payment schedule for the third respondent to ensure that the final payment is made on 20th May 2025, that is, the same date that the final payment is due to be made to the 1st and 2nd respondents under the Consent Order. The respondents also inform this Court that since the Mithani J consequential order, the parties have reached an agreement whereby an initial payment to the third respondent will be made by 28th February 2025, with the remainder to be paid on 20th May 2025. However, up to the time of filing their skeleton arguments, the formal order had not yet been approved by the learned judge.¹⁷ This is indeed an important development and one which this Court ought to take into consideration when exercising its discretion whether to grant the Stay Application (as varied).

[38] The respondents relied on the dicta of Ward JA in the judgment of this Court in **Lunan Pharmaceutical Group Corporation v Zhao Long**¹⁸ that the test for the appellate court when deciding whether to grant a stay of the judgment in the court below, is whether the unsuccessful litigant (the appellant) can show that there are 'exceptional circumstances' why the successful litigant should be deprived (temporarily) of the fruits of their judgment. They also rely on the five principles set out from the **C-Mobile** decision by Ward JA at paragraph [29] of the judgment of this Court in **Lunan**. These are:

(1) The court must take into account all the circumstances of the case;

(2) A stay is the exception rather than the general rule;

¹⁷ Respondents' skeleton arguments filed on 21st February 2025 at paragraph 18b.

¹⁸ BVIHC VAP2021/0007 (delivered 27th April 2023, unreported).

(3) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;

(4) In exercising its discretion the Court ought to apply what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered; and

(5) The court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

[39] In applying these principles to the instant matter, the respondents' primary submission is that the applicant has failed to demonstrate by cogent evidence that there are exceptional circumstances why the Court of Appeal should deprive the respondents or delay further payment to them of the fruits of the Phase 2B judgment, the balance owing under this judgment for their respective shares in JFM. It is also submitted that the applicant has not adduced any cogent evidence that the appeal will be stifled or rendered nugatory unless a stay was granted, and the only risks contended for by the applicant in her submissions are, in the circumstances, the usual risks inherent in every appeal from a money judgment, where the judgment debtor is unable to pay in full the award or judgment debt.¹⁹

[40] The respondents also observe that the Stay Application seems to have been presented on a wrong basis. It is not really presented on the basis that the appeal would be stifled or rendered nugatory unless a stay of execution is granted. Instead, the Stay Application has been presented as if it were an application for further time to pay parts of the Buy-Out price, grounded, as it is, on the perceived prejudice to the applicant/appellant and to JFM of having to realise, through possible execution process, sufficient of its assets to meet the judgment payment sum to the respondents. This wrong basis, says the respondents, is to be assessed in circumstances where the dates for payment of the Buy-Out price were agreed and

¹⁹ Paragraph 28 of the respondents' skeleton arguments filed on 21st February 2025.

enshrined in the Share Repurchase Agreement and Consent Order, which documents a binding and enforceable contract as between the appellant and JFM on the one hand, and the first and second respondents on the other; and also in the context of the now agreed upon full payment date for the sum owing to the third respondent.

[41] The respondents also submit that Lawrence has, by his unfairly prejudicial conduct and actions as a director of JFM as found by Leon J in the Phase 1 judgment, essentially brought this state of affairs of having to sell JFM properties to pay the Buy-Out price for the respondents' shares, upon himself (his estate) and JFM. This is by refusing to offer and to pay the respondents fair market value for their respective shareholding in JFM. This is what has prevailed notwithstanding the several opportunities which occurred for Lawrence to do so, and in the case of the applicant, Alice herself, what appears to be her campaign of obfuscation and delay, examples of which are catalogued in the respondents' first skeleton argument.

[42] The respondents also argue that having regard to the concession by the applicant that HK\$144,485,179.30 (US\$18.5 million) is the minimum further amount owing, the Stay Application is clearly misconceived since the applicant seeks a stay of the entire judgment. However, there is no sound basis on which to stay that part of the judgment concerning the Buy-Out price which the appellant would still have to satisfy even if her appeal were to succeed in full. On this basis, the respondents submit that the Stay Application ought to be dismissed. I have earlier dealt with this issue, pointing to the applicant's concession or shift in position during the oral argument before this Court to what their counsel termed a 'fairer position'. This concession or shift was obviously in full recognition of the unsustainability of the application to stay the entire Phase 2B judgment and award.

[43] The respondents also contend that even if the Stay Application was limited to the judgment amount above the minimum sum conceded by Alice, the evidence in support of the application does not address what the financial prejudice would be to

the appellant and/or JFM of having to fund the 'difference' of HK\$ 254,200,119.15 between these two sums. The simple fact is that this scenario would also rest on the two principal bases on which the Stay Application has been brought, as elucidated by the applicant in her skeleton argument. These are: (i) the difference in property values between the valuation date and the Buy-Out valuation, necessitating a sale by JFM of considerably more of its assets/properties to satisfy the balance of the Buy-Out price and quasi-interest presently unpaid to the respondents; and (ii) the perceived unlikelihood of recovering from the respondents any sums paid were the appellant to achieve either full or partial success in the appeal. These two points or grounds are addressed by the respondents in more detail in their submissions and will be canvassed below.

