[2023 Gib LR 495]

IN THE MATTER OF CASTLE TRUST AND MANAGEMENT SERVICES LIMITED

CASTLE TRUST AND MANAGEMENT SERVICES LIMITED v. WILD

COURT OF APPEAL (Kay, P., Rimer and Elias, JJ.A.): June 28th, 2023

2023/GCA/010

Companies—administration—stay pending appeal—where company appears to be insolvent and court not given full account of liabilities, administration order not stayed pending appeal—order also not stayed to enable appointment of special administrator—order modified so that, pending determination of appeal, joint administrators not to dispose of company's assets otherwise than in ordinary course of business without leave of court

The Supreme Court granted an administration order in respect of Castle Trust & Management Services Ltd.

On the application of the respondent, as the cell liquidator of Cells E, F and G of the Inspirato Fund No. 2 PCC Ltd., the Supreme Court had made an administration order in respect of the applicant/appellant ("CTMS") and appointed joint administrators (that judgment is reported at 2023 Gib LR 413). CTMS had indicated its intention to appeal and asked the Chief Justice to stay the administration order until after the disposal of its appeal. The Chief Justice initially refused to grant a stay but ordered that CTMS, acting by its directors, was permitted to bring an appeal against the administration decision and that, conditional on CTMS filing a notice of appeal in time, the administrators should not, without the leave of the court, dispose of any of CTMS's assets otherwise than in the ordinary course of business. However, a postscript to the judgment provided that a stay was granted conditional on a notice of appeal and notice of motion seeking a stay being filed. It appeared the Chief Justice had granted a stay of the administration order until after judgment on the notice of motion. CTMS filed a notice of appeal and issued a notice of motion by way of its renewed application for a stay of the administration order pending the disposal of its appeal.

CTMS's application to the Chief Justice for a stay had since been shown to be less than frank as to CTMS's true financial position. In particular, it was said that there was no significant body of creditors that could be prejudiced by a stay and that, without the debt underpinning the application for an administration order, CTMS was not insolvent. In fact, there were various judgments, awards and claims pending against CTMS.

CTMS submitted that unless a stay was ordered, the intervention of the joint administrators into CTMS's management pending the disposal of the appeal would potentially be seriously injurious to CTMS's client base, goodwill, commercial reputation and profitability. It also emphasized that the burden of handing over such management to the joint administrators and recovering it back after a successful appeal would be intolerable. Additionally, CTMS submitted that the administration order should be stayed so that CTMS could then agree to the appointment by the GFSC of a special administrator under the Financial Services (Temporary Administration of Companies) Act 2010.

Held, ruling as follows:

(1) As to whether the court should order a stay pending appeal, the applicable principles were clear. First, an appeal against a decision of a court did not by itself operate as a stay of the decision appealed against. Second, the starting point was that a successful claimant was not to be prevented from enforcing his judgment even though an appeal against it was pending. Third, a stay was the exception rather than the rule. Fourth, solid grounds must be advanced by the party seeking a stay. Fifth, if such grounds were made out, the court must undertake a balancing exercise, weighing up the risks of injustice to each side if a stay was or was not granted. Sixth, where the justice of that balancing approach was in doubt, the answer might depend on the perceived strength of the appeal. In insolvency cases, such as the present case, the usual rule was against the ordering of any stay because of the need to secure assets, identify creditors and obtain information (paras. 32–33).

(2) The size of CTMS's indebtedness, and the inference of insolvency to which that gave rise, was highly material to the determination of whether or not to stay the administration order until after the disposal of CTMS's appeal. A misleading picture of CTMS's solvency had been presented to the Chief Justice on the stay application. The court had no confidence that it had yet been provided with a full account of CTMS's liabilities. This was not a case in which CTMS's management should be allowed to remain in control pending the disposal of the appeal. The risk of allowing them to do so was that they might engage in dealings that would be of disadvantage to CTMS's creditors. CTMS's proposition that the court should stay the administration order pending the appeal so that a special administrator could be appointed in the meantime was wholly without merit. The respondent had obtained an order for administration in respect of CTMS. The purpose of that order was to enable the joint administrators to enter into the governance of the affairs of CTMS and perform their functions as

