IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 68

Suit No 979 of 2015
(Registrar's Appeal No 62 of 2016)

Between

(1) Maybank Kim Eng Securities Pte Ltd

… *Appellant*

And

(1) Lim Keng Yong
(2) Lye Hoi Fong

… *Respondents*

JUDGMENT

[Arbitration] — [Stay of court proceedings]

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v
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20 April 2016 Judgment reserved.

Steven Chong J:

Introduction

1 The appellant commenced the present action against the first and second respondents for outstanding trading losses amounting to just over S$8m.[1] The claim against the first respondent is brought under contracts for difference ("CFDs") governed by the appellant's General Terms and Conditions ("the General Terms and Conditions") and its Terms and Conditions for Trading in CFDs ("the CFD Terms and Conditions") while the claim against the second respondent, who is the husband and remisier of the first respondent, is under a Trading Representative's Indemnity ("the Indemnity") included in the remisier's agreement ("the Remisier's Agreement") between the appellant and the second respondent. Although the

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[1] Statement of Claim ("SOC"), para 35.

claims against both respondents are made under different contracts, they are for the same amount and for essentially the same losses arising from the CFDs.

2 The claims are, however, subject to different dispute resolution clauses. Any dispute under the CFD Terms and Conditions is subject to "arbitration in Singapore in accordance with the UNCITRAL Arbitration Rules as at present in force"[2] while any dispute arising under the Indemnity is subject to the "non-exclusive jurisdiction of the Courts of Singapore".[3] Both dispute resolution clauses are standard clauses of the appellant's contracts; thus the inference is that the appellant must have known and intended that different forums govern the disputes arising under the different contracts.

3 The commencement of the present action against the first respondent is therefore *prima facie* in breach of the arbitration clause. As the dispute under the CFD Terms and Conditions is governed by the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA"), the appellant acknowledged that it has the burden to demonstrate sufficient reason why a stay of proceedings should not be ordered under s 6 of the AA. In the court below, the main argument advanced by the appellant to discharge this burden was that, since the claim against the second respondent is not subject to arbitration, the stay in respect of the claim against the first respondent should be refused to avoid multiplicity of proceedings with the attendant risks of inconsistent findings. It seems to me that any multiplicity of proceedings is the direct result of the appellant's own corporate policy to have different dispute resolution clauses to govern disputes under different contracts. The effect of this submission, if accepted, is that on every

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2 Affidavit of Lim Keng Yong ("LKY affidavit"), Exhibit WKLY-2, cl 32.4.

3 LKY affidavit, Exhibit WKLY-11, Appendix, cl 15.

occasion when trading losses are incurred and a remisier is involved (which is not uncommon), leading to claims under different contracts, the court should invariably displace the arbitration clause in favour of court proceedings to avoid multiplicity of proceedings. However, there is another way to avoid the very mischief which the appellant has put into play: the court can stay both proceedings pending the outcome of the arbitration between the appellant and the first respondent, which is *contractually* provided for under the CFD Terms and Conditions. It therefore came as no surprise to me that the Assistant Registrar ("the AR") not only ordered the stay against the first respondent but also invoked the court's case management powers developed by the Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen Holdings Ltd")* to stay the proceedings against the second respondent pending the outcome of the arbitration proceedings between the appellant and the first respondent.

4 When the appeal came before me, the appellant, after some prevarication and in recognition of the difficulties in demonstrating any sufficient reason for refusing a stay under s 6 of the AA, elected to abandon the appeal against the first respondent. At the same time, the appellant's counsel informed the court that it had no current instructions to commence any arbitration proceedings against the first respondent. This was clearly a tactical decision to aid the appellant's argument that the claim against the second respondent, which is not subject to arbitration, should not be stayed since there will no longer be any pending arbitration proceedings between the first respondent and the appellant running in parallel with the court proceedings against the second respondent.

5 The respondents, who had no prior notice of the appellant's decision to drop the appeal against the first respondent, were understandably taken by

surprise. After taking instructions from the respondents following this development, the respondents' counsel informed the court that the first respondent would initiate arbitration proceedings against the appellant under the CFD Terms and Conditions within 14 days of the hearing even if the appellant did not do so. Hence the issue of multiplicity of proceedings *prima facie* remains alive.

6 The respondents accept that there is no legal impediment to the appellant abandoning its appeal against the first respondent and focussing only against the second respondent. That is not to say that there is no ramification arising from this change in position, the impact of which will be examined below. In the final analysis, did this change materially improve the appellant's appeal against the stay in favour of the second respondent? After reviewing the parties' submissions, the affidavit evidence before the court and the governing legal principles, I arrived at the conclusion that the appeal as against the second respondent should nonetheless be dismissed. As it was suggested by the appellant that the case management powers developed in *Tomolugen Holdings Ltd* should not be exercised in this case because, *inter alia*, it concerns an arbitration under the AA rather than under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), this judgment will explain why such powers, if the circumstances warrant their exercise, can equally be invoked in the context of a domestic arbitration under the AA.

