IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 128

Suit No 521 of 2021 (Summonses Nos 1168 and 1169 of 2023)

Between

(1) Devin Jethanand Bhojwani
(2) Dilip Jethanand Bhojwani
(3) Sandeep Jethanand Bhojwani

… *Plaintiffs*

And

Jethanand Harkishindas Bhojwani

… *Defendant*

And

(1) Shankar's Emporium (Private) Limited
(2) Malaya Silk Store Pte Ltd
(3) Liberty Merchandising Company (Private) Limited

… *Non-parties*

GROUNDS OF DECISION

[Civil Procedure — Appeals — Appealing against discovery orders — Whether stay of execution should be granted in respect of the discovery orders]
[Civil Procedure — Discovery]

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Devin Jethanand Bhojwani and others
v
Jethanand Harkishindas Bhojwani
(Shankar's Emporium (Pte) Ltd and others, non-parties)

[2023] SGHC 128

General Division of the High Court — Suit No 521 of 2021 (Summonses Nos 1168 and 1169 of 2023)
Goh Yihan JC
3 May 2023

5 May 2023

Goh Yihan JC:

1 These summonses were the non-parties' and the defendant's applications to stay the execution of discovery orders made earlier by this court. Specifically, HC/SUM 1168/2023 ("SUM 1168") was the application by the non-parties, which I shall refer to as the "Live Companies", for a stay of execution of the discovery orders made in HC/SUM 462/2023 ("SUM 462") pending the final determination of their application for permission to appeal against those orders. In turn, HC/SUM 1169/2023 ("SUM 1169") was the defendant's application for a stay of execution of the discovery orders made in HC/SUM 463/2023 ("SUM 463") pending the final determination of his application for permission to appeal against those orders. These applications were made on the alternative grounds of either O 45 r 11 or O 92 r 4 of the Rules

of Court (2014 Rev Ed) ("ROC 2014"). The plaintiffs did not consent to the applications.

2 After hearing the parties, I allowed both SUM 1168 and SUM 1169. Because the plaintiffs raised a few points of principle, I provide the reasons for my decision in these grounds.

Background

3 By way of brief background, the plaintiffs claim against the defendant for breach of trust. In this regard, the defendant is the trustee of a trust ("the Trust"), in which the plaintiffs and their mother are the named beneficiaries. The defendant is the plaintiffs' father. The Trust assets include shares in several private companies which the plaintiffs' grandfather co-founded. These companies form part of a conglomerate loosely known as "Shankar's Group". The defendant had struck off or dissolved a number of these companies. This left three companies which shares are still part of the Trust. This is also why I have referred to these remaining companies as the "Live Companies".

4 Relevant to the present applications, the plaintiffs appointed their expert on 20 December 2022. The parties then agreed on the expert's issues on 16 January 2023. According to the plaintiffs, their expert was then able to provide final confirmation on the documents and information he required for his report. The plaintiffs thereafter corresponded with the defendant to request for such documents in January 2023. The defendant refused to provide the documents on the basis that, among others, there had been an earlier round of specific discovery between the parties in HC/SUM 2001/2022, which was appealed by the defendant in HC/RA 232/2022. As such, the defendant's position, which he maintained in SUM 463, was that he was not obliged to

provide discovery on the grounds of issue estoppel and the extended doctrine of *res judicata*.

5 Similarly, the plaintiffs had written to the Live Companies in January 2023 to request for various documents. The Live Companies refused to provide some of the documents on the basis that they were "confidential, commercially sensitive and/or proprietary". The Live Companies then proposed several conditions for disclosure, including conditions that the documents would only be disclosed to the plaintiffs' expert alone, and that the plaintiffs undertake that they would not make any application to court to compel disclosure of the documents to themselves or their counsel. The Live Companies maintained this position in SUM 462.

6 I heard the parties in relation to SUM 462 and SUM 463 on 13 April 2023. On 14 April 2023, I allowed discovery for most of the documents which the plaintiffs requested for. I then clarified certain aspects of those orders on 19 April 2023. For convenience, I shall refer to these orders as the "discovery orders". While the deadline for disclosure was to have been 21 April 2023, I allowed an interim stay pending the hearing of these applications. I should also mention that the present applications took place against the trial of the main action (being HC/S 521/2021) already fixed to start on 24 July 2023.

