EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0017
(On appeal from the Commercial Division)

BETWEEN:

C-MOBILE SERVICES LIMITED

Appellant/Applicant

and

HUAWEI TECHNOLOGIES CO. LIMITED

Respondent

Before:
The Hon. Mde. Louise Esther Blenman Justice of Appeal

Appearances:
Mr. Grant Carroll for the Appellant/Applicant
Mr. Mungo Lowe for the Respondent

_____
2014: October 2.
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Interlocutory application – Stay of execution – Exercise of court's discretion to grant stay of proceedings – Whether stay of judge's order in the lower court should be granted pending hearing and determination of appeal of that judge's decision – Whether failure to grant stay of liquidation proceedings would render appeal of judge's decision nugatory – Rule 62.19 of the Civil Procedure Rules 2000 – Arbitration Ordinance – Insolvency Act

The appellant/applicant, C-Mobile Services Limited ("C-Mobile"), is a mobile telecommunications operator in the Ivory Coast, Gambia and formerly Liberia in Africa and is incorporated in the British Virgin Islands. The respondent, Huawei Technologies Co. Limited ("Huawei") is engaged in the business of supplying telecommunications equipment and is incorporated in the People's Republic of China. There is an alleged debt owed by C-Mobile to Huawei arising from a supply agreement signed between C-Mobile and Huawei in June 2004 and purchase orders placed by C-Mobile between 27th February 2007 and 15th July 2008, for equipment and services for C-Mobile's former Liberian operations (the "Liberian debt").

On 17th December 2013 a statutory demand was served on C-Mobile for the Liberian debt. On 30th December 2013 C-Mobile filed an application to set aside the statutory demand, contending, inter alia, that there was provision for arbitration contained in the June 2004 supply agreement. The application was heard by the learned judge on 11th February 2014 and was dismissed. The learned judge's decision was subsequently appealed. Following the learned judge's decision of 11th February 2014, Huawei applied to the court below to appoint liquidators and wind up C-Mobile pursuant to the Insolvency Act. C-Mobile subsequently applied for a stay of the liquidation proceedings pursuant to section 6(2) of the Arbitration Ordinance. C-Mobile's application for stay of the liquidation proceedings was heard by the learned judge on 9th May 2014. The learned judge refused the application and also refused leave to appeal his decision and ordered costs against C-Mobile.

C-Mobile subsequently sought and obtained leave to appeal from the Court of Appeal. C-Mobile also, based on a certificate of urgency, applied to the Court of Appeal for a stay of the liquidation proceedings pending the appeal. The learned Chief Justice granted C-Mobile an interim stay of the judge's order pending an inter partes hearing. On 2nd October 2014 the application was heard by the Court.

Held: granting a stay of the judgment of the judge in the court below, including the order as to costs, pending the hearing and determination of the substantive appeal; and reserving costs on the application, that:

1. There is no automatic right to a stay of proceedings pending appeal and a successful litigant should not normally be denied the fruits of its success pending appeal except for in exceptional circumstances. There are five relevant principles a court should apply when deciding whether to exercise its discretion to stay proceedings pending appeal. The first is that the court should take into account all the circumstances of the case. Second, a stay is the exception rather than the general rule. Third, the party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. Fourth, 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. The fifth is that the court should also take into account the prospect of the appeal succeeding, but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which would usually enable a stay to be granted).

   Leicester Circuits Ltd v Coates Brothers Plc [2002] EWCA Civ 474 applied; NB v London Borough of Haringey [2011] EWHC 3544 (Fam) applied; Marie Makhoul v Cicely Foster ANUHCVAP2009/0014 (delivered 26th August 2009, unreported) followed; Michael James v Tasman Gaming Inc. et al ANUHCVAP2006/0006 (delivered 8th February 2007, unreported) referred; Courtesy Taxi Co-operative Society Ltd. v Lucien Joseph SLUHCVAP2008/0043 (delivered 18th May 2009, unreported) referred.

