[2016] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 62/2016

APPLICATION NO 116/2016

BETWEEN	**KARIN MURRAY**	**1ST APPLICANT**
	GEORGE MURRAY	**2ND APPLICANT**
AND	**SAM PETROS**	**RESPONDENT**

IN CHAMBERS

Miss Carol Davis and Mrs Symone Mayhew for the applicants

Hugh Small QC instructed by Hart Muirhead Fatta for the respondent

6 and 15 July 2016

MORRISON P

Introduction

[1] This is a contested application for a stay of execution pending the hearing of an appeal from a judgment of Batts J (the judge). For easy reference, I will refer to the applicants, who are husband and wife, collectively as the Murrays and individually as Mr or Mrs Murray; and to the respondent as Mr Petros.

[2] In his judgment given on 19 May 2016, the judge made the following orders:

"(i) Specific Performance compelling the Defendants George Murray and Karin Murray to execute the agreement for purchase and sale of shares in terms of the offer dated the 6th March 2013 as was accepted by Mr. Tomlinson on behalf of the Murrays.

(ii) The Registrar of the Supreme Court is empowered to execute the said agreement and all documentation necessary to give effect to this Order, in the event the Defendants or either or both of terms [sic] fail neglect and/or refuse so to do.

(iii) It is Declared that on a true construction the terms of the offer dated 6th March 2013 do not preclude the payment of dividends for the year ending 30th June 2013.

(iv) Liberty to apply

(v) Costs to the Claimant to be taxed or agreed."

[3] Notice of appeal against this judgment was filed on 15 June 2016 and the application for a stay was on the following day. On 6 July 2016, I heard arguments from counsel on both sides and, on 15 July 2016, I refused the application, with costs to the respondent to be taxed, if not sooner agreed. These are the promised reasons for this decision.

[4] At the outset, I should say something about the court's jurisdiction and the principles governing the grant of stays of execution pending appeal, neither of which is in dispute. Rule 2.14 of the Court of Appeal Rules 2002 (CAR) provides that:

"Except so far as the court below or a single judge may otherwise direct –

(a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and

(b) no intermediate act or proceeding is invalidated by an appeal."

[5] Rule 2.11(1)(b) of the CAR empowers a single judge of this court to make an order staying execution of any judgment or order appealed from, pending appeal.

The background

[6] The notes of the evidence taken at the trial are not yet available. The following account of the background to the litigation is therefore taken from the affidavit evidence filed on behalf of the parties on this application, as well as from the judge's detailed written judgment.

[7] The Murrays and Mr Petros are shareholders in two companies known as Tensing Pen Limited (Tensing Pen) and Tensing Pen (Cayman Islands) Limited (Tensing Pen Cayman) respectively (the companies). The Murrays together own 50% of the shares in each of the companies, while Mr Petros owns the remaining 50%. Tensing Pen Jamaica operates a hotel (the hotel) in Negril in the parish of Westmoreland, on land owned by Tensing Pen Cayman. Up to February 2012, the Murrays and Mr Petros were directors of the companies, with Mrs Murray being the director with responsibility for oversight of the hotel. It appears to be common ground that the hotel was, in Mrs Murray's words, "very profitable over the years"[1].

[1] Affidavit of Karin Murray in support of application for a stay of execution pending appeal sworn to on 15 June 2016.

[8] But major differences arose between the Murrays, on the one hand, and Mr Petros, on the other, over the management of the hotel. As the judge put it, "[a]s a result of a deteriorating business relationship, primarily due to differing ideas on how the hotel should be developed, deadlock ensued". This resulted in a series of litigation between the parties, including a claim filed by Mr Petros on 24 October 2011 seeking relief pursuant to section 213A of the Companies Act.[2] This claim was settled in the terms set out in the schedule to a Tomlin Order dated 29 November 2011.

[9] Among the agreed terms were that (i) one of the Murrays would resign as a director of Tensing Pen; (ii) an independent director, agreed to by the Murrays and Mr Petros, would be appointed to act as chairman of Tensing Pen; and (iii) Tensing Pen would hold an Annual General Meeting (AGM) within 60 days of such appointment. In addition, clauses 10 and 11 stated as follows:

> "10. This Agreement is meant to facilitate a settlement of the disputes herein and to effect the Sale. The New Board will make the final determination as to the acceptability of any offer, and the parties hereto confirm the New Board's authority to do so.
>
> 11. In the event that the Sale is not effected, the parties agree that [Tensing Pen] (with the authority of [Tensing Pen Cayman], which its directors hereby give) will list the property with international hotel brokers to procure a purchaser at a price acceptable to the New Board. In the event that no acceptable offers are received within 12 months from the date of this Agreement, the parties shall lower the sale price as recommended by the said international hotel brokers or by 15% whichever is less. The

[2] 2011 HCV 06390 (now 2013 CD 00066)

> price shall be further marked down as recommended by the said international hotel brokers every 4 months provided that if the price falls to US$3m the shareholders shall be entitled to lodge bids with the New Board to purchase the [companies] and upon the New Board being satisfied that it holds the highest such offer for the [companies], the shareholder who has made such offer shall be entitled to purchase the other shareholders' interest pro-rated based on such offer price."

[10] Pursuant to this agreement, Mr Murray duly resigned as a director of Tensing Pen. Further, it was agreed that Mr Kenneth Tomlinson of Business Recovery Services would be appointed as the independent director and chairman of the board and he was so appointed on 5 February 2012. It was also agreed that Mr Tomlinson should be the person who would have the deciding vote in accepting bids or offers to purchase the shares in Tensing Pen and Tensing Pen Cayman.

[11] No suitable bids were received pursuant to the formula provided by the Tomlin Order. As a result, in Mrs Murray's words[3] –

> "9. ... We then agreed to adopt a new process wherein the shareholders would submit a bid for the purchase of all the issues shares of [Tensing Pen] and [Tensing Pen Cayman] held by the unsuccessful bidder. As was contemplated by the Schedule to the Tomlin Order, the bids were to be submitted to the Board but as [Mr Petros] and I were members of the Board, it was agreed that as Chairman, Mr. Tomlinson, as agent for both sellers, would decide which offer was the highest and best.

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[3] Affidavit of Karin Murray in support of application for a stay of execution pending appeal sworn to on 15 June 2016, paras 9-10

> 10. It was also agreed between the parties that Mr. Tomlinson would receive and consider bids from the parties on behalf of and as agent for both. The terms of the bidding process were partly oral and partly contained in emails between the Attorneys-at-law for the parties ..."

[12] Before any offers were made pursuant to these arrangements, there was a discussion, apparently initiated by Mrs Murray, on the subject of the payment of an interim dividend to shareholders out of accumulated profits for the financial year commencing July 2012. In an email to Mr Tomlinson dated 21 February 2013, copied to Mr Murray and Mr Petros, Mrs Murray reiterated a proposal which she had made previously that, prior to the sale of the shares, the board should declare an interim dividend of US$60,000.00 on the year to date accumulated profit of US$134,114.00. By email of even date to Mrs Murray, also copied to the other shareholders, Mr Tomlinson advised that the matter would be discussed at the next meeting of the board. He went on to say this:

> "I have indicated to [Mr Petros] that prior to the transfer of shares to the successful bidder, all share holders would be entitled to some form of dividend based on the profits of the company as at the date of the transfer.
>
> Let us await the outcome of the February 2013 unaudited financials and then we can determine the level of distribution.
>
> Please note that based on the unaudited results for January 2013, Tensing Pen has just turned the corner in relation to profitability for this financial period, and it would be prudent to await the February accounts to see if the profitability projections are achieved."

[13] Then, in a subsequent email exchange on 27 February 2013, Mr Tomlinson confirmed, in answer to Mrs Murray's enquiry, that all assets and liabilities, inclusive of retained earnings, "would be retained in the companies except for any interim dividend declared on unaudited profits".

[14] To return to the narrative, I will mention three items of email correspondence which the judge considered to be relevant to the question of the precise terms of the new bidding process agreed upon by the parties.

[15] The first was an email dated 25 February 2013 from Mrs Jennifer Messado, the Murrays' attorney-at-law, to Messrs Hart Muirhead Fatta, the attorneys-at-law for Mr Petros:

> "We refer to our discussions and to the latest position that has been agreed on by the Conrad George team.
>
> 1. Bidding with the details regarding same to be presented by Monday the 25th February at 3:30 p.m.
>
> 2. Bidding to remain open for all parties to complete with details for the completion;
>
> 3. Bids to remain open until the 6th March 2013 when they will be closed;
>
> 4. The [decision][4] to which bid is to be accepted will be solely that of Mr. Ken Tomlinson, the Chairman of the Board."

[4] The actual word used in the email was "discussions", but the judge stated (at para. [25] of his judgment) that it was common ground that this was "a misprint for 'decision'".