such with a view to achieving the best result they could for its creditors. That was not the function of a special administrator, whose primary, if not sole, concern was to safeguard a company's relevant affairs, *i.e.* all the business and affairs of a company comprising or relating to client services. It made no sense for the court to stay the administration order pending the appeal so that, in the meantime, CTMS could be subjected to a different administrative regime directed at objectives other than achieving the best result for creditors—and also resulting in burdening CTMS with the costs of operating such a regime, which would also be of no benefit to its creditors. The stay on the appointment of the joint administrators should be lifted forthwith. However the court was sensitive to the legitimate concern that, were CTMS's appeal to succeed and the appointment of the administrators to be set aside, it would be profoundly unsatisfactory if in the meantime the administrators had disposed of CTMS's business and undertaking. The court therefore agreed with the type of limitation that, pending the determination of the appeal, the Chief Justice had been minded to impose on the administrators, namely that they must not, without the leave of the court, dispose of any of CTMS's assets otherwise than in the ordinary course of business. Upon the joint administrators' undertaking to the court that, upon the lifting of the stay and the dismissal of CTMS's notice of motion for a renewed stay, and pending the determination of CTMS's appeal, they would not, without the leave of the court, dispose of any assets of CTMS otherwise than in the ordinary course of business, the court would dismiss CTMS's notice of motion for a stay and lift the stay on the administration order that had to date been in force (paras. 28–41).

Cases cited:

(1) *Dooley* v. *Castle Trust & Mgmt. Servs. Ltd.*, [2022] EWCA Civ 1569; [2023] ILPr 7; [2023] Pens. L.R. 4, considered.

(2) *Floyd Foster* v. *Davenport Lyons*, December 23rd, 2011, unreported, considered.

(3) *Investec Trust (Guernsey) Ltd.* v. *Glenalla Properties Ltd.*, [2018] UKPC 7; [2019] A.C. 271; [2018] 2 W.L.R. 1465; 2018 GLR 97, referred to.

(4) *Maud* v. *Aabar Block SARL*, [2016] EWHC 2175 (Ch); [2016] Bus. L.R. 1243, referred to.

Legislation construed:

Insolvency Act 2011, s.59(1)(d): The relevant terms of this provision are set out at para. 2.

S. Knight (a director of Castle Trust & Management Servs. Ltd.) for the applicant/appellant;

E. Phillips with *C. Grech* (instructed by Signature Litigation) for the respondent.

1 **RIMER, J.A.:** On May 30th, 2023, Mr. Justice Dudley, the Chief Justice, delivered his reserved judgment giving his reasons for making an administration order in respect of Castle Trust & Management Services Ltd. ("CTMS") and to appoint as administrators two insolvency practitioners with PricewaterhouseCoopers Ltd., Gibraltar, namely Mr. Edgar Lavarello and Mr. Luke Walsh (in proceedings reported at 2023 Gib LR 413). The application for the order was made by Ms. Joanne Wild in her capacity as the cell liquidator of cells E, F and G of the Inspirato Fund No. 2 PCC Ltd. ("Inspirato"), a protected cell company.

2 Upon the delivery of that judgment, Mr. Daniel Feetham, K.C. for CTMS, instructed by Hassans, indicated CTMS's intention to appeal against it and asked the Chief Justice to stay the administration order until after the disposal of its appeal. In paras. 1–7 of an extempore judgment of May 30th, the Chief Justice acknowledged that CTMS was entitled to appeal against his decision as of right but also gave his reasons for refusing the requested stay of the administration order pending the disposal of any such appeal. He did, however, then make two orders (*ibid.*, at para. 8) under the jurisdiction conferred upon the court by s.59(1)(d) of the Insolvency Act 2011, which provides that, on the hearing of an application for an administration order, the court "may make any interim order or other order that it considers appropriate."

3 First, the Chief Justice ordered that, until further order, CTMS, acting by its directors, was permitted to prosecute an appeal against his decision. The reason for that was that following the appointment of administrators, and but for such an order, the position would be the unsatisfactory one that formally only the administrators could prosecute the appeal that CTMS was entitled to make. Second, and conditionally upon CTMS filing a notice of appeal in time, he ordered that the administrators should not, without the leave of the court, dispose of any of CTMS's assets otherwise than in the ordinary course of business.

4 What then happened is a bit of a mystery. That is because a postscript to the judgment added that:

> "[Following the handing down of this judgment and upon submissions by the parties, a stay was granted conditional upon a notice of appeal and a notice of motion seeking a stay being filed by close of business Friday, June 2nd, 2023.]"

5 On June 2nd, CTMS, acting by Hassans, filed its notice of appeal and a memorandum of appeal setting out its grounds of appeal. On the same day, CTMS also issued a notice of motion by way of its renewed application for a stay of the administration order pending the disposal of its appeal. No order has yet been drawn up reflecting what the Chief Justice ordered on May 30th, and such drafts of the proposed order that this court

has seen are unclear as to what he did ultimately order as regards the imposing of a stay.

6 The notice of motion was argued before us via a remote hearing yesterday afternoon, June 27th, 2023. Within about the last two weeks, Hassans ceased to represent CTMS and came off the record as their solicitors. In the circumstances, we had argument in support of the application from Mr. Steven Knight, a director of CTMS. Mr. Elliott Phillips, appearing with Mr. Colin Grech for Ms. Wild, advanced the opposing argument.