2. C-Mobile need not provide any further evidence other than stating that winding up would dramatically affect the company's operation as it is self-evident that winding

up would cause serious and irreparable harm to the reputation of C-Mobile. Should a stay of the liquidation proceedings not be granted, there would be nothing to prevent Huawei from pursuing liquidation proceedings against C-Mobile and a real possibility exists that C-Mobile would be wound up. In all the circumstances, it is clear that if Huawei pursued the liquidation proceedings, the appeal against the order of judge in the court below would be rendered nugatory. Weighing the likely damage to C-Mobile's reputation if liquidation were pursued by Huawei against keeping Huawei out of the money that it may be owed, the balance of justice favours granting the stay of proceedings.

3. An order for the payment of the disputed sum into court is not appropriate in the instant case as C-Mobile raised the defence before the court below and in the ongoing arbitration proceedings that Huawei's claim is statute barred, which, in the circumstances, leaves no proper basis on which the Court could make such an order.

ORAL JUDGMENT

[1] BLENMAN JA: This is an application for a stay of the judgment of the learned judge in the court below pending the hearing and determination of an appeal against his decision not to grant a stay of liquidation proceedings. The applicant also seeks a stay of the costs order that was made by the learned judge pending the hearing and determination of the appeal.

Background

[2] C-Mobile Services Limited ("C-Mobile") is a company incorporated in the British Virgin Islands and is a mobile telecommunications operator in Africa, in particular the Ivory Coast, Gambia, Sierra Leon and formerly Liberia. Huawei Technologies Co. Limited ("Huawei") is a company incorporated in the People's Republic of China and is engaged in the business of supplying telecommunications equipment. There is an alleged debt due to Huawei by C-Mobile which arises from a supply agreement signed between C-Mobile and Huawei in June 2004 and purchase orders placed between 27th February 2007 and 15th July 2008 for equipment and services provided for C-Mobile's former operations in Liberia (the "Liberian Debt"). A Statutory Demand was served on C-Mobile on 17th December 2013 for the Liberian Debt in the amount of US$2,676,175.10.

[3] It is noteworthy that previously, two statutory demands had been served on C-Mobile by Huawei. One was served for US$2,676,175.00 on 30th October 2012 which was for the Liberian Debt. The other was for US$22,775,327.63 and was served on 19th November 2012. These two previous demands have been relied upon in two separate applications to appoint liquidators. The first application was heard on 18th March 2013 when the application in respect of both statutory demands was withdrawn. The second application to appoint liquidators was dismissed on 16th December 2013 because the statutory demands were stale. Huawei subsequently served a further statutory demand in respect of the Liberian Debt (the "Statutory Demand") on 17th December 2013 with a view to being able to pursue liquidation proceedings against C-Mobile.

[4] C-Mobile filed an application to set aside the Statutory Demand on 30th December 2013 and on 11th February 2014 the learned judge heard that application. C-Mobile had contended that the Statutory Demand should be set aside for the following reasons:

(i) A global agreement had been made in compromise of all debts including the Liberian Debt;

(ii) There is provision for arbitration in Paris contained within the supply agreement of June 2004; and

(iii) The debt claimed was time barred according to the UN Convention on the International Sale of Goods (1974, New York).

[5] The learned judge, Mr. Justice Bannister, QC, held that the Arbitration Ordinance[1] did not apply to insolvency proceedings and that in any event there was no substantial dispute between the parties in respect of the debt owed. He therefore dismissed C-Mobile's application. That decision is subject to an appeal.

[6] C-Mobile filed an application on 9th April 2014 urging the learned judge to stay liquidation proceedings by Huawei. The application was heard by Mr. Justice Bannister, QC on 9th May 2014 and was dismissed. C-Mobile sought leave from

[1] Cap. 6 of the Revised Laws of the Virgin Islands 1991.

the learned judge to appeal his decision but the learned judge declined to grant leave to appeal.

[7] In order to provide context it is useful to state the grounds upon which the learned judge's decision in the substantive matter is challenged. The grounds upon which C-Mobile appealed in the substantive matter are as follows:

(a) Ground One: The learned judge was wrong in fact, alternatively wrong in any exercise of his discretion in that he gave no or insufficient weight or consideration to the fact that officers of C-Mobile believed that there had been a compromise agreement in respect of the debt, this belief being supported by the actions of Huawei as evidenced before the court.

