IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC(I) 03

Suit No 2 of 2015 (Summons No 3 of 2017)

Between

(1) Telemedia Pacific Group Limited
(2) Hady Hartanto

… *Plaintiffs*

And

(1) Yuanta Asset Management International Limited
(2) Yeh Mao-Yuan

… *Defendants*

JUDGMENT

[Civil Procedure] — [Stay of execution]

Telemedia Pacific Group Ltd and another
v
Yuanta Asset Management International Ltd and another

[2017] SGHC(I) 03

Singapore International Commercial Court — Suit No 2 of 2015 (Summons No 3 of 2017)
Patricia Bergin IJ
7 March 2017

13 March 2017

Patricia Bergin IJ:

Introduction

1 By Summons No 3 of 2017 filed on 4 January 2017 ("the Summons"), Yuanta Asset Management International Limited ("Yuanta") and Yeh Mao-Yuan ("Mr Yeh") (collectively, "the Defendants"), seek a stay of execution of parts of the Judgments dated 30 June 2016, *Telemedia Pacific Group and another v Yuanta Asset Management International Limited and another* [2016] SGHC(I) 03 ("the First Judgment"), and 7 December 2016, *Telemedia Pacific Group and another v Yuanta Asset Management International Limited and another* [2016] SGHC(I) 06 ("the Second Judgment") (collectively, "the Judgments"). The stay is sought until the Defendants' appeal from the Judgments in Civil Appeal No 189 of 2016 is determined.

2 The orders in respect of which the stay is sought are as follows:

> 1. That the Defendants are to pay S$1,848,723.75 into a joint trust account held by the solicitors for the respective parties pending the finalisation of the joint venture accounting exercise between the parties.
>
> 2. That the Defendants are to pay the Plaintiffs S$6,464,839.37.
>
> 3. That the Defendants are to pay 75% of the Plaintiffs' costs of the proceedings (excluding any costs incurred by the Plaintiffs in respect of the Portfolio Claim).

3 The application was heard on 7 March 2017. The Defendants were represented by Mr Philip Ling and Ms Kam Kai Qi from Wong Tan & Molly Lim LLC (instructed by Mr Lim Joo Toon from Joo Toon LLC) and the Plaintiffs were represented by Mr Paul Tan, Mr Yam Wern-Jhien and Ms Josephine Chee from Rajah & Tann Singapore LLP.

4 At the conclusion of the hearing, I made an order dismissing the Summons. These are the reasons for that dismissal. In this judgment, I will also deal with the question of costs which was argued on 7 March 2017.

5 The Defendants relied upon Mr Yeh's affidavits dated 4 January 2017 and 14 February 2017. The Plaintiffs relied upon the affidavit of Hady Hartanto ("Mr Hartanto") dated 2 February 2017. The parties relied upon their written submissions filed on 21 February 2017 (the Plaintiffs) and 23 February 2017 (the Defendants) and limited oral submissions at the hearing on 7 March 2017.

Parties' contentions

6 The Defendants contend that if the orders are not stayed, there is a genuine risk that if they succeed on appeal they would not be able to recover the monies from the Plaintiffs. They emphasise that the Plaintiffs are not

residents of Singapore and claim that Mr Hartanto is implicated in "past questionable transactions". They also refer to previous litigation in which Mr Hartanto has been involved and claim that the Plaintiffs cannot be trusted to repay the monies if the Defendants are successful on appeal. The Defendants also rely on the merits of their grounds of appeal in support of their application.

7 I intend in the circumstances to assume that the Defendants' grounds of appeal are reasonably arguable and to consider the other aspects of their application for a stay in this context. In any event, the fact that there are strong grounds for appeal is not, by itself, a special circumstance that warrants a stay.

8 As they did in the main case, the Plaintiffs complain about the veracity of Mr Yeh's claims and contend that the Defendants' conduct is a further attempt to circumvent the orders of the Court. While not accepting that there are grounds warranting the granting of a stay, the Plaintiffs contend that the concerns expressed by the Defendants in relation to the Plaintiffs' capacity to repay the judgment monies if ordered to do so, could be addressed by an order that the judgment monies be paid into Court pending the determination of the appeal. Prior to the hearing of the application, the Plaintiffs proposed to the Defendants that such an order be made by consent to obviate the need for the hearing. However, the Defendants did not accept such a proposal.

