IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 15

Suit No 412 of 2016

Between

Gulf Hibiscus Limited

… *Plaintiff*

And

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

… *Defendants*

GROUNDS OF DECISION

[Arbitration] — [Stay of court proceedings] — [Inherent jurisdiction] — [General discretion to lift stay of court proceedings]

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v
Rex International Holding Ltd and another

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Introduction

1 This case followed my earlier decision in *Gulf Hibiscus Ltd v Rex International Holding Ltd and another* [2017] SGHC 210 ("*Gulf Hibiscus (Grant of Stay)*"), where I affirmed the decision of the learned Assistant Registrar ("the AR") to grant a stay of court proceedings on the basis of case management. Neither side appealed against my earlier decision.

2 I subsequently clarified the terms of the order made. On 30 April 2018, I made an order for the lifting of the stay if the parties had not made progress on arbitration or obtained another order of court by the close of business on 31 May 2018. The defendants have since been granted leave by the Court of Appeal to appeal against this decision.

Facts

The parties

3 The parties were identical to those in *Gulf Hibiscus (Grant of Stay)*. The plaintiff is one of three shareholders of Lime Petroleum PLC ("Lime PLC"), an Isle of Man company. The other shareholders are Rex Middle East Limited ("RME") and Schroder & Co Banque SA ("Schroder"). The shareholders are hereinafter collectively referred to as "the Shareholders". The first defendant, Rex International Holding Limited, is the ultimate holding company of RME. The second defendant, Rex International Investments Pte Ltd, is the intermediate holding company of RME, and a wholly owned subsidiary of the first defendant.

Procedural history

4 The background facts were recounted in *Gulf Hibiscus (Grant of Stay)* from [2] to [10]. It suffices to note that the plaintiff commenced an action by way of Suit No 412 of 2016 ("S 412/2016") to sue the defendants in respect of alleged wrongs committed by them and their associated companies in joint ventures between the two sides. The details of these claims are summarised in *Gulf Hibiscus (Grant of Stay)* at [50]. Running parallel to the action commenced here in Singapore were a number of connected proceedings in foreign jurisdictions (see *Gulf Hibiscus (Grant of Stay)* at [9]).

5 The dispute at hand centres on a Shareholders' Agreement dated 24 October 2011, which also governed the relationship between the plaintiff, RME, Schroder and Lime PLC ("the SHA"). Clause 25.2 of the SHA provides for a tiered dispute resolution procedure, starting first with amicable resolution, then negotiations between a principal officer from each of the Shareholders, and

then arbitration under the extant Rules of International Arbitration of the International Chamber of Commerce ("ICC Rules") (see *Gulf Hibiscus (Grant of Stay)* at [73]).[1]

6 The defendants sought a stay of the proceedings in S 412/2016. The AR granted a stay on the basis of the court's inherent jurisdiction to stay proceedings for case management interests. The plaintiff filed an appeal against the AR's decision. This appeal formed the subject of *Gulf Hibiscus (Grant of Stay)*, where I affirmed the AR's decision for S 412/2016 to be stayed with the following conditions: *Gulf Hibiscus (Grant of Stay)* at [53]:

> (a) if the tiered dispute resolution under cl 25.2 of the SHA is not triggered by any of the parties to the SHA **within three months** from the date of this judgment or an arbitration is not commenced within **five months** from the date of this judgment, the parties shall be at liberty to apply to the court to lift the stay;
>
> (b) the Defendants be bound by the findings of fact made by the putative arbitral tribunal;
>
> (c) the parties shall be at liberty to pursue the court proceedings in S 412/2016 and apply to lift the stay if the putative arbitration is unduly delayed; and
>
> (d) following the conclusion of the arbitration proceedings, subject to any res judicata issues, the parties are entitled to resume S 412/2016 against the Defendants.
>
> [emphasis in original]

7 A hearing was held on 13 November 2017 ("the Clarification Hearing") where I clarified that the requirements in condition (*a*) of the stay were conjunctive. The word "and" should replace the word "or", such that condition (*a*) would read:

> (a) if the tiered dispute resolution under cl 25.2 of the SHA is not triggered by any of the parties to the SHA within three

[1] Dan Brostrom's 3rd Affidavit dated 3 June 2016 at p 65.