7 At the outset of the argument, the court sought clarification from Mr. Phillips as to the precise nature of the stay that the Chief Justice had granted on May 30th, and he informed us that it was a stay of the administration order until after judgment on the notice of motion. Mr. Knight did not disagree. The consequence, as Mr. Phillips made clear, is that the administrators have not yet assumed control of CTMS's business. We had succinct arguments from Mr. Knight in support of the continuation of the stay until after judgment on the appeal and from Mr. Phillips in response. The opposing positions had already been fully explained in the skeleton arguments and the argument was largely devoted to a new argument advanced by Mr. Knight, one which has only emerged since the matter was before the Chief Justice.

8 The background is as follows. Inspirato was incorporated in 2011. It is managed by the Castle Group of companies, of which CTMS is a member and of which Mr. Knight is the beneficial owner. In December 2014, XCAP Nominees Ltd. acquired shares in Inspirato's cells E, F and G and invested £2.735m. in the cells. The cells then used £2.56m. of that money to purchase five fixed rate 6% loan notes from the KB Foundation ("KBF"), a Gibraltar trust of which CTMS is the sole trustee. The loan notes were secured by debentures creating floating charges over the assets of KBF. CTMS, and through it Mr. Knight, thus featured on both sides of the loan transactions.

9 On November 11th, 2022, Ms. Wild, as liquidator of the cells, wrote to CTMS, KBF's trustee, demanding repayment of the sums due under the loan notes. They amounted, with interest, to £3,771,327.67. CTMS does not dispute that that sum was so due. Its position, though, was that the cells were not entitled to look beyond the assets of KBF for payment and that CTMS, as trustee of KBF, had no personal liability to pay it. Ms. Wild disagreed and asserted that CTMS was personally liable. It will be apparent, but I anyway add, that KBF's assets, which have been managed by CTMS as its trustee, fall far short of being able to satisfy the loan notes.

10 Following CTMS's non-compliance with her demand, Ms. Wild applied to the Supreme Court as a creditor under s.56(1)(c) of the Insolvency Act 2011 for an administration order in respect of CTMS. That

application was heard by the Chief Justice on January 4th, 2023, with his reserved judgment being the one delivered on May 30th.

11 The Chief Justice (2023 Gib LR 413, at para. 5) said that "but for the alleged indebtedness created by the loan notes, it is not in dispute that CTMS is solvent." That statement reflected the unchallenged statement in para. 47 of Mr. Knight's witness statement of December 14th, 2022 that, if CTMS was not personally liable on the loan notes, its balance sheets for 2021 and 2022 showed it as having net assets of at least some £2m. In para. 11 (*ibid.*), and reflecting the language of s.57(1)(a) of the 2011 Act, the Chief Justice then said that the core issue before him was whether or not CTMS was insolvent or likely to become insolvent, and that underpinning that issue was the question of whether there was a substantial dispute as to CTMS's alleged personal liability under the loan notes. If there was such a dispute, its resolution would have to be tried in other proceedings, Ms. Wild's administration application was not the right one for achieving its determination and she could not be regarded as having proved her status as a creditor or, therefore, her entitlement to apply for an administration order. If, however, there was no such dispute as to CTMS's liability to pay the money, Ms. Wild would have proved both her status as a creditor and CTMS's insolvency. That is the basis on which the Chief Justice approached the application before him and (*ibid.*, at para. 12 and following) he considered whether or not there was any substantial dispute that CTMS was so liable.

12 That exercise required the Chief Justice to consider the circumstances in which a trustee who enters into a contractual commitment in its capacity as such will, or will not, be personally answerable under such commitment to the counterparty. It involved the application of the guidance explained by the Judicial Committee of the Privy Council in *Investec Trust (Guernsey) Ltd.* v. *Glenalla Properties Ltd.* (3). For the purposes of this application, there is no need to rehearse that guidance. It is sufficient to record that, having considered the applicable legal principles and the rival submissions advanced before him, the Chief Justice gave his reasons for concluding that CTMS had failed to show that there was any substantial dispute that CTMS was personally liable to the cells for the amounts due under the loan notes. It followed that the Chief Justice held that Ms. Wild had made good her status as a creditor of CTMS and that CTMS's non-payment of the debts was evidence of its insolvency. He then proceeded also to find that an administration order in respect of CTMS would be likely to achieve a better result for its creditors than liquidation. Having so found, he made the administration order.