(b) Ground Two: The learned judge was wrong in law in failing to set aside the Statutory Demand pursuant to section 157(2) of the Insolvency Act[2] given that there was a provision for arbitration contained within the agreement dated June 2004.

(c) Ground Three: The learned judge was wrong in law not to stay the order authorising Huawei to make an application to appoint liquidators in that he failed to give proper consideration to section 6(2) of the Arbitration Ordinance.

[8] The judge at first instance having given his decision in the matter, Huawei then applied to the court to appoint joint liquidators over C-Mobile[3], and wind up C-Mobile pursuant to the Insolvency Act, whereupon C-Mobile applied to the court for a stay of those proceedings pursuant to section 6(2) of the Arbitration Ordinance. On 9th May 2014 the learned judge refused C-Mobile's application pursuant to section 6(2) of the Arbitration Ordinance to stay proceedings in claim number BVIHCM2014/0035 to appoint liquidators over C-Mobile. He also refused

[2] Act No. 5 of 2003.
[3] Territory of the Virgin Islands, Claim No. BVIHCM2014/0035.

leave to appeal and ordered costs against C-Mobile. C-Mobile sought and obtained leave to appeal from the Court of Appeal.

[9] In addition, based on a certificate of urgency, C-Mobile applied to the Court of Appeal for an interim stay on the basis that if the stay was not granted the liquidation proceedings against C-Mobile would proceed. The Hon. Dame Janice M. Pereira, Chief Justice, on an ex parte basis, granted C-Mobile the interim stay of the judge's order and ordered an inter partes hearing.

[10] The application that is now before the Court is the inter partes hearing to ascertain whether or not the Court should grant C-Mobile the stay of the proceedings at first instance, pending the hearing and determination of the appeal against Mr Justice Bannister, QC's order in which he refused C-Mobile's application for the stay pending an appeal. The application is supported by an affidavit deposed to by Dr. Nizar Dalloul.

[11] The application is vigorously opposed by Huawei who contends that this Court should not grant a stay of the learned judge's decision in favour of Huawei.

Issue

[12] The issue which arises for determination is whether this Court should grant a stay of the judge's order pending the hearing and determination of the appeal.

Appellant's submissions

[13] Learned counsel Mr. Grant Carroll, in seeking to support his application for a stay, alerted the Court to the factual background of the substantive appeal. He reminded the Court of the main grounds of the substantive appeal. Mr. Carroll argued that the judge was wrong in fact, alternatively wrong in law, in that he found that the Arbitration Ordinance was not applicable to this case. The learned judge failed to take proper account of the fact that the respondent's application to appoint liquidators was based upon a disputed debt arising pursuant to a supply contract which contained an arbitration clause. The learned judge

failed to take account of the draconian nature of the appointment of liquidators and the harm that it will cause to C-Mobile's business.

[14] In further support of his application for the stay, learned counsel Mr. Carroll said that the above finding fails to place adequate weight on the fact that the debt upon which Huawei relies is in itself disputed and furthermore the contract entered between the parties contains an express arbitration clause to the effect that all disputes will be referred to arbitration. The arbitration clause is in the following terms:[4]

> "All disputes arising out or in connection with the formation, construction and performance of this Contract which cannot be settled amicably between the parties shall be finally settled under the rules of arbitration and consultation of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with such rules, unless the Parties agree on the name and identity of a single arbitrator. The arbitration shall be held in Paris; the law to be applied by the arbitrators shall be the French substantive laws, and the language of the arbitration proceedings shall be English."

[15] Learned counsel, Mr. Carroll, said that the court at first instance was presented with a case where C-Mobile was (and is continuing to) assert that there is a dispute over the very sums on which Huawei are relying for the appointment of liquidators. This dispute goes to the very essence and core of the liquidation application. The findings of the court in the confines of an application to set aside a statutory demand are of no consequence to the decision which must be reached on an application for a stay pursuant to the Arbitration Ordinance. He nevertheless argued that C-Mobile has a very compelling case for the grant of a stay pending the hearing and determination of the appeal.