> months from the date of this judgment ***and*** an arbitration is not commenced within five months from the date of this judgment, the parties shall be at liberty to apply to the court to lift the stay.

I invited the defendants to make an application for the stay to continue if no further action was taken in the interim.

8 As it was, the plaintiff applied in April 2018 for the lifting of the stay, on the grounds that the conditions had been met for an application to be made. On 30 April 2018, I ordered for the stay to be lifted at the close of business of 31 May 2018 unless arbitration was commenced or another order of court was granted before then.

9 I declined to grant the defendants leave to appeal against my decision. On 10 September 2018, the Court of Appeal granted them leave to appeal.

The parties' cases

The plaintiff's case

10 The plaintiff argued that the stay should be lifted due to the non-satisfaction of the events specified in condition (*a*) of the stay. First, the tiered dispute resolution under cl 25.2 of the SHA had not been triggered within three months of the judgment. The plaintiff interpreted cl 25.2 of the SHA to require the parties to engage in two rounds of negotiations before proceeding to arbitration. Negotiation was to first take place between the parties. If an amicable resolution was not reached, a second round of negotiations would take place between the Associate Director of Schroder, the Managing Director of Hibiscus Petroleum Berhad ("HPB") and the Chairman of RME.[2]

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2 Plaintiff's Written Submissions dated 20 April 2018 at para 9.

11 The plaintiff argued that RME had failed to take "all reasonable endeavours to resolve the matter amicably", as required under cl 25.2 of the SHA, and had in fact obstructed such a resolution. The plaintiff submitted that the obligation to take "all reasonable endeavours" required the defendants to take all reasonable steps which a prudent and determined man would have taken in the circumstances.[3] However, at the first round of negotiations, RME did not take the negotiations seriously. RME did not indicate what disputes were to be discussed at a proposed meeting in its November 2017 correspondence with the plaintiff. In December 2017, it foreclosed the amicable settlement of the dispute, before subsequently asserting that it would be open to explore an amicable resolution. This change of position showed a lack of sincerity.[4]

12 At the second round of negotiations, the defendants breached cl 25.2 of the SHA by nominating someone other than the Chairman of RME to attend negotiations with the Managing Director of HPB. Although the clear wording of cl 25.2 of the SHA required the Chairman of RME, Karl Lidgren, to attend the meeting, he deliberately made himself unavailable for the meeting in Singapore. The defendants initially proposed that Lidgren's nominee attend the meeting instead, and only suggested at a very late stage that Lidgren conduct a teleconference.[5] RME's actions cumulatively demonstrated its failure to take reasonable steps to resolve matters amicably.[6] Conversely, there had been no delays on the plaintiff's part, and the plaintiff acted reasonably and in good faith in trying to expedite negotiations.[7]

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3 Plaintiff's Written Submissions dated 20 April 2018 at para 10.

4 Plaintiff's Written Submissions dated 20 April 2018 at paras 12–14.

5 Plaintiff's Written Submissions dated 20 April 2018 at paras 15–26.

6 Plaintiff's Written Submissions dated 20 April 2018 at para 27.

7 Plaintiff's Written Submissions dated 20 April 2018 at para 29.

13 Second, arbitration had not commenced within five months of the judgment. The defendants had no good explanation for this, despite their earlier assurances that they were "willing to do all things necessary" in accordance with cl 25.2 of the SHA.[8] The defendants argued that compelling RME to commence an arbitration would not make commercial sense and would unfairly prejudice them, but as they had failed to raise these concerns at the Clarification Hearing earlier, they were therefore precluded from raising them.[9] The court was in any event *functus officio* as regards further clarifying this particular issue.[10]