[16] The second was an email, also dated 25 February 2013, from Mrs Messado to Mr Tomlinson, Mr George and Mrs Murray:

> "We refer to our discussions and to the latest position that has been agreed on by the Conrad George team.
>
> 1. Bidding with the details regarding same to be presented by Monday the 25th February at 3:30 p.m.
>
> 2. Bidding to remain open for all parties to complete with details for the completion.
>
> 3. Bids to remain open at the discretion of the Board Chairman on the understanding that the time for presentation will not exceed the 6th March 2013 when they will be closed;
>
> 4. The [decision][5] to which bid is to be accepted will be solely of that of Mr. Ken Tomlinson, the Chairman of the Board.
>
> 5. The best and final offers must be in by March 6, 2013;
>
> 6. Each party shall have 24 hours to respond to the bid.
>
> 7. Each party shall get a copy.
>
> 8. The Murrays will execute the first offer made today the 25th but it is hereby agreed that they are entitled to receive their future offers under the authority of Mrs. Messado."
>
> Please confirm and approve."

[17] And the third was an email, again dated 25 February 2013, from Mr George to Mr Tomlinson:

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[5] See footnote 4 above

"Dear Ken:

Please see the attached.

Best regards,

Conrad

From: Conrad George

Sent Monday February 25, 2013 2:38 p.m.

To: Talong@hmf.comkjm

Subject: draft email to be sent to Ken Tomlinson for your perusal.

Dear Ken:

I have had discussions with Mrs. Messado, who now represents the Murrays, and we have agreed that the auction of the shares in Tensing Pen Limited and scheduled for this afternoon will no longer take place. Instead, the Murrays and Mr. Petros will submit to you their respective offers to purchase the shares of each other, including price and any relevant terms by 3:30 p.m. today. You will be entitled to discuss each offer with the offerors with a view to obtaining clarification or improvement of any of the proposed terms (including but not limited to price) and having done so by no later than close of business on 6th March 2013, you will in your absolute discretion decide which offer is better. Upon you communicating your decision, the maker of the better offer will then purchase on the terms of such offer the shares of the other shareholder(s) in the above two companies, and such other shareholder(s) shall sell on these terms.

Best Regards,

Conrad."

[18] This last email was not copied to Mrs Messado. The significance of this omission would turn out to be a live issue at the trial, as it appears that it will also be in the appeal. I will come back to it in due course.

[19] The first offer received by Mr Tomlinson was that of Mr Petros, who submitted an offer in the sum of US$1,600,000.00 on 25 February 2013. Next, on that same day, the Murrays submitted an offer in the sum of US$1,700,000.00. As Mrs Murray would later confirm in her affidavit in support of the application for the stay[6], this offer "made clear that we would require financing for the purchase and indeed from June 2011 we had obtained preliminary approval of a loan of US$1,500,000.00 from the National Commercial Bank". Then, on 4 March 2013, the Murrays submitted a further offer in the sum of US$1,750,000.00.

[20] On 5 March 2013, as recorded by the judge[7], Mrs Messado sent an email to Mr George in the following terms:

> "As you are aware this matter is now the subject of further litigation. We therefore have to place on record that the CHAIRMAN cannot make any decisions regarding offers unless there are clear directions from the court accordingly."

[21] Mr George responded that same day:

> "On the contrary. The terms of the agreement between the parties in relation to the offers is clearly set out in the

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[6] At para. 16
[7] At para. [31] of the judgment

> correspondence (letters and emails), exchanged between the attorneys acting for the parties and Mr. Tomlinson.
>
> It is beyond challenge that:
>
> - The parties agreed to submit offers by 3:30 p.m. on the 25th
> - The Chairman may seek improvement on any of the terms of such offers until close on the 6th.
> - At which point the chairman will in his absolute discretion decide which offer is preferable.
>
> This is clear from correspondence from Jennifer Messado & Co. as well as from Hart Muirhead & Fatta. In fact, the insistence on the 6th being, the cut off date came from the Murrays. Sam was prepared to leave it open to Ken to decide when he was satisfied he held the best offer obtainable.
>
> Accordingly, Ken having taken on the task on the above agreed terms, is obliged to choose by no later than close of business tomorrow."

[22] At approximately 4:23 pm on 6 March 2013, Mr Petros submitted a further offer, in the sum of US$1,750,001.00, to purchase the Murrays' shareholding for cash, US$175,000.10 to be paid as a deposit and the balance payable within 30 days of execution of the agreement for sale. The offer went on to state that –

> "It is a condition of this offer that, in the event of its acceptance, for the period between acceptance of this offer and completion of the sale, the Murrays covenant with Sam Petros that prior to completion and without the prior written consent of Sam Petros, [Tensing Pen] shall not (and they shall so procure):

i. incur any expenditure on capital account except in accordance with the budget approved by its board of directors or enter into any commitments so to do,

ii. dispose of or agree to dispose of or grant any option in respect of any part of its assets except in the ordinary course of business;

iii. borrow any money or make any payments out or drawings on its bank account(s) other than in the ordinary course of business;

iv. enter into any unusual or abnormal contract or commitment or make any loan or enter into any leasing, hire purchase or other agreement or arrangements for payment on deferred terms.

v. save as is expressly provided for herein, declare, make or pay any dividend or other distribution or do or suffer anything which may render its financial position less favourable than as at the date of this offer;

vi. grant or issue or agree to grant or issue any mortgages, charges, liens, pledges or other securities for money or redeem or agree to redeem any such securities or give or agree to give any guarantees or indemnities;

vii. create issue or grant any option in respect of any class of share or loan capital or agree so to do;

viii declare or pay any distribution or pay or agree to pay any management fees ([sic] save and except where the payment of such management fee is in the ordinary course of business and in accordance with an agreement entered into prior to the date of this offer."

[23] Next, at some point after 7:00 pm on 6 March 2013, the Murrays submitted a revised offer to purchase Mr Petros' shares in the sum of US$1,850,000.00. This offer proposed as follows:

> "The deposit on the purchase price would be 10% of the purchase price or US$185,000.00 United States Currency with the balance of US$1,665,000.00 United States Currency payable by way of mortgage from either NCB or Capital and Credit Merchant Bank. The mortgage commitment shall be presented within fourteen (14) days of the date of the Agreement of Sale being signed by both parties.
>
> The completion of the transaction is to be within forty-five (45) days of the date of the Agreement of Sale and same shall be unconditional ."

[24] Mrs Messado's email enclosing this last offer drew an immediate response from Mr George:

> "The cut-off for offers was close of business today, at your client's behest. You will recall that it was [sic] your clients that wanted a finite period for consideration, not Sam.
>
> Your clients [sic] reworked offer is therefore out of time.
>
> In any event, it suffers from the same lack of substance as all your client's [sic] previous offers, as the further the offer is from zero, the more reliant it is on financing that does not exist. Mr Tomlinson should pay it no mind and we urge him accordingly."

[25] Responding a few minutes later, Mrs Messado indicated that –

> "We are going to suggest sealed bids within 7 days to the court. Who determines what time is close of business."

[26] Finally, by a letter sent that same evening to the parties, Mr Tomlinson indicated that, as at the close of business, he had received offers of US$1,750,000.00 (subject to financing) from the Murrays and US$1,750,001.00 (cash) from Mr Petros. Accordingly,

he said, he had decided to accept the offer made on behalf of Mr Petros as "the highest and best offer".

[27] Completing the background, Mrs Murray states as follows[8]:

> "24. Mr. Tomlinson resigned as Director and Chairman of the Board of the Company on 31st May 2013. No other director has been appointed to the board and [Mr Petros] and I remain the only Directors of the Company.
>
> 25. Mr. Tomlinson's resignation was made prior to the payment of dividends, [Mr Petros] made it clear that he will not be authorizing the payment of dividends to the shareholders and since then no dividends interim or final have been paid.
>
> 26. Since the resignation of Mr, Tomlinson in May 2013, the Company has remained in a stalemate. There have been no director's [sic] or shareholders [sic] meetings."

The shape of the case below

[28] The judge had four separate actions[9], consolidated by order of the court, before him. The reliefs sought in each of them are admirably summarised by the judge at paras [5]-[9] of his judgment. However, as the judge notes[10], "[o]n the first morning of trial both parties agreed that I should only resolve the issues pertaining to the claims for Specific Performance … [and] … [i]f it becomes necessary, the other matters will be tried at a later date". For present purposes, therefore, it suffices to note that -

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[8] At paras 24-26 of her affidavit
[9] Claims Nos 2013 CD00156; 2013 CD00116; 2013 CD00157 and 2014 CD00076
[10] At para. [19]

(i) in Claim No 2013 CD00156, Mr Petros sought an order of specific performance compelling the Murrays "to execute the Agreement of Purchase and Sale, that reflects the terms of the Agreement as was accepted by Mr. Tomlinson on behalf of the Murrays", while the Murrays counterclaimed for an order that they be permitted to purchase Mr Petros' shareholding in the companies for the sum of US$1,850,000.00; and

(ii) in Claim No 2013 CD00116, the Murrays, as claimants, also sought an order that they be permitted to purchase Mr Petros' shareholding in the companies for the sum of US$1,850,000.00.

