IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 242

Suit No 139 of 2018
(Summons No 4417 of 2018)

Between

NK Mulsan Co Ltd

… Plaintiff

And

INTL Asia Pte Ltd

… Defendant

GROUNDS OF DECISION

[Civil Procedure] — [Stay of Execution]

NK Mulsan Co Ltd
v
INTL Asia Pte Ltd

[2018] SGHC 242

High Court — Suit No 139 of 2018 (Summons No 4417 of 2018)
Woo Bih Li J
15 October 2018

8 November 2018

Woo Bih Li J:

Introduction

1 The main action is by the plaintiff, NK Mulsan Co Ltd ("NKM"), against the defendant, INTL Asia Pte Ltd ("INTL"), for the return of US$3 million ("the Deposit") under a Deposit Agreement dated 19 August 2016 ("the Deposit Agreement") between the parties. NKM is a company registered in the Republic of Korea and its shares are publicly traded on the Korea Stock Exchange. INTL is a private company incorporated in the Republic of Singapore.

2 INTL resisted the claim on the basis that the Deposit was to be returned to NKM only if NKM performed all its obligations to INTL in respect of certain contracts. It alleged that NKM had not performed all its obligations and sought

to retain the Deposit based on an intended counterclaim against NKM which was for an estimated sum of US$1,353,140 ("the Disputed Sum").

3 On 4 September 2018, I granted summary judgment in favour of NKM against INTL for US$1,646,860 ("the Judgment Sum") and made various orders. The Judgment Sum was the difference between the Deposit and the Disputed Sum. I am delivering my grounds of decision in respect of that decision ("the Substantive Decision") separately.

4 The present grounds of decision pertain to INTL's application in Summons No 4417 of 2018 for a stay of execution pending INTL's appeal to the Court of Appeal against my decision granting the summary judgment. I dismissed the stay application on 15 October 2018 and set out my reasons below.

The arguments and the court's reasons

5 The reasons for INTL's application for a stay of execution were:

(a) its appeal to the Court of Appeal had merits;

(b) a stay of execution of the orders would not deprive NKM of the fruits of litigation pending the appeal;

(c) there was a significant risk that INTL's appeal to the Court of Appeal would be rendered nugatory; and

(d) there were special circumstances that warranted the granting of a stay of execution.

6 The parties agreed that the principles applicable to an application for a stay of execution were stated in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 as cited in *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 174 ("*Strandore*") at [7]:

> (a) While the court has the power to grant a stay, and this is entirely at the discretion of the court, the discretion must be exercised judicially, *ie*, in accordance with well-established principles.
>
> (b) The first principle is that, as a general proposition, the court does not deprive a successful litigant of the fruits of his litigation, and lock up funds to which he is *prima facie* entitled, pending an appeal. There is no difference whether the judgment appealed against was made on a summary basis or after a full trial.
>
> (c) This is balanced by the second principle. When a party is exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory. 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.
>
> (d) The third principle follows, and is an elaboration of the second principle, that an appellant must show special circumstances before the court will grant a stay.

7 The parties also raised the case of *Denis Matthew Harte v Dr Tan Hun Hoe & Another* [2001] SGHC 19 ("*Harte*") during the hearing. There, the court took into account the fact that judgment was not a summary one. It had been granted after a trial of 31 days. On the other hand, the first principle reiterated in *Strandore* is that there is no difference between a judgment granted on a summary basis or after a full trial for the purposes of an application for a stay of execution. I was also of the view that there should be no difference.

8 Two other points were also mentioned in *Harte* and *Strandore*.

9 First, the merits of the appeal are not material. This is because the special circumstances which entitle the court to order a stay of execution are circumstances which go to the enforcement of the judgment and not those which go to its correctness (see *Harte* at [63]).

10 In *Strandore*, the court also said, at [7], that a bald assertion of the likelihood of success is inadequate. Every appellant must expect that his appeal will succeed. On the other hand, the court also said, at [10], that if there is, objectively, little merit in the appeal that must be a relevant consideration.

11 I was of the view that the alleged merits of an appeal do not usually constitute a relevant factor for the purpose of a stay application unless it can be easily gleaned, without a minute examination of the merits, that the appeal will be likely to fail or succeed. In other words, if it appears obvious that the appeal is likely to fail or succeed, that will be a relevant factor.

