[2011 (1) CILR 34]

HERIOT AFRICAN TRADE FINANCE FUND LIMITED v. DEUTSCHE BANK (CAYMAN) LIMITED

GRAND COURT, FINANCIAL SERVICES DIVISION (Cresswell, J.): January 14th, 2011

Companies—compulsory winding up—stay of winding up—stay pending appeal refused if refusal will not render appeal nugatory, prejudice shareholders or reduce value of company's assets—pursuant to Court of Appeal Law (2006 Revision), s.19(3), stay only granted if court in discretion considers good cause shown—factors for consideration listed—usually refused if stay would make liquidator's task more difficult

Companies—compulsory winding up—costs—security for costs—on appeal against winding-up order, security for respondent's costs usually ordered pursuant to Court of Appeal Law (2006 Revision), s.19(2)—if no party joined as responsible for respondent's costs, security to be provided by appeal's promoters

Aris sought the winding up of a Cayman mutual fund.

Aris held 23.47% of the participating shares in the fund, and petitioned to wind up the fund, but did not proceed diligently at first. The fund began an informal liquidation process, whereby its management would liquidate assets and repay investors in an *ad hoc* manner. It entered into a contract to sell certain assets to a third party, which would remain binding in the event of a winding-up order being made in respect of the fund.

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The Grand Court (Jones, J.) made a winding-up order (in proceedings reported at 2011 (1) CILR 1) on the basis that the fund was no longer viable and it was appropriate that it be liquidated officially by court-appointed liquidators, and not informally by its management. The fund indicated its intention to appeal and sought a stay of execution of the winding-up order pending the disposal of the appeal, which it was anticipated would be heard in April 2011. The Grand Court (Jones, J.) refused a stay on the basis that the fund's shareholders would not be prejudiced by the continuation of the official liquidation pending the appeal.

The fund applied for a stay of execution of the winding-up order pending the disposal of its appeal, submitting that (a) a stay of proceedings until the disposal of the appeal would not make the official liquidators' task more difficult; (b) any extra difficulty posed by a stay would stem from Aris's failure diligently to prosecute its petition; (c) without a stay, the fund's appeal might be rendered nugatory; (d) unless a stay were granted, there was a risk that the purchaser of the assets would pull out or seek to re-negotiate, or that the sale would otherwise be obstructed, having a negative impact on the value of the fund's assets; (e) granting a stay would cause no prejudice

to Aris; and (f) there was therefore good cause to grant a stay of execution pursuant to s.19(3) of the Court of Appeal Law (2006 Revision).

Aris submitted in reply that a stay should not be granted, since (a) the fund's appeal would not be rendered nugatory by a refusal to grant a stay; (b) it doubted whether the appeal was being promoted for a proper purpose; (c) Jones, J.'s decision to make a winding-up order and not to grant a stay was correct, or at least not plainly wrong; (d) the balance of convenience favoured refusing to grant a stay; and (e) there was therefore no good cause for granting a stay under s.19(3) of the Court of Appeal Law.

Aris applied for security for its costs of the appeal in the sum of US$82,052.50, submitting that a company appealing from a winding-up order should generally be ordered to provide security for costs.

The fund submitted in reply that (a) given that the fund was solvent and would agree that the burden of any costs order made in favour of Aris on appeal would not impinge on Aris's entitlement to a distribution in the winding up, the court should not order the fund to post security; (b) an order for security of US$82,052.50 sought was excessive and might stifle a *bona fide* appeal; and (c) alternatively, the amount of security ordered should reflect the proportionate shareholding of Aris, *i.e.* 23.47% of whatever would otherwise be an appropriate amount.

Held, refusing a stay and ordering security for costs:

(1) The court would not grant the fund a stay of execution of the winding-up order pending the disposal of its appeal. Pursuant to s.19(3) of the Court of Appeal Law (2006 Revision), the court would only grant such a stay if good cause (*i.e.* good reasons) had been shown. Moreover, the

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decision on whether to grant a stay was entirely within the court's discretion, and was not fettered by indications in past cases. In considering whether good cause had been shown, the court would have regard to (a) whether the appeal would be rendered nugatory if a stay were refused; (b) whether the appellant had a good arguable case on appeal; (c) the purposes for which the appeal was brought; (d) the balance of convenience; and (e) any reasons given by the first-instance judge for refusing a stay. In the context of companies, a stay would usually be refused if it would be likely to make it difficult for the liquidator to fulfil its duties (para. 22).

