

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FAMILY DIVISION**
3

4 **CAUSE NO. FAM 66 OF 2014**
5

6 **BETWEEN:**

DJ

PETITIONER

7
8 **AND:**

9 **BJ**

10 **RESPONDENT**
11



12 **Appearances:**

13 **Mr. Andrew Woodcock of Hampson & Co for the**
Petitioner

14 **Mr. Guy Dilliway-Parry of Priestleys for the**
15 **Respondent**
16

17 **Before:**

The Hon. Justice Cheryll Richards Q.C.
18

19 **Hearing:**

9th January 2020

20 **Draft Judgment:**

24th February 2020
21

22 **HEADNOTE**

23 *Family Law – Application for a Stay*
24

25 **JUDGMENT**
26
27
28
29

1 INTRODUCTION

2 1. This is a ruling on an application by the Respondent for a stay of execution in respect of
3 a judgment as to final ancillaries issued on the 5th August 2019 and of the execution of
4 an Order as to costs following a draft judgment issued on the 23rd December 2019,
5 pending the determination of an appeal. The application is made pursuant to s.19 (3) of
6 the *Court of Appeal Law* (2011 Revision) which provides as follows:

7 “(3) No stay of execution or other proceedings shall be granted upon any
8 judgment appealed against save upon payment by the appellant into the
9 Grand Court of the whole sum, if any, found due upon such judgment and
10 the amount of any costs awarded to the other party or parties to the action,
11 or upon good cause shown to the Court or to the Grand Court.”
12

13 2. The application is supported by the Third Affidavit of Sally Crane dated 7th January
14 2020. The grounds for staying the Orders arising from the two judgments are stated to
15 be *inter alia* that:

16 i) The Orders may be reversed on appeal therefore it would be prudent to await
17 the determination of the appeal before requiring payment of any sums of
18 money.

19 ii) In the event that the Respondent is required to make an immediate payment
20 in respect of costs, he will need to liquidate assets in order to do so and will
21 potentially suffer significant financial losses as a result.

22 iii) Given the declared impecuniosity of the Petitioner, there is a real risk that
23 any monies paid to her prior to determination of the appeal could be
24 irrecoverable.



- 1 iv) It would be a significant waste of resources were the taxation process to be
2 commenced with the possible reversal of the amounts relating thereto on
3 appeal.

4 **THE APPLICABLE PRINCIPLES**

- 5 3. There was some agreement between the parties as to the applicable principles, although
6 there was a difference in positions on the approach to be taken. Counsel on behalf of the
7 Respondent referred to the Grand Court case of *Heriot African Trade Finance Fund*
8 *Ltd. v. Deutsche Bank (Cayman) Ltd*¹, and to the more recent Cayman Islands Court
9 of Appeal (CICA) case of *Deputy Registrar and Attorney General v. Day and Bush*²
10 (*AG. v. Day and Bush*). In the earlier case Cresswell J. stated:

11 “22 In my opinion, the relevant legal principles are as follows:

- 12 a. the Court of Appeal Law (2006 Revision), s.19(3) provides so far as
13 material: “No stay of execution . . . shall be granted upon any
14 judgment appealed against save . . . upon good cause shown to the
15 Court or to the Grand Court”;
16 b. the critical test is whether good cause has been shown;
17 c. the onus is upon an appellant to show good cause (i.e. good
18 reasons) for the imposition of a stay pending appeal;
19 d. in considering whether good cause has been shown, the court will
20 have regard to all the circumstances of the case, including, without
21 limitation (i) whether the appeal would be rendered nugatory if a
22 stay is not granted (*Wilson v. Church* (13) (12 Ch. D. at 458–459));
23 (ii) whether the appellant can show a good arguable case; (iii)
24 whether the appeal is in exercise of a true right of appeal and not
25 for some collateral purpose; (iv) the balance of convenience (see
26 *Quintin v. Phillips Petroleum Co.* (9)); and (v) appropriate regard
27 should be had to the reasons given by the first instance judge for
28 refusing a stay;
29 e. a stay of an order for the winding-up of a company will generally
30 not be granted where a stay (*Parmalat* (7) (2007 CILR 1, at para.
31 3)) — “would probably make it very difficult for a liquidator to
32 investigate the affairs so as to be able in a timely and efficient
33 manner to ascertain the company’s liabilities and assets and so take

¹ 2011 (1) CILR 34

² CICA Civil 9 of 2019



- steps to recover those assets for the benefit of the creditors and, if a solvent estate, for the benefit of shareholders as well";
- f. the question whether or not to grant a stay is entirely in the discretion of the court; and
 - g. indications in past cases do not fetter the scope of the court's discretion."

