

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

CAUSE NO. FSD 235 OF 2017 (IKJ)

IN THE MATTER OF SECTION 238 OF THE COMPANIES LAW (2016 REVISION)

AND

IN THE MATTER OF NORD ANGLIA EDUCATION, INC

IN CHAMBERS-VIA ZOOM

Appearances: Mr Mac Imrie, Mr Malachi Sweetman and Mr Lukas Schroeter, Maples and Calder, on behalf of Nord Anglia Education, Inc. (“the Company”)

Mr Richard Millett QC of counsel and Mr Christopher Harlowe of and Mr Harry Rasmussen of Mourant Ozannes, for the Mourant Dissenters (which for the purpose of this application include the Appleby Dissenters)

Mr Hamid Khanbhai, Campbells, for the Campbells Dissenters

Before: The Hon. Justice Kawaley

Heard: 11 May 2020

**Draft Ruling
Circulated:** 19 May 2020

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HEADNOTE

Stay pending appeal as of right against final order-offer of payment into court-applicable legal test and governing principles - impact of Covid-19 Pandemic on stay application - Court of Appeal Law (2011 Revision), section 19(3) - Court of Appeal Rules (2014 Revision), rules 20,21

RULING

Overview

1. The Company seeks a partial stay pending its appeal against this Court's Order dated April 14, 2020 (the "Fair Value Order"). The Fair Value Order was made pursuant to my Judgment dated March 17, 2020 following a three-week-long trial of the Company's Petition under section 238 of the Companies Law. The Fair Value Order appraised the per Share value at US\$37.68, US\$7.23 in excess of the Market Price derived figure of US\$30.45 for which the Company contended. The Company's stay application was made by Summons dated April 23, 2020; its Notice of Appeal was filed the following day. By a Notice of Appeal filed on April 28, 2020 by some 20 of the original 34 Dissenters (the "Appealing Dissenters"), it is contended that the correct fair value ought to be US\$45.45.
2. The Company seeks a partial stay only because it proposes, if granted a stay, having already paid the "undisputed" amount to the Appealing Dissenters to pay into Court an amount representing the "disputed" US\$7.23 per Share. That sum is not a trifling one; it is said to be in excess of US\$140 million. Its case is a straightforward one and can be distilled into the following two short propositions:
 - (a) its appeal has reasonable grounds of success;
 - (b) absent a stay the appeal might be rendered nugatory because of the inherent difficulties of seeking to recover any amounts ultimately found to have been overpaid from 20 different entities in the commercially unpredictable future of the post-Covid-19 pandemic business world, if its appeal were successful.



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3. The Appealing Dissenters opposed the stay application on the following grounds:
- (a) the appeal had no realistic prospects of success, having regard to the threshold required for disturbing findings of fact;
 - (b) the Company's evidence about the risks of any sums found to have been overpaid being irrecoverable fell short of the cogency required to displace the starting presumption that the Appealing Dissenters were entitled to the fruits of their Judgment.
4. The Company's application was complicated by two considerations, in particular. Firstly, the principles governing the grant of stays pending appeal and the correct interpretation of the uniquely worded section 19(3) of the Court of Appeal Law were hotly disputed. The Company's initial stance was that the Grand Court jurisdiction was different to that of the Court of Appeal. (Mr Imrie sensibly avoided the risk of his stronger points being weakened by what I indicated I thought was a hopeless one and ultimately abandoned his initial invocation of GCR Order 47).
5. Secondly, the Covid-19-linked arguments deployed by the Company in support of its case that the appeal might be rendered nugatory without a stay seemed at first blush convincing. However, accepting that argument created another legal policy risk: articulating a new rule of practice that any appellant seeking to avoid paying a judgment debt was entitled to a stay if they could patch together arguable grounds of appeal provided they were able to pay the disputed amount into Court.

The Grand Court's jurisdiction to grant a stay

Statutory provisions

6. Section 19(3) of the Court of Appeal Law (2011 Revision) provides as follows:

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



7. Mr Millett QC advanced the most straightforward reading of the quoted provision. The statute imposes as a general condition of a stay the requirement that the judgment debt and costs be paid into Court. However, this condition may be waived “*upon good cause [being] shown*”. On this reading, the statute is silent as to the substantive principles which govern the granting of a stay. Mr Imrie posited a somewhat more esoteric construction of the subsection, which assumed that it addresses both the principles governing the grant of a stay and the conditions subject to which a stay may be granted. In the Company’s Written Submissions, it was argued that:

“18...s.19(3) distinguishes between stay applications where the appellant pays the disputed sum into Court pending the outcome of the appeal and any other stay application pending the outcome of the appeal; only where the applicant does not pay the disputed sum into Court does s. 19(3) require it to demonstrate good cause...”

8. These contrasting portraits of the appellate stay landscape were each substantially based on an analysis of the Cayman Islands Court of Appeal decision in *Shanda Games Limited-v-Maso Capital Investments Limited et al*, Civil Appeal No. 12 of 2017, Judgment dated August 18, 2017 (unreported). However, the Appealing Dissenters’ counsel invited the Court to construe section 19(3) of the Law together with the following Court of Appeal Rule:

“20 (1) Except so far as the court below or the Court may direct-

(a) an appeal shall not operate as a stay of execution or of proceedings in the court below; and

(b) no intermediate act or proceedings shall be invalidated by an appeal.