- [44] The respondents, at paragraph 25 (a) to (e) of their first skeleton arguments, address the bases upon which the applicant asserts a case of prejudice to herself and JFM if the latter was forced, through execution processes, to sell sufficient of its properties to satisfy the balance of the Phase 2B judgment award, or the difference between the minimum price conceded by the applicant and the judgment Buy -Out price. Suffice it to be said, that the respondents submit that the alleged prejudice cannot amount to "exceptional circumstances". They argue that these issues and concerns are quite commonplace. They arise in every case where a judgment debtor does not have sufficient cash to pay the judgment debt. As to the assertion at paragraph 5(d) of the Stay Application that the applicant would be prejudiced as it may be impossible to recover funds paid over to the respondents should she be successful in the appeal, the respondents submit that this contention is speculative and unsupported by any evidence, much less cogent evidence. Additionally, says the respondents, they have offered the applicant the option of having the 'difference' of \$HK 254,200,119.15 paid into court, thereby completely eliminating any risk or potential prejudice should the appeal be successful. I shall return to this proposal below.

- [45] The respondents address head-on the primary bases underpinning the Stay Application, hinged, as it is, on the disparity in property values in Hong Kong between the 31st March 2017 valuation date on which the Buy-Out price was calculated and the significantly lower present day property values in the same market. This the applicant submitted would result in the necessity for her and JFM to sell considerably more of JFM's assets/properties to satisfy in full the balance of the Phase 2B award including the award of quasi-interest. However, the respondents argue that this ground simply misses the mark and omits to take into account certain pertinent facts. The respondents point out that this ground fails to appreciate the fundamental point that the resulting disparity in property values and their effect or possible effect on the sale of assets of JFM to satisfy the Phase 2B judgment award made several years after the unfairly prejudicial claim in the court below had commenced, is a result, not of any perceived action, failure or fault of the respondents, but of the unfairly prejudicial conduct meted out to the respondents as minority shareholders in JFM by Lawrence. They point to certain findings to this effect by Leon J in the Phase 1 judgment, which led to the making of a Buy-Out order. Specifically, that the said judge mused that Lawrence was 'acting as if he were the sole owner of [JFM]'; and as if he had bought the respondents' shares in the said company, whilst at the same time refusing to pay fair value for their shares.
- [46] In support of this submission, the respondents also point, inter alia, to the findings of Leon J at paragraphs [104], [105], and [106] of his Phase 1 judgment. There the learned judge held that Lawrence had wrongfully withheld the financial information about JFM to which his siblings were entitled, while at the same time he had proceeded to buy shares from two of his siblings at a knock-down price of US\$1.4 million, thereby profiting from his unfairly prejudicial conduct. Thereafter, Lawrence had approached the second respondent, Bertha, to purchase the respondents' shares, but continued to refuse to provide her and the two other respondents as shareholders with any financial information about JFM²⁰. The respondents say, this was because he wanted to avoid having to pay market price for their shares.

²⁰ Paragraph 1 of the Phase 1 judgment.

- [47] It is submitted that had Lawrence dealt correctly and fairly with his siblings, the respondents, and their shareholding in JFM, and had he adopted a willingness to pay fair market price for their shares at that time when property values were higher, he (his estate) and JFM would not have ended up in the current predicament, which predicament the applicant now advances as a major bases upon which to ground a claim of prejudice and that the balance of harm test favours granting the stay. In short, this is a predicament of Lawrence's own making because he failed to discharge his fiduciary duties as a director and majority shareholder to the respondents and elected to unfairly prejudice the respondents to the detriment of their shareholding in JFM. Accordingly, the Court ought not to now countenance this basis or ground advanced by the applicant in support of the Court exercising its discretion to grant the stay.
- [48] The respondents point also to two additional factors which serve, in their opinion, to show that this is indeed a predicament caused by or flowing directly from the unfairly prejudicial conduct of Lawrence. The first is that on the eve of the Phase 1 trial, Lawrence again made an extremely low offer to buy the respondents' shares in JFM, rather than at market value. Prior to that in August 2016, after Leon J had made the Buy-Out Order, this was yet another opportunity for Lawrence to have bought the respondents' shares in JFM at the August 2016 to March 2017 value (which turned out to be the correct valuation date as held by Jack J), but he did not do so. Accordingly, it is submitted, that the prejudice complained of in the Stay Application "is the result of Lawrence's continued refusal to pay [the respondents] what their shares were worth" and, as held by Jack J, "the consequences of that should be visited on [the estate of Lawrence and JFM] and not [the respondents]."
- [49] The respondents also contend that the Stay Application ignores certain key events which have occurred since the Phase 2B hearing. This is, of course, a reference to the Consent Order and Share Repurchase Agreement, and to the Mithani J Order following the consequential hearing. As to the Consent Order, the respondents rely on paragraph 3 thereof, whereby the applicant voluntarily agreed and consented to

pay “the balance of any judgment sum awarded ... to the [first and second respondents] ... within 6 months of the date on which the Reserved Judgment [of Mangatal J] is handed down”.