The bases of the applications

7 The bases of the applications were put forward briefly by the Live Companies and the defendant. The Live Companies' position in SUM 1168 was that their appeal against the discovery orders would be rendered nugatory since the documents cannot be "un-disclosed" once the plaintiffs have access to them. The Live Companies stated that they were "extremely worried about the

[documents] being circulated to third parties, including trade rivals and the [p]laintiffs' mother".[1] During the hearing, their counsel, Mr Keith Lim, also pointed out that the Live Companies were concerned with disclosure being made to the plaintiffs *themselves*, for reasons that he had advanced during the hearing of SUM 462. As such, the Live Companies submitted that it would be in the interests of justice for the discovery orders to be stayed until the final determination of any appeal against them.

8 The defendant's position in SUM 1169 was that the appellate court might ultimately decide certain issues of general principle or importance. These included questions such as whether the principles of issue estoppel and the extended doctrine of *res judicata* should have prevented the discovery orders from being made in SUM 463. As such, the defendant argued that a stay of execution should be granted so that his intended appeal would not be rendered nugatory. During the hearing before me, the defendant's counsel, Mr Terence Tan, submitted that there was no dire urgency for the execution of the discovery orders because this was not an instance where the defendant is alleged to be dissipating assets belonging to the plaintiffs.

The applications in SUM 1168 and SUM 1169 were allowed

The applicable law

9 The generally applicable law was not disputed by the parties. The starting point is that, as the Court of Appeal held in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053, an appeal does not operate as a stay of execution (at [13]; see also, with respect to appeals to the

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[1] 1st – 3rd Non-Parties' Written Submissions in HC/SUM 1168/2023 at para 16.

Appellate Division of the High Court ("the Appellate Division") and to the Court of Appeal respectively, ss 45(1) and 60C(1) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA")). This is because the successful litigant should not be deprived of the fruits of litigation. As such, the burden was on the Live Companies and the defendant to show why there might be "special circumstances" which justified the order of a stay (see the High Court decision of *Taylor, Joshua James and another v Sinfeng Marine Services Pte Ltd and other matters* [2019] SGHC 248 ("*Sinfeng Marine*") at [35], citing the High Court decision of *Naseer Ahmad Akhtar v Suresh Agarwal and another* [2015] 5 SLR 1032 ("*Naseer*") at [96]).

10 However, as against this starting position, the court should also ensure that any appeal, if successful, is not rendered nugatory (see the Court of Appeal decision of *Lee Sian Hee (trading as Lee Sian Hee Pork Trader) v Oh Kheng Soon (trading as Ban Hon Trading Enterprise)* [1991] 2 SLR(R) 869 ("*Lee Sian Hee*") at [5]). Thus, as Yong Pung How CJ held in *Lee Sian Hee*, a stay will be granted if it can be shown by affidavit that there is no reasonable probability of getting back damages and costs that have been paid over, should the appeal succeed. Ultimately, the task of a court when considering a stay application pending an appeal is to "hold the balance between the interests of the parties (pending the hearing of [the] appeal) to avoid any prejudice to any of the parties" (see the Court of Appeal decision of *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 ("*Celestial Nutrifoods*") at [19]).

11 In the present applications, the plaintiffs raised two points of principle that merit some discussion.

12 First, turning to O 45 r 11 of the ROC 2014, the plaintiffs' counsel, Mr Nguyen Vu Lan ("Mr Nguyen"), submitted during the hearing before me that the Live Companies and the defendant had not raised any matter within the terms of O 45 r 11 for a stay to be granted. In this regard, O 45 r 11 provides that:

> **Matters occurring after judgment: Stay of execution, *etc.* (O. 45, r. 11)**
>
> **11.** Without prejudice to Order 47, Rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks fit.

13 I did not agree with Mr Nguyen. While it is clear that O 45 r 11 requires the applicant to point to a matter which has "occurred since the date of the judgment or order", the Live Companies and the defendant satisfied this requirement by pointing to their intention to appeal against the discovery orders, even though whether this is *sufficient* for a court to grant a stay is quite a different matter. Indeed, if an intention to appeal is not a matter which has "occurred since the date of the judgment or order" under O 45 r 11, then I cannot see how the ROC 2014 can otherwise accommodate an application for a stay pending an appeal. In this regard, while Mr Nguyen pointed to O 92 r 4 of the ROC 2014 as another possible avenue, I did not agree with him as the inherent powers of the court should not be invoked unless it was necessary to do so.

