IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 51

Civil Appeal No 184 of 2019

Between

PUBG Corporation

… *Appellant*

And

(1) Garena International I Private Limited
(2) Li Xiaodong
(3) Garena Limited
(4) Sea Limited (formerly known as Garena Interactive Holding Limited)
(5) Garena Online Private Limited

… *Respondents*

EX TEMPORE JUDGMENT

[Arbitration] — [Stay of court proceedings] — [Case management stay of proceedings] — [Validity of settlement agreement containing arbitration clause]

PUBG Corp
v
Garena International I Pte Ltd and others

[2020] SGCA 51

Court of Appeal — Civil Appeal No 184 of 2019
Sundaresh Menon CJ and Quentin Loh J
19 May 2020

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Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

Introduction

1 This is an appeal against the decision of a High Court judge ("the Judge"), who ordered that pending court proceedings between the present parties be stayed. The Judge made this order on case management grounds, given that there was a related issue between the same parties that had been submitted to arbitration. She thought that it was logical for the arbitration to be resolved before the court proceedings were allowed to proceed. By way of a brief outline, the appellant, PUBG Corporation, commenced an action against the five respondents in the High Court alleging the infringement of its intellectual property rights. The parties entered into negotiations in an attempt to reach a settlement. The respondents contend that a settlement agreement was concluded and that it contains an arbitration clause. The appellant disputed that a valid settlement was concluded and wished to prosecute the proceedings it

commenced in court. Faced with this position, the respondents commenced arbitration against the appellant to determine the validity of the settlement ("the Arbitration"). The Judge decided that the court proceedings should be stayed pending the resolution of the Arbitration. The sole question for us is whether she was correct in that determination. For the reasons that follow, we agree with the Judge and therefore dismiss the present appeal.

Background facts

2 The appellant is the developer of a popular computer software game, and on 23 March 2018 it commenced court proceedings against the five respondents, alleging copyright infringement and passing off.

3 Between September and November 2018, timelines in the court proceedings were suspended to allow the parties to reach a settlement. On 14 November 2018, the appellant offered settlement on certain terms by signing and sending a proposed settlement agreement (hereinafter, "the SA") to the respondents by email. The respondents did not countersign or otherwise indicate their acceptance of the settlement terms for a considerable time. According to the appellant, this was because the settlement discussions in respect of the court proceedings took place in the context of wider negotiations involving the licensing of the appellant's computer game to the respondents in other regions. The appellant contends that it was aware that the respondents would not sign the SA until all negotiations were concluded. It is undisputed that the respondents did not sign the SA for several months.

4 On 12 April 2019, seemingly without any prior intimation, the respondents purported to accept the appellant's offer of settlement by countersigning the SA and returning it by email to the appellant's solicitors. The appellant's solicitors responded on 16 April 2019, protesting that the offer

contained in the SA was no longer capable of being accepted, and that accordingly there was no valid settlement.

5 Clause 7.2 of the SA provides for "any dispute, controversy, claim or difference of any kind" arising in connection with the SA to be resolved by arbitration. Pursuant to cl 7.2, on 29 April 2019, the respondents commenced the Arbitration against the appellant, contending that it had acted in breach of the terms of the SA by refusing to recognise the existence of a binding settlement.

6 On 30 April 2019, the respondents applied for a stay of the court proceedings on case management grounds, pending the resolution of the Arbitration. It may be noted that the key issue in the Arbitration is the validity of the SA, and whether it effects a full and final settlement of all the claims which constitute the subject-matter of the proceedings in court.

7 In the meantime, the Arbitration has been progressing steadily. A three-member tribunal was appointed by the parties, with the participation of the appellant, and the hearing has been fixed for 3 August 2020. The parties have filed their respective written cases in the Arbitration. The appellant estimates that the tribunal is expected to render its award sometime in November 2020, at the earliest.

The decisions below

8 The respondents' application for a case management stay was dismissed by the Assistant Registrar. On appeal, the Judge granted the stay, on the basis that it was appropriate to allow the question of validity of the SA to be determined first rather than allow the trial to proceed concurrently with the Arbitration without first resolving the validity issue. The stay was a limited time

stay that has since expired, but on 23 March 2020, the Judge extended the stay for a further six months. The appellant now appeals the decision of the Judge to grant the stay.