The defendants' case

14 The defendants' first argument was that the conditions for the lifting of the stay had not been met. The Clarification Hearing had made clear that the parties could apply for the stay to be lifted upon the non-happening of two events in condition (*a*) of the stay: the triggering of cl 25.2 of the SHA and the commencement of arbitration. If one of the events occurred, parties would have no right to apply to lift the stay. RME had issued a notice under cl 25.2 of the SHA on 23 November 2017, *ie*, within three months from the date of the *Gulf Hibiscus (Grant of Stay)* judgment, inviting the plaintiff to attend a meeting to attempt to resolve the dispute. The first of the two contemplated events had occurred. The plaintiff was therefore not entitled to apply to lift the stay.[11]

15 The defendant's second argument was that the court should not exercise its discretion to lift the stay. The stay had been granted on the basis that the plaintiff's right to choose whom to sue and where was a first order concern that

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8 Dan Brostrom's 7th Affidavit dated 26 March 2018 at para 47.

9 Plaintiff's Written Submissions dated 20 April 2018 at paras 34–37.

10 Plaintiff's Written Submissions dated 20 April 2018 at paras 38–39.

11 Defendants' Written Submissions dated 19 April 2018 at paras 22–30.

was subject to the second and third higher-order concerns identified in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*"). These second and third higher-order concerns were, respectively, the prevention of the plaintiff's circumvention of the arbitration clause and the court's inherent jurisdiction over case management. RME had consistently maintained that it would participate in the arbitration commenced by the plaintiff. The mere fact that RME did not commence the arbitration *as claimant* should not change the basis of the stay. To allow otherwise would effectively permit the plaintiff to circumvent the arbitration agreement or *Gulf Hibiscus (Grant of Stay)* itself.[12]

16 The defendants then cited the Privy Council decision in *Hermes One Ltd v Everbread Holdings Ltd and Ors* [2016] 1 WLR 4098 ("*Hermes One*"). The Privy Council had held that a party's "[submission] to arbitration" did not require the party to actually commence an arbitration. All that was required was for the defendants in *Hermes One* to require the party which commenced the litigation to submit to arbitration (*a*) by making an unequivocal request to that effect, and/or (*b*) where litigation had already been commenced, by applying for a stay. It would be an "evident incongruity" and would not make much commercial sense to require the defendants to commence an arbitration in which they sought no positive relief, and to seek a declaration of non-liability to end litigation even if the plaintiff had no interest or ability to pursue arbitration. Arbitration under the ICC Rules as required under the governing shareholders' agreement would also pose procedural and cost difficulties for the defendants.[13]

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12 Defendants' Written Submissions dated 19 April 2018 at paras 31–35.

13 Defendants' Written Submissions dated 19 April 2018 at paras 36–42.

17 The defendants argued that the *Hermes One* approach should be followed. No claim was pursued by the defendants, and this was not a case where it was possible for them to commence arbitration to seek mirror image declarations of non-liability. If RME were to commence arbitration, it would have to specify why each of the plaintiff's claims should be rejected and why negative declaratory reliefs should be granted in respect of each of those claims. Pursuing a negative claim would be onerous, given the extent of the plaintiff's claims. As in *Hermes One*, arbitration under the ICC Rules would also require the defendants to pay a non-refundable filing fee, among other costs of arbitration.[14]

My decision

18 Having considered the affidavits and submissions, I came to the conclusion that both sides had not moved the case along through arbitration as expeditiously as possible. On 30 April 2018, I gave parties notice that the stay would be lifted on 31 May 2018, unless arbitration was commenced by then or another order of court was granted.

19 I recognised that there were features of this case that took it out of the usual run of case management stays. If the party desiring the stay to continue had to initiate arbitration, as required under the conditions of the stay, it had to essentially commence arbitration in pursuit of a negative case. This party might have to incur costs and effort in doing so, perhaps at a greater level than if it were to simply defend the arbitration. That being said, the court was not in effect directly compelling one side or the other to commence arbitration. Indeed, the court could not do so; it could only specify the consequences if arbitration were

[14] Defendants' Written Submissions dated 19 April 2018 at paras 43–52.

not in effect pursued, namely, that the civil proceedings should be permitted to continue.