[29] The rival contentions are amply set out in the pleadings filed on behalf of the parties in Claim No 2013 CD00156. Mr Petros averred that, on a true construction of the agreement arrived at between the parties, the Murrays were obliged to comply with the decision of Mr Tomlinson and to sell their shares to him on the terms accepted by Mr Tomlinson. That agreement, Mr Petros contended, contained the following terms:[11]

"(a) Initial offers were to be sent to Mr. Tomlinson by 3:30 p.m. on Monday the 25th February, 2013.

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[11] Para. 17 of the particulars of claim dated 25 June 2013

(b) Offers were to remain open for all parties complete with details for the completion.

(c) Offers were to remain open until the close of business on the 6th of March 2013, when they would be closed.

(d) Mr. Tomlinson was to have the sole discretion in deciding which offer to accept.

(e) Each party shall have 24 hours to respond to the bid.

(f) Each party shall get a copy.

(g) Upon the communication of the decision the maker of the better offer will then purchase the shares of the party on the same terms contained in that offer.

(h) Each party was to deposit US$100,000.00 with Mr. Tomlinson as a demonstration of commitment to newly agreed process."

[30] Mr Petros contended further that the parties had agreed to exclude the board from the process, "and in so doing authorised Mr. Tomlinson to act on either party's behalf in the decision and subsequent acceptance of the offer which they empowered him, in his sole discretion to decide which was the better one".[12]

[31] Mr Petros accordingly moved the court for an order of specific performance compelling the Murrays to execute an agreement for purchase and sale of their shares reflecting the terms of the agreement as accepted by Mr Tomlinson on their behalf on 6 March 2013. In the alternative, Mr Petros sought an order requiring the Registrar of the

[12] Para. 18 of the particulars of claim

Supreme Court to sign the agreement on behalf of the Murrays. Mr Petros also claimed damages for breach of contract, in addition to or in lieu of specific performance.

[32] In their defence to the claim, the Murrays took a number of points challenging Mr Petros' account of the history of the dealings between the parties, particularly in relation to the purported variation of the Tomlin Order and the role which it was contemplated that Mr Tomlinson would play in resolving the matter. Specifically, as regards the bidding process, the Murrays averred that:

> "… the purported acceptance of [Mr Petros'] bid was in breach of the agreement between [Mr Petros] and [the Murrays] as to the bidding process for the purchase of each other's shares in the 2 companies and, as such, the said acceptance is null and void and not binding on [the Murrays]."[13]

[33] In particular, the Murrays maintained that -

> (i) at no time was it agreed that bidding was to remain open until the close of business on 6 March 2013, when they would be closed. Rather, what was agreed was that bidding would remain open until 6 March 2013;[14]

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[13] Para. 43 of the defence dated 25 October 2013 (the defence)
[14] Para. 27 iii of the defence

(ii) rather than having "the sole discretion in deciding which offer to accept", as Mr Petros alleged[15], "Mr. Tomlinson was to accept the highest offer, or alternatively the highest and best offer, as Independent Director and Chairman of the Board"[16];

(iii) contrary to Mr Tomlinson's directions and the agreement between the parties that "all assets and liabilities would be retained in the companies except for any interim dividend declared on unaudited accounts", Mr Petros' offer of US$1,750,001.00 dated 6 March 2013 included retained dividends;[17]

(iv) Mr Tomlinson did not act as an independent director, "but acted in a way that showed bias toward [the Murrays]";[18]

(v) in breach of the agreement between the parties, Mr Petros did not respond to the Murrays' bid of 4 March 2013 within 24 hours, but rather responded "at 4:23 pm on 6th March, in an attempt to prevent [the

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[15] Para. 17(d) of the particulars of claim
[16] Para. 27 iv of the defence
[17] Para. 40 of the defence
[18] Para. 43 f of the defence

> Murrays] from responding to [his] offer before the close of offers".[19]

[34] As I have already noted, the Murrays also filed a counterclaim. In it, they sought orders that (i) an independent director be appointed; (ii) the share sale should proceed in accordance with clause 11 of the Tomlin Order; (iii) alternatively, they be allowed to purchase Mr Petros' shares for US$1,850,000.00; and (iv) the "purported acceptance" by Mr Tomlinson of Mr Petros' offer of US$1,750,001.00 for the purchase of their shares be set aside.

[35] The issues before the judge were therefore, firstly, whether there was an enforceable agreement between the parties for the sale and purchase of the shares; secondly, if there was an agreement, what were its terms; and, thirdly, whether Mr Petros was entitled to an order for specific performance.

[36] The judge heard evidence from a number of witnesses, including Mr George for Mr Petros and Mrs Messado for the Murrays, in their respective capacities as the attorneys-at-law who had acted in the negotiations of the alleged agreement between the parties. At the heart of their evidence was a sharp dispute as to fact as regards the terms agreed between the parties, in particular whether it had been agreed that offers were to be received before "the close of business" on 6 March 2013. Mr George insisted that the 'close of business' term had been agreed between him and Mrs Messado in a

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[19] Para. 36 of the defence

conversation between them, while Mrs Messado maintained that no such agreement had been arrived at.

[37] The judge also heard evidence from Mr Tomlinson. According to the judge's summary of his evidence[20], Mr Tomlinson testified that the phrase 'close of business', "is well known and often used in commercial dealings". He said that he had "done many transactions", in North America and the Caribbean, and that "[c]lose of business means 4:30 to 5:00 p.m. anywhere in the world". In his experience of "over 159 projects", Mr Tomlinson said, he had "never seen bids after business hours".

[38] On the question of the payment of an interim dividend before completion of the share sale, Mr Tomlinson considered that the condition of Mr Petros' final offer, relating to non-payment by Tensing Pen, for the period between the acceptance of the offer and completion of the sale, of any dividend or other distribution, prohibited the payment of any dividend or other distribution "as far as it renders the financial position [of the company] less favourable".[21] In the judge's summary of his evidence[22], Mr Tomlinson expressed the view that "the amount of dividend being discussed would not render the company's financial position less favourable than as at the date of [Mr Petros'] offer". The judge's note of what Mr Tomlinson said was as follows:

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[20] At para. [32]
[21] See para. [39] of the judgment
[22] At para. [41]

> "... as of 6th March 2013, even if interim dividend declared it continues to make profit. It would not be less favourable even if a US $60,000 dividend was paid ...
>
> The US$60,000- it came up and what was said, I commit. But decision is a Board decision. How correlate but .... of Board. I said dividend should be paid up to date of transfers. So payment of dividend per se US$60,000 neither here nor there."[23]

[39] In his evidence (as recorded by the judge[24]) Mr Tomlinson confirmed that he had accepted Mr Petros' offer of US$1,750,001.00 because it was the best offer received before the close of business on 6 March 2013. He did not consider the Murrays' offer for US$1,850,000.00, because, in his view, it had come in after the agreed cut-off date of the close of business on 6 March 2013. But he indicated that, even if he had considered it, he would not have considered it the best offer, since it was not a cash offer and, as had been the case with the Murrays' previous offers, it was dependent on bank financing. This is the judge's note of Mr Tomlinson's evidence on the point[25]:

> "[Mr Petros'] offer was a cash offer. [The Murrays' offer] seeking financing. No guarantee it would be completed within 3 to 6 months. Loss to Mr Petros in respect of not receiving based on interest rates on US dollars to be more than dividends."

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[23] See para. [41]
[24] At para. [36]
[25] ibid

The judge's decision

[40] The judge found for Mr Petros. Early on in his judgment[26], the judge indicated that "[t]he matter is essentially one of construction of documents and my decision for the most part will involve mixed issue of law and fact". The judge added this[27]:

> "The first matter to determine is what are the terms of the agreement to vary and are they sufficiently certain to be enforceable. It is common ground that there was an agreement to vary. However, the details of the terms agreed are in dispute as well as their enforceability. The parties contemplated an auction on the 25th February 2013. This was it seems, to be conducted by Business Recovery Services Ltd. It was intended that the parties would attend the auction and bid against each other [see letter dated the 22nd February 2013 Jennifer Messado to Hart Muirhead & Fatta p. 89 Agreed Bundle of Documents]. There followed oral discussions and an exchange of email. In the end the idea of a formal auction was dispensed with and an agreement, the terms of which I am to determine, was arrived at."

[41] After a detailed review of the evidence, oral and documentary, the judge found as a fact that the terms agreed between the parties were as follows:[28]

> "1) Each party would send a deposit of US$100,000 to Mr. Ken Tomlinson.
>
> 2) Each would submit detailed offers to Mr. Tomlinson by 3:30 p.m. on the 25th February, 2013.

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[26] At para. [23]
[27] At para. [24]
[28] At para. [33]

3) Mr. Tomlinson was then free to discuss each offer with the respective parties with a view to clarification or improvement of their offers. This process was to end by close of business on the 6th March, 2013.

4) Mr. Tomlinson in his complete discretion would decide which offer was the best. The decision which bid was to be accepted was to be solely that of Mr. Ken Tomlinson."