(2) On an appeal from the Grand Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court or a Judge otherwise directs.”

9. As a matter of strict construction, one can use the primary legislation under which rules of court are made as an aid to construing the rules, but not vice versa. In a very general



sense, rule 20(1) of the Rules confirms what I would otherwise assume to be obvious. That an appeal does not (absent express statutory provisions to such effect) operate a stay and that a stay can only be granted by express order of the Grand Court or the Court of Appeal. Against this broader background, the natural and ordinary meaning of section 19(3) of the Law makes sense. The subsection merely provides that no stay shall be granted pending appeal “*save upon payment by the appellant into the Grand Court...or upon good cause shown*”. It is only engaged if this Court or the Court of Appeal has, pursuant to rule 20(1) of the Rules, decided in principle to direct that a stay should be granted.

10. At the end of the day, the contending constructions of section 19(3) have already been evaluated by the Cayman Islands Court of Appeal in a decision which is binding on this Court. In *Shanda Games Limited*, Sir Richard Field JA opined as follows:

“26...It is submitted on behalf of Shanda that the meaning and effect of section 19(3) is that, if an appellant pays into court the whole sum due under the judgment appealed against and the costs awarded to the other party or parties, the appellant is thereupon entitled to a stay of execution and does not have to show "good cause" for the grant of such a stay. The only extent to which the Court can exercise any judgment if the first limb of s.19 (3) is relied on by the applicant is to ensure that the right amount has been paid into court. Thus, submits Shanda, if the first limb of s.19 (3) is satisfied, the court can take no account of the merits of the proposed appeal or appeals when deciding whether to order a stay of execution pending an appeal. In advancing this submission, Shanda places emphasis on the words 'shall be granted' and the disjunctive 'or' that is said to show beyond argument that no 'good cause' need be shown if the whole judgment sum and any costs awarded to the other party or parties have been paid in in accordance with the first limb of the subsection.

27. I do not accept that s. 19 (3) is to be construed in this way. By virtue of Rule 20 (1) of the Court of Appeal Rules, the starting point is that an appeal shall not operate as a stay of execution which means that it is for an appellant to satisfy the Court of Appeal that the normal position that execution on the judgment can proceed immediately upon judgment being handed down ought to be departed



from...”

11. As Mr Millett QC rightly submitted, the Company’s construction of section 19(3) has already been rejected by the Cayman Islands Court of Appeal. It needs must be rejected by this Court. The effect of section 19 (3) is that:

“29...if the...Court... is of the view, having regard to all relevant factors, including the strength or weakness of the grounds of appeal, that a stay should be granted, it ought usually, pursuant to s.19 (3), to require payment into the Grand Court of the whole sum found due under the judgment appealed against, unless there is good cause for not imposing this requirement.

Principles governing the grant of a stay

12. In *Shanda Games Limited*, Sir Richard Field JA, after construing section 19(3), proceeded to define the broad parameters of the stay pending appeal jurisdiction as follows:

*“27... By virtue of Rule 20 (1) of the Court of Appeal Rules, the starting point is that an appeal shall not operate as a stay of execution which means that it is for an appellant to satisfy the Court of Appeal that the normal position that execution on the judgment can proceed immediately upon judgment being handed down ought to be departed from. Given this starting point, one would expect the Court to have a wide discretion in deciding whether to grant a stay or not. That indeed is and has been the position in England (where there is now no statutory provision equivalent to s. 19 (3)) since well before the promulgation of the CPR in 1999. Thus in *Winchester Cigarette Machinery v Payne (No 2)*, *The Times*, 15 December 1993, the Court of Appeal (Ralph Gibson and Hobhouse LJJ) held that, in granting a stay of execution of a money judgment pending an appeal, the Court had to start with the assumption that a person should not be stopped from exercising the necessary procedures in order to have the benefit of the money judgment made in his favour. In the view of Hobhouse LJ the appellant had to show special circumstances which took the case out of the ordinary.*

*28. This decision was referred to by Potter LJ in *Leicester Circuits Ltd v Coates**



Brothers plc [2002] EWCA Civ 474 in paragraph [12] before going on to say in [13]:

'The proper approach is to make the order that best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal.

29. In my judgment, on an application for a stay of execution pending appeal, the Court of Appeal has the same wide discretion exercised by the Court of Appeal of England and Wales prior to the introduction of the Civil Procedure Rules, which included the power to impose terms on the grant of a stay. Moreover, the discretion now exercisable by the England and Wales Court of Appeal post the CPR is not materially different than it was pre the CPR. It follows that, if the Cayman Islands Court of Appeal, in the exercise of this wide discretion is of the view, having regard to all relevant factors, including the strength or weakness of the grounds of appeal, that a stay should be granted, it ought usually, pursuant to s.19 (3), to require payment into the Grand Court of the whole sum found due under the judgment appealed against, unless there is good cause for not imposing this requirement. An example of such 'good cause' might be where to do so would stifle a meritorious appeal. Even if the appellant has offered to pay or has paid into court the judgment sum and the amount of any costs awarded to the other party or parties, the Court of Appeal, in the exercise of its discretion, may decide not to grant a stay of execution, for instance where the grounds of appeal are extremely weak and the judgment creditor is very likely to collapse financially if the judgment sum is not received before the proposed appeal is likely to be determined."