[50] This point is most telling. I observe that the Consent Order entered into by Alice on behalf of Lawrence’s estate, were the first and second respondents (and the Share Repurchase Agreement), were made and entered into by the Applicant at a time when she must have appreciated that the property values in the Hong Kong market at that time and into the foreseeable future ,were not and would not have been, as advantageous as they were in March 2017 - the ‘valuation date’ for calculating the Buy-Out price. Furthermore, at the time of entering into the Consent Order, Alice would have fully appreciated the then difficult financial position of JFM, importantly, the likelihood that considerably more of its assets/properties would have to be sold to meet the Buy-Out price, and the lack of certainty as to what would be the Phase 2B judgment of the court below and the award of a Buy-Out Price, quasi-interest, and post-judgment interest, all matters of which she now complains and challenges by way of the appeal and in mounting the Stay Application under consideration.

[51] Specifically on the issue of prejudice to themselves if the stay being sought is granted, the respondents point out that these proceedings were commenced on 2nd May 2014 (now some 11 years ago); Tong, the third claimant, died before Phase 2 commenced, and his executrix, Regina, is almost 82 years old; the first claimant, Ronald, died between the Phase 2B hearing and the handing down of the Phase 2B judgment, as did the second defendant, Lawrence. Only the second claimant, the second respondent herein, Bertha, remains alive, she having been born in 1947 and is now 78 years old, and she should be alive to see the fruits of these proceedings. Further, were the stay to be granted and should the Hong Kong property market fall or decline further, JFM might not have sufficient assets to pay the balance of the Phase 2B judgment. These are certainly important considerations for this Court to bear in mind when seeking to do justice as between the parties in circumstances

where the respondents have the benefit of a judgment and award made after years of proceedings and split trials.

[52] As to the purported strength of the appeal, the respondents submit that the opposite is true, and they reserve the right to strike out the notice of appeal or parts of it “as disclosing no reasonable grounds of appeal”.²¹ No such application has been made and thus the possibility of striking out the appeal is not a relevant consideration at this stage.

[53] However, the respondents argue that the only legal point raised in the appeal is whether a minority discount should be applied in BVI non-quasi partnership unfair prejudice cases. On this issue, they point out that Lawrence accepted at trial that it was open to the trial judge to follow either of two lines of English cases on this point, and the judge chose to and did follow one of them, in the absence of any BVI authority on this issue. Accordingly, it is not a strong ground for the appellant to assert in the appeal that the judge’s choice of one of those lines of English authority was wrong as being contrary to BVI law. In my view, while this is an important factor to bear in mind, it does not preclude the appellant from arguing before this Court in the hearing of the substantive appeal reasons why they say the learned judge erred in having elected to follow a particular line of cases on this issue. The important point of departure by the appellant, however, is that , as appears from her submissions, she now seeks to argue that the line English case law followed by the judge was wrong or meant that she got this issue and award wrong, because it is contrary to BVI, English and Cayman Islands law, and is not supported by the Commonwealth authorities on which the judge relied.

[54] The respondents addressed the grounds of appeal in more detail in their second skeleton arguments²². As to the grounds dealing with minority discount, quasi-interest and serious procedural irregularities, it is the respondents’ submission that

²¹ Paragraphs 3(a) and 30 of the respondents’ skeleton arguments filed on 21st February 2025.

²² Respondents’ skeleton arguments filed on 14th March 2025.

these have little or no merit at all. They do not support a conclusion of strong or very strong grounds of appeal or that the appeal has a strong likelihood of success. Therefore, this limb ought not to be taken into account by this Court when exercising its discretion whether to grant a stay of execution. Finally, as to the appellant's "offer" of House C to the third respondent in full satisfaction and discharge of payment of the Buy-Out price for her shares in JFM, the respondents assert that it is common ground that House C was purchased by Joy Ease and is not a JFM property.

Analysis and Conclusion

Stay jurisdiction and applicable principles

[55] Section 18 (a) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**²³ gives the court, including the Court of Appeal, jurisdiction to stay execution of any judgment or order of a court, including its own order or an order on appeal from the lower court. Rule 62.19(1)(b) of the **CPR** empowers a single judge of the Court to consider and to grant a stay of execution of any judgment or order "against which an appeal has been made" pending determination of the appeal before the Court. To invoke this jurisdiction at the appellate level, there must be a pending appeal from the judgment or order of the lower court or, in circumstances of demonstrated urgency, an intended appeal therefrom. In the latter circumstances, any stay order made by the Court of Appeal will be expressly conditional upon the applicant filing a notice of appeal within, usually, a short period specified in the said order.