(2) In these circumstances, the fund had not shown good cause, and the court would refuse to grant a stay. The fund's appeal would not be rendered nugatory if a stay were not granted, and, further, Jones, J. had been correct to refuse a stay on the basis that the fund's shareholders would not be prejudiced by an official liquidation rather than an informal, *ad hoc* liquidation by the fund's management. Moreover, refusing to grant a stay would not of itself result in the obstruction of the proposed sale, thereby negatively impacting on the value of the fund's assets. The evidence suggested that the purchaser was contractually bound to proceed with the transaction, regardless of

the fund's liquidation. Furthermore, all relevant parties would be aware of, and would base their future actions on, the fact that a winding-up order had been made, irrespective of whether or not a stay was granted. The court would therefore refuse to grant a stay (paras. 23–29).

(3) The fund would be ordered to provide Aris with security for its costs of the appeal pursuant to s.19(2) of the Court of Appeal Law. The general rule was that when a company appealed from a winding-up order, security for the respondent's costs needed to be given, in order to discourage frivolous appeals. In circumstances such as these, in which the fund appealed against a winding-up order without joining anyone as personally responsible for the respondent's costs, it would be appropriate to ensure that security was provided by those promoting the appeal. Further, none of the reasons advanced by the fund justified departing from this approach. The court would exercise its discretion and order that the fund provide security in the sum of US$75,000 (para. 30; paras. 35–37).

Cases cited:

(1) *A. & B.C. Chewing Gum Ltd., In re*, [1975] 1 W.L.R. 579; [1975] 1 All E.R. 1017, referred to.

(2) *Aris Multi-Strategy Lendings Fund Ltd.* v. *Quantek Opportunity Fund Ltd.*, Eastern Caribbean Sup. Ct. (BVI High Ct.), December 15th, 2010, unreported, referred to.

(3) *Belmont Asset Based Lending Ltd., In re*, 2010 (1) CILR 83, referred to.

(4) *Blériot Mfg. Aircraft Co. Ltd., In re* (1916), 32 T.L.R. 253, referred to.

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(5) *Davis & Collett Ltd., In re*, [1935] Ch. 693; [1935] All E.R. Rep. 315, referred to.

(6) *Lancelot Investors Fund Ltd., In re*, 2009 CILR 7, referred to.

(7) *Parmalat Capital Fin. Ltd., In re*, 2007 CILR 1, applied.

(8) *Photographic Artists' Co-op. Supply Assn., In re* (1883), 23 Ch. D. 370, applied.

(9) *Quintin* v. *Phillips Petroleum Co.*, 1997 CILR *N*–4, applied.

(10) *St. Piran Ltd., In re*, [1981] 1 W.L.R. 1300; [1981] 3 All E.R. 270, referred to.

(11) *Tricorp Pty. Ltd.* v. *Deputy Commr. of Taxation (WA)* (1992), 6 ACSR 706; 10 ACLC 474, referred to.

(12) *Wahr-Hansen* v. *Bridge Trust Co. Ltd.*, 1994–95 CILR 435, referred to.

(13) *Wilson* v. *Church (No. 2)* (1879), 12 Ch. D. 454; 41 L.T. 296, applied.

(14) *Wilson (E.K.) & Sons Ltd., In re*, [1972] 1 W.L.R. 791; [1972] 2 All E.R. 160, applied.

Legislation construed:

Court of Appeal Law (2006 Revision), s.19(2): The relevant terms of this sub-section are set out at para. 35.

s.19(3): The relevant terms of this sub-section are set out at para. 22.
K.J. Farrow, Q.C. for the fund;
J.R. McDonough for Aris.