13. Mr Imrie's primary submission, appearing to raise the Cayman Islands flag, was that section 19(3) of the Court of Appeal Law created a more applicant-friendly *sui generis* stay jurisdiction than the corresponding test under English law. I have already rejected that narrow argument. The conclusion that the stay jurisdiction here corresponded to that in England was not an instinctive judicial genuflection to the flag of St. George. It



followed on from a fulsome recitation of the Cayman Islands statutory framework, with account being taken of both the statutory requirements to show deference to first instance decisions (section 5, proviso) and the duty to construe powers conferred by the Law liberally in favour of the right of appeal (section 25). The starting position, after all, was articulated by Field JA in *Shanda Games Limited* (citing the English Court of Appeal decision in *Winchester Cigarette Machinery v Payne (No 2)* as follows:

“in granting a stay of execution of a money judgment pending an appeal, the Court had to start with the assumption that a person should not be stopped from exercising the necessary procedures in order to have the benefit of the money judgment made in his favour.”

14. However, the Company’s secondary submission advanced in oral argument was that the Court had a broad and flexible jurisdiction which should be used to do justice in any event. This proposition is supported by the above-quoted pronouncements of Field JA in *Shanda Games Limited*. The Court has a “*wide discretion*” when determining whether a stay should be granted, “*having regard to all relevant factors, including the strength or weakness of the grounds of appeal*”. The Court of Appeal granted a stay having evaluated the four main grounds of appeal against the final section 238 valuation decision as follows:

- (a) “39. *In my judgment, Grounds 1 and 4 are well arguable, but are not especially strong grounds of appeal...*”;
- (b) Ground 2 depended on leave being granted to adduce expert evidence not adduced at trial and to withdraw concessions, which Shanda would have a “*tough chance in seeking to persuade the Court*” to do (paragraph 39);
- (c) “40. *As for Ground 3, while it is arguable in the sense that it has a real, rather than a fanciful, prospect of success, its arguability does not go very much further than that...*”

15. So far as the question of the strength of grounds of appeal is concerned, the minimum threshold is one or more grounds which have a “*real, rather than fanciful, prospect of*



success”. I reject Mr Millett QC’s submission that a higher threshold must be met. On the other hand it seems to me to be self-evident if the Court is required to balance competing considerations, there may be some case-specific circumstances which require a somewhat more solid threshold to be met by the stay applicant than other.

16. For reasons which are unclear but unimportant for present purposes, in *Shanda Games Limited* the need to analyse why the successful party should be deprived of the fruits of their money judgment did not apparently arise as it does in the present case. The Company accepted that if its construction of section 19(3) was rejected, it would have to establish that its appeal might be rendered nugatory if it paid the judgment debt in full. Reliance was placed on the decision of Creswell J (sitting as a Single Judge of the Court of Appeal) in *Heriot African Trade Finance Fund Limited v Deutsche Bank (Cayman Limited)* (Unreported, Grand Court, 14 January 2011). Creswell J held (at pages 23-24):

“(2) *The critical test is whether good cause has been shown;*

(3) The onus is upon an appellant to show good cause (i.e. good reasons) for the imposition of a stay pending appeal;

(4) In considering whether good cause has been shown, the Court will have regard to all the circumstances of the case including, without limitation:

(a) Whether the appeal would be rendered nugatory if a stay is not granted Wilson v Church (No. 2) (1879) 12 Ch D, 454, 458-9 CA);

(b) Whether the appellant can show a good arguable case;

(c) Whether the appeal is in exercise of a true right of appeal and not for some collateral purpose;

(d) The balance of convenience (see Quintin and Westphal v Phillips Petroleum Co and CISC Bank & Trust Co (Cayman) Ltd 1997 CILR N4 as to (b), (c) and (d))...”

17. Although this case was not a money judgment case, the Company used it to demonstrate the pertinence of *Wilson v Church (No. 2)*, which was such a case, and upon which the



Company relied to illustrate the practical application of the governing principles. I am guided by Creswell J's exposition on the general considerations which must be taken into account on an application for a stay pending appeal. The Appealing Dissenters helpfully commended the following principles applicable to the nugatory requirement to the Court:

“14. Of particular importance in this regard is the principle that an applicant for a stay must show that the risk of non-recovery of the judgment sum from the judgment creditor after a successful appeal is so substantial as to justify a stay. As to this, see Hammond Suddards Solicitors v Agrichem International Holdings [2001] EWCA Civ 2065 [AB/12] at paragraph 22, which notes: [...] the Court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. 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 that 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 any monies paid from the respondent? (emphasis added).”

18. I accept that an essential (rather than “*the essential*”) question in the present context is “*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 any monies paid from the respondent?*” Implicitly, the risk must be sufficiently tangible to justify taking it into account. In summary, the present application is governed by the following guiding principles:

- (1) the Court has a broad discretion as to whether or not to grant a stay;
- (2) the starting position is that the applicant must show good cause as to why the respondents should be deprived of the fruits of their money judgment;
- (3) the applicant must have at least one ground of appeal which has a realistic prospect of success;



- (4) the applicant must demonstrate a real risk that it may be unable to recover any monies paid from the respondents; and
- (5) if a stay is appropriate, the judgment debtor will generally, absent good cause, be required to pay the relevant monies into Court (by virtue of section 19(3) of the Court of Appeal Law).

