IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 72

Civil Appeal No 78 of 2019 (Summons No 116 of 2019)

Between

Independent State of Papua New Guinea

… Appellant in CA/CA 78/2019
Respondent in CA/SUM 116/2019

And

PNG Sustainable Development Program Ltd

… Respondent in CA/CA 78/2019
Applicant in CA/SUM 116/2019

In the matter of Suit No 795 of 2014

Between

Independent State of Papua New Guinea

… Plaintiff

And

PNG Sustainable Development Program Ltd

… Defendant

Version No 1: 27 Oct 2020 (22:41 hrs)

In the matter of Originating Summons No 234 of 2015

In the matter of Clause 9 of the Memorandum of Association of PNG Sustainable Development Program Limited

And

In the matter of Article 52 of the Articles of Association of PNG Sustainable Development Program Ltd

Between

Independent State of Papua New Guinea

… Plaintiff

And

PNG Sustainable Development Program Ltd

… Defendant

GROUNDS OF DECISION

[Civil Procedure] — [Appeals] — [Stay of appeal]

TABLE OF CONTENTS

Version No 1: 27 Oct 2020 (22:41 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Independent State of Papua New Guinea
v
PNG Sustainable Development Program Ltd

[2019] SGCA 72

Court of Appeal — Civil Appeal No 78 of 2019 (Summons No 116 of 2019)
Woo Bih Li J
4 October 2019

19 November 2019

Woo Bih Li J:

Introduction

1 The applicant in the present application, PNG Sustainable Development Program Limited, is the respondent in the substantive appeal, Civil Appeal No 78 of 2019 ("CA 78"). It succeeded before the High Court in defending the claims brought by the Independent State of Papua New Guinea, the appellant in CA 78, and was awarded costs fixed at over $2m. By way of the present application, Summons No 116 of 2019 ("SUM 116"), PNG Sustainable Development Program Limited applied for CA 78 to be stayed until the Independent State of Papua New Guinea paid the costs awarded by the High Court.

2 I will, in these grounds, refer to the applicant in SUM 116 (*ie*, the respondent in CA 78) as "PNGSDP" and the respondent in SUM 116 (*ie*, the

appellant in CA 78) as "the State".

3 The present application concerns the issue of when an appeal may be stayed pending the payment of costs awarded by the court below, which is an issue of some practical importance. I heard the application as a single judge sitting in the Court of Appeal. Having heard the parties' submissions, I dismissed PNGSDP's application for the appeal to be stayed, for reasons which I will explain in these grounds.

Background

4 In Suit No 795 of 2014 and Originating Summons No 234 of 2015 (collectively, "the consolidated proceedings"), the State as plaintiff sought to establish the existence of and enforce rights of control and oversight which it claimed to have over the operations and assets of the defendant, PNGSDP. The trial for the consolidated proceedings took place in 2018, following which the High Court Judge ("the Judge") reserved judgment. On 2 April 2019, the Judge issued his judgment which can be found at *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2019] SGHC 68. In summary, the Judge dismissed all of the State's claims against PNGSDP.[1] The issue of costs was reserved.

5 On 8 April 2019, the State filed CA 78, appealing against the Judge's decision to dismiss all of its claims against PNGSDP. On the same date, the State's solicitors certified that they had furnished the standard undertaking as

---

[1] Affidavit of John Malcolm Wylie dated 10 September 2019 ("Affidavit of JMW") at para 6.

Version No 1: 27 Oct 2020 (22:41 hrs)

security for PNGSDP's costs of the appeal, pursuant to O 57 r 3 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court").

6 On 26 July 2019, the Judge issued his decision on costs of the consolidated proceedings ("costs order of 26 July 2019"). He ordered the State to pay to PNGSDP costs fixed at $2,320,000 plus reasonable disbursements to be taxed if not agreed.[2] Aside from the costs order of 26 July 2019, the Judge had made previous costs orders in favour of PNGSDP for interlocutory applications in the consolidated proceedings.[3] Although the State had made payment of some of the interlocutory costs orders totalling $16,347.75,[4] a sum of $186,300 remained unpaid by the State.

7 Subsequently, on 15 August 2019, PNGSDP's solicitors wrote to the State's solicitors, demanding payment of the total sum of $2,522,356.07 (the "Outstanding Sum") by 22 August 2019.[5] The Outstanding Sum comprised the following:[6]

(a) the costs of and incidental to the consolidated proceedings fixed at $2,320,000 pursuant to the costs order of 26 July 2019;[7]

---

2 Affidavit of JMW at para 6 and exhibit JMW-1 at p 12.

3 Affidavit of JMW at para 3; Schedule 1 to SUM 116.

4 Affidavit of Daniel Rolpagarea dated 20 September 2019 ("Affidavit of DR") at para 10.

5 Affidavit of JMW at para 7(c) and exhibit JMW-2 at p 35.

6 Affidavit of JMW at para 3.

7 Affidavit of JMW exhibit JMW-1 at p 12.

Version No 1: 27 Oct 2020 (22:41 hrs)