4. In the latter case, the Court of Appeal considered what is meant by the requirement for an applicant to show *good cause* on an application for a stay. Following a review of cases, the Court concluded that, provided the proposed grounds of appeal of an applicant for a stay are arguable, and the balance of convenience on the facts in question lie in favour of a stay, then the Court may grant one. This is the applicable test. An applicant for a stay is not required to demonstrate that he has strong grounds of appeal or a strong likelihood of success. The Court stated:

"By section 19 (3) of the Court of Appeal Law (2011 Revision), a stay may be granted for good cause. What amounts to good cause to stay an execution of a judgment has been considered in many cases, a number of which have been drawn to our attention. As the cases make plain, a successful litigant is prima facie entitled to the fruits of his success. There must be good reason for the court to prevent that. In deciding whether or not to impose a stay, the court will consider the grounds of appeal, their likelihood of success and the balance of convenience having regard to the interests of both parties. The overriding feature is the interests of justice in any given case, as the observations of Potter LJ make plain in the case of Leicester Circuits Limited v. Coates Brothers Plc (EWCA Civ 474)."

THE GROUNDS OF APPEAL

5. Counsel on behalf of the Respondent provided seven detailed grounds of appeal against the judgment of this Court made on the hearing of the substantive application. These aver errors in law as to the construction of the pre-nuptial agreement, in the application of legal principles and in findings of fact. Counsel argues in part that the interpretation of the pre-nuptial agreement in this case and the findings in respect of its construction,

1 given the provisions of the *Matrimonial Causes Law (2005 Revision)* (“the Law”) and
2 the usual meaning of matrimonial property, are errors which are open to reversal on
3 appeal. It is submitted that in the event of a successful appeal, the Court will be invited
4 to find that the agreement should be construed so as to limit the accumulation of joint
5 property to the date of separation, that the application for a lump sum payment should
6 be dismissed and that the expenses for J, the child of the marriage should be met by the
7 parties proportionate to their income.

8
9 6. The Petitioner in response argues that while the threshold for the Respondent to meet is
10 relatively low, the Respondent has limited prospects of success given that the Court’s
11 decision is largely based on the exercise of a discretion. Counsel on behalf of the
12 Petitioner relied on the cases of *G. v. G.*³, *Phonographic Performance Ltd. v. AEI*
13 *Rediffusion Music Limited*⁴ and *Rodrigues Architects Ltd. v. New Building Society*
14 *Limited*.⁵

15
16 7. Having considered the submissions of both parties and the grounds of appeal, I note the
17 low level of the threshold and would respectfully adopt the wording of the Court of
18 Appeal in the cited case of *AG. v. Day and Bush* in setting out my conclusion on this
19 aspect, which is that it cannot be said that the Respondent has failed to show that the
20 proposed appeal is arguable.

21

³ [1985] 2 ALLER 225

⁴ [1999] 2 All. E. R. 299

⁵ [2018] CCJ 09



1 THE BALANCE OF CONVENIENCE

2 8. Counsel for the Respondent referred to the case of *Imbar Maritama S.A. v. Republic of*
3 *Gabon* (CA)⁶ for assistance as to the application of the balance of convenience test. In
4 that case Kerr LJ stated:

5 *“Now the term “balance of convenience” is an inexact one and was so recognised*
6 *by Lord Diplock in the American Cyanamid case when he said (1975 AC at 408):*
7 *“It would be unwise to attempt even to list all the various matters which may need*
8 *to be taken into consideration in deciding where the balance lies, let alone to suggest*
9 *the relative weight to be attached to them. These will vary from case to case.”*
10

