IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 56

Civil Appeal No 167 of 2018

Between

(1) Rex International Holding Ltd
(2) Rex International Investments Pte Ltd

… *Appellants*

And

Gulf Hibiscus Limited

… *Respondent*

EX TEMPORE JUDGMENT

[Abitration] — [Stay of court proceedings] — [Case management stay of proceedings] — [Effect of conditions of stay to move a party to commence arbitration in pursuit of a negative case]

Rex International Holding Ltd and another
v
Gulf Hibiscus Ltd

[2019] SGCA 56

Court of Appeal — Civil Appeal No 167 of 2019
Sundaresh Menon CJ, Steven Chong JA and Woo Bih Li J
22 October 2019

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

Introduction

1 This is an appeal against the decision of a High Court judge ("the Judge") to lift a stay of proceedings previously granted on case management grounds. The stay was conditional. The appellants, Rex International Holding Limited and Rex International Investments Pte Ltd ("the Appellants"), say that the effect of the conditions of the stay was to force them to move their subsidiary to commence arbitration in pursuit of a negative case. They point out that the respondent, Gulf Hibiscus Ltd ("the Respondent"), as claimant, ought to have commenced the arbitration and having chosen not to do so, ought not to be allowed to lift the stay. The implication of the Appellants' position is that the stay would have to continue indefinitely, as a practical matter, and the Respondent's only option would be to proceed by way of arbitration against the Appellants' subsidiary, Rex Middle East Limited ("RME").

2 We agree with the Judge's decision to lift the stay and accordingly, dismiss this appeal. Our reasons for lifting the stay, however, differ somewhat from those of the Judge. These are our reasons.

Background facts

3 The facts can be stated simply. On 21 April 2016, the Respondent commenced court proceedings against the Appellants in respect of alleged wrongs committed by the latter and their associated companies in relation to joint ventures between the two sides: *Gulf Hibiscus Ltd v Rex International Holding Ltd and another* [2019] SGHC 15 ("GD") at [4]. The Appellants thereafter sought a stay of the proceedings on case management grounds, relying on a dispute resolution clause found in a shareholders' agreement that had been entered into between RME and the Respondent. The dispute resolution clause provided for arbitration ("the arbitration clause"): GD at [5]. The Appellants are not privy to that shareholders' agreement and are therefore neither bound by the arbitration clause nor able on their own to invoke it. In so far as the Respondent's claims against the Appellants are concerned, those are not subject to any arbitration clause.

4 The Judge upheld the decision of the Assistant Registrar who first heard the matter to grant a stay but made it subject to certain conditions. For the sake of clarity, our subsequent references to the Judge's decision should be understood in this light. Among other things, the parties were at liberty to apply to the court to lift the stay in the event the dispute resolution mechanism in the shareholders' agreement, which includes the arbitration agreement, was not triggered by any of the parties to the shareholders' agreement within three months from the date of judgment and an arbitration was not commenced within five months from the date of the same: GD at [6]–[7]. We will discuss this

further momentarily but pause here to note that this was a curious order. The dispute resolution clause would only apply to any disputes between the Respondent and RME. The Respondent has brought no claim against RME. In these circumstances, it is not entirely clear to us why the action the Respondent had commenced against the Appellants should be stayed. In any event, no appeal was brought against the order, but at the same time, no arbitration or other proceedings between RME and the Respondent ensued.

Decision below

5 In the proceedings below, the Respondent applied to lift the stay. The Judge ordered the stay to be lifted at the close of business on 31 May 2018 unless arbitration was commenced or another order of court was granted before then: GD at [9].

6 The Judge held that the court's discretion to lift a stay of proceedings was not constrained by or contingent upon the conditions of the stay. Regardless of whether the conditions of the stay were met, the court retained a general discretion to lift the stay. This flowed from the fact that the stay was imposed in exercise of the court's case management powers and pursuant to those very powers, the court could now decide that the stay ought to be lifted: GD at [24].

7 In lifting the stay, he noted that there has been no progress towards resolving the dispute since the original order was made in 2017. Given that the dispute relates to matters that arose in 2015, this state of affairs was of some concern. Where the resolution of the dispute in question is in fact stymied by the continuation of the stay, the court can and should reconsider the terms of the stay. It is not in the interests of justice that case management stays remain indefinitely or for prolonged periods of time. Disputes ought to be resolved one way or another: GD at [32], [34]–[35].

