

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN**

3
4 **Cause No: G391/2012**

5 **BETWEEN:**

- 6 1. **M.H. INVESTMENTS**
7 2. **J.A. INVESTMENTS**

8
9 **APPLICANT COMPANIES**

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11
12 **AND:**

13 **THE CAYMAN ISLANDS TAX**
14 **INFORMATION AUTHORITY**
15 **(CITIA)**

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17 **RESPONDENT/APPLICANT**

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20 **Appearances:**

21 **Ms. Dawn Lewis, Crown counsel of the**
22 **Attorney General's Chambers on behalf of**
23 **the Respondent/Applicant CITIA**

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25 **Mr. Tom Lowe Q.C. instructed by Mr. Sam**
26 **Dawson of Solomon Harris on behalf of the**
27 **First and Second Applicant Companies**

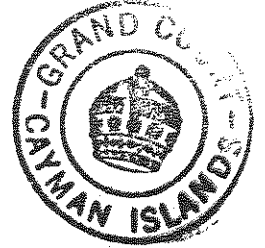
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30 **Before:**

The Hon. Mr. Justice Charles Quin

31 **Heard:**

30th July 2014

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33 **EX TEMPORE JUDGMENT**
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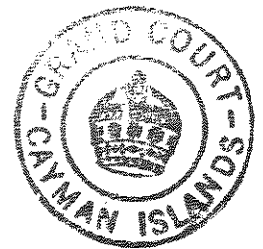
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INTRODUCTION

1. This is the hearing of the Summons filed by the Cayman Islands Tax Information Authority (“CITIA”) on the 30th January 2014, pursuant to r.24(1) of the Court of Appeal Rules and the inherent jurisdiction of the Court for a stay of execution of the Order of the Grand Court made on the 13th September 2013 that the Applicants’ (Companies’) costs of and incidental to their successful Judicial Review application be paid by the CITIA and for a stay of execution of the resulting Costs Certificate, dated the 10th January 2014.
2. The Respondent’s Summons is grounded by the affidavit of the CITIA director, Mr. Duncan Nicol (“Mr. Nicol”). The Applicant companies oppose the said Summons and have filed an affidavit sworn by Mr. John Donnelly (“Mr. Donnelly”) on behalf of the companies. Mr. Donnelly is the sole director of the Companies.

HISTORY

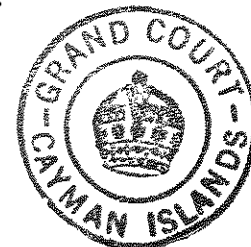
3. On the 18th September 2012 the Applicant companies filed an application for leave to apply for Judicial Review against the decision, which at that time was of an unknown date, of the CITIA, to accede to a Request by the Australian Taxation Office (“ATO”) made pursuant to a Tax Information Sharing Agreement¹ (“Tax Information Agreement”) and the Tax Information Authority Law (2009 Revision) (the “TIA Law”).



¹ Long Title: *Agreement between the Government of Australia and the Government of the Cayman Islands on The Exchange of Information with Respect to Taxes.*

- 1 4. On the 2nd November 2012 an Acknowledgment of Service was filed on behalf of
2 the Respondent CITIA, confirming that the Respondent intended to contest those
3 proceedings.
- 4 5. On the 28th February 2013, after a contested hearing in January 2013, I ordered the
5 disclosure to the Applicant companies of the Requests received by the CITIA from
6 the ATO.
- 7 6. On the 13th September 2013 the Court made an order, *inter alia*, for certiorari,
8 quashing the decisions of the CITIA and also ordering that the Applicant companies
9 costs of and incidental to the application be paid by the CITIA, with such costs to
10 be taxed on the standard basis unless otherwise agreed between the parties.
- 11 7. On the 7th October 2013 the CITIA filed a Notice of Appeal and grounds of appeal
12 against the Judgment and Order dated the 13th September 2013.
- 13 8. On the 10th January 2014 the Taxing Officer, Ms. Tabitha Philander, issued an
14 agreed Costs Certificate confirming that the CITIA had agreed to pay
15 US\$143,665.58 in full and final satisfaction of the CITIA's liability under the Order
16 for costs made on the 13th September 2013.
- 17 9. On the 30th January 2014 the CITIA Respondent issued the Summons which is the
18 subject of this hearing – seeking a stay of the Order for Costs dated the 13th
19 September 2013, and the Costs Certificate dated the 10th January 2014.