Background to the dispute

7 The appellant, Maybank Kim Eng Securities Ltd, is a securities brokerage incorporated in Singapore with which the first respondent, Wendy Lim Keng Yong, maintains a CFD account ("the CFD account").[4] According

to the appellant, the CFD account was opened in 2011.[5] The account permitted her to enter into over-the-counter CFDs with the appellant; these are derivative contracts that allow the account holder to speculate on, and make a profit or loss from, the price movements of an underlying reference security without actually owning that security. As noted above, the CFDs entered into between the appellant and the first respondents were governed by the appellant's General Terms and Conditions as well as its CFD Terms and Conditions.

8 The second respondent, William Lye Hoi Fong, was appointed as a remisier by the appellant pursuant to the Remisier Agreement dated 29 January 2015.[6] The agreement permitted him to trade and deal in financial instruments, including CFDs. It also included the Indemnity, the terms of which will be examined further below. As stated above, he was appointed by the appellant as the trading representative of his wife, the first respondent, in respect of the CFD account.[7]

9 The claims arise from a series of CFD transactions which the first respondent entered into with the appellant in July 2015 ("the CFD transactions") with 216,600 shares in Apple Inc and 105,000 shares in Baidu Inc as the underlying securities.[8] These shares, which are listed on the NASDAQ stock exchange, started falling in value in the second half of August 2015 due to a global stock market selloff. On 24 August 2015, or "Black Monday" as it was infamously termed by commentators, there was a sharp

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4 LKY affidavit, para 5.

5 Plantiff/Appellant's Skeletal Submissions dated 8 March 2016 ("Appellant's Submission"), para 18.

6 LKY affidavit, Exhibit WKLY-11.

7 LKY affidavit, para 29.

8 SOC para, 14; LKY affidavit, Exhibit WKLY-8.

drop in the value of the underlying securities and the appellant proceeded to close out the CFD transactions at the prevailing market prices.[9] As a consequence of the closing out, the CFD account reflected substantial trading losses which the appellant claims exceeded US$10m.[10]

10 The key dispute arising from these facts is whether the closing out of the CFD transactions on 24 August 2015 was authorised by either or both of the respondents. If so, there is a secondary question as to the quantum of trading losses incurred on the CFD account.

11 The appellant claims that it acted on the respondents' express instructions, and that the respondents are liable for the losses incurred on the CFD account. Therefore, taking into account certain alleged rights of set off which the appellant says it has against both respondents[11] and a payment of $157,189.88 made to it by the first respondent on 17 September 2015,[12] the appellant claims the balance sum of S$8,079,664.75 from the first respondent under the General Terms and Conditions and the CFD Terms and Conditions.[13] Significantly, the appellant claims this same amount from the second respondent under the Indemnity. The respondents, however, take the position that the first respondent is only liable for the sum of $157,189.88 which she had already paid the appellant on 17 September 2015, and that neither of them is liable for the losses arising from the closing out of the CFD transactions on 24 August 2015 as this was effected without their consent or authorisation.

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9 SOC para, 25; LKY affidavit, Exhibit WKLY-8.

10 SOC para, 29.

11 SOC, para, 33 and 34.

12 LKY affidavit, Exhibit WKLY-6.

13 SOC, para 35.

12 As I stated in my introduction, the claims are subject to different dispute resolution agreements although they are essentially for the same losses. It is common ground that the appellant's claim against the first respondent is *prima facie* in breach of the arbitration agreement which is part of the multi-tiered dispute mechanism stipulated in cl 32 of the CFD Terms and Conditions,[14] and that this agreement is a domestic arbitration agreement governed by the AA. The parties also agree that the appellant's claim against the second respondent falls within the non-exclusive jurisdiction agreement in favour of the Singapore courts, found at cl 15 of the Indemnity.[15]

Parties' arguments

13 Due to the divergent dispute resolution agreements, the respondents relied on two separate, albeit related, grounds at the hearing before the AR in support of their application to stay both claims. First, relying on s 6 of the AA, the respondents argued that there is no sufficient reason why the claim against the first respondent should not be stayed in favour of arbitration. Next, they submitted that the court should apply *Tomolugen Holdings Ltd* and exercise its inherent power to stay the proceedings against the second respondent in the interests of case management, pending the resolution of the related arbitration involving the first respondent. The AR found in the respondents' favour on both grounds.

