

Stay of Execution under Special Circumstances: A Comparative Analysis between Malaysia and United Kingdom

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ABSTRACT

In Civil Litigation, a stay of execution is like a pause button used by the applicant to restrain the execution of the court judgement from being carried out by the opposing party. Fundamentally, for an application for a stay to succeed, the applicant must show special circumstances to justify the grant of a stay. This article will identify and comparatively appraise the procedures to apply for a stay of execution in Malaysia and the United Kingdom. This article will also examine the principles and factors considered by the courts in Malaysia and the United Kingdom in granting a stay of execution. In light of the global impact of the COVID-19 pandemic, this article will also study whether the courts consider COVID-19 as a special circumstance, warranting a stay of execution. In order to achieve these objectives, the methodology used by the researchers is pure legal research and comparative analysis. The findings of this article show that Civil Courts in both Malaysia and the United Kingdom have unqualified discretion to determine the application for a stay of execution. In addition, the onus is on the applicant to demonstrate the existence of special circumstances to justify the grant of a stay of execution in Malaysia and the United Kingdom. The courts will only grant a stay if there are special circumstances.

Keywords: Civil procedure; stay of execution; special circumstances; Covid-19; United Kingdom

INTRODUCTION

A stay of execution is an order of the courts to be applied by the party. The party applied for a stay pending the hearing and determination of the appeal. A stay of execution prevents a judgment creditor from carrying out the legal processes of execution and does not affect rights acquired independently of the process stayed.¹

‘Special circumstances’ must be something which is being continually repeated or so often as to be especially liable to cause an accident.² Generally, special circumstances mean the circumstances which are special, exceptional in character or something that surpasses in some way what is ordinary. Nevertheless, the special circumstances will depend on their facts and the court’s discretion based on established principles. The list of factors constituting special circumstances is indefinite and could grow with time. A stay can be granted only if there are special circumstances sufficient to serve justice for the applicant who applies for a stay.³

This article discusses the legal framework and the procedure to apply for a stay of execution in Malaysia and the United Kingdom. The rationale behind choosing the United Kingdom in the comparative analysis is because the Malaysian

courts rely mainly on English cases by applying the special circumstance test established by the English courts in granting or refusing a stay of execution.⁴ The fundamental principle is that the onus is on the applicant to demonstrate the existence of special circumstances to justify the grant of a stay of execution. This comparative analysis will provide a broad examination of the procedure to apply for a stay of execution and how the courts in both jurisdictions apply the special circumstance test. In light of the COVID-19 pandemic that affects every country on earth, this article will also study whether or not the courts consider COVID-19 as a special circumstance warranting a stay of execution.

This paper will be divided into three sections. The first section of this paper will determine the procedure to apply for a stay of execution in Malaysia. It will be divided into seven subsections to examine the provisions for the stay of execution in Malaysia. The first subsection will determine the procedure to apply for a stay of execution in subordinate courts. The second subsection will identify the provisions of the stay of execution in an appeal from the registrar to a judge in chambers. The third subsection of this paper looks into the stay of execution in an appeal from the High Court to the Court of Appeal. The fourth subsection identifies

the procedure to apply for a stay of execution in an appeal from the Court of Appeal to the Federal Court. Besides, the fifth subsection will examine the special circumstances in the stay of execution during the Covid-19 pandemic. As for the second section, it will determine the stay of execution in the United Kingdom and the special circumstances during the Covid-19 pandemic. Finally, the last section of this paper is the comparative analysis of the stay of execution under special circumstances between Malaysia and the United Kingdom.

PROCEDURE TO APPLY FOR A STAY OF EXECUTION IN MALAYSIA

In Malaysia, it is a settled law that the courts have absolute discretion in deciding whether to grant or refuse a stay of execution.⁵ As a general rule, an appeal shall not operate as a stay of execution unless the court orders.⁶ Except that the unsuccessful party can prove special circumstances supported by justification, the courts will not deprive a successful party of the fruits of litigation until an appeal is determined.⁷

STAY OF EXECUTION IN SUBORDINATE COURTS

Order 55, rule 16 Rules of Court 2012 (“ROC 2012”) mentions that an appeal made from subordinate courts to the High Court and statutory bodies shall not operate as a stay of execution for the decision appealed against. Any applications for it shall be made in the first instance to the court appealed from.