14 Second, Mr Nguyen also submitted on a point of principle concerning the Live Companies' and the defendant's need to apply for permission to proceed with any appeal against the discovery orders. Mr Nguyen argued that the Live Companies and the defendant do not enjoy an undoubted right of appeal

as they are constrained by s 29A(1)(*c*) read with para 3(*j*) of the Fifth Schedule to the SCJA to obtain the permission of the Appellate Division to appeal against the discovery orders. In this regard, Mr Nguyen relied on Yong CJ's statement in *Lee Sian Hee* that the applicant in that case, who was seeking a stay pending an appeal, needed "many more steps to get his appeal off the ground" (see *Lee Sian Hee* at [9]). Yong CJ then declined to grant a stay. As such, the plaintiffs relied on this statement to argue that because the Live Companies and the defendant are a further step removed from an appeal, this ought to count against them. The plaintiffs therefore submitted that this factor should be kept in mind when considering if a stay should be granted.

15 In my view, while the Live Companies and the defendant need to obtain permission to bring their intended appeals, I did not think that ought to make their task of seeking a stay more difficult. In the first place, if an overarching concern of the court considering the stay application is whether any appeal would be rendered nugatory, then it should not matter whether the applicant had to obtain leave to bring an appeal. While the applicant may have an additional, and arguably difficult, step before an appeal could be brought, it remains that the applicant *can* bring an appeal. Put differently, the fact that the applicant needs to apply for permission to bring an appeal does not preclude the prospect of him bringing an appeal, and of that appeal succeeding. Therefore, so long as the applicant has such a prospect, the court considering a stay application pending an appeal ought not to regard the fact that the applicant needs permission to bring an appeal as a factor against the grant of a stay.

16 More pertinently, the real concern raised in *Lee Sian Hee* was the more substantive question of the likelihood of success in the pending appeal, which Yong CJ regarded as a special circumstance which would justify a departure

from the general rule that an appeal did not operate as a stay of execution. This much becomes clear when Yong CJ's reasoning in *Lee Sian Hee* is stated more fully (at [9]):

> … In the affidavit filed, there are no indications of special circumstances other than the alleged likelihood of success in the appeal. In our opinion, the likelihood of success is not by itself sufficient, even in the context of an appeal against a summary judgment. The applicant has also contended in the affidavit that he has made an application to adduce further evidence. In our opinion, he appears to have many more steps to take to get his appeal off the ground. If a bald assertion of the likelihood of success is adequate, then a stay would be granted in every case, for every appellant must expect that his appeal will succeed (*Atkins v The Great Western Railway Co* [(1886) 2 TLR 400].

As can be seen, it was in that context that the learned Chief Justice observed that the applicant there had "many more steps to take to get his appeal off the ground". Given that those steps involved substantive matters like the adduction of further evidence, it is understandable why Yong CJ would be concerned with the merits of the pending appeal. In contrast, returning to the present applications, the mere fact that an applicant needs to obtain permission to bring an appeal does not necessarily shed light on the outcome of any pending appeal. As such, in so far as the plaintiffs sought to argue for the proposition, I disagreed with them that the fact that the Live Companies and the defendant need to obtain permission from the Appellate Division to bring their appeals was a relevant factor that counted against them in their respective stay applications.

17 Finally, apart from Mr Nguyen's two points of principle above, it is noteworthy that the Live Companies and the defendant advanced their applications on the alternative grounds of either O 45 r 11 or the inherent powers of the court as recognised in O 92 r 4 of the ROC 2014. In relation to O 92 r 4, it is important to bear in mind the Court of Appeal's cautionary

statement in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 that the court's inherent powers should be exercised "judiciously" (at [27]). The same court similarly observed in *Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp Ltd and another* [2003] 2 SLR(R) 353 that such powers "should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands" (at [17]). As such, barring exceptional circumstances, O 92 r 4 should not be a convenient backdoor that parties can use to reach a result contrary to one that would otherwise be reached on the application of another provision in the ROC 2014, such as O 45 r 11 in the present context.

The Live Companies' application in SUM 1168 was allowed

18 With these principles in mind, I allowed the Live Companies' application in SUM 1168 under O 45 r 11. To begin with, the Live Companies' primary argument for a stay was that the disclosure of the documents would render any appeal against the discovery orders nugatory since the documents cannot be "un-disclosed" once the plaintiffs have access to them. I allowed a stay on the basis of this argument for the following reasons.