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1 10. On the 16th May 2014 the CITIA Director, Mr. Nicol swore an affidavit in support
2 of the CITIA summons to stay the Order for costs. Mr. Nicols' affidavit was filed
3 on the 21st May 2014.

4 11. In summary, the CITIA seeks a stay on the following grounds:

5 i. The Applicant companies are exempted companies pursuant to s.164 of
6 the Companies Law (2012 Revision). They have written and expressed
7 a concern about assets within the jurisdiction and Mr. Nicol avers that
8 the only protection in the Law for creditors for exempt companies is
9 contained in s. 50 of the Companies Law. Accordingly Mr. Nicol avers
10 that this protection would not be sufficient for the Respondent to cover
11 its costs in the *"highly likely event they are successful on the appeal."*

12 ii. In support of this contention Mr. Nicol avers that they have a legal
13 opinion from leading counsel from Matrix Chambers and it is the view
14 of the CITIA's leading counsel that the Grand Court erred in most of its
15 findings and conclusions and on all critical conclusions and findings.

16 iii. Mr. Nicol avers that the CITIA believes that it has very strong
17 prospects of success in the Cayman Islands Court of Appeal, and if
18 successful, the Order for costs would be overturned.

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- 1 12. Ms. Lewis in her oral and written submissions relies on:
- 2 a. r.24(a) of the Court of Appeal Rules, stating that a single judge may, upon the
- 3 hearing of an application, make an order for a stay of execution on any
- 4 judgment appealed; and,
- 5 b. s.19(3) of the Court of Appeal Law (2014 Revision) which provides that no
- 6 stay of execution shall be granted unless good cause is shown to the court.
- 7 c. The Court should stay the Order for costs and certificate of agreed costs under
- 8 its inherent jurisdiction.
- 9 13. It is the Respondent's position that the CITIA has good cause and further relies on
- 10 the principles in *Winchester Cigarette Machinery Limited v. Michael John Payne,*
- 11 *Gillian Mary Payne*², that one should “*approach this really as a matter of common*
- 12 *sense and balance of advantage*”.
- 13 14. Counsel on behalf of the CITIA also submits that the Court has an inherent
- 14 jurisdiction to stay the execution to protect the CITIA so that, if its appeal is
- 15 successful, it will not be valueless, and, accordingly, the balance of advantage lies
- 16 in favour of granting a stay of execution.
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² 1993 WL 963008

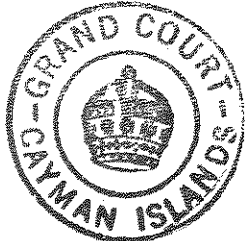
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THE APPLICANT COMPANIES' POSITION

15. Mr. Donnelly in his affidavit sworn on the 5th June 2014 does not accept that CITIA's appeal of the Order dated the 13th September 2013 has any prospect of success. Mr. Donnelly as the director of the Companies confirms that Respondent continues to be in a position to satisfy any adverse costs award made against them in relation to the appeal.

16. The Applicant companies complain particularly about the delay in this case. Mr. Donnelly avers to the fact that initially, this appeal was to have been heard in the August 2014 session of the Court of Appeal, but then the Respondent CITIA confirmed that the Attorney General will not be available to conduct the appeal in August 2014, but that he would be available for the Court of Appeal session in November 2014.

17. Further Mr. Donnelly exhibits correspondence between the legal representatives of both parties and avers that he now discovers that the Attorney General will be involved in another matter before the Court of Appeal for several days in November 2014 and, therefore, the listing of this matter during that period would be inconvenient. Mr. Donnelly exhibits correspondence in which the CITIA's legal representatives now suggest an appeal hearing date of early 2015. Mr. Donnelly further avers that, in view of the fact that the Respondent has instructed leading counsel in England, he does not understand why leading counsel cannot appear on behalf of the CITIA – particularly when the Attorney General is unavailable.