The evidence

9 In his first affidavit dated 4 January 2017, Mr Yeh makes five claims in support of the Defendants' contention that there is a genuine risk that if the Defendants succeed on appeal they would not be able to recover the monies

from the Plaintiffs. Those claims are: (1) that the Plaintiffs are not resident in Singapore; (2) that Mr Hartanto has been implicated in past questionable transactions in Next Generation Satellite Communications Limited ("NexGen"); (3) that Mr Hartanto breached a contract with a potential investor for the sale of shares in NexGen which he did not own or have authority to sell; (4) that Mr Hartanto had been reprimanded by the Singapore Exchange ("SGX") for his role in "round-tripping of money" in a listed company, Scorpio East Holdings Limited ("Scorpio East"); and (5) that Mr Hartanto made false statements in an affidavit sworn in the main proceedings concerning the purchase of Scorpio East shares.

10 In his affidavit dated 2 February 2017, Mr Hartanto recounts the history of the correspondence between the respective solicitors in relation to the Plaintiffs' proposal that the judgment monies be paid into Court or into an escrow account pending the determination of the appeal. He claims that the Defendants' stay application is without merit and is brought in bad faith; and that the Defendants' appeal is unmeritorious. He also claims that if the Defendants are permitted to retain the judgment monies, it is likely that those funds will be dissipated.

11 In his second affidavit dated 14 February 2017, Mr Yeh responds to Mr Hartanto's evidence and claims that the Plaintiffs have no basis to allege that the Defendants have refused to cooperate in the enforcement of the Judgments. He also refers to matters pertinent to the merits of the Defendants' appeal and makes further claims in respect of Mr Hartanto's credibility. Mr Yeh also claims that there is no risk of the judgment monies being dissipated by the Defendants.

Not Singapore residents

12 Neither Mr Hartanto nor Mr Yeh is a Singapore resident. Both Yuanta and Telemedia Pacific Group Limited ("TPG") are companies registered in the British Virgin Islands ("BVI"). Mr Yeh claims at paragraph 13 of his first affidavit that it is "common" for companies to be registered in BVI for "tax avoidance purposes and not for the purpose of operating a genuine business". Mr Hartanto claims at paragraph 19(b) of his affidavit that Yuanta is a "shell" BVI company and that Mr Yeh "effectively accepted" this in his evidence during the trial. The transcript that Mr Hartanto exhibits to his affidavit in support of this claim does not amount to such acceptance. Rather, Mr Yeh accepted that Yuanta was a "new company" (Exhibit HH-5 at p 42 of Mr Hartono's affidavit).

13 The facts that the individual parties reside out of the jurisdiction and that the corporate parties are foreign companies are matters to be taken into account in considering all the circumstances of the application.

Questionable transactions

14 The Defendants rely upon a Report prepared by Ernst & Young Advisory Pte Ltd ("EY") dated 31 October 2014 titled "Factual investigation into certain matters of Next-Generation Satellite Communications Limited" ("the EY Report") in support of Mr Yeh's claims that Mr Hartanto was "implicated in past questionable transactions".

15 Mr Yeh claims at paragraph 15 of his first affidavit that EY "released an audit investigation report". However, it is made clear in the EY Report that it "does not amount to an internal audit and shall not be relied upon as the

primary basis for assessing the adequacy of the system of internal controls" (at paragraph 1.3.3 of the EY Report). It was also made clear that there were limitations to EY's work including that the documents that were available to them were "incomplete" (at paragraph 1.4.2 of the EY Report).

16 NexGen made an announcement on 5 July 2014 that certain NexGen funds deposited with Niaga Finance Company Limited ("Niaga") did not reconcile with NexGen's records and that there were concerns in relation to the discrepancy and restriction of funds held by Niaga (referred to in the EY Report as "the Matter") (at paragraph 1.1.2 of the EY Report). EY was appointed on 25 July 2014 to investigate the Matter, including reviewing the processes and procedures in respect of the deposit of the funds and the movement of cash placed with Niaga and the restriction (at paragraph 1.1.3 of the EY Report).