The Riddick *undertaking did not address the Live Companies' concern about disclosure to the plaintiffs*

19 First, the *Riddick* undertaking would not address the Live Companies' concern about disclosure to the plaintiffs. In this regard, the plaintiffs argued that any documents disclosed by the Live Companies to the plaintiffs would be subject to the *Riddick* undertaking, which was first articulated in the English Court of Appeal decision of *Riddick v Thames Board Mills Ltd* [1977] QB 881. By this undertaking, a party who discloses a document in discovery under

compulsion is entitled to the protection of the court against any use of the document otherwise than in the action in which it is disclosed (at 901H–902A). In the seminal case of *Ong Jane Rebecca v Lim Lie Hoa and other appeals and other matters* [2021] 2 SLR 584, the Court of Appeal clarified that the application of the *Riddick* undertaking should be approached using a three-category framework comprising the following (at [99]–[100]): (a) first, one must determine whether, on the basis of the element of compulsion, a document produced in discovery is covered by the *Riddick* undertaking, (b) next, if the *Riddick* undertaking applies, the question is whether, despite the undertaking, the protected documents may be used without leave of court, due to the nature of the related enforcement proceedings for which the documents are being used, and (c) if neither of the above is satisfied, the party relying on the protected documents to commence or sustain related proceedings must obtain the court's leave for the undertaking to be lifted.

20 The Live Companies did not seriously dispute that the plaintiffs would be bound by the *Riddick* undertaking in respect of the documents disclosed to them. As such, at least until the documents have been used at trial, the plaintiffs would not be able to use the documents disclosed for any alleged improper purposes (see the High Court decision of *Foo Jong Long Dennis v Ang Yee Lim and another* [2015] 2 SLR 578 at [59]–[60]). There would therefore be no danger of the documents being disclosed to the various *third parties*, including trade rivals and the plaintiffs' mother. Further, if the Live Companies are concerned with the *Riddick* undertaking being lifted once the documents are used in open court at trial, it is always open to them to make an application for the use of such documents to be *in camera*, as opposed to open court.

21 However, the *Riddick* undertaking would only address the Live Companies' concern about the plaintiffs' improper disclosure of the documents to third parties. It does not address their concern about disclosure to the *plaintiffs* themselves. While I did not agree that this concern should bar disclosure in SUM 462, the Live Companies have every right to seek permission to appeal against my decision. Accordingly, I agreed with the Live Companies that their appeal, if successful, would be rendered nugatory if the *plaintiffs themselves* have seen the documents. This is because while the *Riddick* undertaking can prevent the plaintiffs from disseminating the documents to third parties, it cannot make the plaintiffs "un-disclose" the documents.

The proposed additional undertakings did not address the Live Companies' concern about disclosure to the plaintiffs

22 Second, over and above the *Riddick* undertaking, the plaintiffs submitted that they were agreeable to interim disclosure being made on terms that offered some additional safeguards to the Live Companies. In this regard, the plaintiffs offered to undertake not to disseminate, to third parties beyond their expert and solicitors, the documents disclosed without the court's approval, pending the determination of the Live Companies' application for permission to appeal and the appeal (if permission to appeal is granted). The plaintiffs also offered to undertake to destroy the documents provided should the appeal succeed. This was based on the High Court's decision of *Sinfeng Marine*, to which I now turn.

23 In *Sinfeng Marine*, Vincent Hoong JC (as he then was) held (at [38]) that undertakings furnished by either party to allay the concerns raised by the other party are relevant in the court's determination of a stay application pending an appeal. The learned judge cited two examples of when an appropriate undertaking might lead to a rejection of a stay. First, in *Celestial Nutrifoods*, the

Court of Appeal granted a stay of a previously granted disclosure order which was appealed against because the appellants provided an undertaking that time would not start to run until the appeal was dismissed (should the appeal be dismissed). This met the respondent's concern that he would face time-bar issues in pursuing claims against the appellants if there was a delay in the disclosure of the requested documents. Second, in *Naseer*, the High Court refused the defendants' application to stay the execution of an order to convene an extraordinary general meeting by which the plaintiff sought to remove the first defendant from his directorship. In that application, the first defendant had asserted in his affidavit that there was a risk of dissipation of the company's assets should he be removed from his directorship. Apart from finding that the first defendant failed to show that there was any real substance to his assertion, Hoo Sheau Peng JC (as she then was) took the view that the plaintiff's offer of an undertaking, which provided that the company funds would not be drawn down save for the ordinary business expenses of the company and with the prior consent of the first defendant, made the grant of a stay unnecessary.