(b) the portion of the costs of interlocutory applications in the consolidated proceedings fixed by the Judge which remained unpaid by the State totalling $186,300;[8] and

(c) the disbursements agreed between the parties on 22 September 2017 and 24 October 2017 for the interlocutory applications in the consolidated proceedings amounting to $16,056.07.[9]

8 On 22 August 2019, the State's solicitors wrote to PNGSDP's solicitors, requesting deferred payment of the Outstanding Sum until the disposal of CA 78 given that the costs orders were subject to the State's appeal in CA 78.[10] On the same date, PNGSDP's solicitors replied, rejecting the State's request for deferred payment on the basis that CA 78 did not operate as a stay of execution of the various costs orders, and reiterating its demand for payment of the Outstanding Sum by 26 August 2019.[11]

9 Having received no further reply from the State's solicitors, PNGSDP filed SUM 116 on 10 September 2019 for all further proceedings in CA 78 to be stayed until the State paid to PNGSDP:

(a) the Outstanding Sum; and

---

8 Schedule 1 to SUM 116.

9 Schedule 2 to SUM 116.

10 Affidavit of JMW at para 7(d) and exhibit JMW-2 at p 37.

11 Affidavit of JMW at para 7(e) and exhibit JMW 2 at p 38.

Version No 1: 27 Oct 2020 (22:41 hrs)

(b) all such further interest payable, at the rate prescribed in the Rules of Court from the date of each costs order or agreement (as the case may be) to the date of full payment.

The basis of the application was this court's inherent powers, as expressly preserved under O 92 r 4 of the Rules of Court.

10 For completeness, I mention that the State claimed in the present application that PNGSDP itself had not paid costs ordered against it in a number of interlocutory applications, totalling $24,979.85. This sum owed by PNGSDP had allegedly not been set off against the Outstanding Sum owed by the State.[12] In any event, the sum of $24,979.85 claimed to be owed by PNGSDP to the State was significantly lower than the Outstanding Sum owed by the State to PNGSDP and there was no dispute that the State remained the net debtor.

11 I heard SUM 116 on 4 October 2019. As at the time of the hearing, PNGSDP had not commenced any enforcement proceedings against the State in respect of the Outstanding Sum.[13] The State also had not applied for a stay of execution of the various costs orders made by the Judge pending the outcome of CA 78.

12 In addition, as at the time of the hearing, the State's case in the appeal had been filed (on 23 September 2019), while PNGSDP's case in the appeal was due on 11 October 2019.[14]

---

12 Affidavit of DR at para 12; The State's Skeletal Submissions at para 23.

13 Affidavit of DR at para 14.

14 Minute sheet for SUM 116 dated 4 October 2019.

Version No 1: 27 Oct 2020 (22:41 hrs)

13 Having heard the parties' submissions at the hearing for SUM 116, I dismissed the application. CA 78 is currently fixed for hearing before the Court of Appeal in January 2020.

Parties' submissions

PNGSDP's submissions

14 PNGSDP relied principally on the Court of Appeal's decision in *Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp Ltd and another* [2003] 2 SLR(R) 353 ("*Roberto*"),[15] where it was recognised that the appellate court has the inherent jurisdiction to require an appellant to pay the costs of the action below, on penalty of the appeal being stayed, where the justice of the case so demanded.[16] It also relied on two decisions of the High Court, namely, *Lim Poh Yeoh (alias Aster Lim) v TS Ong Construction Pte Ltd* [2017] 4 SLR 789 ("*Lim Poh Yeoh*")[17] and *FT Plumbing Construction Pte Ltd v Authentic Builder Pte Ltd and another matter* [2018] SGHCR 3 ("*FT Plumbing*").[18]

15 PNGSDP argued that the requirements as set out in these three cases for a stay of proceedings pending the payment of costs ordered by the court were satisfied in the present case. Specifically, it claimed that there were two factors which, when combined, were sufficient to make the circumstances of the present case exceptional such that a stay of the appeal was justified.

---

15 PNGSDP's Bundle of Authorities ("BOA") at Tab 8.

16 PNGSDP's Skeletal Submissions at para 8.

17 PNGSDP's BOA at Tab 6.

18 PNGSDP's BOA at Tab 5.

Version No 1: 27 Oct 2020 (22:41 hrs)

16 First, PNGSDP argued that the State was able but simply unwilling to pay the Outstanding Sum as it had not provided a convincing explanation for its continued non-payment of the sum.[19] The fact that the State was acting in bad faith in not paying the Outstanding Sum was also allegedly evidenced by its past conduct in the consolidated proceedings.[20] As the State was able but unwilling to pay the Outstanding Sum, the stay of the appeal would not stifle the State's right of appeal and cause prejudice to it, since it would only delay the appeal pending payment of the Outstanding Sum plus interest.[21]