1 **CRESSWELL, J.:** There are two summonses before the court. By the first summons, Heriot African Trade Finance Fund Ltd. ("the fund") applies for a stay of execution of the winding-up order of Jones, J., made on January 4th, 2011, in FSD Cause No. 87 of 2010, pending the determination of the fund's appeal against that order. By the second summons, the respondent (in its capacity as the nominee of Aris Multi-Strategy Lending Fund Ltd. and Aris Africa Fund Ltd.) ("Aris") applies for an order that persons who are promoting the appeal by the fund against the winding-up order provide security for Aris's costs of the appeal.

Introduction

2 I gratefully take the relevant background from the judgment of Jones, J., with appropriate amendments. The fund was incorporated and registered as an exempted fund under the Companies Law on April 17th, 2007. It was established as an open-ended mutual fund and was duly registered under s.4(3) of the Mutual Funds Law, thereby imposing important statutory duties upon its directors. The person principally responsible for promoting the fund was Mr. Gianfranco Cicogna, acting in his capacity as chief executive officer of Heriot Commodity and Trade Finance (Pty.)

Ltd., a South African company which is part of the Heriot Group of Companies, of which Mr. Cicogna has been chairman since 1996.

3 The fund's investment manager is Heriot Investment Management (Cayman) Ltd. ("the investment manager"), a special purpose company incorporated under the Companies Law on May 23rd, 2007, which delegated most of its functions to Heriot Commodity and Trade Finance (Pty.) Ltd. ("the investment adviser") pursuant to an investment advisory agreement. The investment manager does not appear to have played any role in the events giving rise to these proceedings but it is relevant to bear in mind that it owns 100% of the fund's voting shares for which it subscribed a nominal $10. The redeemable participating shares issued to the fund's investors do not carry the right to vote.

4 The fund's investment objective is described in its private placement memorandum dated June 2007 ("the PPM") which constitutes the fund's offering document for the purposes of s.4(7) of the Mutual Funds Law. It follows that the PPM must be filed with CIMA, it must describe the equity interests, in this case the rights attaching to the fund's participating shares, in all material respects, and it must contain such other information as is necessary to enable a prospective investor in the fund to make an informed decision as to whether or not to subscribe for shares. This statutory duty is a continuing one, at least so long as the fund is open to new subscriptions. If the fund's promoter (which in this case includes the investment

adviser and Mr. Cicogna) or its operator (which means the directors) become aware of any change that materially affects the accuracy of any information contained in the PPM, s.4(9) imposes an obligation to file an amended offering document with CIMA within 21 days.

5 Section 3 of the PPM describes the fund's "investment objective" in these terms: "The primary object of the fund is to invest in commodities and act as a provider of trade finance through its trading company named Heriot Trading Ltd. (the 'trading company')," which is a wholly-owned subsidiary. In the event, it appears from the fund's audited financial statements for the year ended June 30th, 2008 that all the business was actually conducted by the fund itself and not through its wholly-owned subsidiary, but nothing turns on this point. Section 3 of the PPM goes on to describe the "investment strategy and process" in the following terms: "The fund [acting through the trading company] will act as a principal trader in commodities and a provider of trade finance." It described the investment adviser's experience in African trade finance and banking and went on to state that—

"the subscription proceeds will be utilized as collateral security to secure banking facilities in the form of documentary credits and short-term collateralized loans and other financial instruments related to securing and execution of trade-related transactions. These

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facilities will be used to purchase commodities against orders from qualifying African commodities traders and to assist in the provision of trade finance for import and export related transactions."

6 Aris holds a total of 23.47% of the issued participating shares in its capacity as custodian for Aris Multi-Strategy Lending Fund Ltd. and Aris Africa Fund Ltd., both of which are themselves carrying on business as collective investment funds. Aris is one of the five largest participating shareholders who, collectively, hold about 80% of the equity. These five shareholders constitute an investor committee which was established in June 2009 as a channel of communication between the fund's management and its principal investors. This investor committee has performed an important role and affidavits have been sworn on behalf of its four other members for the purposes of these proceedings, in which they oppose the positions adopted by Aris.

7 Jones, J. set out the procedural history (2011 (1) CILR 1, at paras. 7–12). In his judgment, to which I refer for its full terms and effect, he addressed the following topics:

(a) the accounting issue (*ibid.*, at paras. 13–18);

(b) the investment restrictions issue (*ibid.*, at paras. 19–22);

(c) the related party issue (*ibid.*, at paras. 23–25);

(d) the loss of substratum issue (*ibid.*, at paras. 26–27);

(e) the applicable law on loss of substratum (*ibid.*, at paras. 28–42); and
(f) the fund's case (*ibid.*, at paras. 43–48).