20 This outcome simply flows from the nature of the case management stay. As indicated in *Gulf Hibiscus (Grant of Stay)* at [92] and [102], the case management stay could not continue indefinitely, given its conditional nature and the liberty of the parties to apply to court to reinstate proceedings if the relevant conditions were met. In any case, the court was entitled to lift the stay in the event of undue delay, through the exercise of its general discretion. I will now set out my reasons for lifting the stay.

The court's power to lift the stay

The terms granting parties liberty to apply to court to lift the stay

21 The defendants' first argument was that condition (*a*) of the stay had not been met, such that neither party had the right to apply to the court to lift the stay. I do not agree that the conditions of a stay have the effect of precluding a party from seeking relief unless and until the conditions have been met.

22 It should first be clarified that the court's discretion to lift the stay is not constrained by or contingent upon the conditions of the stay which gave parties liberty to apply for the lifting of the stay. The liberty granted in conditions (*a*) and (*c*) of the stay simply allowed parties to return to court to make an application for the stay to be lifted if the relevant conditions were met. It provided a further assurance that parties need not take a separate process in order to bring the matter back before the court.

23 As regards the subsequent clarification of the conditions of the stay, the original order at [53] of *Gulf Hibiscus (Grant of Stay)* was probably not crafted

as clearly as it should have been. However, and in any event, my clarification at the Clarification Hearing was not appealed against, nor, if there was any doubt as to whether an appeal was immediately available, was any application made for leave to appeal to be granted.

The court's general discretion to lift the stay

24 Regardless of whether the conditions of the stay were met, the court retains the general discretion to lift the stay. Granting liberty to the parties to apply to the court to lift the stay did not preclude the court from exercising its inherent power to manage its processes to "ensure the efficient and fair resolution of disputes": see *Gulf Hibiscus (Grant of Stay)* at [62], citing *Tomolugen* at [188]. The court's general discretion to lift the stay also flows from the fact that the stay was imposed in the exercise of the court's selfsame case management powers. Such discretion could be exercised even if the conditions of the stay were not met, though one would expect that the circumstances in such a situation would be rather exceptional.

25 As a case management stay is imposed by the court pending a particular determination or outcome, the court does not become *functus officio* after the stay is granted. As such, a stay is not circumscribed by the conditions explicitly laid down at the time of its imposition. Matters arising after a stay has been granted may affect its continued operation, and may be material for the court's consideration. Accordingly, even if the liberty provisions were not triggered on the facts, *eg*, if the defendants were found to have triggered the tiered dispute resolution under cl 25.2 of the SHA, the court was still entitled in its general discretion to consider lifting the stay if evidence was brought concerning issues that arose due to the continuation of the stay.

26 This position is further supported by the discussion in *Tomolugen*, where the Court of Appeal considered various jurisdictions' approaches to the exercise of the court's inherent power to stay or manage court proceedings. At [186], the Court of Appeal concluded:

> The authorities discussed above reveal gradations of responses to what is in essence the same problem as that in the situation of overlapping court and arbitral proceedings outlined … above. … The unifying theme amongst the cases is the recognition that ***the court, as the final arbiter, should take the lead in ensuring the efficient and fair resolution of the disputes a whole. The precise measures which the court deploys to achieve that end will turn on the facts and the precise contours of the litigation in each case.***
>
> [emphasis added in bold italics]

27 I interpreted the approach mandated in *Tomolugen* as aimed at achieving efficient and fair outcomes. For present purposes, two relevant principles emerge. First, the court's power to stay proceedings derives from its role in ensuring the proper resolution of the overall dispute. This power is inherent: it derives from the court's role as "final arbiter", and does not derive from statute. Second, the scope of the court's power to make suitable orders to that end is determined by the circumstances; there are no *a priori* bright-line rules applicable in all situations.