13 It is material to note that CTMS's subsequent application to the Chief Justice for a stay has since been shown to be less than frank as to CTMS's true financial position. In saying that, I make clear that I intend and direct no criticism of or at CTMS's then lawyers, Hassans, or Mr. Daniel

Feetham, K.C., who represented CTMS at the substantive hearing and at the application. I infer that Mr. Knight simply failed to instruct them as to the true position. In particular, and reflecting the substance of Mr. Knight's December 2022 witness statement, CTMS's skeleton argument for a stay asserted in para. 8(e) that:

> "There is no significant body of creditors that can be prejudiced by a stay. Indeed, absent the debt underpinning the application for an administration order [CTMS] was not insolvent. In circumstances where [the liquidator] waited several years before making the application, a short delay until September/October for an appeal to be determined is not going to outweigh the prejudice to [CTMS]."

I add that I suspect the reference to "years" was a mistake, perhaps for either "months" or "weeks."

14 Ms. Wild's skeleton argument on the stay application before the Chief Justice, in answer to CTMS's, met the para. 8(e) assertion in part by referring to the hitherto unmentioned judgment debt for £140,000 against CTMS made in the *Dooley* claims, to which I shall come, and to the massive claims pending against CTMS in that litigation. The evidence subsequently filed by Mr. Knight, Ms. Wild and Mr. Walsh on the application before us has disclosed yet more information about the state of CTMS's financial health. The picture disclosed shows that, on the face of it, CTMS is under pressure from several unsatisfied creditors. Ms. Wild asserts that Mr. Knight's assertions as to its solvency in his December 2022 witness statement were untrue. She criticizes him for having withheld material information about that from the Supreme Court. She suggests that he misled ICC Judge Barber at a hearing on May 10th, 2023 in the High Court of England and Wales.

15 In that regard, the evidence as to various judgments, awards and claims pending against CTMS is as follows. One set of claims is the aforesaid *Dooley* case, namely *Dooley* v. *Castle Trust & Mgmt. Servs. Ltd.* (1). These are multi-party claims pending in the English High Court for substantial sums, said by a *Financial Times* article of January 13th, 2023 to be up to about £10.2m. The claims have been brought by pensioners against CTMS in its capacity as trustee of two qualifying recognized overseas pension schemes, popularly known as QROPS. The claims are in respect of pensioner funds said to have been lost in such schemes. In an early jurisdictional dispute, HH Judge Russen, K.C. held that the High Court had no jurisdiction to entertain them. By its decision of November 30th, 2022, however, the English Court of Appeal reversed his decision and held that it did. The Court of Appeal's order required CTMS, *inter alia*, to pay the successful appellants £140,000 as an interim payment on account of their costs by 4.00 p.m. on December 21st, 2022. It was not so paid, nor has it since been. Mr. Knight's evidence is to the effect that "CTMS has

agreed with the lawyer acting in the Dooley case that they have stood down on collection of the judgment to pay £140,000." I understand that to be because of negotiations currently in place in relation to the claims.

16 Ms. Wild was in fact aware of the *Dooley* proceedings at the time of the hearing before the Chief Justice on January 4th, 2023 and knew also that CTMS had not by then satisfied the £140,000 costs order. I infer that she made no reference to it at that hearing, any more than Mr. Knight did, although at the stay application on May 30th, 2023 she did put the facts relating to the *Dooley* claims before the court, by way of a witness statement made by Mr. Grech, which also explained that she did not know whether the £140,000 had been paid.

17 Ms. Wild has since May 30th, also discovered about, and deposes as to, the obtaining of a judgment by a number of claimants against CTMS in the High Court in the sum of £3,744,964.08. That judgment was dated November 11th, 2022 and Mr. Knight was aware of it both when he made his witness statement of December 14th, 2022 and at the hearing before the Chief Justice. It stands unhappily with his assertion as to CTMS's solvency in his witness statement of December 14th, 2022 and with the aforesaid para. 8(e) of CTMS's skeleton argument before the Chief Justice. The judgment remains unsatisfied and, on March 27th, 2023, Insolvency & Law Ltd., as assignees of the judgment debt by a deed dated March 3rd, 2023, presented a petition in the High Court against CTMS for its compulsory winding up as an insolvent unregistered company. The petition was presented on March 27th, 2023 and came on for hearing on May 10th, 2023 before ICC Judge Barber, when it was adjourned to July 5th, 2023, apparently "for settlement and advertisement."

18 Mr. Knight asserts, or at least suggests, that Ms. Wild knew, or perhaps ought to have known, about the November 2022 judgment debt by the time of the hearing before the Chief Justice on May 30th, 2023. She explains, however, that, and how, the first she learnt of the judgment and petition was on June 1st, 2023, two days after the Chief Justice had handed down his reserved judgment and dealt with the stay application. What happened was that, having learnt of the administration order on the Gibraltar court website, Insolvency & Law Ltd., the High Court petitioner, contacted her and informed her of the judgment debt and petition. She makes the point that, had she known of these matters earlier, she would have informed the court of it on May 30th; the existence of other unsatisfied creditors of CTMS would have served to support her case as to CTMS's insolvency and would have been material to the disposal of the stay application. I have no reason not accept as true Ms. Wild's denial of any earlier knowledge of the judgment debt and petition. It is obvious that, had she known of them earlier, and given the magnitude of the unpaid debt, she would have informed the court of them.