8 Jones, J.'s conclusions were set out as follows (*ibid.*, at paras. 49–51):

"49 I am satisfied that it is just and equitable to make a winding-up order on the basis that the fund is no longer viable, in the sense that it is practically impossible to carry on its business in accordance with the reasonable expectations of its participating shareholders, based upon the representation contained in the PPM. The evidence is that all the participating shareholders agree that the fund should be liquidated and its management have in fact been engaged in an *ad hoc* liquidation at least since March 2009 when they suspended redemptions. There is no basis upon which it can be said that an *ad hoc* liquidation conducted by management is itself part of the fund's business, such that the participating shareholders should not have any reasonable expectation that the fund would be liquidated in accordance with the Companies Law and the Companies Winding Up Rules. To the contrary, investors who put their money into mutual funds incorporated in the Cayman Islands have every reason to

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expect that the companies' affairs will be conducted in accordance with Cayman law, including the Companies Winding Up Rules.

50 The fund is being liquidated because it failed commercially and because it is now practically impossible to carry on the business for which it was established, with the result that the investors want to withdraw what is left of their capital and deploy it elsewhere. The investors agree that the fund should be liquidated. In these circumstances there are strong policy reasons for saying that the liquidation should be conducted by qualified insolvency practitioners in accordance with the provisions of the Companies Winding Up Rules. This would be so even if there were no breach of duty on the part of the company's management. In this case I have concluded that the evidence relied upon in support of the alleged breaches of fiduciary duty does not disclose a triable issue. The investment adviser did act in breach of duty in connection with the investment restrictions. Whether that breach materially contributed to the fund's failure remains an open question.

51 The fund's directors are in breach of the statutory duty to file audited financial statements. The 2009 accounts should have been filed a year ago and the 2010 accounts should have been filed today. The failure to produce quarterly management accounts and the fund's inability to obtain an unqualified audit report in respect of its financial statements for the year ended June 30th, 2008 give rise to two issues which must be resolved for the purposes of liquidating the fund. Having regard to the terms of Deloitte's qualification, there is necessarily an issue about the investment manager's entitlement to a performance fee of $3,342,367 and an issue about the validity of the NAV at which the subscriptions of $22,870,000 received in advance of

the balance sheet date were actually processed. Clearly, the mere fact that these issues have arisen could not, by itself, justify the appointment of inspectors pursuant to s.64. However, the fact that these issues have to be resolved for the purposes of liquidating the fund is a reason for appointing as liquidator a qualified insolvency practitioner who is independent, rather than members of management who have a strong financial interest in the outcome."

The fund's appeal

9 This appeal is brought as of right, in the sense that leave to appeal is not necessary.

Stay

10 Jones, J. refused a stay for reasons which he gave on January 13th, 2011 as follows:

"On January 4th, 2011, I made a winding-up order in respect of the fund. At the end of the hearing, counsel for the fund made an application for a stay of the order pending appeal . . . The court has jurisdiction to stay proceedings on a winding-up order, but it is not the normal practice of this court to grant a stay pending an appeal to the Court of Appeal, and in my judgment this was a clear case in which I should exercise the court's discretion by refusing to grant a stay. I am now asked to put my reasons for doing so into writing.

I dismissed this application because it is plainly obvious that the refusal of a stay will not render an appeal nugatory from the point of view of the fund's participating shareholders. It cannot be said that this winding-up order will have the irreversible effect of terminating a business and thereby prejudicing those who would contend on appeal that the business should be allowed to continue. This is not such a case. It is not in dispute that the fund is being 'liquidated,' and will continue to be 'liquidated' in any event, irrespective of the outcome of the appeal. The issue is how and by whom it should be liquidated. In my judgment it was a clear case in which a winding-up order should be made, in spite of the opposition of a majority of participating shareholders. There is no sensible basis upon which it can be said that the fund's participating shareholders will be prejudiced unless a 'soft wind-down' or '*ad hoc* liquidation' is allowed to continue pending the outcome of an appeal by the fund (acting by its directors and investment adviser). To the contrary, I consider that there are issues about the investment manager's entitlement to a performance fee of $3,342,367 and the validity of the NAV at which subscriptions of $22,870,000 were processed which will need to be investigated and resolved in any event. Whether or not the winding-up order is set aside by the Court of Appeal, this investigatory work will still need to be done and it will still need to be done by someone independent, other than the investment manager and/or adviser who have a strong financial interest in the outcome.

