CPIT Investments Limited
v
Qilin World Capital Limited and another

[2017] SGHC(I) 07

Singapore International Commercial Court — Suit No 5 of 2016 (Summons No 21 of 2017)
Vivian Ramsey IJ
28 July 2017

Civil procedure — Stay of execution

Vivian Ramsey IJ (delivering the judgment of the court *ex tempore*):

Introduction

1 This judgment deals with the principles to be applied to an application to stay execution of a judgment in the Singapore International Commercial Court ("SICC") pending an appeal.

2 Summons No 21 of 2017 ("the Summons") is an application by the Second Defendant ("Qilin") to seek a stay of execution of my judgment handed down in Suit No 5 of 2016 on 17 July 2017 ("the Stay Application"): see *CPIT Investments Limited v Qilin World Capital Limited and another* [2017] SGHC(I) 5 ("the Judgment"). The stay is sought until Qilin's appeal from the Judgment in Civil Appeal No 126 of 2017 ("the Appeal") is determined.

3 In the Judgment, I found there was a constructive trust in respect of proceeds which had come from an unlawful sale for HK$62.5m of the 25,000,000 shares in Millennium Pacific Group Holdings Limited ("Millennium") that the Plaintiff ("CPIT") had provided to Qilin in exchange for a non-recourse loan ("the Pledged Shares"), leading to HK$31.25m being held on trust by Qilin as the proceeds of the sale of the Pledged Shares (at [300(a)]). I also ordered an account be taken of the profits made by Qilin in respect of that sum held on trust (at [300(b)]).

Background

4 Pursuant to the terms of a consent order dated 12 February 2016 and a solicitors' undertaking dated 15 February 2016, the sum of HK$27,532,000 is currently held in Qilin's solicitors' trust account as security for CPIT's claim in these proceedings. The sum is to be released within 14 days from receipt of a written demand from CPIT's solicitors. Given that CPIT's solicitors have issued a written demand on 18 July 2017, the sum would be payable on 1 August 2017.

5 In those circumstances, Qilin now seeks a stay of the enforcement of the Judgment, in particular in relation to the solicitors' undertaking and the sums which are held there, pending the Appeal.

6 The grounds on which Qilin seeks to stay the enforcement of the Judgment are set out in the affidavit of Wilbur VI Morgan James ("Mr Wilbur") dated 21 July 2017. Mr Wilbur is a US citizen who gave evidence before me during the course of the trial. In addition, I have seen written submissions which were submitted shortly before this hearing which outlined the legal position on a stay of execution in Singapore and also set out what Qilin says are the merits of the appeal.

7 I therefore take those matters into account when I consider whether it is appropriate in this case to grant a stay of execution.

The applicable legal principles

8 The position in Singapore, similar to other common law jurisdiction, is set out succinctly by Yong Pung How CJ in *Lee Sian Hee (trading as Lee Sian Hee Pork Trader) v Oh Kheng Soon (trading as Ban Hon Trading Enterprise)* [1991] 2 SLR(R) 869 ("*Lee Sian Hee*") at [5], which has been cited in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 at [14] and also in *Denis Matthew Harte v Tan Hun Hoe and another* [2001] SGHC 19 ("*Denis Matthew Harte*") at [61]. Yong CJ said in *Lee Sian Hee* (at [5]) that:

> While the court has power to grant a stay, and this is entirely in the discretion of the court, the discretion must be exercised in accordance with well-established principles (*Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1990] 1 SLR(R) 772). First, as a general proposition, the court does not deprive a successful litigant of the fruits of his litigation, and lock up funds to which *prima facie* he is entitled, pending an appeal (*The Annot Lyle* (1886) 11 PD 114 at 116). However, when a party is exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory (*Wilson v Church (No 2)* (1879) 12 Ch D 454 at 458–459). Thus, a stay will be granted if it can be shown by affidavit that, if the damages and costs are paid, there is no reasonable probability of getting them back, if the appeal succeeds (*Atkins v The Great Western Railway Co* (1886) 2 TLR 400).

9 Those are the principles which have been applied in the subsequent cases, and they are clearly the principles which are to apply in this case in the SICC.

My decision

10 The first question relates to the merits of the appeal. In this case, Qilin pursues an appeal which is substantially on grounds that were not argued before me, and I consider that this is not a case where there is something in the merits of the appeal which would justify a stay, by being some special circumstances, if there were not other grounds for showing that if the damages and costs were paid, there will be no reasonable probability of getting them back.