19 Ms. Wild accuses Mr. Knight of deliberately misleading ICC Judge Barber at the first hearing of the petition on May 10th, 2023. The hearing was held remotely and Mr. Knight participated in it from Gibraltar. Ms. Wild has exhibited a note of the hearing she has been given, one prepared by counsel for the petitioner. She relies on para. 5 of that note, which reads:

> "Mr. Knight sought that the Petition be dismissed. He stated that there are similar proceedings ongoing in Gibraltar, and submitted that this matter should be dealt with there and that this Petition was an effort to circumvent those proceedings. ICC Judge Barber clarified whether they were insolvency proceedings which Mr. Knight confirmed they were not, rather they were an action by an administrator to recover sums for the same parties, which he stated the Company was trying to resolve. He referred to evidence having been submitted to the court. ICC Judge Barber then clarified that there was an extant judgment against the Company on which the Petition Debt was based, which Mr. Knight confirmed."

20 I am not satisfied that that quotation makes good Ms. Wild's criticism of Mr. Knight as solidly as she would claim. Taken at face value, Mr. Knight appears to have been referring to a money claim being brought in Gibraltar by an administrator on behalf of the same claimants as those in the English proceedings, although what he was in fact talking about is obscure and perhaps the note did not accurately record what he said. He was not, however, obviously there referring to, or therefore misdescribing, Ms. Wild's application for an administration order. And in his witness statement of June 14th, 2023, in reply to Ms. Wild's evidence, he deposed that his written submissions in response to the petition had referred in terms to Ms. Wild's application for an administration order in respect of CTMS. That is a reference to a written submission he had presented to the High Court on May 10th, 2023 in answer to the petition, para. 4(2) of which referred to Ms. Wild's application for an administration order heard on January 4th, 2023 on which judgment had been reserved.

21 I add that para. 4(3) of that submission also asserted that "The Petitioner is aware of other potential winding up orders and is attempting to obtain a preference." That suggests that Mr. Knight was sensitive to an understanding that CTMS's financial state may be even more precarious than is reflected in the information currently before the court. I would not be prepared, on the material before the court, to conclude that Mr. Knight deliberately misled ICC Judge Barber at the hearing on May 10th, although I infer that Judge Barber did not at that stage appreciate that a concurrent application for an administration order was pending before the Supreme Court. Knowledge of that would, I consider, have been of relevance to her approach to the petition.

22 It is, however, clear that, at the hearing on May 30th, the Chief Justice was informed neither of the November 2022 High Court judgment nor of the pending winding up petition. I presume that was because Hassans, Mr. Knight's lawyers, were unaware of its existence. The existence of a pending winding up petition against CTMS based on an unsatisfied judgment debt of nearly £3.75m. was obviously relevant to the disposal of the stay application that CTMS was making. Mr. Knight should have disclosed it.

23 We also have the benefit of an affidavit of June 9th, 2023 from Luke Walsh, one of the two administrators of CTMS, who supports Ms. Wild's opposition to the grant of any stay. The making of the administration order immediately became public knowledge, and Mr. Walsh deposes that the joint administrators were thereafter promptly notified of two further potential claims against CTMS, to neither of which had any reference been made at the hearings before the Chief Justice on January 4th, and May 30th, 2023.

24 One such claim, or potential claim, was made by Viney Gash Properties Ltd. in a sum of £10,000 but I say no more about that since, following Mr. Knight's criticism of the assertion that there can be any such claim, Ms. Wild has recognized that Mr. Walsh was in error in an assertion he made in para. 9 of his affidavit and she does not now seek to add that claim to the list of CTMS's creditors. The other claim referred to by Mr. Walsh is, however, apparently very much a live one. It is one from Preston Turnbull LLP and is based on partial and final arbitration awards made against five respondents, including CTMS and Mr. Knight personally, on November 25th, 2022 and March 27th, 2023 in arbitration proceedings in England. The partial award was for £273,865.97. The final award, for costs, was for sums of £518,880.59 and £36,009.90.