[42] The principal issue of fact which the judge had to resolve on the evidence was whether the parties had agreed that the deadline for the submission of offers to Mr Tomlinson on 6 March 2013 was to have been "by close of business", as Mr George contended. The judge referred[29] to the email sent to Mr Tomlinson by Mr George on the 25th February 2013[30] (which referred to a discussion between Mrs Messado and Mr George in which it had been agreed, among other things, that offers would be submitted to Mr Tomlinson "no later than close of business on 6th March 2013"). The judge then stated that he was satisfied that the attachment contained "the terms agreed between [Mr George] and Mrs. Jennifer Messado". Despite the fact that this email had not been copied to Mrs Messado, which the judge took to be "an oversight", he observed that the terms set out in the email "do not, apart from the reference to 'close of business', depart significantly from those outlined in Mrs. Messado's two

[29] At para. [26]
[30] See para. [18] above

emails".[31] The judge therefore accepted Mr George as "a truthful witness and his recollection of the conversation with Mrs. Messado as accurate".

[43] In this regard, the judge continued[32] –

> "I am fortified in my conclusion on this by the manner in which some evidence was given. Mr. George appeared more focussed and earnest whilst Mrs. Messado was imprecise and at times rather flippant. The content of the oral evidence also influenced me on the issue."

[44] Then, in relation to the 6 March 2013 deadline for offers, the judge characterised Mrs Messado's answers in cross-examination as "less than candid"[33] and, in the light of the documentary and other evidence in the case, concluded that Mrs Messado's evidence "does her no credit"[34]. And, with regard to the 'close of business' issue, the judge described Mrs Messado's responses to suggestions made to her on the issue as being "also unconvincing"[35].

[45] The judge's final reason for rejecting the Murrays' denial that the phrase 'close of business' formed part of the agreed terms was the fact that, in the email exchanges between Mr George and Mrs Messado over the period 5-6 March 2013[36], in which the

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[31] Para. [26]
[32] At para. [27]
[33] At para. [27]
[34] At para. [28]
[35] At para. [30]
[36] See paras [21]-[26] above

former had referred specifically to the point, there had been no protest from the latter. This is how the judge put it:[37]

> "Mrs. Messado's concern manifestly, was that her bid of the 6th March at 7:07 p.m. be considered. She did not deny that 'close of business' had been agreed. It is somewhat strange that she did not deny it even after receiving the email from Mr. George of 5th March at 5:30 p.m. which referred to 'close' and 'close of business' in two separate parts of the email. Had there been no such term agreed I would have expected a clear explicit and prompt rebuttal from Mrs. Messado."

[46] As regards the meaning of 'close of business', the judge accepted the evidence which he had heard from Mr George and Mr Tomlinson:

> "... the phrase is well known and often used in commercial dealings. It references the normal end of the workday. In this case, the evidence suggests anytime from 4:30 to 5:00 p.m."

[47] Having accepted that the parties had agreed to the cut-off date of the close of business on 6 March 2013, the judge rejected the contention made on behalf of the Murrays that the parties nevertheless remained entitled to 24 hours to respond to the bid of the other. The judge said this:[38]

> "That same email said, 'Bids to remain open at the discretion of the Board Chairman on the understanding that the time for presentation will not exceed the 6th March 2013 when

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[37] At para. [31]
[38] At para. [34]

> they will be closed.' This is reaffirmed by a later statement in that email that 'the best and final offers must be in by March 6th 2013.' If each party had 24 hours to respond to every bid submitted, including the 'best and final offer,' then not only would that offer not be final but the 6th March 2013 would not be the date bids 'closed.' As Mr. Tomlinson indicated in his evidence the process might be never ending and that is why commercial men in a bidding process almost always have a final cut off date. I find there was no agreement for a 24 hour or any period extending beyond the 6th March 2013, for the purpose of renewed offers. The agreement rather, was for initial bids to be in by the 25th February, 2013. Between then and close of business on the 6th March 2013 Mr. Tomlinson was at liberty to consider improved offers or counter bids. Thereafter he was to decide which offer was the best."

[48] In accepting Mr Tomlinson's evidence as to why he considered a cash offer superior to an offer subject to financing, the judge observed that –

> "… Mr. Tomlinson clearly articulated to the Murrays his concern that their offer was not for cash see for example his email of the 26th February, 2013 (page 103 Agreed Bundle]."

[49] The judge also accepted Mr Tomlinson's evidence as to the proper construction of the condition of Mr Petros' final offer relating to the non-payment by Tensing Pen of dividends or distributions, "which may render its financial position less favourable than as at the date of this offer". Mr Tomlinson's evidence, it will be recalled, was that only a

payment of dividends which affected the viability of the company was prohibited[39]. The judge said this:[40]

> "I agree with Mr. Tomlinson's construction of the offer. The condition, properly construed, relates to the period between acceptance of the offer and completion. It stipulates that the Defendants will covenant not to pay any dividend or other distribution or do anything 'which may render its financial position less favourable than as at the date of the offer.' In the context of the prior dealings and discussions between Mr. Tomlinson and the parties this is the only credible way to construe the condition. This is because, not just a few weeks earlier, Mr. Tomlinson, as Chairman of the Board, made it clear to both parties that a dividend would be paid prior to the sale, see email from Ken Tomlinson dated 21st February 2013 to Karin Murray and copied to Richard Murray and Sam Petros [p. 88 Agreed Bundle]
>
> '**We will discuss the issue surrounding an interim dividend at the next Board of Directors meeting.**
>
> **I have indicated to Sam that prior to the transfer of the shares to the successful bidder, all shareholders would be entitled to some form of dividend based on the profits of the company, as at the date of the transfer.**
>
> **Let us await the outcome of the February 2013 unaudited financials and then we can determine the level of distribution.**
>
> **Please note that based on the unaudited results for January 2013 Tensing Pen has just turned the corner in relation to profitability for this financial period, and it would be prudent to await the February accounts to see if the profitability projections are achieved.**

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[39] See para. [38] above
[40] At para. [40]

> **I would hope that we are in a position to keep a meeting sometime in March 2013 to discuss same'."** (Emphasis in the original)

[50] Based on Mr Tomlinson's evidence, the judge accepted, and found as a fact[41], "that the payment of a US$60,000 dividend would not render the company's financial position less favourable within the meaning of the condition".

[51] And then, on the issue of whether Mr Tomlinson had given proper consideration to Mr Petros' offer before accepting it, the judge said this[42]:

> "Finally, Mr. Tomlinson's admission, that at the time he made his decision he had not yet read [Mr Petros'] second offer, is of no great moment. The evidence is that by the time he put pen to paper to advise the parties of his decision he had seen the offer. Furthermore, in his opinion, its terms do not affect the comparative superiority of the offer. This is because, on his reading of the conditions only a payment of dividends which affected the viability of the company was prohibited …"

[52] Finally, in a passage that warrants full quotation, the judge concluded as follows[43]:

> "[42] It has also been urged that this court ought not to order specific performance as no contract in terms of the offer accepted by Mr. Tomlinson has come into effect. One reason advanced is because the conditions stipulated in the offer are conditions precedent to the coming into existence

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[41] At para. [41]
[42] At para. [39]
[43] At paras [42]-[47]

of the agreement. These conditions include a 'covenant' by the Murrays to Petros. No such covenant it is said has been give or will be given. The Defendants point to Mr. Tomlinson's evidence in this regard. It was his opinion that the failure to obtain such a covenant might be detrimental to the agreed, as he said:

> 'Q: Did you ever ask Murrays whether they were prepared to make these covenants.
>
> A: No
>
> Q. Put it to you if Murrays did not make covenant the offer would fail.
>
> Objection: Don't think witness should be asked as it is a legal question. I intend to address you on all conditions.
>
> Judge: I will allow the question. I think the understanding of the referee of the process is important.
>
> A: Based on what is outlined here there is a probability the offer would fail in respect of the conditionalities.'

[43] The Claimant on the other hand, says that Mr. Tomlinson's remit meant that the unsuccessful party (to the bidding process) was obliged to sell on whatever terms Mr. Tomlinson accepted. Furthermore, as the Defendant's final offer contained similar conditions (in the financing terms being offered by the financial institution) the Defendants are estopped from objecting to the terms. The Claimant contends that there arose a waiver by election inasmuch as the Defendants (a) submitted an offer with similar terms (b) took no objection to the conditions for almost 3 years. Reliance is placed on the ***'Kanchanjunga' [1980] 1 Cl Rp 391 and Involnert Management Inc v Apriligange Ltd. 2015 EWHC 2225 (Comm)***.

[44] I do not agree that an election by waiver arose, at any rate, not with respect to the specific conditions. This is because, in the first place, the Defendant's offer did not have such a condition. Their offer was conditional on

financing being obtained. It is the financial institution, not the Defendants, which had, virtually buried in its documentation, certain requirements. It is difficult to see how the preconditions to financing offered by a third party, could preclude the Defendants from taking an objection to unreasonable terms.