28 As I understood it, the parties did not take issue with the existence of the court's general discretion to lift the stay. However, and in any case, the conditions of the stay only restricted the parties' liberty to apply to the court to lift the stay, and did not delimit the circumstances in which the court could actually lift the stay. Accordingly, even if I was wrong about the existence of the court's general discretion to lift a stay that it previously granted, I was not precluded from lifting the stay in the present case due to the specific terms of the order I had made in *Gulf Hibiscus (Grant of Stay)*.

The exercise of the court's discretion to lift the stay

29 Having established the court's power to lift the stay, the question that then arises is whether the court should exercise its discretion to lift the stay in the present circumstances.

30 The stay was granted in the exercise of case management powers to "control and manage proceedings between the parties for a fair and efficient administration of justice": *Gulf Hibiscus (Grant of Stay)* at [59]. In the exercise of these case management powers, the court's concern is to determine the best and most appropriate course of action for the efficient, just and fair disposal of the matters before it, taking into account other proceedings, including alternative dispute resolution proceedings, that are either ongoing or available to the parties. The court must take a robust approach in these assessments, as there is no *a priori* guidance that can determine the best outcome in a particular case.

31 Which factors are relevant in such an assessment would depend on the precise circumstances; it would not be fruitful to attempt an exhaustive listing. As noted in *Tomolugen* at [188], whether measures taken by the court are appropriate on a stay application are dependent on the circumstances, but "the balance that is struck must ultimately serve the ends of justice". At [188], the Court of Appeal also referred to the set of factors considered by Venning J at [56] in *Danone Asia Pacific Holdings Pte Ltd and others v Fonterra Co-operative Group Limited* [2014] NZHC 1681 as providing the following "comprehensive (although by no means exhaustive) and instructive guide" for courts deciding applications to stay court proceedings whose outcome depends on the resolution of a related arbitration:

> … (a) the relationship between the parties to the court proceedings and the parties to the arbitration; (b) the claims in the court proceedings and those in the arbitration, and the respective issues which they raised; (c) issue estoppel; (d) the risk of inconsistent findings between the two sets of proceedings; (e) the risk of delay; and (f) cost.

32 It follows that whether the lifting of such a stay is appropriate would also be dependent on the circumstances. As a general rule, where the granted stay is conditional, the parties' compliance with the stipulated conditions would be a material consideration. However, in addition, the court would need to assess whether the stay continues to achieve its purpose of ensuring that a dispute is resolved efficiently and fairly. To my mind, 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. The spectre of Charles Dickens' *Jarndyce v Jarndyce* must be kept at bay.

33 In this regard, I did not find that the Privy Council decision in *Hermes One* was relevant: crucially, it was not concerned with the lifting of a stay. The case concerned the interpretation of an arbitration clause providing that, in the event of an unresolved dispute, "any party may submit the dispute to binding arbitration". The issue was thus: where such a clause applied, were parties entitled to a stay without having commenced arbitration? Lords Mance and Clarke's observations that submission to arbitration did not require the actual commencement of arbitration would indeed be a pertinent consideration in determining applications for the *imposition* of a stay in some circumstances. However, different considerations could come into play in the court's exercise of the discretion to lift such a stay. Furthermore, the clear wording of condition

(*a*) of the present stay required arbitration to be "*commenced*", not merely that parties submit to arbitration.

34 In the present case, part of what the plaintiff raised was pertinent. There was an absence of progress in the case 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. The concern that the grant of a stay might unduly delay proceedings was raised in *Gulf Hibiscus (Grant of Stay)* at [102], where I stated clearly that the defendants should move RME to commence arbitration against the plaintiff, or risk having the stay lifted:

> In the present case, the Defendants have confirmed on affidavit that the Defendants as well as RME are 'ready and willing to do all things necessary to enable disputes that arise out of the SHA to be resolved expeditiously in accordance with the provisions of Clause 25 of the SHA'. Thus, ***even if the Plaintiff does not initiate arbitration against RME, the Defendants can move RME to do so. Where such proceedings are brought, for the reasons stated above, a conditional stay is appropriate to serve the ends of justice. However, an undefined opportunity for arbitration to be commenced would also not be in the interests of justice. The best middle ground in such a case would be to stay the proceedings but for it to be lifted if*** the tiered dispute resolution under cl 25.2 of the SHA is not triggered within the specified period of three months from this judgment or [note: "or" should be replaced with "and", following the Clarification Hearing on 13 November 2017] ***a notice of arbitration is not issued within five months.***
>
> [emphasis added in bold italics]