17 Second, PNGSDP submitted that it would face difficulties enforcing the various costs orders against the State because enforcement would have to be undertaken in Papua New Guinea as the State was not within Singapore's jurisdiction. Any attempt that it makes to enforce the costs orders against the State in Papua New Guinea was likely to be time consuming and ultimately unfruitful.[22] That the enforcement of the costs orders would be a challenging process which would in all likelihood result in PNGSDP not being able to recover the Outstanding Sum for a very long time, and certainly not before CA 78 was disposed of, was argued to be a further reason for the stay to be granted in the present case.[23]

---

19 PNGSDP's Skeletal Submissions at paras 18–21.

20 PNGSDP's Skeletal Submissions at paras 22–25.

21 PNGSDP's Skeletal Submissions at para 31.

22 PNGSDP's Skeletal Submissions at paras 26–30.

23 PNGSDP's Skeletal Submissions at para 30.

Version No 1: 27 Oct 2020 (22:41 hrs)

The State's submissions

18 The State emphasised that the case law, specifically *Roberto*, makes clear that it is only in exceptional circumstances that the Court of Appeal would order a stay of the appeal pending payment of costs awarded below.[24] It argued that the present case was not such an exceptional case justifying the grant of the stay.

19 The State denied PNGSDP's allegations that it had acted in bad faith in the consolidated proceedings. It argued that such allegations were without merit and in any event, bore no connection to the present stay application.[25] It also denied PNGSDP's allegation that it was able but unwilling to pay the Outstanding Sum. It explained that it faced difficulties in paying the Outstanding Sum because of strict foreign exchange controls in place, which made it difficult for it to transfer large sums of foreign currency at short notice.[26]

20 The State further highlighted the fact that PNGSDP had filed the present application without having made any prior attempt to enforce the Outstanding Sum. It argued that PNGSDP was seeking to stifle its right of appeal by bringing the stay application.[27]

---

24 The State's Skeletal Submissions at paras 5–10.

25 The State's Skeletal Submissions at paras 14–18.

26 The State's Skeletal Submissions at paras 25–26.

27 The State's Skeletal Submissions at paras 20, 24.

Version No 1: 27 Oct 2020 (22:41 hrs)

Legal authorities

Locus classicus: Roberto

21 The key authority on staying an appeal pending payment by the appellant of costs awarded to the respondent below is the Court of Appeal's decision in *Roberto*. In that case, the respondents in the substantive appeal applied for the appeal to be stayed until the taxed costs of the first respondent in the action below were paid by the appellants. The application was first heard by a single judge of the Court of Appeal who allowed the respondents' application. The appellants then applied by way of motion to discharge the stay order. A three-judge Court of Appeal allowed the appellants' motion and discharged the stay order.

22 The three-judge Court of Appeal held in *Roberto* that it had the inherent jurisdiction, as preserved under O 92 r 4 of the Rules of Court, to require an appellant to pay the costs of the action below, on penalty of the appeal being stayed (at [15]). Order 92 r 4 of the Rules of Court states:

> **Inherent powers of Court**
>
> **4**. For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

23 In addition, the three-judge Court of Appeal held that s 36(1) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) was sufficiently broad to allow a single judge of the Court of Appeal to stay an appeal pending payment of costs below but not to strike out the appeal for non-compliance of an order to pay such costs (*Roberto* at [23]). The relevant portion of s 36(1) referred to by the court in *Roberto* remains the same in substance today, notwithstanding some

Version No 1: 27 Oct 2020 (22:41 hrs)

modifications in the precise wording. Section 36(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) presently reads:

> **Incidental directions and interim orders**
>
> **36.**—(1) In any appeal or application pending before the Court of Appeal (called in this section the pending matter), the Court of Appeal may, on its own motion or on the application of any party, at any time make one or more of the following directions and orders:
>
> > (*a*) any direction incidental to the pending matter not involving the decision of the pending matter;
> > …
>
> (2) Despite section 30(1), the Court of Appeal is duly constituted to make any direction or order mentioned in subsection (1) if it consists of —
>
> > (*a*) one Judge of Appeal; or
> >
> > (*b*) 2 Judges of Appeal.

24 The Court of Appeal emphasised, however, that the jurisdiction to order a stay of appeal pending payment of costs below should only be invoked in special or exceptional circumstances where there was a clear need for it and the justice of the case so demanded. The court explained (*Roberto* at [17] and [19]):

> 17 … [T]his inherent jurisdiction should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands. The circumstances must be special. The costs due to the successful party in the court below, unless there is an order for a stay of execution, are a debt which is recoverable under the normal enforcement process. Ordinarily, this would have nothing to do with the appeal which is pending. It may well be true that if the successful party were to seek execution by bankruptcy proceedings, he could encounter some problems in view of the fact that the case is under appeal. But that is not the only manner of execution. In any event, a right of appeal should not be curtailed by considerations which are extraneous to the appeal. The appellate court should not be used as a means to enable the respondent to obtain payment of his taxed costs. The appeal, if it proceeds, would only cause prejudice to the respondent as to the costs of the appeal, as he would have to

Version No 1: 27 Oct 2020 (22:41 hrs)

> incur the expenses of defending the judgment. To that extent, he is entitled to be secured.
>
> …
>
> 19 Accordingly, the circumstances where such an order may be made must be rare indeed. We do not wish to prejudge matters or lay down any definite considerations. It is the twin criteria of prejudice/justice which would be decisive. Purely as an example, if a plaintiff was required by the court below to furnish security, and failed to do so, and the case went on to trial as the defendant wished to have the matter disposed of expeditiously, and the plaintiff then failed and appealed, this may be the sort of circumstance where the appeal court could invoke that jurisdiction to order payment of the costs below before the appeal may be allowed to proceed.