STAY OF EXECUTION IN APPEAL FROM REGISTRAR TO A JUDGE IN CHAMBERS

Furthermore, an appeal from the registrar of the High Court to a judge in chambers is not regarded as a stay of the proceedings as stipulated under Order 56, rule 1(4) ROC 2012.

STAY OF EXECUTION IN APPEAL FROM REGISTRAR TO A JUDGE IN CHAMBERS

The words in Section 73 CJA 1964 show that no appeal shall be regarded as a stay of execution under the decision appealed from except as directed by the courts below or the Court of Appeal. Similarly, Rule 13 Rules of Court of Appeal 1994 (“RCA 1994”) mentions the same.

The procedure to apply stay of execution in an appeal from the High Court to the Court of Appeal must begin with a motion and *inter parte* unless the courts order otherwise. The application must be made in the first instance to the High Court that rendered the judgment. Furthermore, the applicant can make an oral application instantly to the judge upon the decision or order being made or subsequently by way of a Notice of Application (*inter parte*) supported by an affidavit. If the court refuses to grant the stay, the applicants should make the application to the Court of Appeal by Notice of Motion supported by an affidavit according to Rule 27 RCA 1994.

STAY OF EXECUTION IN APPEAL FROM REGISTRAR TO A JUDGE IN CHAMBERS

It is equally well-entrenched that an appeal is not operative as a stay of execution except that the courts below or the Federal Court so orders according to Section 102 CJA 1964. Rule 52 Rules of Federal Court 1995 (“RFC 1995”) mentions that an appeal shall not operate as a stay of execution except that the Court of Appeal or the Federal Court so orders.

The application for a stay may be made immediately or through oral application to the judge at the Court of Appeal or subsequently by way of motion supported by affidavit pursuant to Rule 53 RFC 1995. If the court refuses the application, the application should be made to the Federal Court by way of motion supported by an affidavit according to Rule 66 RFC 1995. The affidavit is mandatory for the applicant to demonstrate that there are special circumstances. The fact that the defendant believes that he has a reasonable chance of success in the appeal is not a ground for the courts to grant the stay.⁸

SPECIAL CIRCUMSTANCES IN STAY OF EXECUTION

The courts have the discretion to grant or refuse a stay of execution pending appeal. The court will only grant a stay if the applicants can demonstrate the existence of special circumstances to justify the stay. The Federal Court in the landmark case of *Kosma Palm Oil Mill Sdn Bhd & Ors V Koperasi Serbausaha Makmur Bhd* held the need to establish the special circumstances to enable the court to grant a stay of execution.⁹ In this case, the Federal Court ruled that the existence of special circumstances

and the appeal will become nugatory are among the factors to be considered by the court in granting a stay application. The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application as stated in the case of *Syarikat Berpakat v Lim Kai Kok*.¹⁰

An unsuccessful party applying for a stay must show the special circumstances. What will constitute special circumstances will vary from case to case. For example, an unsuccessful party may submit that the appeal would be nugatory,¹¹ or the basis of an appeal will destroy¹², or where the integrity of an appeal needs to be maintained,¹³ or where serious injury may befall the stay applicant if a stay is refused, or where serious injury may befall the stay applicant if a stay is refused.¹⁴ Another example of special circumstances that need to be proved is that the execution of the order would destroy the subject matter of the action or deprive the appellant of the means of prosecuting the appeal due to poverty.¹⁵ However, merely showing merits or strong grounds for an appeal or the validity or correctness of the decision appealed from are not special circumstances as per NH Chan J (later JCA) in *Che Wan Development Sdn. Bhd. v Co-operative Central Bank Bhd.*¹⁶ It is noted that this case overruled the decision in *Serangoon Garden Estates Ltd v Ang Keng*¹⁷ where Brown J held that the merits of the appeal should be considered by the court besides correct principles.