For these reasons I refused to grant a stay."

11 I hear the application for a stay pursuant to powers exercisable by a judge of the Grand Court (see s.33 of the Court of Appeal Law (2006 Revision)). I hear the application for security as a judge of the Grand Court.

The appellant's submissions

12 Mr. Kenneth Farrow, Q.C., in full and helpful submissions, submitted as follows. The proposition that a stay of a winding-up order will never be granted is a general rule of practice which depends upon the likely

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time-lag between both the commencement of the winding up (June 5th, 2009) and the making of the winding-up order (January 4th, 2011), and between the making of the winding-up order and the disposal of the appeal. Here, the time-lag until April 2011, when it is anticipated the appeal could be heard, is unlikely to cause the JOLs, assuming the appeal fails, any significant difficulties in identifying the assets and liabilities as at January 4th, 2011. The date of June 5th, 2009 is significant for identifying any post-commencement disposals and for fixing the period for the investigation of antecedent transactions. That could present a greater difficulty, but that time-lag stems from the failure of Aris diligently to prosecute the petition. Aris cannot be heard to complain that the JOLs' task will be made more difficult if a stay is granted. Any difficulties are of Aris's making and, in any event, presently exist. Delaying the JOLs until April 2011 will not add to those difficulties.

13 The Cayman authorities indicate a more flexible approach to the grant of a stay than that adopted in *In re A. & B.C. Chewing Gum Ltd.* (1)—see Smellie, C.J. in *In re Parmalat Capital Fin. Ltd.* (7) and Quin, J. in *In re Lancelot Investors Fund Ltd.* (6). The expression "good cause" in s.19(3) of the Court of Appeal Law is not specifically a reference to the merits of the appeal. See further Cotton and Brett, L.JJ. in *Wilson* v. *Church (No. 2)* (13) and Smellie, J. in *Wahr-Hansen* v. *Bridge Trust Co. Ltd.* (12).

14 The decision by the independent directors to exercise the fund's unrestricted right of appeal was for the purpose of testing whether the judgment of Jones, J. was right. The right of a company to avoid being wound up is a substantive rather than a procedural right. As to the merits of the appeal, the draft memorandum sets out the grounds of appeal as follows:

(a) there was an insufficient loss of substratum. There is a conflict between earlier decisions of Jones, J., starting with *In re Belmont Asset Based Lending Ltd.* (3) and the decision of the BVI High Court (Bannister, J.) in *Aris Multi-Strategy Lendings Fund Ltd.* v. *Quantek Opportunity Fund Ltd.* (2);

(b) even if there were a sufficient loss of substratum, the judge failed to take account of a number of factors which militated against the making of a winding-up

order. Examples of the factors upon which the fund relied are set out at para. 6(2) of the memorandum and expanded upon in para. 7(2).

(c) the judge gave no, or no sufficient, reasons for rejecting the evidence and arguments, written and oral, upon which the fund relied in relation to the above ground; and

(d) the judge relied upon a factor which had not been advanced by Aris and was not therefore the subject of argument. The judge gave one factor

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which militated in favour of making a winding-up order: the need to have an independent examination of the investment manager's entitlement to a performance fee of US$3,342,367 (2011 (1) CILR 1, at para. 51). This was not a point raised by Aris, and is wrong. The performance fee relates to the period before the fund acquired an indirect interest in the mines and when its assets consisted principally of receivables. The fee was based on NAV, which was calculated by the administrator on the basis of figures approved by the directors. According to the offering memorandum, the calculation of NAV is final.