[16] Mr. Carroll said that the learned judge was wrong in law in that he did not give effect to the mandatory wording of section 6(2) of the Arbitration Ordinance. He said if the Court is satisfied that there is a dispute and the subject matter of that dispute as well as the parties to that dispute are covered by the arbitration clause,

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[4] Purchase agreement for GSM network between Comium Services Limited & Huawei Technologies Ltd (dated 11th June 2004) at clause 25.

then the Court has no discretion but to stay the proceedings pursuant to section 6(2). Section 6(2) of the Arbitration Ordinance provides that:

> "If any party to an arbitration agreement, other than a domestic arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

[17] The Territory of the Virgin Islands case of Applied Enterprises Limited v Interisle Holdings Ltd. et al[5] is the leading authority on the interpretation of whether or not there is a 'dispute' for the purposes of section 6(2) of the Arbitration Ordinance. Notwithstanding that this case was the subject of an appeal,[6] it remains good law. The test in an application to set aside a statutory demand is whether or not there is a substantial dispute whereas the test set out in Applied Enterprises is a different one, namely *is there a dispute*. Paragraph 26 of the judgment in Applied Enterprises states:

> "Once, however, a defendant who is *prima facie* entitled to the benefit of an agreement to arbitrate indicates that he is not liable to the claimant as claimed, it is impossible, in my view, to say that there is no dispute. The fact that it may be possible to see that the dispute can have only one outcome does not, I think, entitle the Court to say that the dispute is not a dispute."

[18] The court goes on to say at paragraph 28:

> "The correct approach is to ask, first, whether the claim is within the scope of the arbitration agreement and, if it is, whether the defendant disputes it. If it is and he does, then it seems to me that the Court has no alternative but to decline jurisdiction, grant the stay and decline to entertain the application for summary judgment."

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[5] Territory of the Virgin Islands, BVIHCM2012/0135 (delivered 21st June 2013, unreported).
[6] Territory of the Virgin Islands, BVIHCMAP2013/0011 (delivered 1st May 2014, unreported).

[19] Mr. Carroll submitted that the learned judge was wrong in fact, alternatively wrong in law, in finding that C-Mobile was attempting to bring liquidation proceedings within the ambit of an arbitration clause. He failed to give proper weight to the fact that Huawei had served a statutory demand despite knowing that the underlying debt was disputed thereby utilising the liquidation process of the court to subvert the contractual obligation to refer any dispute to arbitration.

[20] Huawei's action in serving a statutory demand was a clear attempt to subvert the arbitration agreement. It cannot be right that the court has allowed the liquidation process to be used to defeat a clear contractual obligation freely entered into between the parties. The Arbitration Ordinance makes it clear that *any proceedings* which are commenced in breach of an arbitration agreement are susceptible to the jurisdiction of section 6(2).

[21] Mr. Carroll argued that if the court is satisfied that there is a dispute and the subject matter of that dispute as well as the parties to that dispute are covered by the arbitration clause, then, unless the clause is inoperative or incapable of performance, the court has no discretion but to stay the proceedings pursuant to section 6(2). Mr. Carroll submitted that in this case there is a clear arbitration clause which covers the very essence of Huawei's claim, i.e. that C-Mobile has not performed its obligation to pay in accordance with the contract. Furthermore, Huawei did not suggest that the arbitration clause was either in dispute or incapable of performance. In fact, it remains the case that there is an ongoing arbitration in Paris. This is a very strong reason for the Court to grant a stay.

[22] Mr. Carroll posited that as a matter of law the Arbitration Ordinance cannot be invoked until such time as there are proceedings before the court. A statutory demand is extra judicial and so cannot properly be considered to constitute court proceedings. Huawei's action in serving a statutory demand (which it knew was disputed) in effect forced C-Mobile to engage in litigation where the evidential hurdle was higher than which should be applied (i.e. *is there a dispute at all pursuant to s.6 (2)).*

[23] Mr. Carroll submitted that given the totality of circumstances the Court should stay the liquidation proceedings pending determination of the appeal and stay the order of 9th May 2014 in respect of the payment of costs. Thereafter the Court was invited to grant a general stay until the conclusion of the arbitration proceedings commenced by the appellant in the International Chamber of Commerce of Paris.

[24] Mr. Carroll, during oral submissions, reiterated that there are on-going arbitration proceedings between the parties. C-Mobile is contending that Huawei's claim is statute barred; the effect of this contention is to absolve C-Mobile from any liability. This same defence was raised before the learned judge and was rejected.