14 In this appeal, the respondents submit that the AR's decision to stay the action against the second respondent ought to be upheld for, *inter alia*, the following reasons:

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14 LKY affidavit, Exhibit WKLY-2.

15 LKY affidavit, Exhibit WKLY-11, Appendix.

(a) It is clear under the terms of the Indemnity that the second respondent's liability is contingent on, and subsidiary to, the liability of the first respondent under the CFD Terms and Conditions. Hence, there is a significant overlap in the factual and legal issues to be determined in both claims, and allowing parallel proceedings will lead to duplication of resources and the risk of inconsistent decisions.

(b) In any case, a case management stay will not unduly prejudice the appellant as it is temporary, and the appellant can still proceed against the second respondent upon the resolution of the arbitration. The court can also lift the stay if the arbitration does not proceed expeditiously on account of any unnecessary delays.

15 As for the appellant, I have outlined the change in its position in my introduction. To summarise, the appellant's main submission before the AR was that the court should exercise its discretion under the AA and refuse to stay the claim against the first respondent. However, this argument, along with the appeal as against the first respondent, was abandoned during the hearing before me. Thus, the appellant now seeks to proceed *only* against the second respondent under the Indemnity.

16 While this shift in approach is entirely within the appellant's prerogative, it does have certain ramifications. For one, there is now a stay of the court proceedings against the first respondent in favour of arbitration. By abandoning its appeal against this stay, the appellant is deemed to have accepted that there is a genuine dispute between the first respondent and the appellant in respect of the CFDs and that the arbitral tribunal is the proper forum to adjudicate the dispute under the CFD Terms and Conditions. Next, although the appellant's counsel informed me that it had no instructions to

commence arbitration proceedings, the issue of multiplicity of proceedings *prima facie* remains alive as the first respondent had indicated that she would instead initiate arbitration against the appellant in any case.

17 To surmount these difficulties, the appellant submits as follows:

(a) The second respondent's liability as sole principal debtor under the Indemnity is separate from and independent of the appellant's claim against the first respondent. The outcome of the claims do not depend on one another, and there is no reason why the claim against the second respondent should be stayed pending the outcome of any arbitration involving the first respondent.

(b) Further, under the contractual bargain between the appellant and the second respondent, the appellant is entitled to bring court proceedings against the second respondent directly without having to first seek recourse against the first respondent. The stay granted by the AR undermines this bargain. It also prejudices the appellant by depriving it of the option of applying for summary judgment against the second respondent.

18 Both parties have also made submissions on the applicability of *Tomolugen Holdings Ltd* to this case as the arbitration agreement under the CFD Terms and Conditions is governed by the AA rather than the IAA. Thus there is a threshold question of whether, and how, the principles laid down in this important Court of Appeal judgment ought to be applied to cases involving a domestic arbitration agreement governed by the AA.

Issues arising from this appeal

19 The issues before this Court are thus as follows:

(a) Does the court's inherent power to stay court proceedings in the interests of case management pending the resolution of a related arbitration extend to cases where the relevant arbitration agreement is governed by the AA? If yes, how should the principles governing this power developed in *Tomolugen Holdings Ltd* be applied in this context?

(b) Is the appellant's claim against the second respondent under the Indemnity separate and independent of its claim against the first respondent under the CFD Terms and Conditions, such that the determination of the claim in the arbitration will be irrelevant to the suit against the second respondent?

(c) If the answer to the second question is no, should the court exercise its inherent power of case management to stay the proceedings against the second respondent?

Court's inherent powers of case management in the context of the Arbitration Act

20 *Tomolugen Holdings Ltd* concerned a claim for minority oppression brought against various defendants comprising the company of which the plaintiff was a minority shareholder, other shareholders and the directors of the company or its related companies. The Court of Appeal held that there were four separate categories of allegations made in support of the minority oppression claim. Of these allegations, only one fell within the scope of an arbitration agreement between the plaintiff and one of the defendants ("Lionsgate"), and was subject to a mandatory stay under s 6 of the IAA. The

Court of Appeal exercised the court's inherent powers of case management, and ordered, *inter alia*, that if the plaintiff wished to pursue the allegation subject to arbitration, then the rest of the court proceedings, whether against Lionsgate or against the remaining defendants, would be stayed in the interests of case management, conditional upon the allegation being arbitrated expeditiously.