[56] **CPR 62.23** and in **Rule 30(1) of the Court of Appeal Rules 1968** sets out several overarching principles applicable to an application for a stay of execution of a judgment or order of the lower court by the Court of Appeal. The first is that an appeal does not automatically operate as a stay of the judgment or order being appealed. CPR 62.23 expressly provides that so far as the court below or the Court of Appeal or a single judge of the Court or an enactment otherwise provides, an appeal does not operate as a stay of execution or of proceedings under the decision

²³ Cap. 80 of the Laws of the Territory of the Virgin Islands.

of the court below. This stipulation has the profound effect that the losing party is and continues to be bound by the judgment or the terms of the order appealed, except and only so far as the court (or judge) below or this Court or a single judge of this Court may order. Importantly, by **CPR 62.24(1)**, in relation to an appeal, the Court of Appeal has all the powers and duties of the High Court, including in particular the powers set out in Part 26.

[57] The other overarching principle of general application to stay applications is that a successful litigant should not be deprived of the fruits of their judgment save in exceptional circumstances; a stay is the exception rather than the rule. Accordingly, an applicant for the grant of a stay must make out a proper case and must do so by providing cogent evidence that absent the stay, the appeal will be stifled or rendered nugatory. These overarching principles are indicative not of an established test of proof of “exceptional circumstances”, but that for a court to deprive the successful litigant of the fruits of their judgment is the exception and not the rule. I shall return to this issue of “exceptional circumstances” when considering below the recent decision of this Court in **Lunan Pharmaceutical Group Corporation v Zhao Long**, an appeal from the Territory of the Virgin Islands.

[58] The five principles which should guide a court when determining an application for stay of execution are well-established. They were enunciated by this Court in **C-Mobile Services Ltd v Huawei Technologies Co Limited**²⁴ and have been followed and applied in many subsequent decisions of our courts both at first instance and at the appellate level. These principles are:

(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.

²⁴ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

(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 strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

[59] In **Lunan Pharmaceutical Group Corporation v Zhao Long** Ward JA, delivering the judgment of the Court, opined at paragraph [29]:

“A litigant should not be deprived of the fruits of their judgment pending appeal save in exceptional circumstances. Thus, an applicant for a stay must make a proper case for the grant of a stay since a stay is the exception rather than the rule. He does so by providing cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. The burden resting [of] an applicant for a stay, and the principles which ought to guide the court on such an application, are clearly stated in the judgment of this Court in *C-Mobile Services Limited v Huawei Technologies Co. Ltd.*”

[60] Counsel for the respondents submitted, on the basis of the above passage in **Lunan**, that the test for the grant of a stay of execution of a judgment or order is ‘exceptional circumstances’, and in deciding whether this threshold has been made out by the applicant, the judge is required to consider and apply the above stated five principles enunciated in **C-Mobile** to the particular circumstances of the case. However, counsel for the applicant disputes that the proper test for a stay of execution to be granted is “exceptional circumstances.” He submitted that the test for the grant of a stay of execution is whether the appeal will be stifled or rendered nugatory, unless a stay is granted, where the balance of harm lies as between the parties to the appeal and how best, in the particular circumstances, ought the court to do justice between the parties and their disparate interests in the litigation.

[61] In my view the passage in the judgment of this Court in **Lunan** properly read does not establish a test of proof of ‘exceptional circumstances’ for the grant of a stay of execution of a judgment or order under appeal. Simply put, the dicta in **Lunan** cited above makes clear that a stay is not the general rule but the exception; not that the

test for the grant of a stay by the court is 'exceptional circumstances'. The passage cited makes clear first that the successful party in the court below is entitled to the fruits of their judgment; and second, that an applicant for a stay must make out a proper case since a stay is the 'exception' and not the rule. To make out a proper case for a stay, the applicant must adduce cogent evidence 'that the appeal will be stifled or rendered nugatory'. It is also made clear in **Lunan** that the five principles enunciated in **C-Mobile**, underscored that 'the court, on an application for a stay, is essentially engaged in performing a balancing exercise which requires the court to consider a number of factors.'²⁵ The essential feature of this balancing exercise is what has become known as the 'balance of harm test'. This test applies to both the applicant for the stay and the successful party, but careful consideration must be given to any likely prejudice to the successful party. Accordingly, the proper approach by a court to an application for a stay of execution of a judgment or order under appeal involves a consideration of all five **C-Mobile** principles. There is no single test of 'exceptional circumstances'.

[62] The first two **C-Mobile** principles are not, strictly, tests. The first principle, a court must take all circumstances of the case into account, is declaratory of the scope and amplitude of the court's approach to its determination of a stay application and its assessment of the evidence adduced in favour and against the granting of the stay sought. The second principle underscores the exceptional nature of a stay of execution of a judgment or order and serves as a reminder to the court or judge that the grant of a stay of execution is not the rule.