12 The second other point from the two cases is that the fact that a successful litigant is outside Singapore, and it would be inconvenient or expensive to seek recovery outside Singapore is not, of itself, a special circumstance warranting a stay (see *Harte* at [64]–[65] and *Strandore* at [13]) although in *Strandore*, the court did also say, at [12], that this is a factor that has to be taken into consideration.

13 In *Viet Hai Petroleum Corp v Ng Jun Quan* [2016] 3 SLR 887 ("*Viet Hai Petroleum*"), the High Court again endorsed the principle in *Harte* and *Strandore* that the fact that a judgment creditor is a foreign entity is not a special circumstance warranting a stay. This was reiterated by the Singapore International Commercial Court in *Telemedia Pacific Group Ltd and another v Yuanta Asset Management International Ltd and another* [2017] 4 SLR 26 at

[33] although the court did also say that the combination of non-residence and the absence of any reciprocal enforcement regime may amount to special circumstances warranting the grant of a stay.

14 It seemed to me that too much weight has been placed by an unsuccessful litigant on the bare fact that a successful litigant is outside Singapore. Furthermore, while the absence of any reciprocal enforcement may be taken into account with that bare fact, there are more important considerations. For example, does the successful litigant have huge financial resources with a good reputation? Such facts may suggest that it is more likely than not that it will honour any judgment or order to repay a sum of money without having to be compelled to do so by proceedings in the country where it conducts its business. Another example is the manner in which it had conducted its business and the litigation. Was there any evidence that the successful party was in the habit of making payments late, whether to the other party or to others? Did the successful party act reasonably in the litigation or was it prone to making unsubstantiated allegations or suppressing the truth?

15 Coming back to *Harte* and *Strandore*, these two cases did not say whether an offer by an unsuccessful litigant to provide security for the sums awarded below, pending an appeal, would constitute a special circumstance warranting the grant of a stay.

16 INTL submitted that such an offer was a special circumstance although not necessarily warranting a stay. All the factors had to be considered. NKM submitted that the Judgment Sum would still be locked up under INTL's offer. Hence NKM did not agree to a stay even if the Judgment Sum was deposited with its solicitors pending the appeal.

17 In *PT Sariwiguna Binasentosa v Sindo Damai Shipping Pte Ltd and others* [2015] SGHCR 20 ("*Binasentosa*"), Assistant Registrar Justin Yeo Rong Wei ("AR Yeo") considered the question whether a stay of execution pending appeal should be granted where the defendant was willing to pay the judgment sum plus interest into court pending the appeal. AR Yeo agreed that mere inconvenience, expense and difficulty in having to bring proceedings in a foreign jurisdiction to recover a judgment debt would not be sufficient to justify a stay without more, citing *Harte*. He noted that the offer would still result in the locking up of funds to which the plaintiff there was *prima facie* entitled.

18 He decided that the fact that there was such an offer would not by itself justify a stay pending appeal. Otherwise it would be open to every judgment debtor to justify a stay pending appeal by making such an offer, a situation which would violate the first principle cited in *Strandore*, insofar as the funds would still be locked up where the plaintiff was concerned.

19 In *Viet Hai Petroleum*, the successful plaintiff was agreeable to a stay on condition that the defendants pay a certain sum (comprising more than half of the claim) into court pending an appeal by the defendants to the Court of Appeal.

20 In *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others* [2017] 2 SLR 12 at [199], Sundaresh Menon CJ granted a stay of execution pending an appeal to the Court of Appeal where the appellants had offered to make payment of a sum awarded by the court below to the respondents either into court or to the solicitors of the respondents to be held by them as security for the sum awarded pending the outcome of the appeals. Two reasons were given:

(a) The substantive appeals had been heard and judgment would be released in due course; and

(b) The stay would mean the least prospect for any possible injustice. The respondents would get their money absolutely, almost immediately and without a risk of non-recovery if they succeeded in the appeals. On the other hand, the appellants would also get their money back, also almost immediately if they succeeded in their appeals.

21 However, besides the fact that the substantive appeals had been heard, there was one other important point in that case. It appeared that the respondents' counsel had agreed to the stay application being granted if the sum was paid to and held by his firm pending the outcome of the appeals.