To summarise, in granting or refusing the stay application, the court will consider the factors of special circumstances and an appeal would be rendered nugatory if the stay is refused.

WHETHER THE COVID-19 PANDEMIC CONSTITUTES SPECIAL CIRCUMSTANCES?

During the COVID-19 pandemic, the government introduced the Temporary Measures For Reducing The Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (“the Covid-19 Act”) to reduce the impact of COVID-19 for the party who is unable to perform any contractual obligation in various categories of contracts. Hence, the question is whether the poor financial performance of an enterprise during the COVID-19 pandemic constitutes a special circumstance warranting the grant of a stay.

The court in *Chubb Insurance (M) Bhd & Ors v Competition Commission*¹⁸ mentioned that the special circumstances test is applicable under the Competition Law in Malaysia. Pursuant to Section 53 of the Competition Act 2010, when an appeal by the Competition Appeal Tribunal (“CAT”) is pending, the Malaysia Competition Commission’s decision is binding unless the appellant applied for a stay approved by the CAT. According to Section 53 of the Competition Act 2010, the act is silent as to what factors are to be considered by the CAT in deciding whether to grant a stay of a decision made by the Commission pending disposal of the appeal or not. Nevertheless, the CAT considered the public interest in determining the stay application. On the other hand, CAT mentioned that the weak economy as a result of the COVID-19 pandemic could not constitute a special circumstance.

In *Ravichanthiran a/l Ganesan v Lee Kok Sun (menjalankan perniagaan milikan tunggal dengan nama dan gaya sebagai L & L Brother Engineering Services) & Ors and another*¹⁹, the Plaintiff is an advocate and solicitor representing the Second Defendant. The First Defendant was the sole proprietor of the Second Defendant.²⁰ He sued both Defendants for unpaid legal fees. The learned SCJ dismissed the Plaintiff’s claim. Thus, Plaintiff appealed to this court. The Plaintiff drew the Court’s attention to the COVID-19 Act to convince the Court that a stay was necessary. Plaintiff claimed that Sections 7 and 10 of the COVID-19 Act prevented the Defendants from executing the judgment, so the application for a stay shall be allowed. In the instant case, *Evrol Mariette Peters JC* referred to *Tropicana Senibong Sdn Bhd v. Optimus Development Sdn Bhd & Anor [2016] 1 LNS 1091* and held that it is a settled law that a stay for monetary judgment generally will not be granted. The exception is when the Defendants manage to show that the Plaintiff is insolvent and they would be unable to repay them if their appeal had been allowed by the Court of Appeal. The Court adopted the principle in *Kosma Palm Oil* and held that Plaintiff never raised the ground about COVID-19 in his affidavits, so he could not grant a stay to the Plaintiff.

Similarly, in *Kerajaan Malaysia v Tangkas Properties Sdn Bhd & Ors*²¹, the Defendants argued that the amount of taxes in dispute and claimed by the Plaintiff is very substantial, which is RM 2,418,157.88 (inclusive of additional taxes and late payment penalty), such that if a stay of proceedings is not granted, a judgment may be ultimately entered

against the defendants. The Defendants' reputation will suffer serious damage. Further, the Defendants suffer a financial crisis arising from the COVID-19 pandemic. Mohd Nazlan Mohd Ghazali J held that payment of a large sum of money or tax does not constitute a special circumstance.