On the facts of the case, the Court of Appeal was of the view that the stay ought not to have been granted.

SOPA cases

25 Aside from *Roberto*, PNGSDP relied on the cases of *Lim Poh Yeoh* and *FT Plumbing*, which concerned applications by a defendant to stay proceedings commenced by the plaintiff, where the judgment debt and costs of separate proceedings between the parties remained unpaid by the plaintiff.

26 In *Lim Poh Yeoh*, the plaintiff engaged the defendant to build a pair of semi-detached houses. The defendant brought adjudication proceedings against the plaintiff and was awarded the sum of $138,660 ("Judgment Debt"). In Originating Summons No 381 of 2013 ("OS 381"), leave was granted to the defendant to enforce the adjudication determination as a judgment debt. Without having paid the Judgment Debt, the plaintiff commenced a separate suit against the defendant ("Suit 92") for damages for uncompleted and defective works. The defendant applied to stay Suit 92 pending payment by the plaintiff of the Judgment Debt and all outstanding costs awarded to the defendant in the various

Version No 1: 27 Oct 2020 (22:41 hrs)

proceedings between the parties. The defendant's stay application was allowed by the assistant registrar, whose decision was affirmed on appeal. In respect of the outstanding costs, the High Court judge found that the plaintiff had the means to pay the outstanding costs but was simply refusing to do so (at [12]). The plaintiff's conduct demonstrated that she was picking and choosing which outstanding orders of court to comply with so that she would not weaken the legal position that she was adopting. In particular, to support her legal position, she had deliberately paid all of the interlocutory costs orders made in Suit 92 but not the costs arising from OS 381 (at [13]). This demonstrated her attempt to "game the system", and "use the power of [the] Court when it suit[ed] her and disregard it when it [did] not" (at [13]). As for the plaintiff's non-payment of the Judgement Debt, the High Court judge noted that a fundamental premise of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA") regime was that a successful claimant should be paid speedily, and thus the plaintiff should not be allowed to continue to deprive the defendant of its right to prompt payment (at [18] and [19]).

27 In *FT Plumbing,* the defendant succeeded in adjudication proceedings against the plaintiff and sought to enforce the adjudication determination as a judgment debt. The plaintiff commenced a suit against the defendant, seeking a final determination of the dispute arising out of the construction contract between the parties. The defendant applied to stay the suit, alleging that the plaintiff's commencement of the suit amounted to an abuse of process of the court given that the plaintiff had not paid the adjudicated amount to the defendant. The issue considered by the assistant registrar in *FT Plumbing* was whether it would be an abuse of process for the losing party in an adjudication to commence proceedings in court to obtain a final determination of the underlying dispute between the parties despite not having paid the adjudicated

Version No 1: 27 Oct 2020 (22:41 hrs)

amount (*FT Plumbing* at [19]). Following the case of *Lim Poh Yeoh*, the assistant registrar granted the stay, rejecting the plaintiff's claim that it genuinely did not have the ability to make payment (at [68]).

28 From the above, it is apparent that the question before the court in *Lim Poh Yeoh* and *FT Plumbing* was not on all fours with that which was before me in SUM 116. In particular, the stay applications in those two cases arose within the specific context of the SOPA regime, where the object of the regime was of relevance. In the present case, on the other hand, the issue was whether an appeal pending before the Court of Appeal should be stayed until the costs awarded below were paid by the appellant. In the circumstances, the usefulness of *Lim Poh Yeoh* and *FT Plumbing* in the present application was in my view to some extent limited.

English cases

29 Although not highlighted by PNGSDP or the State, there were a number of English cases relevant to the issue of whether an appeal should be stayed pending payment of the judgment debt or costs below.

30 Under the English Civil Procedure Rules ("CPR"), the appellate court has a discretion to "impose … conditions upon which an appeal may be brought" where there was a "compelling reason" for doing so (CPR 52.18(1)(c) read with 52.18(2)). Singapore does not have a similar provision.