[45] On the other hand I do believe an estoppel arises. This is because it was within the remit of Mr. Tomlinson to 'accept' the best offer. His decision as to which offer was best binds the Defendants. They thereby became bound to honour the agreement. It has not been demonstrated that the conditions at (i) to (viii) are unusual or in any way unfair. Indeed they appear to be that which any well drafted contract of this type could reasonably contain. Had he accepted an offer without that term any effort by the vendor to depreciate the asset in the manner stated would in all likelihood be a breach of an implied good faith term. The purpose is to ensure that in between contract and completion nothing is done to undermine the value of the assets being sold. The fact that it is reasonable to include such provisions is demonstrable by reference to the conditions contained in the bank's offer of financing, because the terms are similar (although not identical) and serve a similar purpose. Mr. Tomlinson in accepting the offer has not therefore gone outside his remit and the Defendants are in consequence bound thereby. They are for that reason estopped or precluded from refusing to covenant accordingly. I so hold. I repeat for emphasis that, as found at paragraph 41 above, the covenant at (v) only precludes the payment of a dividend to the extent it renders the company's 'financial position less favourable than as at the date of this offer.'

[46] I find that Mr. Tomlinson's answers in cross-examination (outlined at paragraph 42 above) reflect his ignorance of the full legal implications of his mandate. The terms were reasonable and only to be expected in a contract of this nature. I find that whether he knew it or not, Mr. Tomlinson was, as agent of the parties, entitled to bind them to any reasonable term. This must be so or else their power to accept the best and final bid would really be rendered nugatory. This is because every contract has terms in addition to the purchase price. To subject the parties to a

> process of negotiation of those terms, after the best offer was accepted by Mr. Tomlinson, would empower the losing bidder to derail the entire process by taking unreasonable objection to otherwise reasonable terms. This indeed may be the thinking behind the decision of the parties to empower Mr. Tomlinson to accept not just 'the best price' but the 'best offer'.
>
> [47] In the final analysis I hold that Mr. Ken Tomlinson having accepted the Claimants [sic] offer as he best, bound the Defendants to honour all the terms of that offer including the giving of the covenant stipulated. The conditions were therefore not conditions precedent in the classical sense. The word condition in the offer letter was used to denote the import of the term of the contract. In other words acceptance indicated that the vendors covenanted (and procured) the items at (i) to (viii) ..."

The grounds of appeal

[53] Dissatisfied with this outcome, the Murrays have filed a total of 14 grounds of appeal, as follows:

> "1. The Learned Judge erred in finding that the parties had agreed to submit bids by 'close of business' on 6th March, 2013. The pattern of communication between the parties was that there were discussions between the Attorneys, which said discussions were ratified by the [Murrays] and [M Petros] respectively by way of email correspondence copied to them. The Learned Judge found as a fact that in error [Mr Petros'] Attorney had failed to copy the other party with the agreed instructions, and in such circumstances, even though agreed between the Attorneys, the term of the agreement to the effect that bids were to be delivered by close of business on 6th March was never communicated to, ratified nor agreed to by the [Murrays]. In the premises the Learned Judge erred in finding that it was a term of the agreement between the parties that the parties were to submit bids by 'close of business' on 6th March, 2013.

2. Specific Performance being an equitable remedy the Learned Judge erred in that having found as a fact that [Mr Petros'] Attorney-At-law as agent of [Mr Petros] had in error failed to copy the other side with the agreed instructions, he should not have granted specific performance of an agreement founded on [Mr Petros'] error.

3. The learned Judge erred in granting specific performance because the agreement between the parties was unclear and equivocal especially having regard to the issue of the payment of dividends and the provision that each party shall have 24 hours to respond to the bid and specific performance is not appropriate in such circumstances

4. In his judgment (para 38) the Learned Judge found that Mr. Tomlinson had 'clearly articulated to the Murrays his concern that their offer was not for cash see for example his email of the 26th February, 2013 (p103 Agreed Bundle)'. The email of 26th February, 2013 does not reflect a communication of concern of Mr. Tomlinson that their offer was not for cash. In fact there is no evidence that Mr. Tomlinson at any time indicated to the [Murrays] that he considered a cash offer to be superior to an offer that was financed. All offers submitted by the [Murrays] were subject to financing, and all offers submitted by [Mr Petros] were cash offers. In the circumstances unknown to them the [Murrays] were engaged in a bidding process where from the inception they had no chance of success. Such a process is unfair and inequitable, and the learned Judge erred in granting specific performance in such circumstances.

5. The learned Judge erred in granting specific performance of the offer of [Mr Petros] dated 6th March, 2013 in view of the admission by Mr. Tomlinson that he had not read the offer, and also in view of the further evidence of Mr. Tomlinson that he thought that 'based on what is outlined here (in the offer of 6th March) there is a probability the offer would fail in respect of the conditionalities'.

6. The Learned Judge erred in finding as a fact, that the payment of a US$60,000 dividend would not render the company's financial position less favourable within the meaning of the condition.

7. The learned Judge erred in finding that the conditions stated in the offer letter from [Mr Petros] dated the 6th of March were not conditions precedent in the classical sense and that the offer was a conditional one.

8. The Learned Judge erred in finding that the offer of 6th March 2013 was not a conditional offer and unenforceable.

9. The Learned Judge erred in holding that Mr. Ken Tomlinson having accepted [Mr Petros'] offer as the best, bound the [Murrays] to honour all the terms of that offer including the giving of the covenant's stipulated therein, which covenants were not put to the [Murrays] for their express consent and agreement before the offer was accepted by Mr. Tomlinson and especially having regard to the previous discussions between the parties regarding the payments of dividends.

10. The Learned Judge erred in finding that an estoppel arose against the [Murrays] since no estoppel was pleaded in the statement of case or proven at the trial.

11. The Learned Judge erred in declaring that on a true construction, the terms of the offer dated 6th March 2013 do not preclude the payment of dividends for the year ending 30th June, 2013 since such a declaration was in vain.

12. The Learned Judge erred in granting specific performance of the offer of 6th March, since based on the said Order the [Murrays] would be deprived of the payment of dividends for the period between the making of the offer and completion, which dividends they legitimately expected to receive based on the agreement between the parties as communicated by Mr. Tomlinson as agent for both parties. The implementation of the Order of the Court would therefore be unfair to the [Murrays], and as such Specific Performance is inappropriate as a remedy.

13. The Learned Judge erred in granting specific performance of the Respondent's offer of 6th March, 2013 in that as agent for both parties Mr. Ken Tomlinson had by emails directed the parties to submit offers to include all assets inclusive of retained earnings as indicated in the balance sheet with the exception of any interim dividend

> declared on unaudited profits for this financial period **prior to completion.** Further Mr. Tomlinson had by email dated 21st February, indicated to both parties that all shareholders would be entitled to some form of dividend based on profits of the company, **as at the date of transfer**. The [Murrays] had adhered to this Direction and made their offer accordingly. The [Mr Petros] did not comply with the direction. In the circumstances it would be unfair and inequitable to the [Murrays] that the [Mr Petros'] offer submitted in breach of the directive of Mr. Tomlinson be enforced by way of specific performance.
>
> 14. In the circumstances of this case, the Learned Judge erred in finding that the conditions set out in the offer of [Mr Petros] were reasonable and only to be expected in a contract of this nature." (Emphases in the original)

The application for a stay

[54] As I have already noted, the application was supported by Mrs Murray's affidavit sworn to on 15 June 2016. I have already referred to Mrs Murray's affidavit and, as will have been seen, much of the background narrated in this judgment has been drawn from it. Much of what Mrs Murray stated in the affidavit is also reflected in the grounds of appeal set out above. But, for completeness, I should also set out the following paragraphs[44]:

> "21. Mr. Tomlinson entirely ignored our offer of US$1,850,000 on the basis that it was received after close of business even though he was aware of it. He so admitted at the trial. It is to be noted that Mr. Tomlinson purported to accept Mr Petros' bid dated 6th March 2014, notwithstanding his bid included dividends to be retained by the Company.
>
> …

[44] 21, 33-36

33. A stay of execution of judgment pending appeal is requested because there is a risk of injustice if a stay is not granted.

34. The order for specific performance compels us to sign the Agreement and any other necessary documentation to effect the transfer of our shares to [Mr Petros]. The Registrar is empowered to sign the agreement and other relevant documents if we do not agree. Since the judgment has been entered [Mr Petros] through his attorney has written to our attorneys with draft transfers to be signed by us. The attorney has indicated that if we do not sign he will be approaching the Registrar of the Supreme Court to sign the documents as per the order of Batts J.

35. Unless there is a stay of execution pending appeal the transfer of our shares to [Mr Petros] will be effected and we will no longer be shareholders in either of the companies. In the absence of a stay our appeal would be rendered nugatory. In the interim we will have no say in the affairs of the companies.

36. We have been associated with Tensing Pen for the last years [sic]. I have been the Director responsible for oversight and largely through my efforts the hotel has become very profitable over the years. My husband was personally responsible for the landscaping of the property which has contributed to it being a unique and desirable tourist destination in Jamaica. We are both personally very attached to the hotel and we feel that we have been unfairly deprived of a fair opportunity to bid for [Mr Petros'] share in the property. In the circumstances we would be very prejudiced if we are forced to sell our 50% shares in the property prior to the hearing of our appeal herein."