[25] He argued that should this Court decline to grant the stay, C-Mobile's appeal would be rendered nugatory, since Huawei will be sure to pursue the liquidation proceedings against C-Mobile with expedition.

Respondent's Submissions

[26] Learned counsel, Mr. Lowe, highlighted the key chronological events as follows:

(i) On 30th December 2013 C-Mobile filed an application to set aside the statutory demand.

(ii) On 11th February 2014 C-Mobile's application to set aside the statutory demand was heard by the trial judge and was dismissed with costs with leave given to Huawei to file an application to appoint liquidators. On 25th February 2014 C-Mobile filed an application for leave to appeal the order of the judge dated 11th February 2014 and for a stay of execution. On 9th April 2014 C-Mobile filed a notice of application seeking a stay of the liquidation proceedings pursuant to section 6(2) of the Arbitration Ordinance. On 15th April 2014 the Court of Appeal ordered that C-Mobile's application for a stay pending the first appeal be remitted to the court below to be heard by the judge hearing the liquidation application. The application for the stay pending arbitration was argued before Mr. Justice Bannister, QC on 9th May 2014 and was

dismissed with costs and leave to appeal was refused. On 23rd May 2014 C-Mobile e-filed an application for permission to appeal and a stay of the liquidation proceedings. Leave to appeal was granted by a single judge on 23rd May 2014. On 29th May 2014 C-Mobile filed a notice of appeal (the second appeal) and an application for a stay pending determination of the second appeal. On 30th May 2014 an interim stay was granted by order of Pereira CJ.

[27] Mr. Lowe reminded the Court that there is no automatic right to stay proceedings pending the appeal. He referred the Court to rule 62.19 of the Civil Procedure Rules 2000 ("CPR 2000") which provides as follows:

> "Stay of execution
> 62.19 Except so far as the court below or the court or a single judge of the court otherwise directs –
> (a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and
> (b) any intermediate act or proceeding is not invalidated by an appeal."

[28] This provision is also found in rule 30(1) of the Court of Appeal Rules 1968 which provides that:

> "30.1 (1) An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed from, except so far as the court below or the Court may order, and no intermediate act or proceedings shall be invalidated, except so far as the Court may direct."

[29] The Court's power to stay execution pending determination of an appeal is derived from CPR 62.20 which provides that:

> "(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."

CPR 26.1(2)(q) grants the Court the power to stay the whole or part of any proceedings generally or until a specified date or event. Mr. Lowe reiterated that the principle underlying the aforementioned provisions is that a successful litigant should not generally be deprived of the fruits of their litigation pending appeal

unless there was some good reason for this course. The normal rule is for no stay.[7]

[30] The leading principles concerning applications for a stay pending appeal are identified by Mr. Justice Mostyn in the English case of NB v London Borough of Haringey.[8] In particular Mostyn J at paragraph 7 cited and approved dicta of the Chief Judge of the High Court of Hong Kong, Ma J, in Wenden Engineering Services Co Ltd. v Lee Shing UEY Construction Co Ltd[9] where five principles were identified as relevant to applications for stays pending appeal:

(i) The Court must take into account all the circumstances of the case.

(ii) A stay is the exception rather that the general rule.

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

(iv) In exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered.

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

[31] Learned counsel, Mr. Lowe, advocated that the application at bar falls within the category of cases to which the five principles identified by Mr. Justice Mostyn in NB v London Borough of Haringey apply, since it cannot be said unequivocally whether the appeal is not arguable (in which case a stay ought not to be granted) or whether there is a strong likelihood the appeal will succeed (which will usually enable a stay to be granted).

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[7] Leicester Circuits Ltd v Coates Brothers Plc [2002] EWCA Civ 474 per Potter LJ at para 13.
[8] [2011] EWHC 3544 (Fam).
[9] HCCT No. 90 of 1999.