21 In arriving at the decision, Sundaresh Menon CJ (delivering the judgment of the court) examined how the courts of Australia, Canada, England and New Zealand have addressed the situation where a dispute falls to be resolved in part by arbitration and in part by court proceedings, with the two sets of proceedings involving overlapping issues and parties (at [143]–[185]). He then set down the principles to be applied in Singapore in the following passage, which is worth citing in full (at [186]–[188]):

> 186 The authorities discussed above reveal gradations of response to what is in essence the same problem as that in the situation of overlapping court and arbitral proceedings outlined at [140] above. We alluded to this problem in our introduction to this judgment, namely, that of seeking to uphold the statutory mandate and the strong legislative policy in favour of arbitration in circumstances where the dispute which is covered by the arbitration clause in question forms only part of a larger dispute with a broader horizon. The unifying theme amongst the cases is the recognition that the court, as the final arbiter, should take the lead in ensuring the efficient and fair resolution of the dispute as a whole. The precise measures which the court deploys to achieve that end will turn on the facts and the precise contours of the litigation in each case.
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> 187 We would not set the bar for the grant of a case management stay at the "rare and compelling" threshold that the English and the New Zealand courts have adopted. ***We recognise that a plaintiff's right to sue whoever he wants and where he wants is a fundamental one. But, that right is not absolute. It is restrained only to a modest extent when the plaintiff's claim is stayed temporarily pending the resolution of a related arbitration, as opposed to when the plaintiff's claim is shut out in its***

> ***entirety: Reichhold Norway (HC) ([165] supra) at 491 per Moore-Bick J. In appropriate cases, that right may be curtailed or may even be regarded as subsidiary to holding the plaintiff to his obligation to arbitrate where he has agreed to do so.*** The strength of the plaintiff's right of timely access to the court will therefore vary depending on the facts of each case. In a situation where there are multiple plaintiffs, some of whom are not bound to arbitrate (as in *Danone v Fonterra* ([175] supra)), staying the court proceedings may result in a greater derogation from this right for those plaintiffs who are not bound by the arbitration clause. But, that is not a concern for us in the present appeals because Silica Investors is the *sole plaintiff* in the Suit and is *bound to arbitrate* at least one of the issues that it intends to rely on in the court proceedings against Lionsgate and the remaining defendants (namely, the Management Participation Allegation). The presence of the obligation to arbitrate this allegation diminishes the force of any objection that Silica Investors may raise that its right of timely access to the court is being undermined.
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> 188 This does not mean that if part of a dispute is sent for arbitration, the court proceedings relating to the rest of the dispute will be stayed as a matter of course. ***The court must in every case aim to strike a balance between three higher-order concerns that may pull in different considerations: first, a plaintiff's right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice.*** In this regard, we consider that the court's discretion to stay court proceedings pending the resolution of a related arbitration, at the request of parties who are not subject to the arbitration agreement in question, can in turn be made subject to the agreement of those parties to be bound by any applicable findings that may be made by the arbitral tribunal. We also think that the set of factors considered by Venning J in *Danone v Fonterra* (at [179]–[180] above) offers a comprehensive (although by no means exhaustive) and instructive guide for courts faced with the scenario of overlap described at [140] above.
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> [emphasis in original in italics; emphasis added in bold italics]

22 Are the above principles applicable to a case where the relevant arbitration agreement is governed by the AA rather than the IAA? In my view,

the answer is clearly yes. The only substantial difference in the context of domestic arbitration is that the court has an additional option, due to the discretionary nature of s 6 of AA, which is not available in the context of the IAA: it may allow *all* the claims, including those governed by the arbitration agreement, to proceed in the courts. This distinction may appear significant at first as one of the factors relied upon by the Court of Appeal in *Tomolugen Holdings Ltd* was the court's obligation to conform to the statutory mandate laid down in s 6 of the IAA to stay proceedings in favour of international arbitration (at [2]).

23 However, it must be kept in mind that even though the court's power to grant a stay in favour of domestic arbitration under s 6 of the AA is discretionary, the burden is on the party who wishes to proceed in court to "show sufficient reason why the matter should not be referred to arbitration". Assuming the applicant is ready and willing to arbitrate, the court will only refuse a stay in exceptional cases (see *The Eleftheria* [1970] P 94; *Halsbury's Laws of Singapore* (LexisNexis, 2014 Reissue) at para 20.037). This is in line with the desirability of holding the parties to their agreement, as well as Singapore's strong policy in favour of arbitration (see *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR (R) 565 at [20]; *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28]; *Tomolugen Holdings Ltd* at [186]). Hence, the courts should be slow to exercise the option of allowing *all* the claims to proceed in court, including those governed by the arbitration agreement. Certainly, the fact that there are related actions, some governed by arbitration agreements and some not, is not *in itself* a sufficient reason to sanction a breach of an arbitration clause and depart from the policy in favour of arbitration. Apart from this, the principles laid down in *Tomolugen Holdings Ltd*, and the higher-order concerns

identified by the Court of Appeal, namely: the plaintiff's right to choose whom he wants to sue and where; the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes, apply equally whether the relevant arbitration is governed by the IAA or the AA.