[55] In an affidavit sworn to on 6 July 2016, Mr George responded to Mrs Murray's affidavit on behalf of Mr Petros. Among other things, Mr George stated the following[45]:

[45] At paras 3-5

> "3. [Mrs Murray] at paragraph 21 states 'It is to be noted that Mr. Tomlinson purported to accept Mr. Petros' bid dated 6th March 2013, notwithstanding his bid included dividends to be retained by the Company'. This statement is inaccurate, as [Mr Petros'] bid did not include a provision for 'dividends to be retained by the Company' but rather a condition that upon acceptance the Company would not declare make or pay any dividend which would render the financial position of the company less favourable that [sic] it was. The retention of dividends, which do not come into existence unless agreed by the Board of Directors, was not provided for by [Mr Petros'] offer …
>
> 4. [Mrs Murray] at paragraph 26 of her affidavit states 'Since the resignation of Mr. Thompson [sic] in May 2013, the Company remained in a stalemate. There have been no director's (sic) or shareholders meetings.' This admission from [Mrs Murray] illustrates the continued peril the company faces should a stay of execution be granted."

The criteria for the grant of a stay pending appeal

[56] It is common ground between the parties that the proper approach to applications for stays of execution pending appeal is as set out in the following statement by Phillips LJ (as he then was) in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited**[46]:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then

[46] FC2 97/6273/C, judgment delivered 23 July 1997, unreported.

> a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But if there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice. The starting point must be that the normal rule as indicated by Order 59, rule 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal."

[57] Miss Carol Davis, who appeared for the Murrays on this application, accordingly submitted that the general principles governing the grant of stays are that (a) the court should first consider the merits of the appeal and, if merit is lacking, no stay should be granted; and (b) if there are good grounds of appeal, the court will exercise its discretion as to whether to grant a stay by conducting a balancing exercise, in which it will consider the risk of injustice and whether, if the stay is refused, the appeal will be stifled. Mr Hugh Small QC for Mr Petros did not dissent from this analysis and I readily accept it as sound, based as it is on a number of decisions by judges of this court in similar circumstances.[47] This is the basis on which I will therefore approach the matter.

The submissions

[58] As will have been seen, some of the grounds overlap with each other. For the purposes of her submissions, Miss Davis very helpfully took them in groups. Reliance

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[47] See, for example, **Cable & Wireless Ja Ltd (T/A Lime) v Digicel (Jamaica) Ltd (Formerly Mossel Jamaica Ltd)** SCCA No 148/2009, Application No 196/2009, judgment delivered 16 December 2009; and **William Clarke v Gwenetta Clarke** [2012] JMCA App 2.

was placed on the written submissions filed in support of the stay on 6 July 2016, as supplemented by Miss Davis' oral submissions before me. For his part, Mr Small QC was largely content to rely on the written submissions filed on behalf of Mr Petros in opposition to the stay on 28 June 2016. What follows is a summary of the rival contentions in respect of each ground.

The Murrays' submissions

[59] On grounds one and two, Miss Davis described the issue of whether bids were to be in by 6 March 2013, or by close of business on 6 March 2013, as "a critical term of the agreement between the parties". She referred to the judge's finding that Mr George's failure to copy the other side was an error and pointed out that the pattern of the parties was that correspondence was copied to both sides. It is by this means, Miss Davis submitted, that the terms discussed between the attorneys-at-law were communicated to and ratified by the parties themselves. On this basis, Miss Davis submitted that, because specific performance is an equitable remedy, it should be refused "where there is procedural unfairness or surprise".

[60] In support of this ground, Miss Davis referred me to Chitty on Contracts[48], in which the learned editors state as follows:

> "The court may refuse specific performance of a contract which has been obtained by means that are unfair, even though they do not amount to grounds on which the

[48] 29th edn, para. 29-031

> contract can be invalidated. In *Walters v Morgan*[49] the defendant agreed to grant the claimant a mining lease over land which the defendant had only just bought. Specific performance was refused on the ground that the defendant was 'surprised and was indeed induced to sign the agreement in ignorance of the value of his property'."

[61] On ground three, it was submitted that the learned Judge erred in granting specific performance because the agreement between the parties was unclear and equivocal, especially having regard to the issue of the payment of dividends. Miss Davis contended that, in correspondence between Mrs Murray and Mr Tomlinson, it had been established that interim dividends were to be paid before the completion of the sale and not included in the bid. Accordingly, the inclusion in Mr Petros' final bid of a condition that no dividends should be paid 'which may render its financial position less favourable than at the date of this offer" demonstrated that the parties were clearly not *ad idem* with respect to what (if any) dividends should be included. In any event, it was submitted further, the Murrays would have been entitled to conclude from the previous correspondence between the parties that they would have had 24 hours to respond to Mr Petros' final offer. The term was not ambiguous and should not as a matter of law be contradicted by oral evidence and in these circumstances, specific performance was not an appropriate remedy.

[62] On ground four, it was submitted that, in "a fair bidding process", the fact that a cash offer, even if lower, would be considered superior to an offer which would require

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[49] (1861) 3 D.F. & J. (1861) 718, 723

financing it ought to have been communicated to the Murrays from the inception of the process.

[63] On ground five, it was submitted that because, on his own admission, Mr Tomlinson had not read Mr Petros' final offer before making his decision, specific performance ought not to have been ordered, particularly in the light of Mr Tomlinson's evidence that, in his view, the offer would probably fail if the Murrays did not enter into the covenants sought by Mr Petros.

[55] Taking grounds six and 13 together, Miss Davis submitted that, "as a matter of ordinary common sense, a payment of US$60,000 would obviously make a company's financial position less favourable". Further, there being no evidence that the interim dividend would have been $60,000.00, there was nothing before the judge from which he could properly have made a determination of what sum would have been payable as a dividend.

[64] Then, taking grounds seven, eight and nine together, Miss Davis submitted that Mr Petros' offer of 6 March 2013 clearly set out what were referred to as conditions, which required the Murrays to covenant certain things. Having agreed prior to the commencement of the bidding process that bids were not to include interim dividends, Mr Tomlinson's authority as agent was limited in terms of what bids he could accept. It is established law that an agent cannot act beyond the authority of his principal. In this

regard, reliance was placed on the following statement from Halsbury's Laws of England[50]:

> "Where an act done by an agent is not within the scope of the agent's express or implied authority, or falls outside the apparent scope of his authority, the principal is not bound by, or liable for, that act, even if the opportunity to do it arose out of the agency, and it was purported to be done on his behalf, unless he expressly adopted it by taking the benefit of it or otherwise."

[65] On ground 10, Miss Davis was content to submit that it is not in dispute that estoppel was never pleaded, nor was it proved.

[66] And finally, on grounds 11 and 12, it was submitted that, at the time of the correspondence between Mr Tomlinson and Mrs Murray (all of which was copied to Mr Petros), the arrangement was that a board meeting would have been held to determine the quantum of the dividends to be paid to the shareholders. Even if Mr Petros disagreed, the dividends would still have been payable, since it was agreed between Mrs Murray and Mr Tomlinson. However, since that time there has been a substantial change of circumstances, in that Mr Tomlinson has resigned, Mr Petros has now indicated that he is not in favour of paying interim dividends and there have been and will be no further board meetings. In these circumstances, the Murrays complain that they will be deprived of any dividends.

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[50] 4th edn, volume 1, para. 820

[67] For all of these reasons, Miss Davis submitted, the Murrays have an appeal with a good chance of success and that the balance of justice favours the grant of a stay pending the hearing of the appeal.

Mr Petros' submissions

[68] Counsel for Mr Petros made the general submission that, as many of the grounds of appeal sought to challenge the judge's findings of fact, it is necessary to bear in mind the approach of the appellate court to findings of fact by a judge sitting alone. In this regard, I was referred to following well-known passage from the judgment of Lord Thankerton in **Watt (or Thomas) v Thomas**[51]:

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[51] [1947] 1 All ER 582, 587

[69] To the same effect, I was also referred to the following dictum of Harrison P in **Winston Edwards v Gerald Stevenson & Howard Stevenson**[52]:

> "Findings of fact are essentially the province of the trial judge. Consequently, an appellate court will be slow to interfere with such findings unless the trial judge was plainly wrong. This approach has consistently been adverted to and followed by this Court."

[70] Against this background, counsel for Mr Petros submitted that there is no prospect of success in this appeal. Hopefully without doing any injustice to them, I would summarise their submissions on each ground in this way:

(1) The judge's finding that the offer process was to have ended by close of business on 6 March 2013 was based on his observations of the manner in which the witnesses gave their evidence, their patterns of behaviour and their demeanour. An appellate court will lightly disturb such a finding. (Ground one).

(2) As regards the failure of Mr George to send a copy of his email to Mr Tomlinson to Mrs Messado, the judge's finding was that the email in fact reflected the agreement between the parties. The agreement could not therefore be said to be

[52] SCCA No 57/2004, judgment delivered 16 November 2007, page 4

"founded on the Respondent's error", as contended in ground two. (Ground two).