19. The contentious issues in the present case were (a) whether the Company's grounds of appeal were sufficiently strong to justify depriving the Appealing Dissenters of the fruits of the Fair Value Order, and (b) whether the Company's evidence had demonstrated a real risk that it might not be able to recover any monies held to have been overpaid.

Findings: the merits of the stay application

Grounds of appeal

20. The first ground in the Company's Notice of Appeal states as follows:

"1. The Grand Court overstated the fair value of the Dissenters' shares in the appellant company (Company) (Fair Value) because it did not give any weight to the market price methodology. In particular, but without limitation, the Grand Court erred by ruling that:

1.1 the evidence that the market for the Company's shares was semi-strong efficient was inconclusive;

1.2 the proportionate size of the Company's free float relative to its total shares outstanding rendered the market price methodology an unreliable indicator of Fair Value; and

1.3 the presence of non-public information which at first glance might have been, but upon investigation was found not to be, price relevant disqualifies the market price methodology as means of determining Fair Value."



21. The second ground of appeal states as follows:

“2 The Grand Court overstated Fair Value because it gave weight, alternatively too much weight, to a discounted cash flow (DCF) methodology, including, without limitation, because:

2.1 the Grand Court accorded a 40% weighting to the highest figure obtainable from the DCF valuation range of the Company's expert (after adjustment for the Grand Court's finding on the cost of debt), thereby ignoring the evidence that any single point DCF valuation is inherently unreliable and failing to take into account the Company's expert's full DCF valuation range;

2.2 the Grand Court adopted a discount rate in its DCF valuation that was too low to account for the risks inherent in the cash flow forecasts used for the DCF calculation. In particular, the discount rate adopted by the Grand Court was lower than either the lowest discount rate put forward by the expert witness engaged by the Company or the discount rate put forward by the expert witness engaged by the Dissenters once adjusted for the Grand Court's findings on beta, because it:

- (a) did not include a country risk premium in the discount rate it used for its DCF valuation;*
- (b) did not include a size premium in the discount rate it used for its DCF valuation; and*
- (c) included a cost of debt in the discount rate it used for its DCF valuation that was inconsistent with the evidence before the Grand Court that borrowing rates were likely to rise over the period encompassed by the Grand Court's DCF valuation;*

2.3 the Grand Court did not adjust the Base Schools component of the projection it used in its DCF valuation to account for its finding that those projections were not risk-weighted, despite, without limitation and in particular, the Dissenters' expert opining that such risks were taken into account in the country risk premium, which premium the Grand Court excluded from the discount rate; and



2.4 the Grand Court did not adjust the projections it used in its DCF valuation to account for the Company's unchallenged evidence that those projections overstate realisable cash because part of the cash is 'trapped' in, and cannot be extracted from, China.”

22. The third ground of appeal states as follows:

“3 Further or alternatively the Grand Court overstated Fair Value because it only gave 60% weight to the transaction price methodology in circumstances where:

3.1 it found that:

- (a) the transaction/merger price provides important and credible evidence of fair value ;*
- (b) the main actors on the sell side had a fiduciary duty to maximise the merger price;*
- (c) the reasons put forward by the Dissenters' expert as to why key persons on the sell side would be willing to sell the Company at less than fair value were not supported by the factual evidence at trial;*
- (d) there was no evidence that any third party would have been prepared to pay more than the transaction/merger price;*
- (e) the transaction/merger price reflects an arm's length bargain;*
- (f) the transaction process had commercial reality and was bona fide and not tainted by any conflict of interest;*
- (g) the special committee overseeing the transaction process for the Company acted in good faith and in the best interests of the minority shareholders (aka the Dissenters); and*

3.2 the sell side entities, including the managers of the sell side funds, would have gained significant additional profit if they had been able to achieve a higher sale price.”



23. The fourth ground of appeal stated as follows:

“4 The Grand Court overstated Fair Value because it did not incorporate a minority discount in its DCF and transaction price methodologies. In particular, but without limitation, the Grand Court erred by:

4.1 ruling that the evidence of the expert engaged by the Dissenters that as a matter of economics no minority discount was applicable on the facts of the case, and that even if one were applicable it would be no higher than 2%, was uncontradicted; and

4.2 not having regard to the testimony of the expert engaged by the Dissenters that absent a merger the Dissenters would not have been able to sell their shares on the open market for more than the market price of the Company's shares.”