8 The Appellants' main contention below, and on appeal, was that they would be required to move RME to commence arbitration in pursuit of a negative case, namely for a declaration of non-liability, if they desired the continuance of the stay. They submitted that they should not be made to initiate the arbitration process, incur costs and endure a possible impact on litigation strategy when it is the Respondent who is alleging wrongs on the Appellants' part: GD at [36]. The Judge, however, reasoned that the court was not, in the final analysis, compelling any side to commence arbitration. Rather, the court was simply specifying the consequences if arbitration were not in effect pursued: GD at [19]. Considering the overriding objective of ensuring the resolution of an extant dispute, the better course was to lift the stay if no progress was made: GD at [38]–[39].

Our decision

9 Notwithstanding that there was no appeal against the original stay order, we think it is appropriate for us to make some observations on the propriety of that order. In our view, the stay should not have been granted in the first place. A claimant has the right to choose its cause of action and to sue the party it wishes to sue, in whichever forum it wishes, subject only to any applicable legal constraint, such as an arbitration agreement: *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [187]. While this is not an absolute right, it is nonetheless a fundamental one. Its derogation should only be countenanced if the facts properly give rise to other higher-order concerns that warrant such derogation.

10 The Respondent has chosen not to sue RME and before us, maintains that it has no claims against RME which are the subject matter of its claims against the Appellants. In other words, the Respondent harbours *no intention of*

commencing any proceedings in any forum against RME in respect of these matters. Indeed, at the material time, it had not sued RME. In these circumstances, we are puzzled as to why the Judge even considered the possibility of such a claim and granted a stay on that basis. On the other hand, the Respondent *has* chosen to sue the Appellants; *there is no arbitration clause that applies to that dispute because the Appellants are not party to the shareholders' agreement*. This is simply not the sort of case that would, to adopt the words we used in *Tomolugen*, "create a potential case management quandary": at [140]. With great respect to the Judge, it was ill-conceived to stay the Respondent's claim against the Appellants, which was not subject to any arbitration agreement, on account of an arbitration agreement between the Respondent and a non-party to the original dispute, RME.

11 The question of case management arises where there are overlapping issues that will have to be ventilated before different fora among different parties, some of whom are bound by an arbitration agreement, while others are not. The typical case would be one where there is: (a) some overlap in the ***parties*** to the putative arbitration and the parties to the suit; and (b) some overlap in the ***issues*** that will be engaged in the putative arbitration and those in the suit. At times, the issue may be complicated where there is an underlap in the ***remedies*** that the putative arbitral tribunal may grant as compared to those which the court may grant as was noted in *Tomolugen* at [140]. The short point is that in order for case management concerns to be relevant at all, there must first be the existence or at least the imminence of separate legal proceedings giving rise to a real risk of overlapping issues. Until such time, it would be premature to consider, let alone grant, a case management stay. We emphasise that when considering whether to grant a case management stay, it is critically important that the court apply its mind to appreciate the nature and extent of the overlaps between the putative arbitration and the court proceedings. Otherwise, the court

may find itself, as it did here, ordering a case management stay for no good reason, because it has been distracted by some abstract notion of potential or theoretical overlapping of issues, parties or proceedings. It is, of course, always conceivable that there might appear to be a potential for some sort of overlap where common events involve several different parties. But a court should not stop there. Instead, it must go further and examine precisely which are: (a) the potential fora for the resolution of the dispute; (b) the different parties before each forum; and (c) the issues to be determined before each such forum. The sort of overlap that would attract a case management stay is one where the proper ventilation of the issues in the court proceedings *depended on* the resolution of the related putative arbitration. In such circumstances, a case management stay would be needed in order to achieve the efficient and fair resolution of the dispute as a whole: *Tomolugen* at [186].