35 Accordingly, I did not find, and did not have to find, that there was such conduct on the part of the defendants as to amount to a lack of reasonable effort to arrive at an amicable resolution, as argued by the plaintiff. The upshot was that progress on the matter between the parties had, whatever the cause, essentially ground to a halt, and the dispute remains hanging. The stay should be lifted, if only to allow for the just and fair disposal of these longstanding matters.

36 The other pertinent factor was that of autonomy. This was raised at various points during the proceedings, including at the original hearing between the parties: *Gulf Hibiscus (Grant of Proceedings)* discussed the plaintiff's concerns about this issue at [22] and [96]. In the present case, the defendants were concerned that the conditions of the stay would require them to commence arbitration as plaintiff. Their primary contention was that they should not be made to initiate the process of arbitration, with the attendant costs and impact on litigation strategy.

37 I had sympathy for the defendants' arguments. The court would not generally wish to compel a party to commence suit or pursue dispute resolution proceedings. An arbitration agreement upheld by the court only prescribes a particular form of dispute resolution, arbitration in such an instance trumping litigation. That is the general position. But the present situation was not a run-of-the-mill case. The difficulty here was that the defendants were not party to the arbitration mechanism under cl 25.2 of the SHA: only RME, their subsidiary, was party to the SHA. The fact that the defendants were not party to an arbitration agreement with the plaintiff was discussed in *Gulf Hibiscus (Grant of Stay)* at [54]-[60] and [102]. Leaving the stay in place for a prolonged period essentially left the plaintiff with only the choice to arbitrate vis-à-vis RME. On the other hand, the defendants themselves apparently had little incentive to procure arbitration on the part of their associate companies. They argued that they should not be put to the expense of doing so, given that it was the plaintiff's dispute, and that they would essentially have to put forward a negative case.

38 Considering that the overriding objective was one of ensuring the resolution of an extant dispute, the better course to my mind was to lift the stay if no progress was made. Accordingly, that was my order.

39 My decision no doubt had the effect of compelling the defendant to choose between initiating arbitration proceedings or continuing the civil suit in S 412/2016. The defendants would seem content to leave things as they were: they are the defendants after all. However, while I had some sympathy for the defendants' stance, I could not continue the stay indefinitely, given the context of the specific case, namely, that the defendants themselves were not directly parties to an arbitration agreement with the plaintiff. Although the defendants could have moved RME to initiate arbitration against the plaintiff (see *Gulf Hibiscus (Grant of Stay)* at [102]), it had not done so. Seeing as the plaintiff also did not initiate arbitration against RME, and given that no progress was made under cl 25.2 of the SHA, the lifting of the stay will enable the proceedings in S 412/2016 to continue.

Specific orders made

40 As I anticipated that the parties would take various steps to proceed to arbitration or to recommence the civil suit in S 412/2016, I did not order an immediate lifting of the stay on 30 April 2018, but allowed parties until the close of business on 31 May 2018 to commence arbitration or to obtain a fresh court order for the continuation of the stay. As the latter events did not occur, the stay was lifted on 31 May 2018.

Conclusion

41 The plaintiff's application to the court to lift the stay in S 412/2016 was thus granted. The Court of Appeal has granted the defendants leave to appeal against this decision.

Aedit Abdullah
Judge

Jason Chan and Leong Yi-Ming (instructed) (Allen & Gledhill LLP) and Lee Koon Foong, Adam Hariz (Tito Isaac & Co LLP) for the plaintiff;
Jaikanth Shankar and Tan Ruo Yu (Drew & Napier LLC) for the defendants.