[63] The third **C-Mobile** principle establishes the high threshold which an applicant for a stay of a judgment or order must attain - whether absent the stay the appeal will be stifled or rendered nugatory - and the legal and evidential burden necessary to meet it having due regard to the second principle. The application must be supported by cogent evidence, not bare assertions or allegations. The evidence in support must be relevant, detailed, and where necessary, well-supported or documented. The

²⁵ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) at paragraph 30.

fourth principle is a crucial one. It focuses the court's consideration on the issue of prejudice to the applicant and to the respondent if a stay is granted. It requires the court to apply the 'balance of harm' test in seeking to ascertain what decision is in the interest of justice.

[64] The fifth **C-Mobile** principle addresses the prospects of the appeal succeeding. However, this is only to be considered or weighed in the court's exercise of its discretion, where strong grounds of appeal are shown or a strong likelihood of the appeal succeeding demonstrated. Where the judge is satisfied that the grounds of appeal are strong or that the appeal has a strong likelihood of succeeding, a stay will usually be granted. This is so because the interest of justice would dictate that in such circumstances it would be appropriate or compelling that a stay of the judgment appealed ought to be granted. In giving due consideration to this fifth principle, the court or judge must abstain from conducting a mini appeal as this is not the role of the judge or court dealing with the stay application, but solely one for the appellate court. The burden is therefore on the applicant to be able to demonstrate the strength of their appeal and likelihood of its success, without indulging in a detailed argument of the grounds of appeal. Likewise, this caution applies equally to the respondent when attempting to demonstrate that the appeal is not strong or very strong and the prospects of success are weak or that the appeal is more likely to fail.

[65] Where the judge is not satisfied that there are strong grounds of appeal or strong likelihood of success, the fifth principle is not to be considered in determining granting a stay. It does not follow, however, that in such circumstances the stay application must *ipso facto* be refused. In such circumstances, the judge must consider and weigh the other factors or principles, including whether the appeal would be stifled or rendered nugatory if a stay is not granted. The judge must also consider whether, applying the 'balance of harm test', the successful party would be more prejudiced if the stay was granted or, conversely, the applicant would be more

prejudiced by a stay not being granted, and whether in all the circumstances, the interest of justice dictates that the stay sought be granted or not.

- [66] In support of the Stay Application, the applicant relied on three main bases upon which the Court ought to exercise its discretion in granting the stay of execution, pending the determination of the appeal. These are: (1) unless a stay is granted, the appeal if successful, would be rendered nugatory, because the respondents may seek enforcement action against the JFM properties and assets and at even further discounted prices than they are currently being marketed for sale, resulting in permanent loss of the properties and leaving no recourse to recover the lost value, if the appeal is successful; (2) the balance of harm test, since if the stay is not granted the appellant will suffer serious harm and prejudice; (3) the appellant has strong grounds of appeal pointing to the grant of the stay. I shall deal with each of these bases seriatim.

Appeal will be rendered nugatory

- [67] The applicant has not demonstrated by cogent evidence that if a stay is not granted the appeal will be rendered nugatory. The applicant's main argument in support of this primary submission is rooted in her fear that unless the Phase 2B judgment is stayed (or at least the difference between the balance of the Buy-Out Price not yet paid plus the quasi-interest judgment sum and the resulting balance if the appeal is successful), the respondents will take enforcement action to sell the JFM properties and to do so at a heavily discounted price, resulting in appreciably more of JFM's properties and assets having to be sold to pay the judgment balance in full to the respondents. This, argues the appellant, will irreversibly deplete JFM's assets and adversely affect the value of Lawrence's estate, which is primarily locked up in the value of JFM, Lawrence being the majority shareholder of JFM at his death.
- [68] The respondents counter that the appellant's position is no different from that of any judgment debtor who does not have sufficient liquid funds to pay the judgment debt in full. More acutely, the respondents argue that this basis misses the mark, as it

fails to take into account that the current predicament in which JFM and Lawrence's estate find themselves is of Lawrence's own making, for the reasons chronicled above.

[69] I find the respondents' arguments and points advanced in opposition to this basis to be sound and very persuasive. Any proper consideration of this important question, in the exercise of the court's discretion, cannot exclude from the matrix the simple fact that at the root of this dispute is a finding of wrongdoing on the part of Lawrence in his management of JFM and its assets in relation to the respondents by unfairly prejudicing their interest in JFM.

[70] It is this conduct of Lawrence which led to the commencement of these proceedings and to the Phase 1 judgment against Lawrence and the upholding of the Buy-Out Order made by Leon J. By this judgment, Leon J also found that Lawrence having wrongfully withheld financial information and accounts of JFM and its underlying subsidiaries and businesses from the respondents, who as shareholders were entitled to such information, he sought to further disadvantage the respondents by purchasing or attempting to purchase their shares in JFM (or some of them) at what was clearly significantly low or below then prevailing market prices. This conduct led also to the finding and judgment of Jack J at the end of the Phase 2A proceedings that the 'valuation date' for the purpose of determining the Buy-Out Price for the respondents' shares in JFM would be 31st March 2017. The appellant is bound by this decision and the consequences which flow from it. She cannot now be heard to contend that JFM and Lawrence's estate would be or are disadvantaged because using that valuation date has resulted in a higher Buy-Out Price requiring the sale of more properties and assets of JFM to satisfy that sum at a time years later when the Hong Kong property market has already experienced a significant drop in values.