25 The Chief Justice found CTMS to be insolvent on the basis of its failure to satisfy the demand for the payment of the loan notes sums that he found it was liable for. On the face of it, the unsatisfied judgments and awards I have referred to raise serious questions as to the extent of CTMS's insolvency. Mr. Knight's evidence, however, appears rather to brush them all aside. He asserts that the £140,000 *Dooley* judgment (1) will be recoverable from insurers once the case is finalized. He advances a complicated explanation about the origins and future of the November 2022 judgment debt and asserts that the judgment sum is matched by funds held by Spanish lawyers which will enable satisfaction of the claim to be made "over the course of the next few weeks" and, in support, Mr. Knight exhibits an email of June 1st, 2023 from James McGovern relating to the "Makarios Investment Group Limited and Sico Group of Companies" which confirms that "funds have now been secured independently for the full repayment of (all) creditors capital pertaining to the Charis Capital Management Limited 2019 liquidation." The email goes on to say that "this

is not a matter of if, but when . . .” Mr. Knight apologizes for the fact that Hassans were not made aware of this claim. He says that:

> “I have for many months been fighting battles on several fronts and have simply assumed that—given all the lawyers knew about the claims and had referred to some of the orders made—they had access to the file and understood the position.”

26 As for the winding-up petition based on that judgment debt (brought by its assignees), in his witness statement of June 14th, 2023 Mr. Knight levels strong criticism at Insolvency & Law Ltd. (the petitioner) on various grounds and asserts that CTMS will contest the petition. As regards the arbitration awards, I understand his position to be that Castle Ship Management Ltd., another of the five respondents, will discharge the liabilities under the awards. It has not done so yet.

27 I make clear that my brief summary of Mr. Knight’s position with regard to the various judgments and awards against CTMS is indeed just that. He has dealt with them at length in his evidence and his explanations, at times complicated, are not easy to summarize. Ultimately, however, the details behind these claims and his explanations about them are not of direct materiality. It may perhaps be that, given time, and but for the making of the administration order, the judgment debts, petition and arbitration awards might somehow be satisfied or otherwise disposed of. But I take the view that this court cannot make any assumptions as to that. As matters stand, the Chief Justice has found CTMS to be liable to the liquidator for a sum of £3,771,327.67 that it has failed to pay. In 2022, the English High Court and Court of Appeal gave judgments against CTMS for sums of £3,744,964.08 and £140,000 respectively that it has failed to pay. CTMS is the subject of arbitration awards totalling £828,756.46 that it has failed to pay. Its said liabilities total something approaching £8.5m. It has paid none of it and such failure gives rise to an inference of material insolvency. It is facing a petition for its compulsory winding up on the ground that it is insolvent. It is also facing the QROPS claims for compensation of some £10m. Mr. Knight put before us CTMS’s latest management accounts, which include a balance sheet as at April 30th, 2023 showing total net assets of £921,458. The creditors include the unsatisfied *Dooley* judgment for £140,000, but none of the other liabilities I have referred to. If they are taken into account, CTMS is massively insolvent.

28 In my judgment, the size of CTMS’s indebtedness, and the inference of insolvency to which that gives rise, is a factor highly material in the judgment required to be exercised in deciding whether or not to impose any stay of the administration order until after the disposal of CTMS’s appeal. That point is underlined by the fact that CTMS’s skeleton argument before the Chief Justice went out of its way to point out, apparently wrongly, that “there is no significant body of creditors that can be prejudiced by a stay.”

There is in fact a very significant body of creditors that might well be prejudiced by a stay if its effect were to leave CTMS's management team to have a free hand in CTMS's governance. The court has no basis for assuming other than that it is that management that has resulted in the incurring by CTMS of the unsatisfied liabilities I have listed. CTMS's management as KBF's sole trustee has also led to KBF being reduced to a position in which its assets are unable to satisfy the loan notes.

29 I come to whether, as Mr. Knight asks, the court should now stay the administration order until after the disposal of the appeal, which is likely to be heard in the Court of Appeal's September/October 2023 session. As to whether this court should order a stay pending an appeal, the applicable principles are clear.

30 I start by saying that we have had no argument on the merits of the proposed appeal and I am thus in no position to express any sort of view on its likely outcome. I can at least say, though, that I am not of the view that CTMS proposed appeal has no prospect of success. The question raised by the appeal is essentially one of the construction of the documentation. Such questions can be difficult and my present assessment is that so also may be the questions raised by the appeal.

31 That said, the position is, however, that Ms. Wild, did of course succeed in her application for an administration order. She won the argument and obtained the order she was seeking. It was, however, also open to CTMS to apply to stay that order, as it has, and the reported authorities provide clear guidance as to the court's approach in dealing with such applications. I derive the principles that I shall now summarize from the judgment of Mr. Justice Snowden (as he then was), and the citations in it he drew from earlier judgments, in *Maud* v. *Aabar Block SARL* (4).