As mentioned in the case of Ravichanthiran a/l Ganesan, it is a settled law that a stay for monetary judgment generally will not be granted subject to the exception, where the Plaintiff is insolvent and they would be unable to repay them if their appeal had been allowed by the Court of Appeal. The question is, how about its position during the COVID-19 pandemic? According to a decided case, Respondent's tenant and its guarantors ("Appellants") applied for a stay of execution for the Summary Judgment, which was granted in favour of Suria KLCC Sdn. Bhd ("Respondent"). The Summary Judgment concerned the execution of winding up proceeding against the Appellants. The High Court held that the COVID-19 pandemic falls under special circumstances, but the court excluded winding up proceedings from the stay order granted and directed Appellant to pay costs to Respondent. This decision shows that the COVID-19 pandemic will be considered by the court in the stay application, although the summary judgment is purely monetary in nature.²²

On the other hand, it has been established that a decision made by a public-decision-making body could be stayed by a court's order pending the judicial review of the decision. This was expounded in the case of AIA Bhd v Ketua Pengarah Hasil Dalam Negeri.²³ In this case, respondent, the Director General of Inland Revenue, had found that the applicant, AIA Bhd had received the reinsurance commissions and profits commissions from the reinsurance companies. The applicant was requested by respondent to pay RM92,553,840.66 as additional taxes and penalties for three years, i.e., 2015, 2016 and 2017, based on the notices of additional assessment and audit finding letters ("the decision"). The applicant applied for a stay of execution of the decision pending final determination of the judicial review. Noorin Badaruddin J took into consideration the current COVID-19 pandemic and the importance of the insurance industry to the public and granted the stay of execution to the applicant. Thus, it can be concluded that the Malaysian courts will consider the COVID-19 pandemic when determining the application for a stay.

ANALYSIS

The Malaysian courts acknowledged that the Covid-19 pandemic is a very unusual phenomenon suffered by all levels of society. The authors observed that allowing or refusing the Covid-19 pandemic as a special circumstance would depend on the facts of the cases. The findings are that the Covid-19 pandemic could not constitute a special circumstance in situations as follows:

1. The courts have the discretion to grant or refuse a stay of execution. In Chubb Insurance (M) Bhd & Ors case, although MyCC had granted a moratorium in the payment of the financial penalty and the appellant was facing financial difficulty, MyCC had the final discretion in this issue. Also, the courts would not consider granting a stay if the applicant failed to demonstrate the existence of the special circumstance to justify the stay.
2. Non-compliance with the procedures. In the Ravichanthiran a/l Ganesan case, it shows the importance of complying with the principle enunciated in Kosma Palm Oil. As a matter of practice, the applicants should demonstrate the existence of special circumstances to justify the grant of a stay of execution. They must be deposed in the affidavit filed in support of the application. This is also applicable in the Covid-19 situation. Hence, the authors suggested that all litigants strictly comply with such a procedure. Besides, the 'inability' to pay during Covid-19 must be supported by evidence. If this requirement was not satisfied, the courts would refuse to grant a stay.
3. The ground of colossal financial damage shall not constitute a special circumstance and is not nugatory. This is because the courts would not consider the nugatory argument especially when it involves tax payment where there would be no concerns of the appeal being rendered nugatory since any tax collection from the taxpayer can be refunded by the DGIR empowered to collect taxes.

The authors also found that the Covid-19 pandemic could constitute a special circumstance in situations when it involves public interest. Public policy consideration is one of the factors which constitute a special circumstance for granting a stay. For instance, the courts took into account the Covid-19 pandemic as shown in AIA Bhd v Ketua

Pengaruh Hasil Dalam Negeri because the insurance company will provide protection and financial support to their customers who were infected with Covid-19. The consequence of not allowing the stay would affect policyholders such as Malaysian citizens and companies

STAY OF EXECUTION IN THE UNITED KINGDOM

A stay of execution is a court order that prevents any planned action from taking assets and selling them to pay off a debt. If a company cannot serve a money judgment or order immediately, the court may grant a stay of execution. A stay of execution simply prevents the judgment creditor from carrying out the legal processes of execution; it has no bearing on rights earned outside the stayed process.²⁴