15 The balance of advantage or balance of convenience test subsumes the concept of an appeal being rendered nugatory. Absent a stay, the appeal may be rendered nugatory. The balance of advantage favours the granting of a stay. The prejudice which may be caused to the fund if a stay is not granted is apparent from the evidence of Mr. Cicogna and Mr. McArthur. There is a risk that, unless a stay is granted, the purchaser under the share sale agreement of October 4th, 2010 will pull out, or seek to re-negotiate the terms of the sale, or the DMR will not grant the necessary licences or give the necessary consents to permit the sale to be completed. Either of these events could have a dramatic impact on the value of the fund's principal assets, the mines.

16 A stay will cause no prejudice to Aris. The fund's instructions are that, if no stay is granted, there will be little point in pursuing the appeal and it will almost certainly be withdrawn.

Aris's submissions

17 Mr. McDonough for Aris, in full and helpful submissions, submitted as follows. To obtain a stay pending an appeal, an appellant must show (a) that if a stay is not granted, his appeal would be rendered nugatory; (b) that his appeal is brought *bona fide*; (c) that he has a good arguable case or a real prospect of success on appeal; and (d) that the balance of convenience favours the granting of a stay. The practice reflected in *Parmalat* (7) is also the practice of the English court—see *A. & B.C. Chewing Gum* (1) ([1975] 1 W.L.R. at 592–593, *per* Plowman, J.). Even if it were the practice of this court to stay winding-up orders pending appeal (which it is not)—

(a) the fund's evidence does not establish that the appeal would be rendered nugatory, for the reasons set out in paras. 21–27 of Mr. Papastavrou's affidavit; and

(b) there is doubt as to Mr. Cicogna's *bona fides* in promoting the appeal—see paras. 8–9 of Mr. Papastavrou's affidavit.

18 As to the contention that it is not just and equitable, in the face of

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opposition from investors, to wind up an investment fund whose management are conducting an *ad hoc* liquidation of its affairs, see *In re Blériot Mfg. Aircraft Co. Ltd.* (4) (32 T.L.R. at 255, *per* Neville, J.), *In re Davis & Collett Ltd.* (5) ([1935] Ch. at 701, *per* Crossman, J.) and *In re St. Piran Ltd.* (10) ([1981] 1 W.L.R. at 1307, *per* Dillon, J.).

19 In making the winding-up order, Jones, J. was exercising a discretion. He did not misdirect himself on the law or the evidence and his decision was correct. It was certainly not so plainly wrong that he must have exercised his discretion wrongly. There is ample authority to support the findings that it was just and equitable to make a winding-up order on the basis that the fund was no longer viable in the sense that it was practically impossible to carry on its business in accordance with the reasonable expectation of its participating shareholders, based upon representations contained in its offering document. There was nothing controversial in relation to any of his findings on the evidence because they were largely agreed by the fund.

20 The absence of accounts (other than the 2008 accounts which were seriously late), and the 91% qualification of the 2008 accounts justify an investigation by liquidators. The performance fee needs investigation because it was based on values that the auditor was unable to confirm. Further, based on the findings in his judgment as to the numerous failings of the fund's management, there were other pleaded "standalone" bases on which the judge could have found that it was just and equitable to make a winding-up order—in particular the need for an independent investigation of the fund's affairs and Aris's justifiable loss of confidence in the conduct and management of the fund's affairs. If the appeal proceeds, Aris intends to file a respondent's notice contending that the decision of the court below should also be affirmed on these additional grounds.

21 The balance of convenience favours refusing the stay for all the reasons and concerns expressed in Mr. Papastavrou's affidavit.

The relevant legal principles

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

(a) the Court of Appeal Law (2006 Revision), s.19(3) provides so far as material: "No stay of execution . . . shall be granted upon any judgment appealed against save . . . upon good cause shown to the Court or to the Grand Court";

(b) the critical test is whether good cause has been shown;

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

(d) in considering whether good cause has been shown, the court will

have regard to all the circumstances of the case, including, without limitation (i) whether the appeal would be rendered nugatory if a stay is not granted (*Wilson* v. *Church* (13) (12 Ch. D. at 458–459)); (ii) whether the appellant can show a good arguable case; (iii) whether the appeal is in exercise of a true right of appeal and not for some collateral purpose; (iv) the balance of convenience (see *Quintin* v. *Phillips Petroleum Co.* (9)); and (v) appropriate regard should be had to the reasons given by the first instance judge for refusing a stay;