32 First, an appeal against a decision of a court does not by itself operate as a stay of the decision appealed against. Second, the starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal against it is pending. Third, a stay is the exception rather than the rule. Fourth, solid grounds must be advanced by the party seeking a stay. Fifth, if such grounds are made out, the court must undertake a balancing exercise, one requiring the weighing up of the risks of injustice to each side if a stay is or is not granted. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover from the respondent any moneys he has paid over to him? Sixth, where the justice of that balancing approach is in doubt, the answer may depend on the perceived strength of the appeal.

33 Those are the principles that apply in the general run of cases. In insolvency cases, however, such as this case, the usual rule is *against* the ordering of any stay. In that regard, the *Aabar* case cites from the decision of Mr. Justice David Richards (as he then was) in *Floyd Foster* v. *Davenport Lyons* (2), cited in *Muir Hunter on Personal Insolvency.* The relevant paragraphs read (English High Ct., December 23rd, 2011, unreported):

> "21. The usual position in appeals against bankruptcy orders is that a stay will not be ordered. This is for the reasons which I earlier indicated, of the need to secure in particular the assets of the estate, to identify creditors and to obtain information. If there is a complete stay of a bankruptcy order and either permission to appeal is refused or, if allowed, the appeal is unsuccessful, there may well in the meantime have been dealings which will be to the disadvantage of creditors. The conduct of Mr Foster in the present case makes clear that this is a real rather than a theoretical risk in this case.
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> 22. In the decision of the Court of Appeal in *Re a Debtor* (No 644), 1969, reported some years later at [2001] BPIR 901, which concerned an appeal against the refusal of a stay of a bankruptcy order pending the hearing of the appeal Russell LJ giving the only reasoned judgment, said, 'Only the rarest kind of circumstance can justify such a stay and in my view such circumstances are absent here.'
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> 23. There may of course be circumstances when it is appropriate to modify the full effect of a bankruptcy order, in circumstances where there appear to be substantial grounds for an appeal, and where a bankruptcy order would cause irreparable damage to the debtor. The court will be concerned if possible to fashion some remedy or order which holds the [ring], balancing the interests of the creditors on the one hand and the debtor on the other. An example of such steps being taken is the decision of Mr Justice Morgan in *Emap Active v Hill* [2007] BPIR 1228. In order for those interests properly to be balanced and for an appropriate regime to be put in place, it is essential the interested parties are represented before the court, that is to say in particular, of course, the debtor on the one hand and the trustee in bankruptcy on the other and perhaps also the petitioner and supporting creditors, but their role I apprehend would be less important. For that to occur, of course notice of the application for a stay should be given to the trustee in bankruptcy or to the Official Receiver if a trustee has not been appointed. I would consider that save in exceptional circumstances a stay of a bankruptcy order pending appeal should not be granted unless notice has been given to the Official Receiver or to the trustee in bankruptcy."

34 The present case is not a bankruptcy, or personal insolvency, case. It concerns what the Chief Justice found to be a corporate insolvency. In my judgment, however, the general principle that Mr. Justice David Richards explained as applying in a bankruptcy case must apply equally to cases of corporate insolvency, for the like reasons he explained in his para. 21 of the citation. Leaving aside for the moment Mr. Knight's new point, to which I have referred and to which I shall come, this is a case in which I would apply what I regard as the usual position obtaining in insolvency cases, namely that there should be no stay.

35 Mr. Knight argues strongly, however, that unless a stay is ordered, the intervention of the joint administrators into CTMS's management pending the disposal of the appeal will potentially be seriously injurious to CTMS's client base, goodwill, commercial reputation and profitability, and he also emphasizes that the burden of handing over such management to the joint administrators, and recovering it back after what he hopes will be a successful appeal, will be intolerable.

36 I of course understand both points, although I suspect that Mr. Knight may have rather overplayed the first. Mr. Knight's various concerns are the consequence of the making of the administration order; and knowledge of that is already in the public domain. Further, even if CTMS, by Mr. Knight and his team, were to be allowed to continue to manage CTMS pending the appeal, they would, as a matter of fair dealing, have to make known to all those they might deal with that an administration order has been made in respect of CTMS and that the proposed appellate challenge to such order may fail. As for Mr. Knight's second point, I understand that too, but that is the type of practical difficulty likely to arise in most cases like this in which a stay pending appeal is refused and the appeal then succeeds. It is not a feature peculiar to this case.