The court in the United Kingdom has absolute and unrestricted discretion in granting or refusing a stay of execution, as well as deciding the terms on which it will grant it. As a general rule, the court will grant a stay only in special circumstances, which must be deposed to by affidavit.²⁵ Because these powers are cumulative, not exclusive, in their operation, the court's power to stay of execution may be invoked under specific statutory provisions or the Civil Procedure Rules 1998 ("CPR") in addition to or instead of a stay under its inherent jurisdiction.²⁶ The Arbitration Act 1996, the Insolvency Act 1986, the Domicile and Matrimonial Proceedings Act 1973, the Law Reform (Husband and Wife) Act 1962, and the Supreme Court Act 1981 are among the non-exhaustive acts that give courts the power to stay of execution.²⁷

Unless the CPR states otherwise, the court may stay the whole or part of any execution or judgment indefinitely or until a specific date or event happens.²⁸ A party impacted by order may seek to have it stayed if the court makes it without hearing the parties or providing them with a chance to make representations.²⁹ The order must include a statement of the right to do so. A party may ask for the order to be set aside, varied or stayed if it is made by the court.³⁰ These powers are part of the court's general case management powers under CPR 1998.

An appeal does not function as a stay unless the appellate court or the lower court orders otherwise, or the appeal is from the Asylum and Immigration Tribunal.³¹ In *Hyams v Plender*³² The Court of Appeal stressed that the appellate court is unlikely to grant those seeking to appeal any relief, such as a

stay of the order, unless it can consider the reasons given by the judge in the court below for making the order. This case reflects the provision under the CPR 1998 that the Court of Appeal has the power to issue a stay of execution pending the outcome of an appeal. The effect of CPR 52.16 is that both the Court of Appeal and the lower court have concurrent jurisdiction to grant or deny an application for a stay of execution of a judgement. According to the *Hyam's* case, after a notice of appeal has been submitted, the exclusive jurisdiction to order a stay rests with the Court of Appeal.

PRINCIPLES AND FACTORS REFERRED BY THE ENGLISH COURTS TO GRANT A STAY OF EXECUTION

The court has absolute and unfettered discretion in granting or refusing a stay. The applicant must show that special circumstances exist in order for the court to issue a stay of execution. This requirement, which must be met before a stay of execution can be granted, is satisfied when there are special circumstances that justify granting a stay. The reasons must be related to the enforcement of the judgment. The special circumstances must be explained in the affidavit supporting the application. This must be proven in the affidavit if it is asserted that the unsuccessful party will not be reimbursed even if its appeal is successful for whatever reason, such as the opposing party's insolvency. This assertion must be supported by evidence.³³ The common-law rule established by the case of *The Annot Lyle*³⁴ is that an appeal shall not function as a stay of execution unless the court orders.

*Atkins v Great Western Railway Co.*³⁵ stated that a stay may be granted if the appellant produces written evidence showing that if the damages and costs were to be paid, there would be no reasonable probability of getting it back if the appeal were to succeed. For many years the courts have followed this principle. When deciding on an application for stay of execution, the court does not deprive a successful litigant of the fruits of his litigation, and locks up funds to which prima facie he is entitled, pending an appeal.³⁶ In other words, even though a successful litigant may be denied his or her share of a successful case's proceeds, the court does not lock away monies to which the successful litigant is entitled until an appeal has been filed. Although the right to appeal is undeniable, the court should make sure that the appeal, if successful, is not nugatory.³⁷

This means that if the other side wins their appeal, the party will have no obstacles to enforcing any ruling in its favour.³⁸ If the appeal is successful, the failed party may be allowed to return to their former position. So long as it can be proven that damages and expenses will not be returned in the event of an appeal, an order of stay will be issued.³⁹

However, the existence of solid grounds for an appeal does not automatically justify granting a stay. In *Atkins*, Lord Esher MR refused a stay, stating that there were substantial grounds for appeal was irrelevant; no one should appeal unless they had compelling reasons to do so.⁴⁰ The claims of misdirection, that the judgment was against the weight of evidence, and that there was no evidence to support it are not special circumstances on which the Court will give a stay of execution, according to Lord Esher MR in *Monk v. Bartram*.⁴¹