11 9. Under this heading Counsel for the Respondent submitted that the balance of
12 convenience in relation to the grant of a stay must be viewed in the context that this
13 matter is already some six years old. A further delay of four months will be caused by
14 the grant of a stay which is proportionately insignificant. Additionally it is said that in
15 the course of the substantive hearing, there was evidence that the Petitioner had
16 significant income and some CI\$77,900.00 – being the proceeds of the sale of land.
17 Additionally it is urged that there is provision within the Law for the Petitioner to seek
18 a costs allowance and as such there is very little discernable prejudice to the Petitioner
19 if the Court exercises its discretion in favour of staying the order.
20

21 10. Counsel submitted that this is in contrast to the position of the Respondent who would
22 face considerable prejudice in the event that a stay of execution was not granted. This
23 would include the payments of lump sum amounts, sums towards the purchase of a home
24 for the child of the marriage, and payment of an interim costs order, all of which would
25 require liquidation of various assets and investments. It is said that the effect of this

⁶ 1988-89 CILR 286



1 would be that in the event that the monies are returned following a successful appeal,
2 the Respondent would still have suffered significant loss.

3
4 11. In response, Counsel on behalf of the Petitioner, submitted that the Respondent had
5 failed to negative the presumption that the successful party is "*prima facie entitled to*
6 *their judgment*," as per Lord Justice Potter in *Leicester Circuits Ltd. v. Coates Bros.*
7 *PLC*⁷ and that a number of factors indicate that the balance of harm favours the refusal
8 of a stay of execution in this case. Counsel submitted that the Respondent has provided
9 no evidence to demonstrate that his appeal would be stifled in the event that a stay is
10 refused and further submitted that, in particular, there was no evidence to demonstrate
11 that in the event of a reversal, any payment made to the Petitioner would be irrecoverable
12 or cause the Respondent irremediable harm.

13
14 12. The primary submission of the Petitioner was that there was likely to be no negative
15 impact from the maintaining of the status quo given that by the terms of the substantive
16 judgment, the Respondent was entitled to a period of 36 months within which to pay the
17 lump sum payment and that even if the Respondent is successful on appeal, the Petitioner
18 will still be entitled to a lump sum payment of some amount. Counsel submitted further
19 that:

20 i) It is common ground that the Respondent has significantly greater financial
21 means available to him than the Petitioner has available to her. The failure by
22 the Respondent to make any payment, whether by way of lump sum or by way



⁷ [2002] EWCA Civ. 474 at paragraph 14.

1 of costs does, in fact, have the potential effect of stifling the Petitioner's capacity
2 to respond to the appeal.

3 ii) It is the Petitioner who would be adversely affected by the grant of a stay of the
4 payments.

5 iii) No prejudice is likely to be suffered by the Respondent in the event that the stay
6 is refused because of the term over which the payment is to be made. Any
7 rectification would simply be an accounting undertaking rather than a refund of
8 monies.

9 **ASSESSMENT**

10 13. In response to my inquiry both Counsel indicated that the test on an application for the
11 grant of a stay is a cumulative one. If both elements are not satisfied the application
12 would fail. Put another way, as I understood the submissions of Counsel, even if there is
13 said to be an arguable case on appeal, I must still consider all the circumstances and
14 determine where the balance of convenience lies.

15
16 14. The date of the forthcoming appeal is relied on by both parties as an important factor,
17 the Respondent argues that the appeal is so close in time that a stay ought to be granted.
18 The Petitioner argues the reverse, which is that the appeal is so close in time that there
19 is an urgent need for funds such that she will not be able to defend the appeal if not
20 allowed the "*fruits of the judgment.*"

21
22 15. To the Respondent's submission that the Petitioner can make an alternative application
23 for a costs allowance, the Petitioner responds that such an application should be



1 unnecessary because in effect she would be asking for what already has been ordered to
2 be paid to her.