1 *THE LAW*

2 18. I turn now to examine the case law in relation to applications for a stay pending
3 appeal.

4 19. As Foster J. stated at paragraph 28 in *In Re Freerider Limited*³:

5 *“It is a matter of trite law that an appeal does not automatically operate*
6 *as a stay of the order appealed against.”*

7
8 20. Gibson LJ stated in the *Winchester Cigarette* case in agreeing with the
9 approach of Balcombe LJ in *Bhinji v. Chatwani*:

10 *“One starts with the assumption that a successful Plaintiff is not to be*
11 *prevented from enforcing his judgment, even though an appeal is*
12 *pending.”*

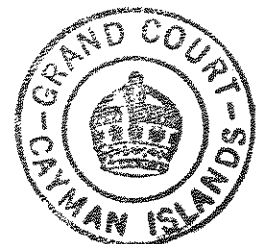
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14 Gibson LJ stated in *Winchester Cigarette* at page 3:

15 *“I do not disagree with the formulation “balancing of advantage”,*
16 *provided that, in holding that balance, full and proper weight is given to*
17 *those starting principles, that there must be good reason to deprive a*
18 *successful Plaintiff of their right to enforce a judgment, and the mere*
19 *existence of an arguable ground of appeal is not, by itself, such a*
20 *reason.”*

21
22 21. Smellie J (as he then was), in applying the principles set out in *Winchester*
23 *Cigarette* in *Quintin and Westphal v. Phillips Petroleum Co. and CIBC*
24 *Bank and Trust Co. (Cayman) Ltd.* stated:

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³ 2011 (1) CILR 233 dated the 7th April 2011





DELAY

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2 25. The unsuccessful party, in applying for a stay pending appeal, is seeking to
3 deprive the successful parties of their right to enforce an Order. This Court
4 considers that when an unsuccessful party wishes to apply for a stay pending
5 appeal there is a duty on the party seeking the stay to file and serve its
6 application and any supporting evidence promptly.

7 26. The Respondent waited for five months before filing its Summons for a stay
8 of the order dated the 13th September 2013. No affidavit was filed by the
9 CITIA with its Summons for the stay pending appeal. Instead, the
10 Respondent CITIA waited a further four months before swearing and then
11 filing the necessary affidavit in support of its application for a stay pending
12 appeal. The inevitable inference to be drawn is that the Respondent did not
13 consider its application for a stay to be an urgent matter. Furthermore, the
14 Court notes that the Respondent, CITIA, has not advanced any reasons for
15 its delay in filing its application for a stay and the affidavit evidence to
16 support its application.

17 27. I note that the CITIA has not challenged the Companies' submission that it
18 has failed to serve its Notice of Appeal dated the 7th October 2013 in time
19 and, further, it has failed to apply for an order from the Cayman Islands
20 Court of Appeal that the time for service of the Notice of Appeal be
21 extended. Again, no explanation has been offered by the CITIA as to why
22 these necessary steps have not been taken.

1 *GOOD REASON/CAUSE*

2 28. I have carefully considered the evidence in support of CITIA's application
3 for a stay and despite the opinion of a UK counsel I find that the CITIA has
4 not provided any good reason or cause for a stay of the Order dated the 13th
5 September 2013. It may well be that the Respondent has arguable grounds of
6 appeal, but as Gibson LJ stated in *Winchester Cigarette* that by itself is not a
7 good reason. Furthermore, it has not satisfied this Court that there is a real
8 prospect of success. Accordingly, it is my view that a stay would unfairly
9 deprive the Companies of their agreed costs pursuant to their successful
10 judicial review application.

11 29. In light of all the circumstances set out above, and for the aforesaid reasons, I
12 dismiss the Respondent's application for a stay of the Order for costs pending
13 appeal.
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15 30. As costs normally follow the event, I order that the costs of and incidental to
16 today's hearing be awarded to the Companies in any event and that such costs be
17 taxed if not agreed.
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19 Dated this the 30th day of July 2014

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23 Honourable Mr. Justice Charles Quin Q.C.
24 Judge of the Grand Court