PROCEDURE TO APPLY FOR A STAY OF EXECUTION IN THE UNITED KINGDOM

Application for a stay of execution is made by summons or motion on notice, and must be served with an affidavit setting forth good and substantial reasons for a stay.⁴² When a judgement or order is issued for the payment of money by any person, the defendant, who can be either the judgement debtor or another party liable to execution, may apply to the court for a stay of execution of a writ of control or a warrant, either absolutely or for a specific period of time, if the court is satisfied that there are special circumstances that render it inconvenient to enforce the judgement or order or that the applicant is unable from a legal or financial standpoint to pay the money.⁴³

If the application is not made at the time of judgement or order is issued, it must be made under Part 23 of the Civil Procedure Rules and may be so made notwithstanding that the party liable to execution did not acknowledge service of the claim form or serve a defence or take any previous part in the proceedings.⁴⁴ It is necessary that the reasons for making such a request be clearly stated in the application notice and be supported by a witness statement or affidavit signed by or on behalf of the applicant.⁴⁵ The application notice and a copy of the supporting witness statement or affidavit must be served to the party authorised to enforce the judgement or order not less than four clear days before the hearing.⁴⁶ An order staying execution under these provisions may be varied or revoked by a subsequent order.⁴⁷

WHETHER THE COVID-19 PANDEMIC CONSTITUTES SPECIAL CIRCUMSTANCES IN THE UNITED KINGDOM

In *Toppa Holdings Ltd and another v Simply Construct (UK) LLP*,⁴⁸ the defendant (Simply) sought a stay of execution because that the claimants would most likely be unable to repay the sums awarded, if required to do so in later proceedings. The court found no evidence that either Covid-19 or the reputational issues referred to have or will have a significant impact on the claimants' financial performance. Accordingly, the defendant failed to establish that the claimants would probably be unable to repay the judgment sum when it fell due.

Given the circumstances surrounding the case involving *Toppa Holdings Ltd.*, it is abundantly evident that the financial standing of a party implicated in the Covid-19 pandemic is one of the factors that the English court takes into consideration. However, the court presiding over this matter does not believe Covid-19 to be special circumstances under which a stay should be granted because there was no evidence to support the claim that Covid-19 would have a significant influence on the financial performance of the claimants. Hence, the court will only consider Covid-19 as special circumstances to grant a stay when a party can adduce strong evidence that their financial situation suffers from the impact of Covid-19.

In *Broseley London Ltd v Prime Asset Management Ltd (Trustee of the Mashel Family Trust)*,⁴⁹ the defendant (PAML) applied for a stay of execution for the entire judgement sum that the probable inability of the claimant (BLL) to repay the judgement sum at the end of the trial of the underlying issues between the parties. In determining the financial position of the BLL, the court referred to a list of BLL's current projects and projects BLL has won. The court accepted that the Covid-19 emergency measures might well impact whether all these projects will continue or commence, as the case may be. However, it is not reasonable to assume that BLL will eventually be unable to repay the judgement sum because of Covid-19. The court found that if PAML had moved with due diligence, it could have had a result by adjudication of its alleged entitlements before the Covid-19 crisis blew up, and at a time when BLL would have been able to repay. When the defendant did not take any steps to litigate against BLL, this was considered a lack of due diligence on their part. In other words, PAML chose to take other steps to avoid paying BLL, which were

inconsistent with its litigating against BLL to obtain a final determination. For these reasons, the court rejected the ground. Consequently, the defendant's application for a stay was dismissed.