17 Mr Yeh refers to observations made in the EY Report including: that on 20 January 2009, the NexGen Board of Directors ("BOD") resolved to open a bank account; that an account was opened with Niaga; that Niaga was not a bank but a "money lender"; and that Mr Hartanto was a director of Niaga and a 19.7% shareholder in Niaga (at paragraphs 1.6.1; 1.6.2 and 1.6.39(h)). Mr Yeh claims at paragraph 16(a) of his first affidavit that EY "found that there was no documented basis for this inconsistency". EY did not make such a finding. Rather, the EY Report included reference to the interview conducted with Mr Hartanto in which he advised EY that at the relevant time NexGen was under "debt restructuring" and it was difficult to identify a bank that would not compromise NexGen's interest. The EY Report also recorded that Mr Hartanto advised that he was a director of Niaga at the time and that he

was "more comfortable" to place NexGen's funds with it (at paragraph 1.6.5). The EY Report recorded that these matters were "not documented in any of the documents available" to EY (at paragraph 1.6.5).

18 Mr Yeh claims in his first affidavit that Mr Hartanto "also failed to disclose his shareholding" to the BOD and that it was "questionable" as to how he would have authorised the opening of the Niaga account when "he knew it was not a bank" (at paragraph 16(a)). The EY Report recorded that it appeared that NexGen had "misconceived Niaga as a bank instead of a money lender" (at paragraph 1.6.2). It also recorded that Mr Hatanto had taken legal advice about his obligations of disclosure of his Niaga shareholding, albeit that EY did not have sight of such advice (at paragraph 1.6.39(h)).

19 The EY Report included a list of thirteen "questionable" transactions from Niaga's account statements between 13 April 2010 and 11 July 2012 (at paragraph 1.6.18).These included relevantly: two transactions on 13 April 2010 (a transfer of S$1.7m from NexGen's Niaga account to Mr Hartanto's Niaga account; and a transfer of S$1.7m from Mr Hartanto's Niaga account to NexGen's Niaga account); one transaction on 5 July 2010 (a transfer of S$4.5m from Nexgen's Niaga account to Mr Hartanto's Niaga account); one transaction on 6 July 2010 (a transfer of S$4.5m from Mr Hartanto's Niaga account to NexGen's Niaga account); and a transaction on 4 July 2012 (a transfer of S$9,408,125 from Nexgen's Niaga account to Mr Hartanto's Niaga account) (at paragraph 1.6.18). The EY Report recorded that there were no accounting entries in relation to these transactions and that Mr Hartanto was unable to provide a "satisfactory explanation" in respect of them. It also

included the opinion that the movement of these funds "may be in breach" of Mr Hartanto's duties as a NexGen director (at paragraph 1.6.22).

20 My Yeh claims that the "[a]uditors further stated that in light of their findings against Hady, Nex-Gen should consider getting legal advice on the matter" (at paragraph 17 of his first affidavit). The section of the EY Report relied upon by Mr Yeh in this regard is paragraph 1.6.39(i). Far from referring to "findings", the EY Report records that the abovementioned transactions in themselves appeared "inappropriate but due to the absence of documents, [EY was] unable to conclude if the transactions were made in the best interest of the Company with proper business purpose". It was in the light of this inability that EY suggested that NexGen should "make the necessary assessment and also seek legal advice on the implications, if any".

Breach of contract

21 Mr Yeh relies upon a judgment of the High Court of Hong Kong SAR in proceedings in which Mr Hartanto, as 1st Defendant, was sued by the plaintiff Ms Huang Li in support of his claim that Mr Hartanto "breached a contract with a potential investor". TPG was the 2nd Defendant and NexGen was the 3rd Defendant. The plaintiff had secured *ex parte* Mareva orders against each of the defendants. The judgment relied upon is in respect of NexGen's successful application for the discharge of the Mareva order against it: see *Huang Li v Hady Hartanto and others* [2015] HKCFI 714.