[71] The consequences identified at paragraph 5 of the Stay Application are anticipatory and somewhat speculative. No cogent evidence has been adduced by the appellant

in support of them in her affidavit evidence or otherwise. The appellant's evidence consists of bald statements that she has been marketing certain of JFM's Hong Kong properties for sale at already discounted prices, but with little or no success. No solid evidence of this has been adduced, identifying which properties, the offering prices, and what efforts have been undertaken to market them. The appellant's case seems to be that only she should be permitted to sell the assets of JFM to pay the balance of the judgment Buy-Out Price plus quasi-interest, and the respondents must sit and wait on her to process this and to finally make payment in full, which according to her case, both at first instance and in the appeal is a sum considerably less than the resulting balance of the judgment sums after deducting the payments made thus far to the first and second respondents.

[72] The simple answer to each of these points is that the respondents are entitled to the fruits of their judgment and to take enforcement action to realise full payment of the balance of the Buy-Out Price owed to them as a judgment debt, including quasi-interest. In this vein I agree with the respondents' point that the Stay Application is not grounded in any real assertion that the appeal will be rendered nugatory but is more of an attempt by the applicant to further postpone payments of the Phase 2B judgment to the respondents and to thereby seek to vary or sanction her non-compliance with the terms of the Consent Order and with the agreement reached with the third respondent to pay the sum adjudged as owing to his estate for his shares in JFM.

[73] Two other significant developments or steps in the proceedings below are relevant and must be considered and weighed by this Court when exercising its discretion in determining whether the applicant has satisfied this Court that the stay applied for ought to be granted. These two factors are relevant to its consideration of all grounds upon which the Stay Application is made, including whether the appeal will be rendered nugatory if the stay is not granted.

[74] The first is that Consent Order as between the appellant and the first and second respondents, and the failures or breaches of that order by the appellant. The Consent Order represents the 'contract' between the appellant and the first and second respondents for the payment of the balance owing under the judgment to the first and second respondents within 6 months of the date of delivery of the Phase 2B judgement, that is by, either 20th May or 12th June 2025. The second other important factor is the terms of the order of Mithani J made 6th February 2025, particularly as it relates to payment or reaching an agreement on payment of the judgment sums owing to the third respondent Tong and the fact that it has been agreed by the appellant that Tong is to be paid in full on 20th May 2025, the same date on which the first and second respondents are to be paid in full by the appellant under the terms of the Consent Order.

Balance of harm and prejudice

[75] This issue, ground 2 of the Stay Application, is addressed at paragraph 22 of the applicant's skeleton arguments. The arguments in support of this ground are essentially the same as those made in support of ground 1. These arguments have been addressed in some detail above and the reasoning of this Court equally applicable to this ground – the balance of harm test. Accordingly, it is for the same reasons given above that the applicant's arguments in support of ground 2 are also not accepted as sound.

[76] At the very core of the applicant's submissions on the balance of harm test is the contention that to pay the 'difference' (the differential sum) between the balance owed to the respondents under the Phase 2B judgment and the minimum sum conceded by the applicant/appellant, JFM would have, in the present Hong Kong property market, to sell significantly more of its properties than it ought to be required to sell to pay in full the balance owing to the respondents under the Phase 2B judgment. This conundrum, the applicant argues, is exacerbated by the valuation date for the Buy-Out Price fixed by the Phase 2A judgment being at a time when the Hong Kong property market was very buoyant thus yielding a higher Buy-Out Price.

However, that market in present day is 40% lower than it was in March 2017. It is also submitted that where JFM to have to realize by way of forced sales in execution of the balance of the Phase 2B judgment debt to the respondents the sale of additional of its properties and assets, this will potentially crystallize a significant loss to JFM and consequently, Lawrence's estate. This is the centrepiece of the prejudice which the applicant submits that she and JFM would suffer if a stay of execution of the Phase 2B judgment debt is not granted. In addition, the applicant likewise is also concerned that steps in enforcement of the Phase 2B judgment (the balance owed thereunder to the respondents) might include an application by the respondents to appoint a receiver over the shares of JFM.

[77] By contrast, the applicant submits that a stay of execution would not cause any irreversible harm to the respondents, and the only prejudice to them will be the delay in receiving payment of the balance owing under the Phase 2B judgment after the appeal has been heard and determined, which may very well result in a significant reduction in that balance, and not necessitating the sale of such a large portion of the property portfolio of JFN. Furthermore, any such prejudice to the respondents can be compensated by the 'generous' post-judgment interest of 5% and, in any event, both the first and second respondents have already received substantial payments on account of the debt to them, and the third respondent has been offered a valuable property in lieu of cash payment.