11 Therefore, I concentrate, for the purpose of this application, on the question of whether if the sum of HK$27,532,000 were paid, there is "no reasonable probability of getting them back, if the appeal succeeds", to use the words of Yong CJ in *Lian See Hee* ([8] *supra*).

12 In this case, the evidence I have before me is limited to the affidavit of Mr Wilbur. It is clearly the burden of the party who seeks to stay proceedings to put forward some convincing grounds in the affidavit. If those convincing grounds are put forward, then the opposing party to a stay has an obligation to put in an affidavit in response, setting out why what is said is incorrect.

13 In the present case, the matters relied upon are summarised in para 15 onwards of Mr Wilbur's affidavit. There, he deposes to the fact that in April 2017, CPIT sold 993,000,000 shares in Millennium at a low value. And he says that, to the best of his knowledge, those shares were the only assets belonging to CPIT. Mr Wilbur then says that it is clear from the above that CPIT is not in a healthy financial condition and there is a serious risk, if a stay of execution is not granted pending the appeal, that Qilin will not see the return of the money if the appeal succeeds. He says that as CPIT has already liquidated the sole asset, it is essentially a shell company and there are grave

concerns that if a stay of execution is not granted pending the appeal, the appeal would be rendered nugatory.

14 The main evidence I have before me, as Ms Wendy Tan ("Ms Tan") acting on behalf of CPIT has shown, is at p 130 of the affidavit of Mr Wilbur. At the bottom of that page, it explains the circumstances in which the sale of the shares took place. It says pursuant to that agreement, "CPIT Investments has agreed to sell and the Offeror has agreed to purchase 993,000,000 Sale Shares, representing approximately 18.99% of the entire issued share capital of the Company as at the Last Trading Day at the consideration of HK$66,531,000 in cash, representing HK$0.067 per Sale Share". And it continues to say that that sum is the consideration for this transaction.

15 It therefore follows, although Mr Wilbur does not say so in his affidavit, that CPIT has received a sum of HK$66m. Added to that, as Mr Renganathan Nandakumar ("Mr Nandakumar") acting on behalf of Qilin has pointed out, there is also a sum of some HK$3.9m in the value of the remaining Millennium shares. That means that there is altogether, on the evidence which has been put before me by Mr Wilbur, a sum of about HK$70m, which is shown on the evidence to have been the asset of CPIT as at the end of April 2017.

16 The question therefore is whether, in accordance with Yong CJ's statement in *Lee Sian Hee*, it has been shown by affidavit that, if the damages and costs are paid, there is no reasonable probability of getting that sum back. The evidence therefore has to show that, if a stay were not granted, there would not be a reasonable probability of the HK$27,532,000 from Qilin's solicitors' account, being returned to Qilin if the appeal succeeded. It seems to me on the affidavit evidence, where there is evidence that CPIT had assets of

HK$70m as shown on the documents, it is not possible for me to say that there is no reasonable probability of Qilin getting back some HK$27m if the appeal succeeds. On that basis, I do not consider that this is a case where a stay should be granted.

17 It is said that CPIT, being a BVI company and not publishing accounts, should have put forward some evidence of their financial status. However, as I have indicated, I consider that a party only needs to do so if they wish to challenge the matters set out in the affidavit. The particular matters, which are set out in Mr Wilbur's affidavit, do not seem to me to justify a response if CPIT merely wishes to rely on what is said there.

18 I should add that in the SICC, there are necessarily parties from foreign jurisdictions. In the present case, Qilin and CPIT are both BVI registered companies. That, as the authorities show (see *Denis Matthew Harte* ([8] *supra*) at [64]), is not in itself a sufficient ground for there to be a stay of execution of a judgment pending an appeal.

19 The fact that both parties in this case have decided that they should be registered companies in jurisdictions where the full financial status of the company is not made evident is not something which I consider the court, taking all the circumstances into consideration, should give weight to. Whilst in other jurisdictions it is possible to obtain financial information as to the financial status of a company, I do not consider that this means that, where that information is not available, the court should draw an inference that the company does not have assets because of the absence of the information. Whilst a party might wish to put evidence before the court to answer otherwise compelling evidence as to the absence of assets, I do not consider that, as in Mr Wilbur's affidavit in this case, a party can make mere assertions,

unsupported by evidence, as to the absence of assets and expect the other party to provide financial information which is otherwise protected by registration in a foreign jurisdiction. Equally, the difficulty of enforcing a judgment against CPIT, a BVI company, or against any assets in Hong Kong, is not a sufficient ground for a stay, as recognised in *Denis Matthew Harte* ([8] *supra*) at [65] and [66].