22 Mr Yeh's reliance on this judgment is misconceived. What is recorded in the judgment are the allegations made by the plaintiff in that case. There are no findings made against Mr Hartanto.

Reprimand by the SGX

23 The reprimand of Mr Hartanto in respect of his conduct in Scorpio East by the SGX is the subject of the First Judgment dated 30 June 2016 (at [154]). It is a fact.

False statements in affidavits

24 Mr Yeh's evidence includes copies of a Police Report that he lodged with the Singapore Police Force on 28 December 2016 and a Magistrate's Complaint he made under section 151 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) dated 6 February 2017 in which he claims that Mr Hartanto's evidence in the trial in relation to the acquisition of Scorpio East was "false".

25 Mr Yeh's claims in this regard are not a permissible forensic exercise in this application.

Consideration

26 The principles applicable to this application are: (1) as a general proposition, the court does not deprive a successful litigant of the fruits of the litigation or lock up funds to which the litigant is *prima facie* entitled, pending appeal; (2) a stay will be granted if the evidence establishes that if the judgment monies are paid, there is no reasonable probability of getting them back if the appeal succeeds (rendering the appeal nugatory); and (3) an applicant must show that there are special circumstances warranting the granting of a stay: see *Lee Sian Hee (trading as Lian See Hee Pork Trader) v Oh Kheng Soon (trading as Ban Hon Trading Enterprise)* [1991] 2 SLR(R)

869 at [5]; *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 at [14]; *Strandore Invest A/S and Others v Soh Kim Wat* [2010] SGHC 174 ("*Strandore Invest*") at [7]. The "special circumstances" include where it may be impossible to reverse the execution of the judgment: *The "Shen Ming Hong 7"* [2010] SGHC 269 ("*Shen Ming Hong 7*") at [13]–[14].

27 The Defendants contend that their appeal would be rendered nugatory if the stay is not granted. It is not suggested in the evidence that Mr Hartanto is impecunious. The Defendants claim that they do not know, or cannot find out, what assets TPG may have. The approach they have adopted is to claim that because Mr Hartanto has been implicated in the questionable transactions which are the subject of the EY Report, neither he nor TPG can be trusted to return the judgment monies should the Defendants be successful on appeal.

28 The Plaintiffs claim that it would be unfair to allow the Defendants to rely on the EY Report in circumstances where the allegations within it have not been prosecuted, let alone tested or proved in a court. I agree. However, I will address the submissions in relation to its contents on the assumption that it may be permissible for the Defendants to rely upon it.

29 The EY Report is dated 31 October 2014. The Plaintiffs make two very sound points: (1) if the allegations in the Report were thought to be justified, it is reasonable to expect that as a public company, NexGen would have taken steps, including litigation, against Mr Hartanto. There is no evidence of such steps having been taken in over two years since the EY Report was produced; and (2) there is no evidence of any criminal, regulatory or disciplinary action being brought against Mr Hartanto arising from the contents of the EY Report.

30 At best, I think the contents of the EY Report demonstrate that: there were transactions that could be said to be "questionable"; there were concerns about the lack of documentation to support and/or explain those transactions; that in some respects Mr Hartanto had not provided satisfactory explanations in relation to them; it was not possible for EY to conclude whether the transactions were in NexGen's best interests; and EY did not conclude that Mr Hartanto had breached his duties as a director.

31 Even if it were fair for the Defendants to rely upon the EY Report in this application, I do not regard it as a basis for concluding that there is no reasonable prospect of the Defendants recovering the judgment monies from the Plaintiffs should they succeed on appeal.

32 The authorities relied upon by the respective parties are all judgments of courts other than the Singapore International Commercial Court ("SICC"). The principles in respect of an application for a stay of execution of a judgment were developed prior to the establishment of the SICC in 2015. These parties consented to their case being heard in this Court. Having done so, they are taken to have understood that they must comply with the orders of this Court. It seems to me that if parties embrace the jurisdiction of an International Court to determine their dispute, there should be little force in a claim that seeks to rely upon the international status of one or other of the parties to claim that the orders of the Court should not be enforced. However, this was not a matter relied upon by the parties and in the circumstances I will take their claims in this regard into account.