37 Subject to what I have referred to as Mr. Knight's new point, in my judgment this is therefore a case that requires that the administrators should immediately take over the management of CTMS's business. Mr. Knight painted a misleading picture about CTMS's solvency in his affidavit of December 14th, 2022; and he allowed a misleading picture of it to be presented to the Chief Justice on the stay application. The court has since learned a good deal more about the huge unsatisfied liabilities CTMS has incurred, and I record that those relating to the Preston Turnbull LLP arbitration awards were not, as they should have been, volunteered by Mr. Knight but were the fruit of the publication of the making of the administration order. I have no confidence that the court has yet been provided with a full account of CTMS's liabilities. In para. 21 above, I referred to Mr. Knight's remark in his response to the High Court winding up petition, namely that "The Petitioner is aware of other potential winding up orders and is attempting to obtain a preference." He did not explain to what other "potential winding up" orders he was referring, but his remark

perhaps suggests that the pressures on CTMS are greater than the court knows about. This is not a case in which Mr. Knight and his team should be allowed to remain in control of the management of CTMS pending the disposal of the appeal. The risk of allowing them to do so is that they may engage in dealings that would be of disadvantage to CTMS's creditors.

38 Mr. Knight's new point, one indicated for the first time in a five-line "Important Prologue" to his skeleton argument served on June 21st, is that the administration order should be stayed so that CTMS can then agree to the appointment by the Gibraltar Financial Services Commission ("the GFSC") of a special administrator under the Financial Services (Temporary Administration of Companies) Act 2010. If no stay is granted, the GFSC could not and will not appoint such an administrator. But if a stay *is* granted, the court's understanding is that the GFSC will appoint one, which is what Mr. Knight wants. If, however, the outcome of the pending appeal is the dismissal of the appeal, the appointment of the joint administrators would come into unquestionable force, whereupon the appointment of any special administrator would automatically terminate: see s.12(1)(c) of the 2010 Act. The correspondence between CTMS and the GFSC that we have seen shows that the GFSC is concerned about CTMS's financial position, whether it is being run in a sound and prudent manner, whether it is satisfying the "threshold conditions" applicable to it under the Financial Service Act 2019 and that it may be trading whilst insolvent. The GFSC has not, however, sought to intervene in these proceedings and I do not understand it to oppose the implementation of the administration order.

39 In my judgment, Mr. Knight's proposition that this court should stay the administration order pending an appeal so that a special administrator can be appointed in the meantime is wholly without merit. Ms. Wild has obtained an order for administration in respect of CTMS. The purpose of that order is to enable the joint administrators to enter into the governance of the affairs of CTMS and perform their functions as such with a view to achieving the best result they can for its creditors. That is not the function of a special administrator, whose primary, if not sole, concern is to safeguard the company's "relevant affairs," meaning "all the business and affairs of a Company comprising or relating to Client Services": see s.6 and s.2(1) of the 2010 Act. It makes no sense for this court to stay the administration order pending the appeal so that, in the meantime, CTMS can be subjected to a different administrative regime directed at objectives other than achieving the best result for creditors—and also resulting in burdening CTMS with the costs of operating such a regime, being costs whose incurring will also be of no benefit to its creditors. Mr. Phillips also makes the point that whereas a lifting of the stay of the order will enable the joint administrators then to make representations in the English winding-up proceedings as to why the petition should be dismissed, a special administrator would probably have no standing to oppose the

petition and probably no basis for doing so. I would refuse Mr. Knight's somewhat "last ditch" bid for a stay on the ground that it will enable him to agree to the appointment of a special administrator, whose functions would be quite different from those for which the joint administrators were appointed.

40 It is, therefore, my view that the stay on the appointment of the joint administrators should be lifted forthwith. I am, however, sensitive to Mr. Knight's legitimate concern that, were CTMS's appeal to succeed and the appointment of the administrators set aside, it would indeed be profoundly unsatisfactory if in the meantime the administrators had disposed of CTMS's business and undertaking. I would therefore respectfully agree with the type of limitation that, pending the determination of the appeal, the Chief Justice was minded to impose on the administrators, namely that they must not, without the leave of the court, dispose of any of CTMS's assets otherwise than in the ordinary course of business. Paragraph 23 of the judgment of Mr. Justice David Richards in the *Floyd Foster* case (2) indicates that, pending an appeal, the just disposition of a stay application may well require the court to modify the full effect of a bankruptcy order; and I am satisfied that in this case too the court should modify the full effect of the administration order in respect of CTMS. To that end, Mr. Phillips has obtained from the joint administrators instructions to give their undertaking to the court that, upon the lifting of the stay and the dismissal of CTMS's notice of motion for a renewed stay, and pending the determination of CTMS's appeal they will not, without the leave of the court, dispose of any assets of CTMS otherwise than in the ordinary course of business.

41 Upon that undertaking, I would dismiss CTMS's notice of motion dated June 2nd, 2023 for a stay of the order dated May 30th, 2023 appointing joint administrators of CTMS. I would also lift the stay on the administration order that has to date been in force.

42 **ELIAS, J.A.:** I agree.

43 **KAY, P.:** I also agree.

Ruling accordingly.