Our decision

9 As we have noted above, we are satisfied that the appeal should be dismissed. We make some brief observations about the intersection between the court proceedings and the arbitration in this case, which is at the heart of our decision to uphold the stay.

10 The applicable principles on which a court should exercise its inherent power to stay court proceedings on case management grounds, pending the resolution of a related arbitration were developed in our decision in *Tomolugen Holdings Ltd and anor v Silica Investors Ltd and or appeals* [2016] 1 SLR 373 ("*Tomolugen*"). In the proceedings below and in the submissions before us, much attention was directed at applying the factors and observations set out in *Tomolugen* and our more recent decision in *Rex International Holding Ltd and anor v Gulf Hibiscus Ltd* [2019] 2 SLR 682 ("*Rex International*"). Although the principles developed in those cases are generally relevant, we caution against their application in a mechanical way without regard to the particular circumstances giving rise to the stay application in each of these cases.

11 *Tomolugen* concerned a court action involving multiple defendants, only one of whom was party to an arbitration clause with the plaintiff that covered some of the issues in dispute. A mandatory stay under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") was granted in respect of the sole issue falling within the arbitration clause. This gave rise to a multiplicity of proceedings with some matters involving some parties and some issues in arbitration, and other parties and other issues in court. The court was

confronted with the question of case management, either by ordering a stay of the *remaining issues* in the court proceedings against the defendant who was privy to the arbitration clause, or by staying the court proceedings against *the remaining defendants* until after the conclusion of the arbitration proceedings with the defendant who was party to the arbitration agreement. It was in that context that we remarked that it is ultimately for the court to take the lead in facilitating the fair and efficient resolution of the dispute as a whole. The grant of a case management stay of court proceedings, where a related arbitration is ongoing, is a balance between three imperatives or "higher-order concerns": preserving the plaintiff's right to choose whom to sue and where; upholding agreements to arbitrate; and preventing an abuse of process: *Tomolugen* at [186] and [188].

12 On the other hand, *Rex International* was a case where the plaintiff commenced court proceedings against the defendants, who applied for and obtained a case management stay on the ground that the plaintiff had an arbitration agreement with the defendants' subsidiary. As we noted in our judgment, that stay should not have been granted in the first place. There was no arbitration agreement between the parties to the court proceedings. The defendants were not seeking a stay in order to arbitrate a dispute with the plaintiff; rather, the stay was sought to shield the defendants from the plaintiff's claims and direct the plaintiff to pursue legal proceedings against an entirely different party, when it was the plaintiff's right to choose how and against whom it wished to frame its case.

13 We reiterate that the inherent power to stay court proceedings where related issues involving some or all of the same parties are also subject to an arbitration agreement must be exercised with due sensitivity and regard to the

facts and in particular, the nature of the overlapping issues: *Tomolugen* at [186]; *Rex International* at [11].

14 In the present case, the appellant commenced court proceedings against the respondents claiming that its intellectual property rights had been infringed. While that dispute was working its way through the courts, the parties attempted to settle this and that has spawned a secondary dispute in relation to whether a valid settlement was concluded. The appellant contends that as between the court proceedings and the Arbitration, there is no "overlap" in factual or legal issues in the sense conveyed in *Tomolugen*. At a superficial level, those disputes concern distinct issues, since the proceedings in court do not concern the settlement at all and the Arbitration does not concern the infringement claims at all. But such an analysis wholly fails to capture the real essence of the situation before us. To put it simply, if there is a valid settlement that has the effect of compromising the underlying claims, the court proceedings cannot proceed; and if there is no valid settlement, then the court proceedings must proceed.

15 In this light, it becomes obvious, given the contentions of each party, that the existence or otherwise of a valid settlement be resolved *first*. It makes no sense at all for the court proceedings to continue, if there has been a valid settlement. As we noted in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [95], the effect of a settlement is to put an end to the proceedings, to preclude parties from taking any further steps in the action, and to supersede the original cause of action altogether. For that reason, the question of whether a settlement agreement exists is often tried as a preliminary issue (see also our observations in *Ng Chee Weng v Lim Jit Ming Bryan and anor* [2012] 1 SLR 457 at [53]).