The Dissenters’ attack on the grounds of appeal

24. The ‘Skeleton Argument of the Dissenters’ made the bare assertion that *“the grounds of appeal advanced by the Company are anything but reasonable. They have no merit at all”* (paragraph 40). However, rather than engaging with the grounds themselves, a broader attack was launched based on English authorities dealing with the constraints on challenging factual findings on appeal. In his oral submissions, Mr Millett QC went somewhat further and sought to persuade me that each ground was not sufficiently cogent to support a stay:

- (a) as far as Ground 1 is concerned, he submitted that the weight given to the evidence, even expert evidence, was simply not appealable because it concerned the weight to be attached to expert evidence;
- (b) as regards the Discounted Cash Flow (“DCF”) points, it was submitted that:
 - (i) the complaint that 40% was attributed to a DCF analysis using the upper figure in the Company’s expert’s range rather than taking the full range into account did not discharge the burden on the Company to demonstrate realistic prospects of success,



(ii) the complaint that the discount rate applied was too low could not be sustained because the relevant findings were rational ones,

(iii) the complaints about failing to make risk adjustments in respect of the Base Schools and the problems of extracting cash from China amounted to “double counting”. More broadly, just because the case involved section 238 of the Companies Law did not open the door to revisiting all factual findings made at trial;

(c) as regards the complaint that a Minority Discount should have been applied, this challenge was not sufficiently strong to support a stay.

25. It is important to note that the First Affidavit of Fiona Keddie (at paragraph 9) asserted without evidential contradiction that if each of the three points were to be resolved in the Company’s favour (apparently Cost of Debt, Country Risk Premium and Minority Discount), the Fair Value would be reduced to close to the Market Price contended for by the Company. This demonstrates that to refuse a stay solely or primarily on the ground that the appeal is unarguable, the Court must at a minimum conclude that none of these three “big ticket” points have realistic prospects of success.

26. Because the Appealing Dissenters placed so much reliance on the legal assertion that factual findings are not easily disturbed on appeal, it is important that I evaluate those legal assertions. Mr Millett QC referred the Court to the following portion of the Dissenters’ Skeleton Argument:

“For present purposes the court need look no further than the decision of the UK Supreme Court in Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600 [AB/16], where Lord Reid said:

‘...48. ... an appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration.

57. I would add that, in any event, the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment



presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however preeminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

...

67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

27. The Court was also referred to *Bank St Petersburg PJSC-v-Arkhangelsky* [2020] EWCA Civ 408 where the following statement appears in the judgment of Sir Geoffrey Vos (Chancellor):

“31. In Henderson v. Foxworth Investments Ltd [2014] UKSC 41, Lord Reed said at [62] that ‘the adverb “plainly” [in plainly wrong] does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached’.”

28. Mr Millett QC also commended the following passage from Lord Sumption’s judgment in *Volcafe Limited-v- Compania Sud Americano de Vapores SA* [2018] UKSC 61:



“41. This court has on a number of occasions pointed out that while an appeal to the Court of Appeal is by way of rehearing, a trial judge’s findings of fact should not be overturned simply because the Court of Appeal would have found them differently. It must be shown that the trial judge was wrong: ie that he fundamentally misunderstood the issue or the evidence, or that he plainly failed to take the evidence into account, or that he arrived at a conclusion which the evidence could not on any view support. Within these broad limits, the weight of the evidence is a matter for the trial judge. There is a world of difference between the impression which evidence makes on a judge who has followed it as it was deployed and the impression that an appellate court derives from cold transcripts...”

29. These general principles were not disputed by the Company. The critical question is how they apply to the grounds of appeal in the present case.

Findings: merits of grounds of appeal

30. In my judgment the arguability of the grounds of appeal in the present case require careful scrutiny. The Company contends that the appeal would likely be rendered nugatory in large part by reference to generic economic uncertainties arising from the Covid-19 pandemic. The Appealing Dissenters complain that they will be kept out of their money through this appeal for a period of 18 months to 2 years.
31. As I observed in the course of the hearing of the present application, I also feel bound to take into account the distinctive legal context of the present appeal. The section 238 fair value jurisdiction is an emerging one replete with novel points of law and practice which are typically extensively argued, with different nuances at trial and on appeal. It is noteworthy that in what I regard as the leading local authority on the grant of stays pending appeal in section 238 cases, *Shanda Games Limited-v-Maso Capital Investments Limited et al*, Civil Appeal No. 12 of 2017, Judgment dated August 18, 2017 (unreported), Sir Richard Field described the minority discount point raised by the Company which succeeded on appeal as “*not an especially strong*” ground of appeal. I caution myself about the inherent difficulties of assessing the strength of grounds of appeal at the interlocutory stage.



32. Ground 1 complains that the value of the Dissenters' Shares was overstated because I "did not give any weight to the market price methodology". I reject the submission that this point must fail because the weight to be given to evidence is a matter for the trial judge. In the valuation context, where the Court is asked to choose between competing valuation methodologies being proposed by the experts, the complaint that the Company's proposed methodology was rejected is far more substantive than that. In the present case, moreover, the Fair Value Order was not based on simply my choice of one expert's methodology over the other. A blended approach giving greater emphasis to the Transaction Price than a DCF analysis was adopted. The most recent Cayman Islands Court of Appeal decision on appeal from fair value trials is *In Re Shanda Games Limited* [2018 (1) CILR 353] where the use of the DCF methodology was agreed. How this Court should choose between competing methodologies has not to my knowledge been considered by the Court of Appeal before.
33. Ground 1, fairly read, raises mixed questions of law and fact and in my judgment has more than fanciful prospects of success even though the ground is not "especially strong" viewed on its own.
34. Ground 2 complains that the wrong approach was adopted to certain aspects of the DCF analysis, which formed the basis of 40% of the assigned Share value. The first sub-point is that I was wrong to decide that it was appropriate to select a value that was at the top of the Company's expert's DCF range. In effect it is complained that if any regard was had to the Company's expert's DCF analysis at all, it was only permissible to choose a figure in the middle of that range ignoring altogether the Dissenters' expert's far higher range. On its face, there is little to that point.
35. However more coherent complaints are made about the findings made in relation to the elements of the discount rate, namely the failure to apply a Size Premium, a Country Risk Premium and the Cost of Debt calculation. At first blush, these appear to be factual findings which cannot easily be reversed on appeal. There is some circularity about the complaints. The Court ought to have wholly accepted the Company's expert's DCF approach and range; therefore the Court was wrong to apply computations which resulted in a fair value at the top of the Company's expert's proposed range, the argument seems to essentially run. However, in *In Re Shanda Games Limited* [2018 (1) CILR 353], the