33 The fact that the Plaintiffs are ordinarily resident outside Singapore, which may cause inconvenience and expense in seeking recovery outside the

jurisdiction, without more, is not a special circumstance warranting a stay: *Strandore Invest* at [13]. The combination of non-residence and the absence of any reciprocal enforcement regime may amount to special circumstances warranting the grant of a stay. However, it will depend on consideration of all the relevant circumstances of the case. There is no reciprocal enforcement regime between Singapore and BVI. However, there is an enforcement regime between Singapore and Hong Kong: see Reciprocal Enforcement of Foreign Judgments (Hong Kong Special Administrative Region of the People's Republic of China) Order (GN No S 93/1999) made pursuant to the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed).

34 The Defendants could pursue Mr Hartanto in the Hong Kong Courts should it be necessary to do so. Although it may be expensive and inconvenient, it would not be impossible to enforce a judgment against him. However, the question of the capacity to enforce a judgment against TPG in the BVI is unclear. In any event, the Defendants could seek recovery of the whole of the monies from Mr Hartanto, should that be necessary.

35 The Defendants have searched the records of the Hong Kong Courts and rely on documents produced from those searches to show that Mr Hartanto has been involved in previous litigation over the years. Mr Hartanto's evidence shows that all but one of those cases have been concluded. The fact that someone is sued may mean only that they are in a commercial endeavour in which they take a different view to commercial circumstances relied upon by their business associates. On the other hand, it may mean that they are unreasonably withholding agreement to a proposal of their commercial counterparts. This cannot be proved by simply showing that a person has been

involved in previous litigation. It would be necessary to prove the underlying facts to show that there had been some form of commercial recalcitrance. This has not been done in this case.

36 The fact that Mr Hartanto misconducted himself as a director of a public company such as to warrant an SGX public reprimand does not qualify as a "special circumstance" warranting a stay. Rather, it is evidence that calls into question Mr Hartanto's integrity as an officer of a public company.

37 In *Viet Hai Petroleum Corp v Ng Jun Quan and another and another matter* [2016] 3 SLR 887, after judgment was entered for the plaintiff, the defendants filed an appeal and applied for an unconditional stay of execution of the judgment, pending appeal. One of the grounds relied upon by the defendants in that case was that they had limited information about the plaintiff and that the plaintiff appeared to conduct its business "in a manner that is highly questionable and unreliable". The defendants claimed that for this reason, combined with the fact that the plaintiff was a foreign company not registered in Singapore, they feared they would be unable to recover their money in the event of a successful appeal (at [50]).

38 In deciding that this ground was insufficient to warrant a stay, Chua Lee Ming JC (as his Honour then was) said at [52]:

> That the judgment creditor is a foreign company, making it inconvenient or expensive to seek recovery outside jurisdiction, is not a special circumstance warranting a stay: *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 174 at [13]; *Dennis Matthew Harte v Tan Hun Hoe* [2001] SGHC 19 at [64]. The defendants alleged that the plaintiff's conduct of its business lacked accountability due to the absence of proper record keeping. The defendants' main contention was that the plaintiff had "displayed an astounding lack of accountability in

> the manner they conducted their business transactions through their absence of paper documentation of such transactions". In my view, whilst the plaintiff's record keeping could have been better, the defendants' description overstated the matter. In any event, I did not agree with the defendants' submission that this meant that there was a risk that they would be unable to recover their money should the appeal succeed.

39 In that case, the plaintiff had agreed to a stay on condition that the defendants pay a proportion of the judgment monies into court. A conditional order was made that "addressed the defendants' concerns and ensured that the plaintiff would not be deprived of its judgment sum if the defendants failed in their appeal" (at [53]).

40 It is one thing to be trustworthy enough to comply with a court order. It is quite another thing to have the funds available to comply with a court order. The Defendants have not called evidence to show the Plaintiffs are impecunious or would not be in a position to repay the monies if ordered to do so. Their focus has been on seeking to establish that the Plaintiffs cannot be trusted to comply with such an order; or cannot be trusted to have the funds available to so comply.