Broseley London's case demonstrates that the English court does consider the financial position of the parties affected by Covid-19. However, the court, in this case, does not consider Covid-19 as special circumstances to grant a stay because the main reason for the inability of BLL to repay the judgement sum was the lack of due diligence by the PAML. The court concluded that if PAML had acted responsibly, it would have been possible for it to have obtained a result by adjudication of its alleged entitlements before the Covid-19 issue erupted, and at a time when BLL would have been able to repay. Thus, a party cannot apply for a stay on the ground that a party's financial position is affected by Covid-19 when the reason for a party's inability to repay the judgement sum is their lack of due diligence.

In light of the English cases discussed above, the English court does not consider Covid-19 as special circumstances in the following situations:

1. No evidence to support the claim that Covid-19 would have a major influence on the financial performance.
2. Lack of due diligence is the main reason why a party could not pay the amount of the judgement.

COMPARATIVE ANALYSIS BETWEEN MALAYSIA AND UNITED KINGDOM

This section will compare the similarities and differences between the stay of execution and the special circumstances in both Malaysia and United Kingdom jurisdictions. Firstly, it is trite law in both jurisdictions that the court has an absolute and unfettered discretion to grant or refuse an application for a stay. Allowing a stay is entirely up to the judge's discretion, which must be done with care based on the need for fairness in each situation.

Secondly, it is observed that the stay of execution pending appeal in Malaysia and the United Kingdom will not be granted unless there are special circumstances. This can be seen from Malaysia's provision on Order 47 rule 1(1) ROC 2012 and the United Kingdom's provision on CPR 83.7(4). Both provisions show the same requirement which must be fulfilled in order to satisfy the court to grant a stay on the application made at the time of the judgement or order which are as follows: there are special circumstances which render it inexpedient to

enforce the judgment or order, or that the applicant is unable from any cause to pay the money.

Thirdly, under both jurisdictions, the applicant has the burden to prove special circumstances. The applicant must submit an affidavit detailing the special circumstances; this information should not be omitted from the submissions process. This procedure is applied by both courts in Malaysia and the United Kingdom. The Malaysia Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* demonstrates this approach, stating that the burden of proving special circumstances is with the applicants to obtain a stay of execution. Similarly, the court in *Atkins v The Great Western Railway Company* stated that the only ground for such a stay was an affidavit showing that if the damages and costs were paid, there was a reasonable probability of getting them back even if the appeal succeeded. Therefore, the courts will only grant a stay of execution if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application.

Fourth, Malaysia and English courts agree that an appeal does not operate as a stay. This is done in accordance with the principle that a stay of execution will be granted so that a successful litigant is not deprived of an immediate harvest of the fruits of litigation.⁵⁰ This can be illustrated by the decision made by the House of Lords in *Smith, Hogg & Co Ltd v The Black Sea & Baltic General Insurance Co Ltd*, which held that a stay of execution during an appeal would not be allowed unless there are very exceptional circumstances. For example, a stay will be refused where execution will damage the action's subject matter or deprive the appellant of the ability to pursue the appeal. Hence, the Malaysian courts and the United Kingdom courts will only grant a stay if the applicants can demonstrate the existence of special circumstances to justify the stay.

Next, the author observed that some Malaysian courts had allowed COVID-19 as a special circumstance, but some courts have refused to consider COVID-19 as a special circumstance. In Malaysia, the issue started to arise when the party could not pay due to financial difficulty. Hence, the losing party filed an application for a stay of execution.

The findings of this issue are that the COVID-19 pandemic did not constitute a special circumstance in Malaysia and the United Kingdom when the party failed to comply with the procedures. As a matter of practice, the applicants must demonstrate the existence of special circumstances to justify the

grant of a stay of execution. They must be deposed in the affidavit filed in support of the application. Hence, the authors suggested that all litigants strictly comply with such procedure.

Besides, the 'inability' to pay during Covid-19 must be supported by evidence. About this, the United Kingdom does not consider Covid-19 as a special circumstance when there is a lack of due diligence on the reasons provided by a party that they could not pay the amount of the judgement. If this requirement were not satisfied, the Malaysian and United Kingdom courts would refuse to grant a stay.⁵¹

On the other hand, the Covid-19 pandemic could constitute a special circumstance in situations when it involves public interest. Public policy consideration is one of the factors which constitute special circumstances for granting a stay. However, the authors did not find any related facts in the United Kingdom cases to be compared with Malaysian cases.