Court of Appeal entertained broadly similar complaints about the trial Judge's approach to disputed expert evidence (the calculation of beta, the size risk premium and the appropriate terminal period) on their merits. Segal J's findings on these issues were ultimately upheld, but there was no suggestion that the relevant points were not properly arguable ones which could only be disturbed if the trial Judge was plainly wrong. The remaining sub-points under Ground 2, like the first one, seem to imply that the trial Judge has no independent evaluative function at all. But I cannot exclude the possibility that these weak points might be fortified at the hearing of the appeal.

36. On balance I conclude that Ground 2 to this extent also has more than fanciful prospects of success even though the ground is not "*especially strong*".
37. Ground 3 complains that fair value was overstated because only 60% weighting was given to the Transaction Price. There is no binding authority on the extent to which a 'blended approach' to valuation methodologies may be adopted in the absence of expert agreement, in the context of section 238 proceedings. How generous is the scope of the judicial appraisal function? In my judgment this ground must in these circumstances be objectively viewed "*arguable in the sense that it has a real, rather than a fanciful, prospect of success, its arguability does not go very much further than that...*": *Shanda Games Limited-v-Maso Capital Investments Limited et al*, Civil Appeal No. 12 of 2017, Judgment dated August 18, 2017 (unreported) at paragraph 40. On the other hand this ground raises important questions of law and practice.
38. Ground 4 complains that fair value was over-stated because of the failure to apply a Minority Discount. An important aspect of this complaint is the averment that I was plainly wrong to find that the Dissenters' expert's opinion that no minority discount was appropriate was "*uncontradicted*". This finding is criticised for overlooking the fact that the Dissenters' expert in his oral evidence did dispute the contention that no minority discount was appropriate when he testified that "*absent a merger the Dissenters would not have been able to sell their shares on the open market for more than the market price of the Company's shares*" (Notice of Appeal paragraph 4.2). The footnote to this point in the Notice of Appeal suggests that this evidence may be found at Transcript Day 11 page 76 lines 11-19 (note 12). That citation in actuality refers to a portion of the Company's own cross-examination of Professor Gompers, the Dissenters' expert. I will assume in



the Company's favour that Professor Fischel did in his oral evidence at least indirectly challenge the assertion that a Minority Discount was appropriate if a DCF valuation was relied upon. He may well have supported his case for using the Market Price methodology by reference to the fact that this is all the Dissenters would have been able to get for their Shares if the Merger had not taken place.

39. So the first limb of Ground 4, viewed in the context of what transpired at trial, amounts to this. Although Professor Fischel did not in his Reply Report expressly challenge Professor Gompers' assertion that no Minority Discount was appropriate, and although the Company did not address the point in its Closing Submissions, it was and ought to have been obvious to me that the expert evidence of the Dissenters' expert on this point was contradicted. I ought to have properly considered which expert's evidence I preferred on this issue. The Court of Appeal is in these circumstances now entitled to consider this issue on appeal, which again is probably best viewed as a question of mixed fact and law. The Privy Council in *Shanda Games Ltd-v-Maso Capital Investments Ltd* [2020] UKPC 2 (at paragraph 55, per Lady Arden) [found] that as a matter of law a minority discount should generally be applied, subject to the caveat that such a discount might be "*inappropriate due to the particular valuation exercise under consideration.*" I am bound to find that the complaint that I should have found that the need for a minority discount was on the expert evidence disputed and proceeded to resolve that dispute is, to use Sir Richard Field's phrase, "*well arguable*".
40. The second limb of Ground 4 is somewhat less solid and even more nuanced. The Court was only positively invited in Closing Submissions by the Dissenters to apply a Minority Discount (if at all) to a DCF valuation at the 2% rate proposed by Professor Gompers in the body of his Expert Report. The Company, whose primary case was that the Market Price should be used, did not appear to me to address the point at all (in closing) by way written or oral argument. However, it will argue by way of appeal that not only ought I to have applied the 2% minority discount substantively proposed by the Dissenters' expert. The Company wishes to argue that I should have applied one of the higher rates referred to by Professor Fischel in footnote 183 of his Supplemental Report. This appears in paragraph 65 in Section A of the Supplemental Report, which explains why a DCF analysis is unreliable. The Company's expert points out Professor Gompers' 2% figure is not based on Cayman Islands research and refers to articles illustrating that higher



discounts have been applied in other jurisdictions without commending an alternative rate to the Court. He opines instead that there should be no DCF valuation at all.