[32] It is therefore necessary for C-Mobile to provide additional reasons to demonstrate why a stay is justified. It cannot be good enough for C-Mobile to rely on the bald assertion that the risk of C-Mobile being placed in liquidation prior to the hearing of the appeal is, in itself, evidence of the appeal being rendered nugatory. This would provide a means for an appellant facing the prospect of liquidation to circumvent CPR 62.19 and invoke a stay pending any appeal. There is a risk this would become a debtor's charter to frustrate liquidation applications.

[33] Mr. Lowe submitted that C-Mobile had wholly failed to lead any cogent evidence that the appeal will be stifled or rendered nugatory. The evidence in support of this contention is found at paragraphs 13-16 of the appeal affidavit of Dr. Nizar Dalloul. In summary Dr. Dalloul contended that:

(i) C-Mobile is part of a group of companies known as Comium CI.

(ii) The Comium group operates in Ivory Coast, Gambia and Sierra Leone.

(iii) In 2013 the Comium group's operations generated revenues of between US$4.5 million and US$5.3 million per month in Ivory Coast and approximately US$20 million a year in Sierra Leon.

(iv) The debt of US$2.6 million is relatively small in commercial terms which would easily be serviced in the ordinary course of business if it were not disputed.

(v) The appointment of liquidators over C-Mobile will dramatically impact the operations of the Comium group and cause serious and irreparable damage to the reputation of the C-Mobile group in Africa and disruption to its customers.

(vi) There are no other creditors who might be prejudiced by the granting of the stay.

[34] Mr. Lowe argued that none of these statements reveal anything "exceptional" about the circumstances of the case to justify a departure from the normal rule. They are merely bald assertions, unsupported by any documentary evidence, and do not take the arguments any further. For example:

(i) If the purpose of this evidence is to support the contention that the Cromium group's operations would be irreparably damaged if C-Mobile was put into liquidation, crucially there is no explanation why this would be so. There is no evidence of how the Cromium group is organised and, in particular, how the liquidation of C-Mobile would irreparably damage the other companies in the group or impact on the group's operations or cause disruption to its customers.

(ii) If the intention of the statement is to demonstrate that C-Mobile is "good for the money" but has merely elected not to pay because the Liberian Debt is disputed, it fails to accomplish this. There is, of course, an important distinction between revenues on the one hand and profits on the other hand. Evidence regarding the former cannot demonstrate that C-Mobile Is solvent.

[35] Next, learned counsel, Mr. Lowe, stated that when conducting the 'balance of harm' test, there is, on C-Mobile's best case, very little evidence for the Court to conclude that the impact of the appointment of liquidators over C-Mobile, its members and customers, is so significant that Hauwei ought to be deprived of its right to pursue the liquidation application. Conversely, if a stay pending appeal is upheld, Huawei would suffer prejudice as it will be subject to further delay in being able to appoint a liquidator and substantial injustice. The debt has been outstanding for a considerable period of time and notwithstanding clear and binding admissions that it is due as far back as 2012, C-Mobile continues to delay and frustrate Huawei's attempts to recover the same.

[36] Mr. Lowe stated that if, contrary to these submissions, the Court is minded to uphold the stay, he respectfully invites the Court to do so on the condition that C-

Mobile pays into court US$ 2,675,175.00, the Liberian Debt, which is in dispute, within 21 days. C-Mobile contends that the Liberian Debt, if it were not disputed, would be easily serviced in the ordinary course of business. If this is correct, it should not be presented with any difficulty in complying with a condition in these terms.

[37] Finally, Mr. Lowe said in the circumstances, the application for a stay should be dismissed and the order dated 30th May 2014 should be set aside on the basis that C-Mobile has failed to demonstrate any basis for departing from the rule that an appeal does not operate to stay proceedings. If, contrary to these submissions, this Honourable Court is minded to uphold the stay, it is respectfully invited to order that any stay be condition upon payment into court of the debt.

Discussion and Analysis

[38] The learned trial judge having refused to stay the liquidation proceedings, the crux of this application is whether the Court should grant the application to stay the order of the learned judge wherein he refused to grant C-Mobile a stay of his judgment. There is no doubt that Huawei is seeking to appoint joint liquidators of C-Mobile and a winding up order pursuant to the provisions of the Insolvency Act.