CONCLUSION

Execution stays in Malaysia and the United Kingdom have the same effect as pressing the pause button. The court's order or decision can be put on hold awaiting the outcome of the appeal hearing. If the court decides that a trial or hearing of the claim should be avoided, it will do so in order to protect the other party from unfair prejudice or procedural abuse and to protect the court's time and resources.⁵²

The court in Malaysia and the United Kingdom have inherent discretion to hear and decide the application for a stay of execution. It is a fundamental principle in Malaysia and the United Kingdom that the burden of proof falls on the applicant to show that there are special circumstances justifying a stay of execution. A stay will be granted only in special circumstances. The court will not deprive a successful party of the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances to justify it. In each situation, the existence of special circumstances is a matter of fact. It must be special and neither ordinary nor common.

The courts in Malaysia and the United Kingdom are cautious about granting a stay of execution with Covid-19 under special circumstances. It has been found that a party will utilise Covid-19 as special circumstances to apply for a stay when a party is unable to repay the judgement sum. In matters involving financial situations arising from Covid-19,

the court will take into account the Covid-19 pandemic depending on the facts of each case. For Covid-19 to constitute as special circumstances, it must be supported by solid reasons that can justify the court to grant a stay. The court agrees that Covid-19 constitutes special circumstances warranting a stay when the party who raises this argument can show that their financial position has gotten worse because of the impact of Covid-19. As a result, they cannot pay the judgement sum without the risk of loss or severe harm. The English courts do not entertain any party who tries to utilise Covid-19 to avoid paying a judgement sum because of inadequate due diligence actions. There must be sufficient evidence to satisfy the court that Covid-19 has a significant influence on the financial position.

Both courts relied on the same principles to guide them in granting or refusing a stay. This is because the Malaysian courts relied heavily on the principles established by the common law. It is important for a party to ensure that they have a strong ground before applying for a stay. This is because the court will refuse a stay if there are no strong grounds for the application. Thus no one should apply for a stay unless they have compelling reasons.

NOTES

- ¹ Clifton Securities Ltd v Huntley [1948] 2 All ER 283.
- ² Harris v Ruhby Portland Cement Co Ltd [1955] 2 All ER 500.
- ³ Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86.
- ⁴ Atkins v Great Western Railway Co. (1886) 2 TLR 400.
- ⁵ Halsbury's Laws of Malaysia - Civil Procedure (Volumes 7(1) and 7(2)).
- ⁶ Kosma Palm Oil Mill Sdn Bhd v. Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257.
- ⁷ Kosma Palm Oil Mill Sdn Bhd v. Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257.
- ⁸ Teh Yih Shen [1986] 2 MLJ 65.
- ⁹ Kosma Palm Oil Mill Sdn Bhd v. Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257.
- ¹⁰ Syarikat Berpakat v Lim Kai Kok [1983] 1 MLJ 406.
- ¹¹ Teow Guan & Ors V Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598.
- ¹² Kosma Palm Oil Mill Sdn Bhd & Ors V Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257.
- ¹³ Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd (No 3) [2006] 5 MLJ 372.
- ¹⁴ Ang Sue Khoon v Majlis Bandaraya Pulau Pinang [2016] 11 MLJ 516 referred to Siglin V Choules BC200106081.
- ¹⁵ Re Kong Thai Sawmill [1976] 1 MLJ 131.
- ¹⁶ Che Wan Development Sdn. Bhd. v Co-operative Central Bank Bhd [1989] 3 MLJ 40.
- ¹⁷ Serangoon Garden Estates Ltd v Ang Keng [1953] MLJ 116.
- ¹⁸ Chubb Insurance (M) Bhd & Ors v Competition Commission [2021] 11 MLJ 189.

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