31 In *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] All ER(D) 258 ("*Hammond Suddard*"), the English Court of Appeal held that these provisions gave the court the discretion to order the continued prosecution of an appeal to be made conditional on the appellant's payment of

Version No 1: 27 Oct 2020 (22:41 hrs)

the judgment debt and costs below (at [38]–[40]). In that case, the appellant was a company incorporated in the British Virgin Islands. The respondents opposed the appellant's application for a stay of execution of the judgment below, and asked for an order that the appellant be allowed to continue its appeal only if it paid or secured the full amount of the judgment debt and costs below. The court granted the order sought by the respondents, having taken into account the following six factors which, when combined, sufficed to constitute a compelling reason (at [41]):

> (1) The appellant is an entity against whom it will be difficult to exercise the normal mechanisms of enforcement. It is registered in the British Virgin Islands and has no assets in the United Kingdom. There is, accordingly, a very real risk that if the appeal fails, the respondents will be unable to recover the judgment debts and costs as ordered by Silber J. Given the attitude of the appellant to date, including that demonstrated on these applications, it is fanciful to think that the appellant will co-operate in the enforcement process.
>
> (2) The appellant plainly either has the resources or has access to resources which enable it both to instruct solicitors and leading and junior counsel to prosecute its appeal and make an application to the court for a stay of execution and to provide a substantial sum by way of security for costs.
>
> (3) There is no convincing evidence that the appellant does not either have the resources or have access to resources which would enable it to pay the judgment debt and costs as ordered. It has failed to do so. It is, accordingly, in breach of the orders made by Silber J on 12 July 2001.
>
> (4) The discovery which the appellant has provided of its financial affairs is inadequate and gives the court no confidence that it has been shown anything near the truth. Moreover, as stated earlier, it has produced evidence (when it wanted to) that it was a thriving and profitable institution. It has wealthy owners and there is no evidence that, if they were minded to do so, they could not pay the judgment debt including the outstanding orders for costs.
>
> (5) For the reasons we have already given we are not persuaded that this appeal will be stifled if we make the order sought.

Version No 1: 27 Oct 2020 (22:41 hrs)

> (6) In these circumstances, we find it unacceptable that absent any other orders of the court the appellant is intending to prosecute the appeal (and is willing to put up security for costs in order to do so) whilst at the same time continuing to disobey the orders of the court to pay the judgment debt and costs, as well as seeking to persuade us that it cannot do so.

32 Thus, based on *Hammond Suddard*, it would appear that in England, the fact that there is a real risk that the respondent would be unable to recover the judgment debt and costs below in the event the appellant fails in the appeal (due to difficulties in enforcement), alongside the lack of evidence from the appellant that it is unable to make payment, is sufficient to constitute a compelling reason for the stay to be granted.

33 In *Bell Electric Ltd v Aweco Appliance Systems GmbH & Co KG* [2003] 1 All ER 344, the English Court of Appeal further held that even where there was no reason to suppose that vigorously pursued steps of enforcement would *ultimately* prove fruitless if the appeal fails, there may nonetheless be a compelling reason for the stay to be granted (at [22]). Such compelling reason may be found where the reason for the appellant's non-payment of the judgment debt and costs below is not financial difficulty, but its knowledge that the respondent is unlikely to commence enforcement proceedings while the appeal is pending due to practical difficulties (at [22]–[23]). The court stated (*per* Potter LJ, with whom Carnwath LJ agreed):

> [22] The question posed in this case, to which the judgment in the *Hammond Suddard* case provides no answer, is whether, where there is no reason to suppose that vigorously pursued steps by way of enforcement will *ultimately* prove fruitless if the appeal fails, there may none the less be a 'compelling reason' meanwhile to make an order staying the appeal if the interim order is not complied with, or a payment into court made or other security provided in respect of the judgment sum. Depending upon the overall circumstances, I see no reason *in principle* why that should not be so in a case where (i) the appellant is in deliberate breach of the order to pay the

Version No 1: 27 Oct 2020 (22:41 hrs)

> judgment sum; (ii) he has applied for and been refused a stay; (iii) his failure or delay in payment is due not to any financial difficulty but is cynically based upon the practical difficulties for the respondent in seeking enforcement in a foreign jurisdiction.
>
> …
>
> [26] … It is implicit in the decision I have reached that I reject the argument that, if the 'normal' processes of enforcement are available to a successful party in respect of a sum ordered to be paid following trial, that is fatal per se to a successful application under r 52.9 [now r 52.18] for payment for security in respect of the judgment sum. I think it clear that, in the ordinary case of an appeal by an individual or company resident in the United Kingdom or possessed of assets here, the court would be most unlikely to regard the failure of an unsuccessful defendant to pay the judgment sum following refusal of a stay of execution as constituting a compelling reason to deploy its powers under r 52.9. In such a case, in the absence of very exceptional circumstances, it seems plain that the remedy of execution and/or bankruptcy or winding-up proceedings should be deployed as the appropriate and effective route to enforcement. None the less where, as here, a litigant of means, whether a United Kingdom resident or a resident in a member state of the Community subject to the regulation, demonstrates its intention to ignore the orders of the court and to rely upon the expense or other practical difficulties which may confront the respondent in seeking enforcement of its judgment abroad, it may well be appropriate for the court to exercise its powers under r 52.9. In my view this is such a case.
>
> [emphasis in original]

34 In the recent case of *Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik AS* [2018] 1 All ER 721 ("*Goldtrail Travel Ltd*"), the UK Supreme Court approved of the Court of Appeal's holdings in *Hammond Suddard* at [41(1)]–[41(3)], including the Court of Appeal's treatment of the likely difficulties faced by the successful party in enforcement as a relevant factor in the consideration of whether there was a compelling reason for the stay to be granted (*Goldtrail Travel Ltd* at [21]). It cautioned, however, against the Court of Appeal's phraseology at [41(4)] concerning the issue of when the appellant's access to funds from a third party could be taken into account in assessing the