24 Furthermore, once the court does decide to stay a dispute in favour of domestic arbitration under the AA, this crucial difference between the AA and the IAA falls away. The court is then confronted with the same question it faces in the context of the IAA: whether, having stayed one claim in favour of arbitration, it should order that the other claim be likewise stayed as a matter of proper case management. In both situations, the case management powers have the same objective and there is no plausible reason why a different outcome should prevail. This is certainly true in this case given that there is no longer any appeal against the AR's decision to stay the proceedings against the first respondent.

Relationship between the claim against the first respondent and the claim against the second respondent

25 Next, I come to the appellant's argument that multiplicity of proceedings is not even an issue here as the claims against the first and second respondent are independent of each other. This is a surprising submission as the appellant, in its own skeletal submissions for the appeal before me ("Appellant's Submissions"), argued as follows (at [38]):

> Both sets of proceedings would involve issues arising out of the same factual matrix. Moreover, at least one issue will need to be determined by both the court and the arbitral tribunal i.e. the quantum of trading losses incurred on the CFD

> Account. The risk of conflicting findings is obvious. This is an undesirable state of affairs that ought to be avoided.
>
> [emphasis in original]

The above passage was put forward in support of the appellant's former position that both actions ought to be allowed to proceed in the courts, which has since been abandoned. Nevertheless, the passage strikes me as a true reflection of the state of affairs: although the claims arise under different contracts, the facts, parties and issues are essentially and substantially the same.

26 The appellant, however, submits that it is crucial that the claim against the second respondent is under an indemnity contract under which the indemnifier's liability is primary and not contingent or dependent upon any other party's liability being first determined. Multiple authorities are cited in support of this well-established legal proposition. However, the relevant question is not whether the two *contracts* are legally independent, but rather whether the two *proceedings* are in fact separate and independent such that the determination of the claim in the arbitration will be irrelevant to the suit against the second respondent. As noted in *Tomolugen Holdings Ltd*, the complication inherent in having to resolve a dispute across two different fora arise whenever the two sets of proceedings engage "common, *although not necessarily identical*, issues and parties" [emphasis added] (at [2]). Whether there are such common issues is ultimately a fact-specific inquiry. Hence, I have to carefully examine the terms of the Indemnity, as well as the position taken by the parties in respect thereof.

27 The material terms of the Indemnity are as follows:[16]

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[16] LKY affidavit, Exhibit WLKY-11, Appendix.

> 1. In consideration of Maybank Kim Eng Securities Pte. Ltd. ("the Company", which expression shall include its successors and assigns) agreeing at my request to allow and to continue to allow me and/or my clients to trade up to such limits (as the case may be) … and on such terms and conditions and for so long as the Company may think fit, I … hereby irrevocably and unconditionally AGREE TO INDEMNIFY the Company and keep the Company indemnified fully and completely against any and all loss/contra loss damage cost and expense whatsoever (including legal costs on a full indemnity basis) and all other liabilities of whatsoever nature or description (including any deficit balances under my profit and loss/stock accounts) *which may be incurred or suffered by the Company in connection with or in any manner arising from any and all transactions dealt by or through me or accepted by me or allocated/designated under my code or under any of my aforesaid accounts* including any interest whatsoever thereon charged by the Company (hereinafter called "the Losses").
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> …
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> 7. As between myself and the Company, I shall be liable under this Indemnity as if I am sole principal debtor. I hereby waive any right to require the Company to (i) proceed against any other person, (ii) proceed against or exhaust any security or collateral, and (iii) pursue any other remedy in the Company's power whatsoever as a precondition to their liability hereunder.
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> 8. These obligations are additional to, and not instead of, any other security or other guarantee or indemnity at any time existing in favour of the Company, whether from me or otherwise.
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> [emphasis added]

28 There is no doubt that this is an indemnity agreement under which the second respondent's liability is primary and not contingent on liability against the first respondent under the CFD Terms and Conditions being first established (*American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 at [41]; *China Taiping Insurance (Singapore) Pte Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd) v Teoh Cheng Leong* [2012] 2 SLR 1 at [27]–[28]). This alone does not mean that the claim against the second respondent is factually and legally independent of the claim

against the first respondent; it is necessary to examine when liability under the Indemnity arises. The key provision is cl 1 which provides that the second respondent's liability under the Indemnity only arises in relation to losses incurred by the appellant in relation to transactions "dealt by or through [the second respondent] or accepted by [him] or allocated/designated under [his] code or under any of [his] … accounts". This clause *prima facie* indicates that the closing out of the CFD transactions on 24 August 2015 must have been expressly or impliedly authorised either by the second respondent himself (*ie*, "dealt by" or "accepted by" him) and/or his client, the first respondent (*ie*, "dealt … through" or "allocated/designated under [his] code or under any of [his] … accounts") in order for the appellant to be able to rely on the Indemnity.