(3) There was nothing unclear or equivocal about the agreement in relation to either the payment of dividends or the time which each party had to respond and, the judge having so found, there was no ambiguity affecting the grant of specific performance. (Ground three)

(4) Even if Mr Tomlinson did not evince a preference for a cash sale, there was no evidence to suggest that what the parties were engaged in was an unfair bidding process. (Ground four)

(5) (i) The evidence was that, by the time Mr Tomlinson came to render his decision in writing, he had seen Mr Petros' final offer. But, in any event, Mr Tomlinson's evidence was that the terms of the offer did not affect is "comparative superiority", since "only payment of dividends which affected the viability of the company was prohibited".

(ii) Mr Tomlinson was, as the judge found, "as agent of the parties, entitled to bind them to any reasonable term". (Ground five)

(6) The judge's finding that the payment of a US$60,000.00 dividend would not render the company's financial position within the meaning of the condition was a finding of fact based on the evidence of Mr Tomlinson, a witness of much experience in corporate affairs. It is on this basis that the judge made the declaration that "on a true construction the terms of the offer dated 6th March 2013 do not preclude the payment of dividends for the year ending 30th June 2013". The result of this is that, if declared by the directors, dividends could be paid for the period between the making of the offer and completion. (Grounds six, 11, 12 and 13)

(7) The conditions set out in Mr Petros' final offer, which were expressly stated to come into effect "in the event of its acceptance", could not be regarded as conditions precedent. As a natural incident of the law of agency, Mr Tomlinson was capable of binding the Murrays to the conditions. (Grounds seven, eight and nine)

(8) (i) The failure by a party to plead a particular point in his or her statement of case is not an absolute bar to consideration of the point by the court. It is therefore open to a court to

consider principles of law not specifically pleaded by a litigant.

(ii) In any event, the judge's findings on estoppel were based on his findings of fact as to what constituted the terms of the agreement. (Ground 10)

(9) In all the circumstances, the judge was entitled to make the findings which he did, those findings were primarily findings of fact and the appeal has no reasonable prospect of success.

(10) But in any event, the balance of justice favours the refusal of a stay: there is a greater risk of injustice to the companies, decision making in which has been "sterilized and stifled" by the ongoing litigation between the parties, than to the Murrays, the sale of whose shares was the very aim of the schedule to the Tomlin Order signed by them.

Discussion and conclusions

[71] I bear in mind, as I must, that the court's first duty at this stage is to determine whether the Murrays' have an appeal, on any or all of the grounds advanced on their behalf, which has some merit. As Phillips JA observed in **William Clarke v Gwenneta**

Clarke[53], "[i]t is now well established and has been accepted, that a stay will not be granted unless the appeal has some prospect of success…". In considering this question, it appears to me that the principal issues raised by the grounds of appeal surround the judge's decision in relation to (a) the 'close of business' issue (grounds one and two); (b) the dividend issue (grounds three, six, 11, 12 and 13); (c) Mr Tomlinson's role (grounds four, five, nine and 14); (d) the condition precedent/conditional contract issue (grounds seven and eight); and (e) the estoppel issue (ground 10). I will consider each in turn.

(a) <u>The 'close of business' issue (grounds one and two)</u>

[72] In the light of the judge's penetrating analysis of the conflicting evidence on this issue[54], I think that it will be extremely difficult to argue on appeal against the judge's finding that there was an oral agreement between Mrs Messado, acting on behalf of the Murrays, and Mr George, acting for Mr Petros, that the cut-off point for offers to Mr Tomlinson was to be close of business on 6 March 2013. The judge considered the actual content of the conflicting evidence, the manner of the giving of the evidence by the witnesses, their demeanour and, in relation to Mrs Messado, the inconsistency of her evidence when measured against her own contemporaneous correspondence. In these circumstances, as it seems to me, the traditional disinclination of the appellate

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[53] [2012] JMCA App 2, para. [28]
[54] See paras [42]-[45] above

court to interfere with a trial judge's findings of fact must serve to insulate the judge's clear findings, which were amply justified by the evidence, against challenge on appeal.

[73] It is no doubt in recognition of this difficulty that Miss Davis hinged her submissions primarily on Mr George's failure to copy his email to Mr Tomlinson dated 25 February 2013 to the Murrays. The point was, as I understood it, as Mrs Murray herself put it in her affidavit in support of the application for the stay[55], that, "[i]n such circumstances, even though agreed between the Attorneys, the term of the agreement to the effect that bids were to be delivered by close of business on 6th March was never communicated to, ratified nor agreed to by us".

[74] In considering this point, it is relevant to observe, I think, that Mrs Murray's formulation proceeds on the explicit basis that the close of business cut-off term was in fact agreed to by Mrs Messado. It is not in dispute that Mrs Messado was the Murrays' duly authorised agent for the purposes of this transaction. There was no evidence of any agreement, whether express or implied (despite Miss Davis' reference to "a pattern of communication"), that Mr George should, in addition to negotiating with Mrs Messado on behalf of his own client, also keep Mrs Messado's clients advised of the agreements reached. In the absence of any such evidence, Miss Davis' submission must necessarily involve the proposition that the agent for a party, in a negotiation with the agent for the party on the opposite side, who is duly authorised to negotiate and enter into a binding agreement on behalf of her client, is obliged to keep his opposite number's

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[55] At para. 38

client informed of the outcome of the negotiations. No authority was cited for this proposition and I would have thought that it would have been each agent's responsibility to keep his or her client or clients apprised of the agreements entered into in the client or clients' name. Against this background, I find it difficult to see how, as a matter of contract, it can successfully be maintained that Mr George's omission to copy his 25 February 2013 email to Mr Tomlinson to the Murrays can relieve the latter from the agreement entered into by their agent on their behalf.

[75] The judge found as a fact that, as now appears to be accepted by the Murrays, the close of business term was expressly agreed between Mr George and Mrs Messado. The case is therefore wholly different from **Walters v Morgan**, the case referred to by the editors of Chitty in the passage relied on by Miss Davis[56], in which specific performance of a mining lease over land which the defendant had only just bought was refused on the ground that the defendant was "surprised and was indeed induced to sign the agreement in ignorance of the value of his property". In the circumstances of the instant case, I therefore think that it will be difficult to maintain successfully that the close of business term was "founded on [Mr Petros'] error", as Miss Davis contended.

[76] It accordingly seemed to me that there was no prospect of success on the close of business issue.

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[56] See para. [54] above

(b) The dividend issue (grounds three, six, 11, 12 and 13)

[77] The Murrays' contention on this issue is based on the premise that, while their offers, in keeping with Mr Tomlinson's directives, excluded "any interim dividend declared on unaudited profits for the financial period **prior to completion**"[57], Mr Petros' final offer did not, in that it included a condition that no dividends should be paid 'which may render its financial position less favourable than at the date of this offer". Thus, it was submitted, the parties were not *ad idem* with respect to what (if any) dividends should be included and the agreement was to that extent equivocal. Further, the Murrays contend that, as a result of Mr Tomlinson's acceptance of Mr Petros' offer, they have been deprived of the interim dividend which they had been led to believe they would receive.

[78] In considering these submissions, I observe firstly that, as Mr Tomlinson's responses to Mrs Murray and his evidence on this question made clear, while he supported the entitlement of the shareholders to some form of interim dividend before completion of a sale, the actual declaration of any such dividend and its amount would be a matter for the board of directors[58]. Secondly, Mr Petros' final offer did not include "dividends to be retained by the Company", as Mrs Murray asserted in her affidavit[59]. Rather, as Mr George pointed out in his affidavit in response[60], it stipulated a condition

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[57] Mrs Murray's affidavit, para. 32 d (Emphasis as in original)
[58] See paras [13], [38] and [49] above
[59] See para. [52] above
[60] See para. [53] above

that, in the event of its acceptance, and without Mr Petros' written consent, the Murrays should covenant, among other things, "not to declare make or pay any dividend or other distribution or do or suffer anything which may render [the company's] financial position less favourable than as at the date of the offer". And thirdly, the judge found as a fact, based on Mr Tomlinson's evidence, "that the payment of a US$60,000 dividend would not render the company's financial position less favourable within the meaning of the condition"[61].

[79] In the light of these considerations, I find it difficult to discern anything equivocal in the agreement in relation to the payment of an interim dividend. Mr Tomlinson having indicated that, subject to the decision of the board, he supported the payment of an interim dividend, there was nothing in the condition of Mr Petros' offer to preclude the payment of a dividend, should the board (of which Mr Petros remained a member) decide to declare one. Indeed, it seems difficult to gainsay the judge's comment that the purpose of the condition was "to ensure that in between contract and completion nothing is done to undermine the value of the assets being sold"[62]. Then, and in any event, there is the judge's finding, based on Mr Tomlinson's evidence, which he was plainly entitled to accept, given Mr Tomlinson's position as chairman of the board and the parties' chosen arbiter, that payment of an interim dividend of US$60,000.00 would not fall afoul of the condition. That sum, it will be recalled, was the very amount previously canvassed with Mr Tomlinson by Mrs Murray, who was the director closest to

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[61] See para. [49] above
[62] See para. [50] above

the company from an operational standpoint. And lastly, there is the declaration granted by the judge, obviously based on this finding and designed to secure the Murrays' anxiety on the subject of the interim dividend, that "on a true construction the terms of the offer dated 6th March 2013 do not preclude the payment of dividends for the year ending 30th June 2013".