(e) a stay of an order for the winding-up of a company will generally not be granted where a stay (*Parmalat* (7) (2007 CILR 1, at para. 3))—

"would probably make it very difficult for a liquidator to investigate the affairs so as to be able in a timely and efficient manner to ascertain the company's liabilities and assets and so take steps to recover those assets for the benefit of the creditors and, if a solvent estate, for the benefit of shareholders as well";

(f) the question whether or not to grant a stay is entirely in the discretion of the court; and

(g) indications in past cases do not fetter the scope of the court's discretion.

Analysis and conclusions

23 I refuse to grant a stay, for the following principal reasons. I apply the legal principles set out above.

24 I am not persuaded, applying the principles set out above and having regard to all the circumstances of the case, that the appellant has shown good cause/good reasons for the imposition of a stay pending appeal. Moreover, I do not consider that the appeal would be rendered nugatory if a stay is not granted.

25 I consider that there is force in Jones, J.'s reasons for refusing a stay, in particular, the following:

"There is no sensible basis upon which it can be said that the fund's participating shareholders will be prejudiced unless a 'soft wind-down' or '*ad hoc* liquidation' is allowed to continue pending the outcome of an appeal by the fund (acting by its directors and investment adviser)."

26 There are, or may be, issues about the true financial position of the fund and sub-issues that flow, or may flow, from the true financial position of the fund which call for urgent investigation. The only financial statements ever published by the fund to its shareholders are those for the year ended June 30th, 2008, which were not delivered until May 2010. The 2009 accounts should have been filed a year ago, and the 2010

accounts should have been filed in early January. Further concerns are raised in the evidence as to the whereabouts of certain assets of the fund.

27 A central submission made by the appellant is that, unless a stay is granted, there is a risk that either the purchaser will pull out, or seek to re-negotiate the terms of the sale, or the DMR will not grant the necessary licences or give the necessary consents to permit the sale to be completed. Either of these events, it is said, could have a dramatic impact on the value of the fund's principal assets, namely, the mines. It is, in my opinion, necessary to draw a distinction between (a) the making of a winding-up order and (b) a stay of the same. Even if a stay were imposed, it would not affect the fact that, for reasons set out in his judgment, Jones, J. has made a winding-up order. I am not persuaded that the concerns raised by the appellant will be removed if a stay is granted. A winding-up order has been made and that order will, or may, be known to those dealing with the fund with any attendant consequences, irrespective of whether a stay is granted or not.

28 There is force in the points made in Mr. Papastavrou's affidavit at para. 24(b): "Even if they are now concerned about the appointment of the JOLs, [the Chinese purchasers] have entered into a binding contract with the fund's Bermudan subsidiary, Webster Minerals Ltd., to purchase the mining assets which . . . they are not entitled to terminate on the grounds of the fund's liquidation. They have no leverage to negotiate a reduction in the sale price. If they do not proceed with the transaction in breach of their agreement, then Webster will no doubt have a claim against them for damages . . . the agreement . . . provides that the Chinese purchaser had to procure a performance bond in the amount of US$15m. to secure the performance of its obligations. Mr. Cicogna confirmed that that performance bond has already been provided by the purchaser . . . that would . . . be a powerful incentive for them to perform their obligations, rather than 'walking away' in breach of the agreement because a shareholder of their contractual counterparty has been wound up."

29 Although I am not prepared to grant a stay in this matter, it is common ground that there is a difference in approach between that of Jones, J., in a line of cases to which I have referred, and that of Bannister, J., in the BVI authority to which I have referred. For this reason, in my view, it is desirable that the appeal should be heard as soon as practicable.