22 I come back to the reasons for INTL's application. Its first reason was the merits of its appeal. I have elaborated in the grounds of decision for the Substantive Decision why I granted summary judgment for the Judgment Sum and need not repeat them here. It suffices to say that I could not conclude that it was obvious that INTL would succeed on its appeal. Therefore, the alleged merits of its appeal did not constitute a positive factor in favour of a stay.

23 As for the second reason, INTL asserted that a stay would not deprive NKM of the fruits of litigation. However, while it was true that NKM would be secured by the offer, the funds would still be locked up for the time being. Thus, NKM was still being deprived of the fruits of its litigation.

24 I now address the third and fourth reasons together as they overlapped.

25 I did not agree with INTL's suggestion that AR Yeo's decision had been influenced by the clarification in that case that the appeal there was on quantum only and not on liability (see [10] of *Binasentosa*). This was not a reason that featured in AR Yeo's decision at [30]. I was also of the view that such a distinction was not material.

26 I agreed with AR Yeo that any such offer to pay the judgment sum plus interest into court pending the appeal did not in itself justify the granting of a stay. Otherwise it would be open to every defendant to obtain a stay on that ground alone. That would in turn mean that the sum was still locked up as far as a plaintiff is concerned. Therefore, INTL's offer was but one factor in considering whether special circumstances existed to warrant the granting of a stay.

27 On the question whether there was significant risk that INTL's appeal would be rendered nugatory, if successful, it is worth reiterating that it is not sufficient to say that the successful litigant is a foreign party, and that it would be inconvenient or expensive to seek recovery outside Singapore if no stay of execution was granted. Otherwise a stay would be granted each time such an offer was made if the successful litigant was foreign party. The supporting affidavit of INTL's director, Gregory Kallinikos, made the bare assertion at paras 24–25 that a successful appeal "would be rendered nugatory" and that there was "a real threat that [INTL] may not be able to recover the sums paid out to [NKM] in the event that [INTL's] appeal is successful". However, no elaboration was given. It seemed that INTL was relying on the bare fact that NKM is a foreign litigant, which was not a special circumstance in itself.

28 On the contrary, there were other factors militating against a stay:

(a) The only claim which INTL had against NKM up to the date of the Substantive Decision was its counterclaim for the Disputed Sum. INTL was still holding onto the Disputed Sum to secure that counterclaim. Therefore, even if INTL succeeded in its appeal to the Court of Appeal and NKM failed to repay the Judgment Sum to INTL, and even if INTL succeeded in its counterclaim eventually, there would still be no loss to INTL in respect of the Disputed Sum. Whether INTL had to incur costs was a separate point which I have addressed in the grounds of decision for the Substantive Decision.

(b) NKM is a company listed on the Korea stock exchange. While there was no evidence of NKM's market capitalisation or of its balance sheet, the fact that it is listed on the Korea stock exchange suggested that if there was a judgment or order that NKM was to repay the Judgment Sum, it would honour that obligation as a default would tarnish its reputation. Also, INTL did not suggest that NKM was in financial difficulties.

(c) Furthermore, NKM had bought coal from INTL under five Sale Contracts. INTL did not suggest any default by NKM in paying the purchase price of the coal. Neither did INTL suggest any default in the past by NKM in paying any other liability where such liability was undisputed.

29 For completeness, I mention that even the amount of INTL's counterclaim was vacillating. In INTL's Answer to the Notice for Arbitration, the counterclaim was estimated to be US$1,353,140. In a later email from Holman Fenwick Willan Singapore LLP ("HFW") to INTL's Singapore solicitors dated 21 September 2018, which was sent after the date of the

Substantive Decision, HFW said that INTL intended to plead that its principal counterclaim was "at least US$1,752,764.80". HFW also said that the counterclaim was likely to be significantly higher than this sum pending disclosure by NKM of certain communication. Yet when the counterclaim was eventually filed on or about 5 October 2018, the specific sum which INTL was counterclaiming for was US$1,303,140 and not US$1,353,140 or US$1,752,764.80 although INTL was still suggesting that it might make further claims after discovery was made.

30 Therefore, the circumstances did not warrant the granting of a stay of execution. I add that it was in the interest of justice to refuse to grant a stay.

Woo Bih Li
Judge

Suresh Divyanathan and Leong Yu Chong Aaron
(Oon & Bazul LLP) for the plaintiff;
Tan Thye Hoe Timothy and Shakti Sadashiv (AsiaLegal LLC)
for the defendant.