[78] Again these arguments advanced by the applicant are not supported by cogent evidence and are somewhat speculative. Moreover, they do not address certain important developments in the proceedings in the court below, nor do they factor in uncertainty in the Hong Kong property market values inherent in any such market, and the possibility that with further delays in payment to the respondents as a result of a stay being granted, the values may go even lower, again adversely affecting the ability of JFM and the estate of Lawrence to pay the balance under the Phase 2B judgment debt to the respondents.

- [79] The very conundrum of which the applicant complains as being potentially prejudicial to JFM and by extension the estate of Lawrence, is one stemming from and as a direct result of the conduct of Lawrence deceased as a director of JFM in wrongly and unfairly prejudicing the respondents as shareholders of the said company. It is his said conduct which put in motion the dispute the genesis of the underlying claim before the BVI Commercial Court, leading, as it has, to the findings of Leon J adverse to Lawrence and to the Buy-Out Order for the respondents' shares, which order was upheld by the Privy Council.
- [80] In this context it must also be borne in mind that Lawrence did not appeal the judgment finding as to the valuation date in the Phase 2A judgment upon which the Buy-Out price was to be determined at the Phase 2B trial. Moreover, the respondents cannot be blamed for pursuing their legitimate rights and claims, leading to a judgment in their favour, nor can any drop in the Hong Kong property market be attributed to them. The latter is a matter entirely beyond the control of parties to litigation.
- [81] However, it is nevertheless the kind of factor which is entirely foreseeable as a possible consequence which may adversely affect values and one which, in the circumstances of this case, Lawrence ought to have had in his contemplation when by his conduct he caused this litigation and one which he ought to have given very serious consideration to as the litigation became protracted. This likelihood and the conundrum which has resulted upon which the applicant relies so heavily in support of the Stay Application, is one which the appellant must now deal with in circumstances where the appellant and JFM do not have the readily available cash reserves to pay in full the balance of the Phase 2B judgment debt.
- [82] It seems, however, that this realization came late to Lawrence and by extension the applicant. The Consent Order was entered into in August 2024. It represents finally an effort to stem the tide and to face the financial consequences and the reality of the BVI Commercial Court decisions. The Consent Order, in so far as it relates to

the first and second respondents' judgment debt and its payment in full upon certain agreed terms by the parties to it, puts the question of this Court's exercise of its discretion to grant a stay and its attempt to do justice between the conflicting interests of the parties, on a footing which does not favour the grant of the stay to the applicant.

[83] Fundamentally, the applicant/appellant is contractually bound under the terms of the Consent Order to pay the balance owing under the Phase 2B judgment to the first and second respondents, and to do so by 20th May 2025. Furthermore, as matters stand currently, a similar agreement has been reached between the applicant/appellant and the third respondent whereby the amount owed to the latter under the Phase 2B judgment is also to be paid in full by 20th May 2025. It is not open to this Court to alter or vary the specific and binding terms of the Consent Order, by acceding to the Stay Application, the effect of which will be to do just that to the detriment and prejudice of the respondents. In short, by entering into the Consent Order which has the binding effect of a contract, the applicant has effectually tied the hands of this Court with regard to the Stay Application. A similar position may also be now applicable in relation to the third respondent and the sum to be paid to his estate under the Phase 2B judgment.

[84] The upshot of all this is that in any event the applicant has failed to demonstrate that the balance of harm favours the grant of the stay. In fact, the balance of harm favours denying the stay, for the reasons given above.

Strong grounds of appeal

[85] This ground can be dealt with quite shortly. Having given due consideration to the arguments and counter-arguments of the parties in relation to each of the grounds of appeal, I am not satisfied that the applicant/appellant has demonstrated strong grounds of appeal or that the appeal is likely to succeed. These grounds of appeal concern (i) the valuation of the respondents' shares in JFM for the purpose of ascertaining the Buy-Out Price, the appellant's complaint being that the learned

judge preferred the respondents' expert valuation over that of the appellant's expert valuer; (ii) the minority discount issue where the learned judge followed a certain line of English authorities in holding that there is a general rule that no minority discount should be applied, and that it is only in exceptional cases that such a discount should be factored in; (iii) the quasi-interest issue where the learned judge concluded that the approach to interest in unfair prejudice claims was the same as the court's approach to the award of interest on damages in an ordinary commercial case; (iv) the judge's failure to allow for transactional costs such as agency fees, legal fees and a 16.5% Profit Tax on any capital gains to be deducted from the Buy-Out Price; and (v) the alleged serious procedural irregularities stemming from the inordinate delay by the judge in delivering the Phase 2B judgment.

[86] The delay in giving the judgment is certainly concerning, as it is inordinate. However, an appellant must demonstrate to the satisfaction of the appellate court that the delay has so affected the judge's ability to remember the matter clearly, including the evidence and the submissions, and thus the delay has clearly affected the judge's ability to properly perform and discharge the judicial function in fully appreciating and addressing the important legal and factual issues arising in the case and rendering a reasoned and coherent judgment therein, such that the judgment is unsafe and ought to be set aside. Having considered the arguments posited by the applicant on this ground of appeal, while I am concerned and cannot say that it is without merit, I am unable to conclude that it is or must be a strong ground of appeal.