Security for costs

Aris's submissions

30 Mr. McDonough submitted as follows. The general rule is that where

a company appeals from a winding-up order, security for costs must be given. To adopt any other view would encourage frivolous appeals—see *In re Photographic Artists' Co-op. Supply Assn.* (8) (23 Ch. D. at 371, *per* Baggallay, L.J.). Where a company appeals against a winding-up order without joining anyone as being personally responsible for the respondent's costs, an order should be made ensuring that security is procured from those concerned with promoting the appeal—see *In re*

E.K. Wilson & Sons Ltd. (14) ([1972] 1 W.L.R. at 792, *per* Stamp, L.J.). The law is the same in Australia—see the decision of the Supreme Court of Western Australia in *Tricorp Pty. Ltd.* v. *Deputy Commr. of Taxation (WA)* (11).

31 Campbells have estimated that Aris's costs of the appeal (including the security for costs application stay application) will be US$82,052.50. Those costs are estimated based on the actual hourly rates paid by Aris. It is appropriate to assess the amount of security by reference to Aris's actual costs (as opposed to the rates recoverable on a taxation on the standard basis) because (a) Aris was awarded its costs of the petition on the indemnity basis and that would also be the appropriate basis on which to award Aris its costs of an unsuccessful appeal; and (b) the security provided should in any event be indemnifying security. The appeal is being promoted without any support from the fund's investors.

The appellant's submissions

32 Mr. Farrow, Q.C. submitted as follows. In approaching the exercise of its discretion, the court should have regard to the limited circumstances in which, apart from s.19(3), security for costs can be ordered. The fund is solvent—if it were otherwise, Aris would have had no standing to seek and obtain a winding-up order. The fund will agree that the burden of any costs order made in favour of Aris on the disposal of the appeal will not impinge on Aris's entitlement to a distribution in the winding up.

33 Alternatively, the amount of security should reflect the proportionate shareholding of Aris, that is 23.47% of whatever would otherwise be an appropriate figure. In *E.K. Wilson & Sons* (14), the Court of Appeal rejected this approach on the grounds, first, that it would leave the petitioner bearing his proportionate share of the remainder and, secondly, that it involved "some extremely difficult adjustment of the contributories' rights *inter se*." As to the first ground, the remainder of the costs would be borne as suggested above, that is, no part would fall on Aris's shareholding. As to the second ground, it is difficult to see that experienced insolvency practitioners would have any difficulty in adjusting matters as between Aris and the remaining investors.

34 Paragraph 1 of Aris's summons seeks to identify the individuals or entities against whom an order for security should be made. Even if, which is not the case, all those identified could be said to be "promoting"

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the appeal, it is not appropriate to make an order in that form. An order for security, certainly of the magnitude sought, may well stifle a *bona fide* arguable appeal. As to quantum, an order in the sum of US$82,000 would be excessive.

Analysis and conclusions

35 The jurisdiction to order security for costs is found in s.19(2) of the Court of Appeal Law (2006 Revision), which provides:

"The appellant shall . . . deposit in the Grand Court . . . together with such further sum as security for costs of the appeal as a Judge of the Grand Court may direct, and such security for costs may be given by the appellant entering into a bond by himself and such sureties and in such sum as the Judge of the Grand Court may direct, conditioned for the payment of any costs which may be awarded against the appellant and for the due performance of the judgment of the Court."

36 In the exercise of my discretion, in all the circumstances, I consider it appropriate to order security on the usual terms. I refer to and follow the reasoning in *E.K. Wilson & Sons* (14). I am not persuaded that it is appropriate to depart from the approach in that case for any of the reasons advanced by the appellant.

37 In my opinion, security should be provided in the sum of US$75,000. The form of the order will be as in *E.K. Wilson & Sons*, suitably amended, as follows:

"The fund do on or before January 28th, 2011, procure some sufficient person on its behalf (the source of funding to be identified by the fund by letter to the respondent's attorneys) to give security (to the satisfaction of the court in case the parties differ), in the sum of US$75,000 conditioned to answer costs in case any shall be ordered to be paid by the fund to the respondent on the appeal. In default of the fund so procuring such security by the said time, it is ordered that, upon the attorneys for the respondent certifying such fact in writing to the court, the appeal be thereupon struck out without further order—and thereupon it is ordered that the fund do pay to the respondent its costs occasioned by the said appeal, including its costs of this summons down to and including this order and consequent hereon, such costs to be taxed by the taxing officer accordingly."

Order accordingly.

Attorneys: *Mourants* for the fund; *Campbells* for Aris.