

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

3 **CAUSE NUMBER FSD 96 OF 2013 (CQJ)**

4 **IN THE MATTER OF THE COMPANIES LAW (REVISED)**

5 **AND IN THE MATTER OF HITS AFRICA LTD (IN OFFICIAL LIQUIDATION)**

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7 **BETWEEN:**

**HITS AFRICA LIMITED (IN
OFFICIAL LIQUIDATION)**

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AND:

APPELLANT/DEFENDANT

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HUAWEI TECHNOLOGIES CO. LTD.

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Appearances:

**Mr. Colm Flanagan of Nelson & Co. for
the Applicant/Defendant**

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**Mr. David Butler and Ms. Jessica
Williams of Harneys for the
Respondent/Petitioner**

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Before:

The Hon. Mr. Justice Charles Quin Q.C.

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Heard:

18th July 2014

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EXTEMPORE JUDGMENT

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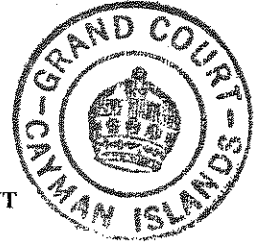
1. This the hearing of the Appellant's application dated the 8th April 2014 for a stay of the Winding Up Order dated the 29th January 2014 pending the conclusion of the appeal brought by the appellants, and the application by the Respondent, dated the 24th April 2014, for security for costs in the sum of US\$98,155.00.

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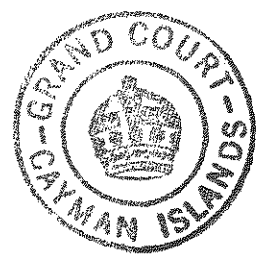
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1 2. I am grateful to counsel for both parties in confirming their agreement on the
2 principles to be followed in an application for a stay of a winding up pending
3 Appeal.

4 3. Cresswell J. in *Heriot African Trade Finance Fund Limited v. Deutsche Bank*
5 (*Cayman*) *Ltd*¹ set out the following principles at paragraph 22 of his Judgment:

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



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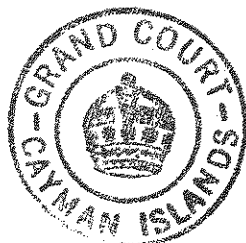
¹ 2011 (1) CILR 34

1 4. I refer to the authority of *In re A & BC Chewing Gum Ltd*² where Plowman J
2 stated in very wide terms that, although there was jurisdiction to do so, a stay,
3 as a matter of practice is never granted, and there are good reasons for not doing
4 so. As the Chief Justice said in the matter of *Parmalat Capital Finance*
5 *Limited*³, in following the dicta of Plowman J. section 103 of the Companies
6 Law [now section 111] provides:

7 *“The Court may, at any time after an order has been made for winding up a*
8 *company, upon the application by motion of any creditor or contributory of*
9 *the company, and upon proof to the satisfaction of the Court that all*
10 *proceedings in relation to such winding up ought to be stayed, make an*
11 *order staying the same...”*

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13 5. The reasons given in *In re A & BC Chewing Gum Ltd* and *Parmalat* are
14 generally applicable to winding up orders in that a stay will affect the ability of
15 the liquidator to investigate and ascertain the liabilities and assets of the
16 company and such reasons could be written for this case. It is clear from Mr
17 Hutchison’s helpful affidavit that the Company is hopelessly insolvent and there
18 are many aspects of the company’s affairs that require investigation. The Court
19 is disturbed to note from the affidavit evidence that Mr Das’ revival plan is
20 possibly an attempt to sell off assets of the company.

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² [1975] 1 WLR 574
³ [2007] CILR 1

1 6. I do take into account that my judgment was delivered on the 29th January 2014,
2 the Notice of Appeal was filed on the 17th February 2014, and, the
3 Memorandum of Appeal was filed on the 25th March 2014 and subsequently
4 amended. The Company took all of these steps but waited until the 8th April
5 2014 to apply for a stay. This demonstrates there was no question of urgency
6 on the part of the appellant in relation to applying for a stay of the winding up
7 order dated the 29th January 2014. I note that the appeal against the winding up
8 order has been set for hearing before the Cayman Islands Court of Appeal
9 (CICA) has been set for hearing on the 15th August 2014.

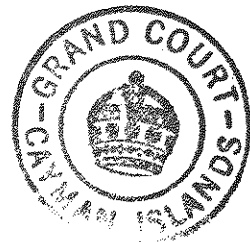
10 7. I follow the principles in the classic case of *Wilson v Church*⁴ and recently set
11 out by Cresswell J in *Heriot*.

12 8. I refer to section 19(3) of the Court of Appeal Law, which provides the critical
13 test. The onus is on the Appellant to show good cause and I find that the
14 Appellant has not shown any good cause for the Court to grant the stay in this
15 case. I also find that the appeal would not be rendered nugatory by not granting
16 a stay. Furthermore, from my review of the affidavits before the Court I can see
17 no evidence of there being any irrecoverable damage to the Company by not
18 granting a stay of the winding up order.

19 9. It is clear from the evidence before me that the company is insolvent and
20 therefore a stay would only delay the liquidation and possibly prejudice the
21 creditors. When I consider the balance of convenience I find that it is in favour
22 of the Liquidation continuing and that Mr Hutchison should continue his
23 investigation and analysis of the Company's affairs.

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⁴ (13) 12 Ch. D. at 458-459



1 10. Both parties consider the appeal of sufficient importance to justify instructing
2 leading counsel to conduct the appeal. The Respondent has provided what is in
3 my view a reasonable estimate of costs for the appeal. Accordingly, when I take
4 into account all the circumstances of this case I find that it is appropriate to
5 order security for costs in the sum sought.

6 11. I reject the application for a stay for the reasons I have outlined and order
7 security for costs in the sum requested.

8 12. Security is to be paid within fourteen (14) days.

9 13. I order the costs of today's hearing to be costs in the Appeal.

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12 **Dated this the 18th day of July 2014**

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19 **Honourable Mr. Justice Charles Quin Q.C.**

20 **Judge of the Grand Court**

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