[39] It is common ground that clause 25 of the relevant contract contains an arbitration clause in the following terms:

> "All disputes arising out or in connection with the formation, construction and performance of this Contract which cannot be settled amicable between the parties shall be finally settled under the rules of arbitration and consultation of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with such rules, unless the Parties agree on name and identity of a single arbitrator. The arbitration shall be held in Paris; the law to be applied by the arbitrators shall be the French substantive laws, and the language of the arbitration proceedings shall be in English."

[40] Equally, it is common between the parties that there is a dispute as to whether C-Mobile owes the sum of US$2,676,175.00 to Huawei pursuant to the contract. C-Mobile denies that it owes Huawei that sum; in fact its main defence is that the

debt is statute-barred. Further, what is critical is that after the statutory demand was served by Huawei, C-Mobile commenced arbitration proceedings in the ICC in Paris in relation to the dispute that is at the heart of the liquidation proceedings before the learned trial judge.

[41] The question which therefore arises is whether the justice of this application requires the Court to exercise its discretion and to stay the liquidation proceedings pending the determination of the appeal against the learned judge's decision. In exercising the Court's discretion it is noteworthy that the learned Chief Justice had granted an interim stay of the liquidation proceedings pending this inter partes hearing. During this inter partes hearing, it became clear that C-Mobile was maintaining in the arbitration proceedings in Paris that Huawei's claim was statute-barred and therefore it was not indebted to Huawei at all. This is one of the defences upon which it relied in the liquidation proceedings in seeking to obtain a stay before the trial judge, even though they were unsuccessful.

[42] Learned counsel Mr. Carroll urged the Court to grant the stay on the basis that if the Court were to refuse to do so it would render C-Mobile's appeal nugatory and would severely prejudice C-Mobile. I have given deliberate consideration to the oral and written submissions of both counsel. Mr. Carroll maintained that the judge erred in holding that the Arbitration Ordinance was not applicable to the case at bar. He submitted that the judge fell into error when he failed to take proper account of the fact that Huawei's application to appoint liquidators was based upon a disputed debt arising pursuant to a supply contract which contained an arbitration clause.

[43] Mr. Lowe for his part implored the Court not to grant a stay of the liquidation proceedings pending the hearing and determination of the appeal in relation thereto, since to do so would continue to unnecessarily keep Huawei out of the money it is owed. It is the law that there is no automatic right to a stay of proceedings pending appeal.[10] The law is clear: a successful litigant should not

[10] See CPR 62.19.

be deprived of the fruits of his labour pending litigation save in exceptional circumstances.[11] Further, in Marie Makhoul v Cicely[12], George-Creque JA cited with approval, Hammond Suddards Solicitors v Agrichem International Holdings Ltd[13], that, the decision whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk to one or other or both parties if it grants or refuses a stay and that this calls for an examination of the nature of the case.[14]

[44] I find the principles that Mostyn J enunciated in NB v London Borough of Haringey very helpful. I can do no more than adopt them and apply them to the appeal at bar. In so doing, I remind myself of the totality of circumstances of the case, and of the fact that a stay is the exception rather than the general rule. These two principles, in my view, are extrapolated from Mostyn J's pronouncements.

[45] The third principle is very powerful in this appeal; I will repeat it for emphasis: '… the party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless the stay is granted.'[15]

[46] Having reviewed the factual context of the application there is no doubt in my mind that if the stay is not granted, C-Mobile's appeal would be rendered nugatory, for reasons which will become clearer shortly. Indeed, should this Court not grant the stay pending the hearing and determination of the appeal there would be nothing to prevent Huawei from vigorously pursuing its liquidation proceedings, and probably winding up C-Mobile. In fact, all that has transpired so far leaves me in no doubt that had it not been for the interim stay that was granted by the learned Chief Justice, C-Mobile may well have been wound up already. If this were to

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[11] See Leicester Circuits Ltd v Coates Brothers PLC [2002] EWCA Civ 474.
[12] Antigua and Barbuda, ANUHCVAP2009/0014 (delivered 26th August 2009, unreported) at para. 5 – 6.
[13] [2001] EWCA Civ 2065.
[14] See also: Michael James v Tasman Gaming Inc., Antigua and Barbuda, ANUHCVAP2006/0006 (delivered 8th February 2007, unreported) per Rawlins JA at para. 24; Courtesy Taxi Co-operative Society Ltd. v Lucien Joseph, Saint Lucia, SLUHCVAP2008/0043 (delivered 18th May 2009, unreported) at para. 14.
[15] [2011] EWHC 3544 (Fam) at para 7.

occur, the appeal against the decision of the learned judge would be rendered otiose or nugatory.