29 The respondents dispute that there was such authority from either of them in relation to the CFD Terms and Conditions as well as the Indemnity. This significant issue ("the Authorisation Issue") insofar as it pertains to the first respondent is now undeniably subject to arbitration, but it is common to both claims. Thus a finding thereon either for or against the appellant in the arbitration against the first respondent must logically have a direct impact on the appellant's suit against the second respondent.

30 The appellant argues otherwise, and relies on the Court of Appeal's judgment in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*"). The case concerned a winding up application against the defendants which was based on their liability under an indemnity deed ("the Deed"). At the same time, there was an on-going arbitration as to whether the principal contract ("the 2003 contract") was legally binding. The Court of Appeal nevertheless allowed the winding up application to proceed, and approved the reasoning of Judith Prakash J in the

High Court (*S Y Technology Inc v Pacific Recreation Pte Ltd* [2007] 2 SLR(R) 756 at [22]–[25]):

> 22 Under Singapore law, an indemnity is in the nature of a primary obligation and a creditor may still recover the relevant losses in the event of the principal transaction being defective. *Ellinger's Modern Banking Law* (Oxford University Press, 4th Ed, 2006) states at p 846:
>
> > A guarantee is distinct from an indemnity, which is an undertaking by 'one party to keep the other party harmless against loss' arising from particular transactions, or events, and is not dependent on the continuing liability and default of the principal debtor. An indemnity is thus in the nature of a primary rather than a secondary obligation. Unlike a guarantee, it is not required to be in writing, or evidenced in writing, and is usually unaffected by the fact that the obligation indemnified is void or [un]enforceable. Additionally, certain types of conduct of the creditor will discharge a guarantor but not an indemnifier.
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> …
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> 25 … The arbitration proceedings before CIETAC were irrelevant to the obligations of the defendants under the Deed. It may be worth pointing out that the parties to the arbitration were the parties to the 2003 contract, *ie*, the plaintiff, Shanghai Pacific and Mr Lee. They were the parties who were bound to arbitrate disputes under that contract. The defendants were not parties to the 2003 contract and their obligations to the plaintiff arose under a completely separate contract. *They were not involved in the arbitration and could not be affected by its outcome if the Deed was not subject to Chinese law.*
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> [emphasis added]

31 The precise relationship between the arbitration and the winding-up proceedings in *Pacific Recreation* is vital. The arbitration under the 2003 contract was brought by the managing director of the defendants on the basis that the primary contract was not legally binding as it had not been registered as required by a specific provision of Chinese law. In the winding up, the defendants argued that the outcome of the arbitration would impact their liability under the Deed. However, Prakash J found that the Deed was not

governed by Chinese law and was an indemnity contract. For this reason, the two *proceedings* were found to be independent and separate – the *validity* of the Deed was entirely separate from the validity of the 2003 contract, and the Deed would have been enforceable even if the plaintiff should fail in the arbitration. This key difference appears to have escaped the attention of the appellant – in *Pacific Recreation* the invalidity argument only affected the 2003 contract. Therefore even if the 2003 contract had been found to be invalid, there would have been no impact on the defendants' liability under the Deed which was independent and separate. Therein lies the significance of the legal status of an indemnity as a primary and independent contract: it can survive any argument which renders the underlying transaction unenforceable or void. Here, the Authorisation Issue does not pertain to the invalidity or unenforceability of the CFD Terms and Conditions, and directly impacts on both sets of proceedings. If it is determined at the arbitration that no requisite authorisation was given by either of the respondents, then there is simply *no debt* due to the appellant from the first respondent under the CFDs. Should that come to pass, it is inconceivable that the second respondent can be liable to the appellant given the terms of cl 1 of the Indemnity. The appellant's reliance on *Pacific Recreation* is hence misplaced.