24 More relevant to the Live Companies' contention, Hoong JC in *Sinfeng Marine*, relying on the Hong Kong decision of *Akai Holdings Ltd (in Compulsory Liq) & others v Ho Wing On Christopher & others* [2009] HKCU 542, accepted that the undertakings provided by the recipients of the documents would be sufficient to meet the concern that the documents could not be "unseen" once they have been disclosed. Thus, as the learned judge said (at [41]):

> In meeting the defendants' assertion that the plaintiffs will not be able to "un-see" the documents once they have been disclosed, counsel for the plaintiffs have indicated that the plaintiffs are willing to undertake that they will not disseminate the documents disclosed pursuant to the Orders to any third parties without the court's approval, pending the appeal. The

> plaintiffs further indicated that they are prepared to return or destroy the documents provided should the defendants be successful in their appeal. Finally, at the hearing before me on 7 October 2019, counsel for the plaintiffs also indicated that they are amenable to a staggered, or staged, disclosure, whereby the defendants would only be required to disclose the more recent documents, being documents from 2016 to 2018, that are the subject of the Orders. In my view, these broad undertakings are sufficient to allay the concerns raised by the defendants. …

Applied to the Live Companies' application, an undertaking by the plaintiffs to similar effect would, over and above the *Riddick* undertaking, protect the Live Companies' concerns in relation to the improper dissemination of the documents to third parties.

25 However, similar to the *Riddick* undertaking, the additional undertakings from the plaintiffs would still not address the nub of the Live Companies' concern, which was to prevent the documents from being disclosed to the *plaintiffs* themselves. Again, while I did not think that this concern was sufficient to avoid disclosure in SUM 462, the Live Companies are entitled to appeal against my decision on this point. Accordingly, I agreed with the Live Companies that their appeal against the discovery orders, if successful, would be rendered nugatory if the documents were disclosed to the *plaintiffs* now.

The plaintiffs' prejudice was not insurmountable

26 Finally, while I agreed with the plaintiffs that they would be prejudiced by a stay of the discovery orders in the form of potentially tight timelines, this was not insurmountable in the present context.

27 In this regard, the trial dates have been fixed to begin on 24 July 2023. If the trial dates are not shifted, the plaintiffs would certainly be prejudiced if

the disclosure orders were stayed until the appeal is disposed of. This is because their expert would not have as much time as if the documents were disclosed now to prepare his report. However, if, as Mr Nguyen confirmed before me, the plaintiffs' prejudice was only confined to this, this was not insurmountable because the trial dates and other timelines can always be adjusted. Indeed, the trial dates had already been shifted once in the past to accommodate various matters, including the appointment of the plaintiffs' new counsel.

28 In summary, I found that, in so far as the Live Companies' perspective was concerned, any pending appeal would be rendered nugatory because the *Riddick* undertaking and the plaintiffs' proposed further undertakings did not address the Live Companies' concern about the documents being disclosed to the *plaintiffs* themselves. I also found that while the plaintiffs would be prejudiced by a stay of the discovery orders in terms of potentially tight timelines, that was not an insurmountable problem. For all of these reasons, I allowed the Live Companies' application for a stay in SUM 1168.

The defendant's application in SUM 1169 was allowed

29 As for the defendant's application for a stay in SUM 1169, the defendant's argument was simply that a stay should be granted because he intends to appeal against the discovery orders in SUM 463. This was in itself not a good reason because, as Yong CJ said in *Lee Sian Hee* (at [9]), "[i]f a bald assertion of the likelihood of success is adequate, then a stay would be granted in every case, for every appellant must expect that his appeal will succeed". While the defendant might have, from his perspective, good reasons to think that he would succeed in obtaining permission to appeal (and in the resulting appeal), those were not sufficient for a stay to be granted if there was nothing put before the court to substantiate them.

30 However, since the relevant timelines would likely be affected by my decision in favour of the Live Companies in SUM 1168, and also because the plaintiffs' stated prejudice is only in respect of the potentially tight timelines if the trial dates are not shifted, I allowed the defendant's application for a stay of the discovery orders in SUM 1169 under O 45 r 11 to maintain consistency with the consequences of my decision in SUM 1168.

31 For completeness, since I allowed both SUM 1168 and SUM 1169 on the basis of O 45 r 11 of the ROC 2014, there was no need for me to exercise the inherent powers of the court under O 92 r 4.

Conclusion

32 For the reasons that I have stated above, I allowed both the Live Companies' and the defendant's applications for a stay of the discovery orders. I ordered costs for both applications to be in the appeal or, if permission to appeal is not granted, costs to be in the originating application for permission to appeal.

Goh Yihan
Judicial Commissioner

Thio Shen Yi SC, Koh Li Qun Kelvin, Nguyen Vu Lan and
Uday Duggal (TSMP Law Corporation) for the plaintiffs;
Tan Li-Chern Terence (Robertson Chambers LLC) for the defendant;
Suresh s/o Damodara, Ong Ziying Clement, Darius Malachi Lim

Wen Hong, Lim Dao Yuan Keith and Brenan Mah Zhi Xian
(Damodara Ong LLC) for the non-parties.