3
4 16. In considering the circumstances, I take note of the Respondent's argument that if the
5 Petitioner claims now to be impecunious, that there is doubt as to whether she will be
6 able to repay any sums following an appeal. The submission of the Petitioner in response
7 is that the fear expressed of an inability to recover money is insupportable because the
8 Respondent will be obliged to pay a sum of money in any event and that even a full
9 reversal of every aspect of the judgment would still see an obligation to pay. In my view,
10 this is a submission of some force. Indeed as referenced in the judgment on costs, the
11 final *Calderbank* offer made by the Respondent to the Petitioner before the hearing on
12 the substantive application was for a lump sum payment of C\$410,000.00. The
13 Court's award was C\$747,878.99. In the circumstances of this case, the fact that the
14 appeal is said to be arguable does not mean that in the event of a successful appeal the
15 Petitioner will be said to be entitled to no funds. In essence the issue relates to quantum
16 of payment, not the fact of whether or not there should be such payments. This is an
17 important consideration for the purpose of this application.

18
19 17. Additionally, as per the Order made on the substantive hearing the single first payment
20 to be made is ten percent of the sum, (\$74, 787.00), which is in my view well below any
21 likely total lump sum payment to be made. Similarly another aspect of the appeal, as I
22 understand it, relates *not* to whether a home should be purchased for J, which was an
23 offer made by the Respondent, but to the difference in cost between that offered by him
24 and that ordered by the Court, being a difference of \$100,000.00 more than was offered.



1 I accept the submission of the Petitioner that, should there be a reversal, this difference
2 can properly be adjusted without difficulty as part of an accounting exercise.

3
4 18. The Petitioner's position is while there has been a reasonably substantial income earned
5 over the five years, in excess of \$200,000.00 of that income has been expended on legal
6 fees. Further, that as a result of this substantial expenditure the Petitioner is placed in the
7 position that there is a risk that she will not be fully armed to resist the Respondent's
8 appeal. It is urged that it would be an unjust outcome for a successful litigant not to be
9 able to respond to an appeal. Counsel for the Petitioner argues that given the
10 Respondent's substantial income, there is inequity of arms, in that he would be able to
11 make the initial payments and still conduct his appeal while the Petitioner would not be
12 able to do so and would be adversely affected to the point where she may be deprived of
13 a fair hearing on appeal.

14
15 19. I have considered all the circumstances of this case with care. These include the
16 economic disparity between the parties, the fact that the issues on appeal in large
17 measure relate to quantum of payment rather than non-payment, that the payment
18 structure as proposed in the Order does not require immediate and full payment of the
19 lump sum ordered, the possible effect upon the Petitioner who seeks to be able to respond
20 on appeal and the level of difficulty with the making of adjustments in the event of a
21 successful appeal. In the circumstances of this case, I do not consider that there would
22 be difficulty in making adjustments should there be reversals on appeal. On the side of
23 the Petitioner given her stated need for funds, there would be a distinct disadvantage
24 were a stay to be granted. She would either have to bear further costs in making an
25 application for a costs allowance order or seek an alternative solution in circumstances

1 where the Respondent agreed on the substantive hearing that the Petitioner is entitled to
2 receive some funds on the separation.

3
4 20. I have considered any possible prejudice to the Respondent were the stay not to be
5 granted. I have noted that he would be expected to meet not only the initial partial lump
6 sum payment and maintenance and therapeutic costs but also the interim costs allowance
7 order and initial payments towards obtaining a home for J. should one be identified. I
8 have considered the high level of his monthly income, the assets which are available to
9 him, some of which are investments, as evidenced during the substantive hearing as
10 against the limited amounts which would be required to be paid initially. I have
11 considered the Petitioner's lesser economic position and her needs in the face of the
12 forthcoming appeal. I have weighed all the factors as part of the discretionary exercise
13 which I am required to undertake. In my view the balance of convenience in this case is
14 in favour of not granting a stay.

15
16 21. I would therefore conclude that the application of the Respondent for a stay of execution
17 is refused.

18
19 **Dated this the 28th day of February 2020**

20 



21
22 **Honourable Justice Cheryll Richards Q.C.**
23 **Judge of the Grand Court**