Version No 1: 27 Oct 2020 (22:41 hrs)

likelihood that it could make payment of the judgment debt (see *Goldtrail Travel Ltd* at [22]). The UK Supreme Court also emphasised that a condition to the appellant's continuation of the appeal should not be imposed where the effect of such a condition would be to stifle the appeal. The Supreme Court observed in particular (*per* Lord Wilson, with whom Lord Neuberger P and Lord Hodge agreed):

> [12] To stifle an appeal is to prevent an appellant from bringing it or continuing it. If an appellant has permission to bring an appeal, it is wrong to impose a condition which has the effect of preventing him from bringing it or continuing it. …
>
> …
>
> [15] There is no doubt—indeed it is agreed—that, if the proposed condition is otherwise appropriate, the objection that it would stifle the continuation of the appeal represents a contention which needs to be established by the appellant and indeed, although it is hypothetical, to be established on the balance of probabilities: for the respondent to the appeal can hardly be expected to establish matters relating to the reality of the appellant's financial situation of which he probably knows little.
>
> [16] But, for all practical purposes, courts can proceed on the basis that, were it to be established that it would probably stifle the appeal, the condition should not be imposed.

35 In my judgment, the following principles may be distilled from the above-cited three English cases:

(a) In an application by the respondent for a stay of appeal pending payment by the appellant of the judgment debt or costs below, the respondent has to show that there is a "compelling reason" for such a stay to be granted. A compelling reason is provided if the respondent would likely face difficulties in enforcing the judgment in the event the appellant loses the appeal, and the appellant's non-payment of the

Version No 1: 27 Oct 2020 (22:41 hrs)

judgment debt or costs is not due to financial difficulty but an illegitimate reason.

(b) If a compelling reason is provided by the respondent for the stay to be granted, the appellant will have to establish on a balance of probabilities that the stay will stifle its appeal because of its inability to make payment, in order for the stay not to be granted.

36 I noted a difference between the principles underlying the approach set out by this court in *Roberto* and the English approach. Under the English approach, a key consideration is the timely payment of a judgment debt or costs and this principle justifies the grant of a stay of the appeal where the appellant can afford to pay the costs below but fails to do so. As the English Court of Appeal noted in *Hammond Suddard* (at [48]):

> 48. … We do not disagree with Rix LA [*sic*] "cautious" approach to CPR rule 52.9 [now CPR 52.18] … We do, however, take the view that the new regime of the CPR, with its emphasis on the timely payment of costs, and the use of costs as a sanction, warrants a robust approach to appellants who fail to obey orders for the payment of a judgment debt and costs when they can afford to pay them either themselves or through others.

37 In *Roberto*, however, this court emphasised that a stay of appeal pending payment of costs below should only be granted in "rare" cases as the right of appeal should not be curtailed by considerations which are extraneous to the appeal. It was explained that the appellate court should not be used as a means to enable the respondent to obtain payment of his taxed costs (*Roberto* at [17]). On this basis, *Roberto* suggests that the mere fact that the appellant has the ability to pay the costs below but has not done so is not a special or exceptional reason for a stay to be granted.

Version No 1: 27 Oct 2020 (22:41 hrs)

The court's decision

38 As mentioned, PNGSDP submitted that there were two factors which made the circumstances of the present case exceptional. First, it suggested that the State was able but simply unwilling to pay the Outstanding Sum and therefore was abusing the process of the court in failing to comply with the costs orders.[28] Second, PNGSDP argued that it would likely face difficulties in enforcing the costs orders against the State in Papua New Guinea. As both of these allegations were not made out on the evidence, there was no basis for the stay to be granted and I accordingly dismissed SUM 116.

Abuse of process

39 First, PNGSDP relied on the case of *Lim Poh Yeoh* to argue that a stay should be granted because the State was allegedly able but unwilling to pay the Outstanding Sum. As for the reason provided by the State for its continued non-payment of the Outstanding Sum, that is, the strict foreign exchange controls in place in Papua New Guinea, PNGSDP argued that the State failed to explain how the policies affected the payment due. Further, the State had only said that it was "difficult" and not impossible to transfer the Outstanding Sum.[29] The logical conclusion, it argued, was that the State could afford to pay the Outstanding Sum but was deliberately and wilfully refusing to make payment.

40 I found that there was insufficient evidence in the present case establishing that the State was deliberately and wilfully refusing to pay the Outstanding Sum, and abusing the process of the court as a result, unlike the

---

28 PNGSDP's Skeletal Submissions at paras 15 – 16, 18.

29 PNGSDP's Skeletal Submissions at para 20.

Version No 1: 27 Oct 2020 (22:41 hrs)

judgment debtor in *Lim Poh Yeoh*. As mentioned above, in *Lim Poh Yeoh*, the High Court made an express finding that the judgment debtor was cherry-picking which outstanding orders of court to comply with so that she would not weaken the legal position that she was adopting in the proceedings. This demonstrated her attempt to "game the system", specifically to "use the power of [the] Court when it suit[ed] her and disregard it when it [did] not" (see above at [26]).