12 It seems to us that in granting the stay, certain matters were, with respect, overlooked. While the Judge concluded that there was a significant overlap between the factual issues in the putative arbitration with those in the court proceedings, he did not consider sufficiently the shape of the putative arbitration (see *Gulf Hibiscus Ltd v Rex International Holding Ltd and another* [2017] SGHC 210 ("Stay Judgment") at [89(a)]): Who are likely to be parties to it? For what relief? How would the issues there relate to the issues in the proceedings that were before him? The Judge also did not ask the further question of whether the court proceedings *depended on* the resolution of issues that may arise in the putative arbitration. Had these questions been asked, he would have seen that the putative arbitration was a largely illusory one because RME – the only relevant party subject to an arbitration agreement with the Respondent – was not being sued by the latter and had not itself suggested that it had any claims to bring against the Respondent. Instead, the Judge shoehorned the present case into the mould of *Tomolugen* by coming to the view that "even if the

[Respondent did] not initiate arbitration against RME, the [Appellants] can move RME to do so": Stay Judgment at [102]. But, with respect, this is an artificial scenario. It is not clear to us how the Appellants' position that they were "ready and willing to do all things necessary to enable disputes that arise out of the [shareholders' agreement] to be resolved expeditiously in accordance with [the arbitration clause]" could lead to the conclusion that they were willing to move RME to *commence* arbitration: see Stay Judgment at [102]. Further, there were no relevant disputes under the shareholders' agreement. Thus, even if the Appellants could move RME to commence arbitration, it would be unclear what case RME would or could bring if the Respondent had no claims against RME in the first place. RME would be "shadow-boxing" against putative claims that had not yet been threatened.

13 This last point in fact addresses the principal argument that has been raised by the Appellants, which is that the effect of lifting the stay would be to compel RME to commence arbitration in a defensive posture. They contend that it would be unfair for them to have to cause RME to commence arbitration if they wished to retain the benefit of the case management stay as such an arbitration would not be for the purposes of pursuing a claim but to obtain a declaration of non-liability. It falls on the Respondent, as claimant, to commence arbitration and if the Respondent chooses not to do so, it does not lie in its mouth to say that it has been prevented from proceeding against the Appellants in court. In our judgment, the Appellants' contention is wholly misconceived. It assumes that there are claims against RME to begin with. The real mischief of the original case management stay is that it had the effect of preventing the Respondent from pursuing its claims against the *Appellants*. If the Appellants are correct in their position, it would mean that the Respondent would be unable to prosecute its claims against the Appellants and would

instead have to pursue RME in arbitration, despite the fact that the Respondent evidently has no wish to pursue RME at all. This is plainly untenable.

14 The Appellants appear to contend that the Respondent cannot be heard to say that it has no claims against RME as the Respondent's "real complaint" is against RME for breaches of the shareholders' agreement. We do not accept this. It is for the Respondent to formulate its own cause of action and to decide for itself if it is worth pursuing a matter with a particular party. While the Respondent's claims do concern RME and the shareholders' agreement, the allegations are ultimately directed towards the alleged misconduct of the Appellants in various joint venture businesses. We fail to see how the Respondent can properly be prevented from framing its claim as it wishes and from pursuing the matter against the Appellants. If it should transpire that this was ultimately an ill-conceived claim, then the Respondent will find itself liable in costs.

15 It is sufficient for us, from the foregoing, to conclude that the stay ought to be lifted. But if there remains any doubt that the stay should be lifted, we would agree with the Judge that the continuance of the stay would have stymied the resolution of an already protracted dispute and that the dispute ought to be resolved. As we have already said, the effect of the stay was to prevent the Respondent from pursuing its claim against the Appellants and to require them instead to proceed against RME under the shareholders' agreement. This was simply baseless.

16 Finally, there was some suggestion that this court should not "reopen" the Judge's decision to grant the stay as the appeal is against the decision to lift the stay and not the earlier decision to grant the stay. This argument misses the mark. The grant of a stay on case management grounds is part of the court's

exercise of its inherent jurisdiction to manage its own internal processes. It is administrative. The Judge correctly recognised that the court does not become *functus officio* after a stay is granted and has an independent power to lift the stay: GD at [24]–[25].

Conclusion

17 For these reasons, the appeal is dismissed. The Appellants are to pay the Respondent costs of $27,000 which is an aggregate sum, inclusive of disbursements. The usual consequential orders to apply.

Sundaresh Menon Chief Justice	Steven Chong Judge of Appeal	Woo Bih Li Judge

Jaikanth Shankar, Tan Ruo Yu, Darren Low, Yee Guang Yi and Terence De Silva (Davinder Singh Chambers LLC) for the first and second appellants;
Jason Chan, Leong Yi-Ming (Allen & Gledhill LLP) (instructed counsel), Tito Issac and Hariz Lee (Tito Issac & Co LLP) for the respondent.