16 If, as seems obvious to us, the validity of the settlement *must* be resolved first, the only remaining question is which forum is to do that. In truth, the stance of the present actions point clearly to the answer. The appellant has not raised the validity of the SA in the court proceedings. Those proceedings concern the substantive question of the alleged infringement of the appellant's intellectual property rights. The respondents on the other hand have commenced the Arbitration to determine that precise question and as we have noted, the tribunal has been empanelled and will in due course give its award after hearing the parties. The respondents have done this on the basis of cl 7.2 of the SA, which they maintain is a valid arbitration agreement. It is true that cl 7.2 is contained in the SA and the appellant challenges the validity of that agreement. But the appellant is making its submissions on that point to the arbitral tribunal. That is plainly correct because it would not be appropriate for us to pre-empt the Arbitration and summarily hold that the settlement agreement is invalid, and therefore that there was never a valid obligation to arbitrate. Indeed, it is clear that when a court is presented with what appears on its face to be a valid arbitration agreement and a dispute that appears to fall within the scope of that agreement, the court is bound not to ignore that agreement. Instead, it should allow any such dispute to be determined by the arbitral tribunal: *Tomolugen* at [63]; *Malini Ventura v Knight Capital Pte Ltd* [2015] 5 SLR 707 ("*Malini Ventura*") at [36]; *Sim Chay Koon and ors v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871 at [4]–[6].

17 This analysis is not affected by the fact that this case concerns a case management stay rather than a mandatory stay under s 6 of the IAA. The reason we are concerned with a case management stay is that we are dealing with separate sets of issues, some raised in court and some in arbitration. Had the appellant sought to introduce the validity of the settlement as an issue in the court proceedings, there is no doubt that the respondents could have applied for

a mandatory stay. Further, on the basis of the authorities that we have mentioned in the previous paragraph and for the same reasons set out there, we would have been bound to stay that issue and refer it to arbitration. Given that analysis, the appellant cannot improve its position by effectively ignoring the SA. This is entirely in line with the principles of judicial non-intervention in arbitral proceedings and *kompetenz-kompetenz*, by reason of which, even where the formation of the arbitration agreement is in question, the tribunal may first determine the existence of its own jurisdiction: *Tomolugen* at [67]; *Malini Ventura* at [37]. It follows that the court cannot decide the validity of the SA without first allowing the tribunal to determine that question.

18 If the tribunal decides that there is no valid settlement and therefore that it has no jurisdiction, subject to the availability of any appeal against a negative jurisdictional ruling, the court proceedings will continue. But if the tribunal decides that there is a valid settlement and that it has jurisdiction in the matter, the appellant may challenge that decision either as a preliminary ruling on jurisdiction or in a setting-aside application. The short point is that the question of whether there is a valid settlement may still return to the court, but only in the context of a review of the tribunal's ruling on jurisdiction. That fact should not obscure the correct analysis to be applied, which is as we have set out above.

19 Finally, counsel for the appellant, Mr Daniel Lim, made reference to the possible injustice that might be occasioned to the appellant by the continuance of the case management stay. While it might have been open to the appellant to seek an order that the case management stay in this case be made subject to appropriate conditions to address any such possible injustice, that has simply not been the nature of the appellant's position. The appellant never sought the imposition of conditions to address such concerns; instead, it sought the *lifting* of the case management stay to enable it to prosecute its underlying claims in

court. For the reasons we have outlined above, we are satisfied that this was misplaced. Given the absence of anything in the evidence before us that points to the possible injustice that might befall the appellant, and given that the respondents have therefore not had any occasion to address this, there is no basis for us to subject the present stay to any conditions at this stage.

Conclusion

20 For these reasons, the appeal is dismissed. We will hear the parties on costs.

Sundaresh Menon
Chief Justice

Quentin Loh
Judge

Lim Ying Sin Daniel (Joyce A Tan & Partners LLC) for the appellant;
Vignesh Vaerhn (Allen & Gledhill LLP) for the respondents.