32 The other authority cited by the appellant is *Lanna Resources Public Co Ltd v Tan Beng Phiau Dick and another* [2011] 1 SLR 543 ("*Lanna Resources*"). That was also a judgment of Prakash J which dealt with the defendants' liability under a guarantee agreement ("the Guarantee") which secured the plaintiff's claim against the principal debtor ("SRL") under a Memorandum of Agreement ("the MOA"). The Guarantee contained a non-exclusive jurisdiction clause in favour of the Singapore courts, but the MOA was subject to arbitration. As the plaintiff had already commenced arbitration

under the MOA, the defendants argued, *inter alia*, that the court proceedings under the Guarantee ought to be stayed pending the final determination of the arbitration proceedings. They pointed to common issues of fact and law in both claims. Prakash J rejected this prayer and held as follows (at [18]–[20]):

> 18 The plaintiff's final argument invoked the question of fairness. The plaintiff argued that even if the claim under the guarantee could not be arbitrated, this action should be stayed pending the arbitration between the plaintiff and the principal debtors. This would avoid the spectre of conflicting decisions on the common issues. Whilst it is generally undesirable to have conflicting decisions on common issues of fact and law, sometimes such a result cannot be prevented. *The parties have provided in their documentation for two different regimes to govern disputes under the MOA and under the guarantee. The defendants were legally advised at the material time and, indeed, the guarantee was drafted by their own legal advisers. The defendants had an opportunity to provide for disputes under the guarantee to be governed by arbitration or for liability under the guarantee not to arise until liability under the MOA had been legally established. Yet, the guarantee does not contain such provisions. The courts must hold parties to their contractual bargains. The parties' bargain was for claims under the guarantee to be settled in court. I did not consider that there would be any fundamental unfairness in requiring the claim under the guarantee to be litigated in court at the same time as the claim under the MOA is being litigated in arbitration since this was a situation contemplated by the parties' own contractual arrangements.*
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> 19 In this connection, the English case of *Etri Fans Ltd v NMB (UK) Ltd* [1987] 1 WLR 1110 provided some assistance. In that case, the English Court of Appeal had to consider whether to grant a stay of legal proceedings to an applicant who had taken steps in the proceedings and was seeking to rely on an arbitration agreement to which he was not a party. The court refused to exercise its inherent jurisdiction to grant a stay and observed (at 1114):
>
> > In particular, in order to protect itself in relation to attempts to abuse the process of the court, the court has undoubtedly very wide powers of staying proceedings. However, as Mr Boyd concedes, because here the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant as [sic] stay under its inherent jurisdiction in

> situations dealt with by the statutory provisions, but where it could or would not do so in exercise of its statutory jurisdiction, will be rare. The jurisdiction is truly a residual one principally confined to dealing with cases not contemplated by the statutory provisions.
>
> 20 In the present case, there was no question of abuse of process of the court. The plaintiff was entitled under the guarantee to commence its action against the defendants in the High Court. *I agreed that the Singapore court's inherent discretionary power to order a stay is a residual one and should be exercised only rarely and in exceptional cases when the application for a stay does not fall within established statutory jurisdiction or legal principles. I did not consider the circumstances before me to be exceptional such that they justified the grant of a stay under the inherent powers of the court.*
>
> [emphasis added]

33 While there are similarities between *Lanna Resources* and the present case, the above passage highlights several key distinctions. First, in deciding whether to exercise the court's inherent jurisdiction to stay proceedings, Prakash J applied the "rare and exceptional" threshold laid down by the English courts. This test was expressly considered but not endorsed by the Court of Appeal in *Tomolugen Holdings Ltd* in which it was held that the court, as the final arbiter, should take the lead in the efficient and fair resolution of the dispute as a whole (at [186]–[187]). Thus *Lanna Resources* on this point must be taken to have been somewhat superseded. Second and more crucially, looking at the judgment as a whole, it is clear that the focus of the parties' submissions, and therefore the court's analysis, was on the traditional grounds for staying an action, namely the presence of an arbitration agreement, *forum non conveniens*, and *lis alibi pendens* (at [12]–[13]). These grounds were rejected on the facts. However, the key question of whether the court should exercise its discretionary case management powers on the basis that liability under the Guarantee *would not even arise* if no debt under the MOA was established in the related arbitration was not raised or considered in

detail. This can perhaps be explained by the fact that *Lanna Resources* was decided prior to *Tomolugen Holdings Ltd*. Thus the case does not assist the appellant to dispose of the respondents' central argument that a stay should be granted here as any determination on the Authorisation issue in the arbitration will necessarily affect the suit against the second respondent.