[80] For these reasons, I therefore considered that there was no prospect of success on the dividend issue.

[81] Although unrelated to the payment of dividends, I will mention here one further respect in which it was contended in ground three that the agreement between the parties was equivocal. This is the question of whether the Murrays should have been allowed a further 24 hours after 6 March 2013 to respond to Mr Petros' final offer. The judge found[63] that, although "such a term was at one time contemplated … there was no agreement for a 24 hour time period extending beyond the 6th March 2013, for the purpose of renewed offers". In arriving at this conclusion, the judge accepted Mr Tomlinson's evidence that, otherwise, "the process might be never ending and that is why commercial men in a bidding process almost always have a cut off date". On the evidence in this case, it seems to me that the opposite is unarguable. For, although steadfastly maintaining her unawareness of the close of business term, Mrs Murray stated clearly in her affidavit[64] that, "[i]t was my understanding that the bids would

[63] See para. [47] above
[64] At para. 11

remain open for the entire day of 6th of March 2013, i.e until midnight". In other words, that there would come a point when no further bids would be accepted.

(c) Mr Tomlinson's role (grounds four, five, nine and 14)

[82] There is no appeal from the judge's finding that it was a term of the agreement between the parties that –

> "Mr. Tomlinson in his complete discretion would decide which offer was the best. The decision which bid was to be accepted was to be solely that of Mr. Ken Tomlinson."

[83] Nor has there been any criticism of the view expressed by the judge[65] that –

> "… it is not, I think, for this court to sit on appeal from Mr. Tomlinson's decision. The parties agreed to allow him decide based on his best judgment."

[84] Notwithstanding this, the Murrays complain that, because they were not told beforehand that a cash offer would be preferred over an offer subject to financing, the offer process engaged in by Mr Tomlinson was "unfair and inequitable". It appears to be common ground[66] that, as Miss Davis submitted, the email of 26 February 2013 to which the judge referred "does not reflect a communication of concern of Mr Tomlinson that [the Murrays'] offer was not for cash". But it is difficult to see how, given the fact that Mr Tomlinson was entrusted by the parties with the task of determining, in his "complete discretion", which offer was best, he can be faulted for considering that an

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[65] At para. [38]
[66] Although I was not shown a copy of the email in question

offer for cash was better than an offer subject to finance: while one was certain and virtually immediate, the other was dependent on the approval of a lending agency (described, in the case of the Murrays' final offer on 6 March 2013, as "either NCB or Capital and Credit Merchant Bank"[67]). It seems to me that, having expressly agreed that the decision as to which offer was 'best' was to be Mr Tomlinson's, the parties must be taken to have subjected themselves to his judgment in this regard, based on his own knowledge and experience, subject only to considerations of reasonableness.

[85] The Murrays also complain that Mr Tomlinson ought not to have accepted Mr Petros' final offer without putting to them the covenants sought to be extracted by Mr Petros. But this complaint must equally be subject, it seems to me, to the overriding consideration that the parties had, without any stated reservation, invested Mr Tomlinson with full discretionary authority to decide which offer was best. As has been seen, the judge considered that, in accepting Mr Petros' final offer, Mr Tomlinson did not go outside of his remit, since the conditions laid down in it were not "unusual or in any way unfair", and appeared to be such as "any well drafted contract of this type could reasonably contain".

[86] On a plain reading of the conditions laid down in Mr Petros' final offer[68], it seems clear that each of them was designed simply to ensure that, once the offer was accepted, the Murrays would not do anything to alter the company's financial position

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[67] See para. [28] above
[68] See para. [23] above

between the date of acceptance and completion of the sale. Given that Mrs Murray remained the director with direct oversight of the company's affairs, this was obviously a realistic position. It therefore appears to me that it will be difficult to fault the judge's view that, without such terms, "any effort by the vendor to depreciate the assets in the manner stated would in all likelihood be a breach of an implied good faith term".

[87] The Murrays also complain that, in the light of (i) Mr Tomlinson's admission that he had not read Mr Petros' final offer; and (ii) his view that "there is a probability the offer would fail in respect of the conditionalities", the judge ought not to have granted specific performance. The first part of the complaint is covered by the judge's finding that, by the time Mr Tomlinson came to render his decision to the parties in writing, he had seen Mr Petros' final offer[69]. This was a pure finding of fact, in respect of which there was no contrary evidence.

[88] As regards the second part of the complaint, the judge took the view[70] that "Mr. Tomlinson's answers in cross-examination … reflect his ignorance of the full legal implications of his mandate ... as agent of the parties, [he was] entitled to bind them to any reasonable term". Once it is accepted that, as must now be taken to be common ground, it was for Mr Tomlinson, "in his complete discretion [to] decide which offer was the best", it seems to me to be difficult to argue against this conclusion. Were it

[69] See para. [51] above
[70] See para. [46] of the judgment, set out at para. [52] above

otherwise, as the judge pointed out, "the losing bidder [could] derail the entire process by taking unreasonable objection to otherwise reasonable terms".

[89] For these reasons, I therefore considered that there was no prospect of success on grounds four, five, nine and 14.

(d) The condition precedent/conditional contract issue (grounds seven and eight)

[90] The judge found that the conditions stated in Mr Petros' final offer were "not conditions precedent in the classical sense"[71]. This view followed on from the judge's conclusion that, "Mr. Ken Tomlinson having accepted [Mr Petros'] offer as the best, bound the [Murrays] to honour all the terms of that offer including the giving of the covenant's [sic] stipulated". At least two considerations seem to me to make it difficult to argue to the contrary. First, there is the judge's now unchallenged finding, which I have already discussed, that the decision as to which offer was best was left by the parties to the sole discretion of Mr Tomlinson. Second, there is the plain wording of Mr Petros' final offer, which was that –

> "… in the event of its acceptance, for the period between acceptance of this offer and completion of the sale, the Murrays covenant with Sam Petros that prior to completion and without the prior written consent of Sam Petros, [Tensing Pen] shall not …[etc.]"

[91] Put another way, it was only if and when Mr Tomlinson, in the exercise of the discretion given to him by the parties to do so, accepted the offer, that the Murrays

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[71] See para [52] above

would be bound to enter into the covenants. Looked at in this way, therefore, the conditions were not conditions that were required to come into existence before the formation of the share sale contract, but the terms upon which the contract was to be performed, once it was determined by Mr Tomlinson that Mr Petros' final offer was the best offer.

[92] For these reasons, I therefore considered that there was no prospect of success on the condition precedent/conditional contract issue.

(e) The estoppel issue (ground 10)

[93] This issue arises from the judge's conclusion that the Murrays were "estopped or precluded" from refusing to covenant in the terms stipulated by Mr Petros. It was submitted that the judge's reliance on an estoppel was misplaced, since the doctrine of estoppel requires to be pleaded and proved, neither of which was done in this case. In considering the significance of the judge's reference to estoppel in this context, it is necessary to bear in mind, I think, the true nature of estoppel. Thus, it has been said to be "a complex legal notion, involving a combination of several essential elements – statement to be acted upon, action on the faith of it, resulting detriment to the actor"[72]. There is no question that this is not the cause of action pleaded by Mr Petros in this case. But, as a matter of language, the verb 'to estop' means no more than "to hinder

[72] Per Lord Wright in **Canada & Dominion Sugar Co. Ltd v Canadian National (West Indies) Steamships Ltd** [1946] 3 WWR 759, 764

or preclude"[73]. From the context in which the word "estopped" appears in the judgment, it seems to me that the judge plainly used it in this latter sense, to denote something which in all the circumstances the Murrays could not be allowed to do, given the terms of their agreement with Mr Petros. As the judge said[74]:

> '… I do believe an estoppel arises. This is because it was within the remit of Mr. Tomlinson to 'accept' the best offer. His decision as to which offer was best binds the [Murrays]. They thereby became bound to honour the agreement … Mr. Tomlinson in accepting the offer has not therefore gone outside his remit and the [Murrays] are in consequence bound thereby. They are for that reason estopped or precluded from refusing to covenant accordingly."

[94] So while this may have been a somewhat unguarded use of language, given the issues in this case, it is difficult to see what impact it can have on the overall result, given the judge's conclusion that the Murrays were contractually bound to submit to Mr Tomlinson's decision. For these reasons, I therefore considered that there was no prospect of success on the estoppel issue.

Disposal of the application

[95] Having come to the conclusion that there was no merit in the grounds of appeal, I therefore concluded that, on generally accepted principle, there was no basis for ordering a stay of execution. In the light of this result, Miss Davis realistically accepted

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[73] The Chambers Dictionary, 12th edn, page 528
[74] See para. [52] above

that costs should follow the event. These are therefore my reasons for refusing the application, with costs to the respondent to be agreed or taxed.