41. In my judgment it is nevertheless “*well arguable*” that I should have adopted the 2% rate which was the only rate positively supported in evidence before the Court, assuming of course that I was required to find on the evidence that a minority discount was not “*inappropriate*”. It is to my mind not arguable that I ought to have applied a higher discount based on a footnote to a section of Professor Fischel’s Supplemental Report which dealt with a different topic in circumstances where (a) the Company’s expert did not affirmatively propose one or more of those higher rates to the Court, and (b) the Company did not even by way of submission contend for any of those higher rates.
42. In summary, my findings on the arguability of the Company’s four grounds of appeal is as follows:
 - (1) the first ground is arguable, but “*not especially strong*”;
 - (2) the second ground is likewise arguable, but not “*especially strong*”. However, significantly, two ‘big ticket’ sub-points are embraced by this ground;
 - (3) the third ground is just arguable, but raises important points of principle for this developing and commercially significant area of the law;
 - (4) the fourth and most solid ground is “*well arguable*”, but I do not assess its commercial significance as being close to what the Company considers it to be.
43. The Company’s Notice of Appeal discloses four arguable grounds of appeal, one of which has potentially significant commercial consequences, another of which raises points of law and practice and the last of which is “*well arguable*” although not to the financial extent the Company contends.



Findings: is there a risk that any sums found to have been overpaid if a stay is refused would not be recoverable?

44. The First Affidavit of Fiona Keddie deposes as follows:

“C. Risk of Appeal Becoming Nugatory

11. As noted at paragraph 5 above, since the Judgment has been released, the Company, like many other businesses worldwide, has been affected by the COVID-19 crisis. Based on my experience in London and in the regions where the Company operates, the business world is in a state of uncertainty and an economic downturn appears likely.

12. If the Company pays the full amount due under the Fair Value Order to the Dissenters now and is subsequently successful in its Appeal, it will be forced to recover amounts from different Dissenters located in many different jurisdictions. The impact of COVID-19 and the consequential recession or business disruption has the potential to radically change the commercial environment in other ways such as increasing insolvencies or creating liquidity problems for the Dissenter funds. Recovery of any overpaid amounts will also be time-consuming given the number of Dissenters involved.

13. To avoid those difficulties, the Company seeks an order permitting payments equivalent to US\$30.45 per share to be made to the Dissenters now (less the sums already paid to the Dissenters by way of interim payment) to stand as partial payment, with the balance being stayed pending the outcome of the appeal, with the sum in question being paid into Court for time being. In the circumstances as set out above, I respectfully request that the Court grant a stay on execution in the terms sought in the Company's application.”

45. At first blush, I found the assertions advanced in paragraph 12 of the First Keddie Affidavit to be compelling. The Company is under commercial pressure because of uncertain global financial conditions flowing from the Covid-19 pandemic. If it pays the Judgment sum in full, it may have difficulty in recovering any sums found to be overpaid if its appeal succeeds because the Appealing Dissenters are located in various



jurisdictions and may be facing liquidity problems at the relevant time. Mr Imrie fortified this evidence with two concise submissions, one legal and one evidential. Firstly, as mentioned above, he demonstrated that such recoverability problems are a legally recognised ground for granting a stay pending appeal. And secondly he pointed out that the Company's evidence was not contradicted by any evidence from the Appealing Dissenters.

46. The point of principle established by the English Court of Appeal in *Wilson-v-Church* (No. 2) (1879) 12 Ch.D 454 (Cotton LJ at page 458) was the following:

“I am of opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognise that it may be reversed), the appeal ought not to be rendered nugatory.”

47. Mr Millett QC sought to diminish the weight to be attached to this authority by characterising the facts upon which it was based as extreme and quite different to this case. The key facts were that, absent a stay, a fund would be distributed to various bondholders, whose identities could not be known because they were bearer bonds. Evidentially, the evidence relied upon by the Company in the present case did not make out a sufficiently cogent case for the risks identified, he submitted. It was also said that the risks of recovery difficulties were exaggerated because many of the Appealing Dissenters were Cayman Islands companies. Mr Imrie countered by submitting that there was an analogy with the facts of the present case because the judgment monies would likely not simply be retained by the Appealing Dissenters but distributed to their various unknown investors. Moreover, the risks identified by the Company were real, particularly in the absence of any assurances being offered by the Appealing Dissenters as to how any monies overpaid would be repaid. The risks to my mind are twofold:

- (a) in the absence of cast-iron guarantees to repay, the Company's own commercial fragility might impede its ability to fund multiple recovery actions if those actions were opposed;
- (b) in the absence of convincing evidence about the Appealing Dissenters' own financial immunity to the slings and arrows of potentially outrageous commercial fortune, there is a risk that less than full recoveries would be



made by the Company.

48. What facts potentially justify a stay based on the broad and flexible *Wilson-v-Church (No.2)* principle are infinitely various and unsuitable for narrow categorisation. The Company's evidential stay reaches the requisite threshold because it ultimately relies on notorious facts of which the Court may take judicial notice. Because of the current pandemic, the Company's own financial prospects (rosy at trial) are clearly uncertain. The same must apply to the Appealing Dissenters' financial prospects; it is unsurprising that no deponent has stepped forward on their behalf to swear that by the time the appeal is disposed of in 18 months to 2 years' time they will each be flush with cash and able to repay whatever is required.
49. Accordingly I am bound to find that there is a real risk that the appeal would be rendered nugatory in that if the Company was found to be entitled to recover an amount in the region of US\$140 million or some lesser sum, all or (more likely) a part of the monies paid pursuant to the Fair Value Order might not be recovered. This does not dispose of the application because it is still necessary to balance the competing interests and consider where justice lies over all. This balancing exercise is particularly important in the present case because the nugatory point is based on generic considerations which will potentially apply for some time to every commercial case.