20 In those circumstances, for the reasons I have given, I do not grant a stay in this case.

Partial stay pending application to Court of Appeal

21 Mr Nandakumar next makes an oral application for the court to grant what he describes as an "interim stay" of execution of the orders pending Qilin's application to the Court of Appeal to stay the proceedings pending the Appeal. To this end, Mr Nandakumar relies on *Naseer Ahmad Akhtar v Suresh Agarwal and another* [2015] 5 SLR 1032 ("*Naseer Ahmad Akhtar*"), where Hoo Sheau Peng JC ordered a *partial* stay of execution of the orders in those proceedings pending an application to the Court of Appeal for a *full* stay. The High Court's power to order such a partial stay was explained by Hoo JC in the following terms (at [108]):

> … It has long been held, since the old case of *Cropper v Smith* (1883) 24 Ch D 305, that the High Court and the Court of Appeal possess concurrent jurisdiction as to the staying of proceedings pending an appeal (at 311, *per* Brett MR). This was approved of in *Au Wai Pang v AG* [2014] 3 SLR 357 at [76]–[78], where the Court of Appeal explained that an application to the Court of Appeal for a stay under O 57 r 15 of the ROC is not, strictly speaking, an appeal but an application in the first instance. What is being invoked is the "incidental appellate jurisdiction" of the Court of Appeal: the Court of Appeal was assuming the "jurisdiction and powers of the court below" for the purpose of hearing matters which are "incidental to the hearing and determination of an appeal" of which an application for a stay of execution of the judgment is

> one (at [70]). However, the Court of Appeal explained that even though the jurisdiction of both courts is concurrent, the Court of Appeal would not, because of O 57 r 16(4), exercise its jurisdiction to hear the stay application unless an application had first been brought before the High Court and refused.

22 Ms Tan opposes Qilin's oral application. She argues that it is inconceivable that a partial stay should be granted in every situation where a renewed application has to be made to the Court of Appeal for a stay, and that the court's decision in *Naseer Ahmad Akhtar* ought to be restricted to the confines of its specific facts. She also asserts CPIT's *prima facie* entitlement to the sums demanded under the solicitors' undertaking dated 15 February 2016 – Qilin could have specifically provided for payment to be made only after any appeal has been disposed of, but it did not; Qilin cannot now attempt to rewrite the terms of the undertaking by seeking this partial stay.

23 In my judgment, when an application is made for a stay in proceedings, and where the law on the application for a stay is clear, and where the evidence before the court is clear, then it is not generally for a first instance judge to decide not to give effect to the decision that has been made, so as to allow yet a further application to be made to deal with a stay of proceedings. I have come to the clear conclusion that based upon settled law and the facts of this case, there should not be a stay. And I do not consider that this is a case where I should grant a partial stay pending any application to the Court of Appeal.

24 I also think there is some strength in what is said by CPIT in this case. This is not a case where CPIT is seeking immediately to enforce the full judgment. The position is that Qilin by its solicitors gave a solicitors' undertaking to pay a certain sum once a particular period had passed from an order. And that, it seems to me, is a factor that I should take into account in

considering whether or not to grant a partial stay pending any application to the Court of Appeal. That is a further reason why in this particular instance I should not grant a partial stay pending any application to the Court of Appeal.

Costs

25 CPIT submits that costs of both the original application for a stay of orders pending the Appeal and the oral application for a partial stay should be awarded in favour of CPIT, to be fixed at S$6,000 plus disbursements. Qilin, on the other hand, asks for the costs of this application to be in the cause: the stay sought in these proceedings is a necessary part of the Appeal and the Appeal would have a necessary effect on the stay application as well. Qilin also alternatively asks, should the court decide that the costs should follow the event, for costs to be fixed in favour of CPIT at about S$3,000.

26 An application for stay, it seems to me, is a separate matter which should be considered on its merits rather than as part of the appeal. In those circumstances, I consider that CPIT should have their costs of the stay application. However, the stay application has not taken a full day. There have been no affidavits or written submissions produced by CPIT. In those circumstances, I consider that the appropriate figure would be S$4,000 plus disbursements.

Conclusion

27 For all of the reasons set out above, I dismiss Qilin's application for a stay of orders pending the Appeal as well as Qilin's oral application for a partial stay pending any application to the Court of Appeal for a stay. I also award costs in favour of CPIT, to be fixed at S$4,000 plus disbursements.

Vivian Ramsey
International Judge

Tan Poh Ling Wendy and Chua Han Yuan, Kenneth (Morgan Lewis Stamford LLC) for the plaintiff;
Renganathan Nandakumar, Sharon Chong Chin Yee and Nandhu (RHTLaw Taylor Wessing LLP) for the defendants.