41 Turning to the present case, I accepted that there were some inadequacies in the evidence given by the State on the reasons for its continued non-payment of the Outstanding Sum. For instance, while the State's position was that existing foreign exchange controls made it difficult to make payment at "short notice",[30] no detail was provided as to the estimated amount of time it needed to transfer the sums owed to PNGSDP. In addition, no explanation was provided as to why *the State* would have difficulty in meeting its own foreign exchange controls. That said, these were insufficient to lead to the conclusion that the State's continued non-payment of the Outstanding Sum was deliberate and wilful, and clearly an abuse of process of the court. Unlike in *Lim Poh Yeoh*, there was no evidence that the State was able to make payment and in failing to pay the Outstanding Sum, attempting to "game the system". This case was therefore not a "rare" one in which the justice of the case required that the stay be granted (see *Roberto* at [19]).

42 Second, PNGSDP submitted that the fact that the State was acting in bad faith in failing to pay the Outstanding Sum was evidenced by its past conduct

---

30 Affidavit of DR at para 15; The State's Skeletal Submissions at paras 25–26.

Version No 1: 27 Oct 2020 (22:41 hrs)

in the consolidated proceedings, where the State allegedly made numerous attempts to re-characterise its claims against PNGSDP, resulting in a protracted litigation between the parties.[31] PNGSDP also claimed that the State's claims against it were "contrived" and that it had suffered prejudice as a result of having to defend the State's claims in the consolidated proceedings. This was because of, amongst others, an interim injunction obtained by the State which prevented PNGSDP from effecting changes to its memorandum, articles of association and board of directors and which required it to regularly furnish information to the State on its assets and liabilities, pending the outcome of the litigation.[32]

43 I rejected PNGSDP's submissions in this regard. There was no connection between the State's alleged past conduct in the consolidated proceedings and the State's present non-payment of the Outstanding Sum. Even if I were to assume that PNGSDP's allegations were true, the fact that the State's claims had evolved from the time of commencement, and that it had obtained an interim injunction against PNGSDP pending the outcome of the case, did not establish abuse of process on the part of the State *for the purposes of staying the State's appeal pending its payment of costs below.* The situation might have been different if for instance there was evidence that the State had consistently flouted court orders and that the non-payment of the Outstanding Sum was another manifestation of its abuse of the process of the court (see *eg*, *Suntech Power Investment Pte Ltd v Power Solar System Co Ltd (in liquidation)* [2019] SGCA 52 at [51]–[52] in the context of an application to strike out a pending

---

31 PNGSDP's Skeletal Submissions at paras 22–25; Affidavit of JMW at paras 8–10.

32 PNGSDP's Skeletal Submissions at para 24.

Version No 1: 27 Oct 2020 (22:41 hrs)

appeal where the appellant was in continuing breach of a court order). There was, however, no such suggestion made by PNGSDP in the present case.

44 In the circumstances, I found that there was no evidence that the State was deliberately and wilfully refusing to pay the Outstanding Sum, and abusing the process of the court as a result.

Difficulties in enforcement

45 PNGSDP's second main submission was that a stay should be granted because any attempt it makes to enforce the costs orders against the State in Papua New Guinea was likely to be time consuming and ultimately unfruitful. Specifically, it alleged that the State would utilise certain provisions within the relevant Papua New Guinea legislation for enforcement of judgments to stymie its attempts at enforcement. In its written submissions, PNGSDP raised various aspects of the applicable legislation in Papua New Guinea which would allegedly allow the State to stymie its attempts at enforcement. It claimed, *inter alia*, the following:[33]

(a) Under s 5 of the Papua New Guinea Reciprocal Enforcement of Judgments Act 1976 (Cap 50) ("REOJA"), a successful registration of a judgment may be set aside on grounds of public policy.

(b) If the registration of the judgment is not set aside under s 5 of the REOJA, pursuant to s 13(2) of the Papua New Guinea Claims By and Against the State Act 1996 (No 52 of 1996) ("CBAATSA"), to enforce the judgment, PNGSDP would have to serve a form on the Solicitor-

[33] PNGSDP's skeletal submissions at paras 28–29.

Version No 1: 27 Oct 2020 (22:41 hrs)

General of Papua New Guinea. The Solicitor-General could endorse one of two options on the form. The first option was to allow the judgment to be satisfied. The second option was to certify that "the State proposes to take further action in this matter and satisfaction of judgment cannot take place". While the legislation did not prescribe how the Solicitor-General's discretion would be exercised "[p]resumably, it [would] be exercised in favour of the State and therefore to the detriment of PNGSDP".

(c) Even if the Solicitor-General were to endorse that the judgment may be satisfied, the Departmental Head responsible for finance matters could only satisfy the judgment out of "moneys legally available", pursuant to s 14(3) of the CBAATSA and it was unclear what that meant in practical terms.