The balance of convenience

50. In *Hammond Suddards Solicitors-v-Agrichem International Holdings* [2001] EWCA Civ 2065 the approach to balancing the competing interest in a stay pending appeal application was summarised as follows by Clarke LJ:

“22.... Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. 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 that 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 any monies paid from the



respondent?”

51. Creswell J has described this exercise as the “*balance of convenience*”: *Heriot African Trade Finance Fund Limited v Deutsche Bank (Cayman Limited)* (Unreported, Grand Court, 14 January 2011) at page 24.
52. The main risk of injustice to the Appealing Dissenters if a stay is granted is that they will be denied the fruits of the Fair Value Order in the practical sense that they will not receive the monies and be free to deal with them as they see fit pending the appeal. The main risk of injustice to the Company if a stay is not granted is that it may not be able to recover all or some of any portion of the judgment debt which they are held to have overpaid if its appeal succeeds. If the Company was seeking to deprive the Appealing Dissenters of all of the fruits of their judgment, the balance of convenience would lie clearly in their favour. But only a partial stay is sought, consistent with the ambit of the actual amount in dispute. It is proposed to pay the Appealing Dissenters what I calculate to be approximately 80.8% of the total sum payable under the Fair Value Order, and to pay the remaining 19.2% into Court.
53. The commercial stakes of the 20 remaining Appealing Dissenters are probably unevenly spread, a few stakeholders being larger than many others. Still, viewing the matter broadly, the Company is one commercial entity and the prejudice it will suffer if it were to pay out, win its appeal (in full) and fail to recover all of the disputed sum would be greater than the prejudice to each Appealing Dissenter of having access merely delayed to their individual share of 19.2% of the Fair Value Order award. The balance of convenience in my judgment lies, somewhat narrowly but ultimately clearly, in favour of granting the partial stay sought by the Company.
54. While the Appealing Dissenters have (perhaps for tactical reasons of their own) not advanced this point, it is self-evident that the same economic uncertainties which cast doubt on the recoverability any sums overpaid by the Company may create commercial pressures which compel all or at least some of the Appealing Dissenters to negotiate settlements with the Company before the appeal is heard. The Company has already reportedly settled with 14 of the 34 Dissenters involved at the trial. It is obvious that tactical benefits are likely to accrue in favour of the Company by dint of the stay being granted. This might be a ground for refusing a stay in a case where there was no equality



of arms between the parties, or where fundamental rights and freedoms were involved. The present litigation takes place on a level playing field with the robust parties seemingly united in the conviction that all is fair in love, war and section 238 proceedings.

55. I accept Mr Imrie's submission that the appeal is brought in good faith. Nevertheless I have taken account of the tactical benefits which are likely to accrue to the Company from the grant of a stay by scrutinizing the merits of its grounds of appeal more carefully than I would ordinarily have done. Mr Imrie indicated that the proposed Order would permit the monies the Company proposes to pay into Court to be paid out of Court. Such a provision would be an additional protection of the interests of the Appealing Dissenters. Subject to hearing counsel, my provisional view is there should be general liberty to apply. The Appealing Dissenters should be able to apply to seek payment out not just in the event that they reach a global settlement or some lesser agreement with the Company. Should they feel that the Company has unreasonably refused to accept assurances about the repayment of the disputed sums which they may subsequently decide to give, any such dispute should, it seems to me, be resolved (in the first instance at least) by this Court. That said the commercial uncertainties which pivotally justify the grant of the stay application may well be sagely viewed by all parties concerned as an indicator that the safest depository 'port' for the disputed sums, in the face of what presently appears to be an economic storm, is the Consolidated Fund of one of the most solvent Governments in the world.

Summary

56. In summary:
- (1) the Court has a broad discretion as to whether or not to grant a stay;
 - (2) the starting position is that the applicant must show good cause as to why the respondents should be deprived of the fruits of their money judgment;
 - (3) the Company has four grounds of appeal which have a realistic prospect of success, one of which is more solid (but not as commercially significant) as the others, but relating to a developing area of local law and practice;



- (4) the Company has demonstrated a real risk that it may be unable to recover any monies paid from the respondents so that its appeal would be rendered nugatory if it substantially succeeds;
- (5) the Company proposes to pay 80.8% of the judgment debt to the Appealing Dissenters and only pay the disputed balance into Court. The balance of convenience accordingly favours granting the stay sought pending appeal, with liberty to apply to permit payment out on terms to be agreed or decided by this Court.

57. For the above reasons, the Company is granted the partial stay sought by its Summons dated April 23, 2020. It is difficult to see why costs should not follow the event so that the Company is awarded its costs of the present application in any event. I will hear counsel, ideally on the papers, in relation to the form of the Order and costs, to the extent that these matters cannot be agreed.



**THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT**