[87] The ground of appeal concerning the trial judge's decision to prefer the respondents' expert valuation evidence does not, in my assessment, meet the criteria of a strong ground of appeal. Expert evidence is opinion evidence and ultimately these are questions of fact for the determination of the trial judge. It is for a trial judge to decide which expert opinion/valuation evidence to accept or to rely upon, and which to reject or not take into account. A trial judge may in certain circumstances reject the evidence of the experts on both sides but, in such circumstances, must give cogent

reasons for doing so. Where a judge has made a decision to accept the expert evidence adduced by one party, he/she must also give reasons why this course was adopted. Having done so, an appellant has a high bar to convince an appellate court to overturn or to set aside such a finding. This is the hurdle which the applicant/appellant faces in relation to this ground of appeal. While I do not for these purposes conclude that this ground is wholly without merit or is doomed to fail, in my considered view its veracity and soundness does not lead me inexorably to conclude that it is a strong ground with a strong or high likelihood of success.

[88] With respect to the minority discount ground, the applicant has not demonstrated that this is a strong ground of appeal for much the same as the reasons articulated by the respondents in their submissions, which I have addressed earlier and do not bear repeating or recounting here. The quasi-interest ground of appeal while certainly arguable, the applicant has not clearly demonstrated its strength or that it rises to the level of being a strong ground of appeal. Further, the points raised at paragraphs 10.3 of the applicant's skeleton arguments are not demonstrative of this being a strong ground of appeal. Finally, in relation to the ground of appeal concerning the judge's failure to deduct transactional costs from the Buy-Out Price, at first blush and without seeming to decide the issue, the arguments advanced at paragraph 10.4 by the applicant are not convincing of this being a strong ground of appeal.

[89] The upshot of this is that strong grounds of appeal or strong likelihood of the appeal succeeding has not been shown by the applicant at this stage. Accordingly, this fifth factor or principle in **C-Mobile** cannot be taken into account in deciding to grant a stay of execution of the Phase 2B judgment.

Interest of Justice

[90] This leaves the question of whether in the round the interest of justice would be best served by granting the stay of execution sought. The clear answer to this question is no. Taking all the relevant circumstances of this matter into account, including the

matters addressed above, in my judgment, the interest of justice lies with not granting the stay. The respondents, after several years of litigation, have finally gotten to the stage in these proceedings where they have judgments in their favour at Phases 1, 2A and 2B of the proceedings in the court below. The appellant and JFM have been ordered to purchase the respondents' shares in JFM; and the Buy-Out Price and other related issues have been determined and quantified as a judgment debt. During the period this litigation has been ongoing, two of the respondents have regrettably passed on. Their brother Lawrence has also died. However, the litigation continues now at the appellate level.

[91] In my view, the respondents (or their respective estates) should not be delayed further in obtaining full payment of the sums awarded to them by the court below in the Phase 2B judgment by this Court granting the stay of execution applied for by the appellant, the effect of which would be to vary the terms of the Consent Order and the agreement now reached with the third respondent for payment of the judgment debt owed to his estate. These agreements were negotiated by the parties and should be respected and fully complied with. To the extent that the applicant/appellant is not compliant with the Consent Order and the order evincing the agreement reached with the third respondent, she must take all necessary steps to do so, including selling certain of the JFM properties to do so. Failing which the respondents ought to be free and unencumbered by a stay of execution to take enforcement action to fully realise the award under the Phase 2B judgment, including the forced sale of properties owned by JFM, and to be able to do so as expeditiously as is possible in the circumstances.

[92] Counsel for the respondents in his oral submissions drew the Court's attention to an offer made on 21st February 2025 by the respondents²⁶ to put the money paid over in satisfaction of the judgment debt into court pending the outcome of the appeal which offer was time sensitive and has now lapsed. Counsel also during submissions in the appeal, made a new offer or proposal to pay the difference into

²⁶ Page 122 of the hearing bundle.

court pending the outcome of the appeal. Counsel for the applicant in reply agreed to take her client's instructions on the said proposal. However, nothing further concerning this has been communicated to the Court and it is assumed that the proposal was not accepted by the appellant. It seems to me that either of these offers/proposals for resolution of the issue of a stay represents a sensible and pragmatic approach which takes account of the interests and concerns of both the respondents and the appellant (Lawrence's estate). I will say no more about this.

Disposition

[93] For the reasons given above, the notice of application filed by the appellant on 6th February 2025 is dismissed with costs to the respondents, such costs to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days from the date of delivery of this judgment.

[94] On behalf of the panel, I thank counsel for the parties for their useful submissions.

I concur.
Mario Michel
Chief Justice [Ag.]

I concur.
Trevor M. Ward
Justice of Appeal

By the Court

Chief Registrar