(d) The Departmental Head responsible for finance matters also had the "absolute discretion" to make payment by instalments as long as the judgment was satisfied "within a reasonable time", pursuant to s 14(4) of the CBAATSA.

(e) Under s 14(5) of the CBAATSA, no action for mandamus or contempt of court may lie against the Solicitor-General or Departmental Head responsible for finance matters in respect of satisfaction of a judgment under the CBAATSA, other than for failure to observe procedural requirements, or unless other exceptional circumstances could be shown.

46 I did not accept PNGSDP's allegations on the difficulties it would face in enforcing the costs orders as there was a lack of evidence to support its

Version No 1: 27 Oct 2020 (22:41 hrs)

allegations. As counsel for PNGSDP confirmed at the hearing before me, the allegations pertaining to difficulties in enforcement of the costs orders in Papua New Guinea were not raised on affidavit and only in written submissions for SUM 116. There was, in the circumstances, no basis for me to accept PNGSDP's allegations about the State's likely conduct in enforcement proceedings.

47 In coming to my decision, I had regard to the principle established in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") that raw sources of foreign law, including foreign legal codes which are admissible under s 40 read in conjunction with s 86 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"), may be adduced as evidence of the foreign law (at [55]–[58]). However, in *Pacific Recreation*, the Court of Appeal explained that even if raw sources of foreign law were admissible under these sections of the Evidence Act, it did not mean that the courts were obliged to accord these sources any evidentiary weight, as it was preferable that solicitors provide expert opinions on foreign law whenever possible (at [60]).

48 In the present case, while PNGSDP had reproduced the relevant Papua New Guinea legislation it sought to rely on in its bundle of authorities filed alongside its written submissions,[34] there was nothing on the face of the relevant provisions of the REOJA and CBAATSA cited by PNGSDP which suggested that the costs orders awarded by the High Court in this case would not be enforced in Papua New Guinea. There was no explanation on affidavit why the

---

34 PNGSDP's BOA Tabs 1 and 2.

Version No 1: 27 Oct 2020 (22:41 hrs)

registration of the judgment would likely be set aside on grounds of public policy under s 5 of the REOJA. Similarly, in respect of the allegations as set out at [45(b)]–[45(e)] above, no evidence was adduced to establish that the Solicitor-General was likely to endorse that the satisfaction of the costs orders of the Singapore High Court could not take place, or that the Departmental Head responsible for finance matters would not make the relevant payment to satisfy the costs orders.

49 I was also of the view that as the State was a foreign plaintiff, it was open to PNGSDP to apply for security for its costs of the action pursuant to O 23 r 1(1)(*a*) of the Rules of Court, but it had not. At the hearing before me, counsel for PNGSDP accepted that this was an option available to PNGSDP but which it had not undertaken. Having omitted to apply for security for costs of the action, PNGSDP was partly responsible for the predicament it found itself in.

50 For these reasons, I found that PNGSDP had failed to establish that it would face difficulties in enforcing the costs orders and that this was an exceptional reason for the stay to be granted.

51 As I have observed above, there are a number of English authorities which suggest that the fact that the respondent is likely to face difficulties in enforcing a judgment debt or costs order could be a compelling reason (under the CPR) for the appeal to be stayed pending payment of the judgment debt or costs by the appellant. However, the approach in *Roberto* is different although *Roberto* was not a case involving the need to seek enforcement of a judgment debt or costs order in a foreign country. It is uncertain if the English approach will be adopted in Singapore, given the observation in *Roberto* that the

Version No 1: 27 Oct 2020 (22:41 hrs)

respondent may well face difficulties in enforcing the costs order below while the appeal is pending but that the appellate court should not be used as a means to enable the respondent to obtain payment of his taxed costs (at [17]). Since PNGSDP failed to adduce any evidence of the difficulties it would face in enforcing the costs orders, it was unnecessary for me to decide the point. It suffices for me to observe that, based on *Roberto*, the mere fact that enforcement proceedings would have to be commenced overseas against a judgment debtor is unlikely to be sufficient to constitute a special or exceptional reason for a stay to be granted as that would result in a stay of appeal being granted in almost all cases where the appellant resides in a foreign country. This would undermine the general principle that a stay of an appeal pending payment of costs below should only be granted in special or exceptional circumstances.

Conclusion

52 For all of the foregoing reasons, I found that the twin criteria of prejudice and justice for a stay to be granted pending payment of the Outstanding Sum were not met. There was no special or exceptional circumstance justifying the stay. I therefore dismissed PNGSDP's application with costs.

Woo Bih Li
Judge

Philip Antony Jeyaretnam SC, Andrea Gan Yingtian and Ashwin Nair Vijayakumar (Dentons Rodyk & Davidson LLP) for the applicant in CA/SUM 116/2019;
Quek Yi Zhi Joel and Ng Pei Qi (WongPartnership LLP) for the

Version No 1: 27 Oct 2020 (22:41 hrs)

respondent in CA/SUM 116/2019.

Version No 1: 27 Oct 2020 (22:41 hrs)