41 The Plaintiffs contend that if a stay is ordered the Defendants will dissipate the judgment monies. In response, the Defendants make the point that this is not the appropriate focus for the stay application; which is on the judgment creditor and not the judgment debtor. Although the principles require the Defendants in this application to establish special circumstances in which the focus is on the judgment creditor, the Court considers the whole of the circumstances of the case. It may consider whether, for instance, the

Plaintiffs, as judgment creditors, would suffer "irreparable damage" if a stay were granted: *Shen Ming Hong 7* at [17].

42 The Defendants also contend that if the Plaintiffs have or had a fear that the Defendants would dissipate their assets to avoid meeting their obligations under the Judgments, they could have applied for an injunction to prevent such dissipation. They have not done so and it is submitted that it is not appropriate to order that monies be paid into Court to achieve the outcome the Plaintiffs have not otherwise been willing to pursue. There is some force in this submission. However, it is not necessary to consider it further because of the conclusion that I have reached on the evidence called by the Defendants.

43 Each of the individual parties (Mr Yeh and Mr Hartanto) have had their credit called into question in these proceedings. However, each continues to embrace the jurisdiction of the Court and be legally represented. There is only suspicion that the Plaintiffs might not comply with a court order requiring them to repay the monies if the Defendants are successful on appeal. That suspicion is possibly tempered by the Plaintiffs' willingness to consent to a conditional stay pursuant to which the judgment monies would be paid into court pending the determination of the appeal.

Conclusion

44 On all the evidence called by the Defendants (including the EY Report) and in all the circumstances of the case, including the assumption of the Defendants' reasonably arguable grounds of appeal, I am satisfied that the Defendants have failed to establish that their appeal would be rendered nugatory if the stay is not granted. They have not established that there are

special circumstances warranting the granting of a stay. The Summons is therefore dismissed.

Costs

45 The Plaintiffs seek their costs of the application on an indemnity basis. The Plaintiffs also submit that the costs should be fixed on that basis at S$15,000.

46 The Defendants' first submission was that the costs of the application for the stay should be left to be determined by the Court of Appeal after the determination of the appeal. It was submitted that if the Defendants are successful on their appeal they would have been justified in bringing the application for the stay and would be entitled to their costs of the application. There is a difference between success on appeal and bringing an unsuccessful claim for a stay. Success on appeal does not convert an unsuccessful stay application into a successful stay application, an event which costs would follow. This is particularly so where there has been a failure to call evidence to establish special circumstances warranting the grant of a stay. I am satisfied that costs should not be left to be determined by the Court of Appeal.

47 In this circumstance, the Defendants accepted that they cannot resist a costs order being made against them, but submitted that there is no proper basis for an award for indemnity costs. There was no objection to the costs being fixed. However, it was submitted that the costs should be fixed at an amount between S$5,000 and S$10,000.

48 The Plaintiffs relied upon their without-admission offer in correspondence, in their written submissions and in Court of a conditional stay on the basis of the judgment monies being paid into Court. However, the Defendants eschewed this proposal and pursued their stay application. The Defendants were entitled to argue for an unconditional stay. Their arguments were not hopeless. Rather their evidence was found wanting. They also put forward a reasonably arguable contention that the Plaintiffs would not have been entitled to the condition that they proposed in circumstances where they had not made an application for an injunction or security on the basis of a fear of dissipation. I am not satisfied that costs should be awarded on an indemnity basis.

49 The Plaintiffs were certainly put to trouble and expense in dealing with evidence that had to be answered, including having to liaise with the Plaintiffs' legal representatives in Hong Kong. I am of the view that the costs should be fixed at S$10,000.

50 The Defendants are to pay the Plaintiffs costs fixed at $10,000.

Patricia Bergin
International Judge

Paul Tan, Yam Wern-Jhien and Josephine Chee (Rajah & Tann Singapore LLP) for the plaintiffs;
Lim Joo Toon (Joon Toon LLC), Philip Ling and Kam Kai Qi

(instructed counsel) (Wong Tan & Molly Lim LLC) for the defendants.