34 Besides the legal authorities, the appellant also relies on cl 9(f) of the Indemnity in support of the contention that the two claims are separate and independent. Clause 9(f) reads as follows:

> 9. This indemnity shall not be prejudiced diminished or affected in any way nor shall I be released or exonerated by any of the following:-
>
> …
>
> (f) any irregularity, unenforceability or invalidity or any legal limitation on or insufficiency in the powers or disability or incapacity relating to any transactions traded under my code …

35 The argument, which was first raised by the appellant's counsel during the oral hearing, is that due to this clause, the second respondent is liable under the Indemnity even if there had been no authorisation given by the first respondent to close out the CFD transactions, as the transactions would still have been "traded under [his] code". I have difficulty accepting this submission particularly at this stage. The specific deficiencies covered in cl 9(f), namely, irregularity, unenforceability, invalidity, insufficiency in powers, and so on, pertain to procedural or legal flaws in the relevant underlying transaction. They do not specifically govern a situation where the transaction is executed without any authorisation and hence no liability arises at all from the client. In any case, the parties' written submissions and the affidavit evidence before me do not address this point directly; nor do they engage with the fact that cl 1 of the Indemnity, on its face, indicates that

express or implied authority must have been given by either or both of the respondents, as noted above. Hence, I disagree that cl 9(f) can be construed as having the effect of displacing the need to establish authorisation as required under cl 1 of the Indemnity.

36 Finally, apart from the Authorisation Issue, the quantum of trading losses incurred on the CFD account is another common issue to be determined by both the court and the arbitral tribunal, as identified by the appellant itself (see [25] above). Therefore, even though the second respondent's liability under the Indemnity is primary and not contingent on liability against the first respondent being established, there are important issues common to both proceedings. The undeniable fact remains that the claim amounts brought by the appellant against the first and second respondents are *identical*.

Exercise of the court's discretion in this case

37 Given the significant overlap in the proceedings, I have to consider whether to exercise the court's inherent powers of case management and uphold the stay of the court proceedings against the second respondent. The exercise of this discretionary power turns on the balance to be struck between the three higher-order concerns identified in *Tomolugen Holdings Ltd*.

(a) First, as noted in *Tomolugen Holdings Ltd*, the appellant's right to proceed in the courts is not absolute. This right will not be unduly prejudiced in this case given the temporary nature of the stay, as well as the liberty granted in the AR's order for the appellant to apply to court to reinstate the proceedings against the second respondent if the arbitration does not proceed in a reasonably expeditious manner.[17] If

[17] Order of Court 1467 of 2016 dated 2 February 2016 in Summons No. 5107 of 2015.

and when the court proceedings resume, the appellant can avail itself of its full rights including the option to seek summary judgment against the second respondent.

(b) Second, just as in *Tomolugen Holdings Ltd*, this is a case where there is a sole plaintiff, the appellant, who has contracted to arbitrate its related claim against the first respondent. This obligation to arbitrate diminishes the force of its objection that its right of timely access to the courts is being undermined (at [187] of *Tomolugen Holdings Ltd*).

(c) Finally, dealing with the court's duty to ensure the efficient and fair resolution of the dispute, I note that the following factors in favour of a stay, identified in *Danone Asia Pacific Holdings Pte Ltd and others v Fonterra Co-Operative Group Limited* [2014] NZHC 1681 and approved in *Tomolugen Holdings Limited* (at [188]), are present in this case:

(i) the factual bases underlying the claims in the two proceedings are essentially the same;

(ii) there are common issues in both claims, namely the Authorisation issue and the quantification of the trading losses incurred on the CFD account;

(iii) there is a practical risk of inconsistent findings of fact and law between the court proceedings and the arbitration given these overlapping issues; and

(iv) there would be a duplication of witnesses and evidence between the arbitration and the court proceedings.

38 It is material that the Court of Appeal in *Tomolugen Holdings Ltd* exercised its case management powers even though the allegation which was subject to arbitration was only one of four claims pending in the court proceedings. Here, the grounds for the court to exercise its case management powers are even more compelling as the main issues in the arbitration as well as the court proceedings not only overlap but are practically identical.

39 Considering all of the above, I find that the balance in this case is inexorably in favour of a stay of the court proceedings against the second respondent pending the resolution of the related arbitration between the appellant and the first respondent. While this stay necessarily impinges on the appellant's right to seek recourse against the second respondent under the Indemnity without first determining the arbitration proceedings between itself and the first respondent, the current state of affairs is largely of the appellant's own making. More fundamentally, I am satisfied that the orders granted by the AR are fair and reasonable and ultimately serve the ends of justice.

40 The appeal is therefore dismissed, with costs which I fix at $10,000 inclusive of disbursements.

Steven Chong
Judge

Alvin Yeo, SC, Chua Sui Tong and Reka Mohan (WongPartnership LLP) for the appellant;
Ng Lip Chih and Jennifer Sia (NLC Law Asia LLC) for the respondents.