[47] Accordingly, there is much force in Mr. Carroll's arguments that this Court should place much store on Dr. Dalloul's affidavit at paragraph 13, in relation to the likely impact that the appointment of liquidators will have on C-Mobile. If the liquidators are appointed the arbitration proceedings may not take primacy. This much is self-evident.

[48] Mr. Carroll asserted that if no stay is granted there is certainty that Mr. Lowe will request a date for the hearing of the liquidation proceedings. While there is no evidence to support this assertion, the facts do give rise to the drawing of this inference.

[49] Each case must be construed on its own particular facts and in the appeal at bar I am not of the view that Dr. Dalloul needed to say anything more than the liquidation of C-Mobile would dramatically impact upon the operations. That much is pretty self-evident. I also think that it must be uncontroversial that if a company were placed in liquidation serious and irreparable damage would be caused to its reputation. This must be weighed against the fact that Huawei is being kept out of money that it may be owed.

[50] Regretfully, I do not find much force in Mr. Lowe's argument that C-Mobile has failed to provide cogent evidence to support its contention that if the stay is not granted the appeal would be rendered nugatory. As alluded to earlier, there is not a scintilla of doubt in my mind that should this Court not grant the stay Huawei will pursue its liquidation proceedings and there is the real possibility that C-Mobile could be wound up. If this were to occur the appeal against the order of the trial judge would be rendered nugatory. This also could have serious consequences since there is the real likelihood of the insolvency proceedings before the Commercial Court proceeding at the same time that the arbitration hearing before the International Chamber of Commerce is progressing. This would be a totally unacceptable state of affairs if this were to occur.

[51] In my opinion the factual background of this appeal is very compelling and together with the totality of circumstances lead only to one conclusion, namely, that if this Court does not grant the stay the appeal would be rendered nugatory.

[52] I should not however downplay the fact that C-Mobile has obtained leave from a judge of this Court to appeal against the judge's order. This is an indication that the view is held that C-Mobile's case in the substantive appeal is at the minimum arguable.

[53] Further, if C-Mobile is placed into liquidation one thing is clear and that is, the whole composition of the company will change. New individuals who are not appointed by the shareholders will go in and take control of the company. The balance of justice favours C-Mobile when one compares the respective detriment each party is likely to suffer.

[54] It is critical that the appeal from the decision of the learned trial judge wherein he held that the arbitration clause in the contract did not cover liquidation proceedings and that those proceedings should be pursued, should be ventilated fully before the Court of Appeal. Of significance is the fact that the limitation point was advanced by C-Mobile before the learned judge in opposition to the liquidation proceedings being heard, but it was rejected by the learned judge. This issue is the focus of the appeal in the substantive matter and should be determined by the Court of Appeal.

[55] In my opinion, and taking into consideration the totality of circumstances, the justice of this application demands that a stay of the learned judge's judgment be granted pending the hearing and determination of the appeal on the effect of the arbitration clause.

[56] In addition, I am not persuaded that this is an appropriate case for this Court to make an order for C-Mobile to pay the disputed sum into court. I am driven to this ineluctable conclusion based on the fact that as the application unfolded, it is clear that C-Mobile continues to assert before the arbitration proceedings that Huawei's

claim is statute barred. This is one of the defences it advanced before the learned judged at first instance. There is no proper basis to order C-Mobile to pay the disputed debt into court.

[57] Therefore, I accept Mr. Carroll's arguments that the request for the conditional payment is draconian bearing in mind that C-Mobile's main defence is that any claim that Huawei may have had has become time-barred.

[58] Conclusion:

(1) For the above reasons, I would grant a stay of the judgment of the learned judge including the order as to costs pending the hearing and determination of the substantive appeal.

(2) The costs on this application are reserved.

[59] I gratefully acknowledge the assistance of learned counsel.

Louise Esther Blenman
Justice of Appeal