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

[2021] SGHC(A) 18

Civil Appeal No 54 of 2021 and Summons No 26 of 2021

Between

Tan Hock Keng

… *Appellant*

And

Malaysian Trustees Berhad

… *Respondent*

In the matter of Originating Summons No 1113 of 2020

Between

Malaysian Trustees Berhad

… *Plaintiff*

And

Tan Hock Keng

… *Defendant*

EX TEMPORE JUDGMENT

[Civil Procedure] – [Foreign judgments]

Tan Hock Keng
v
Malaysian Trustees Bhd and another matter

[2021] SGHC(A) 18

Appellate Division of the High Court — Civil Appeal No 54 of 2021 and Summons No 26 of 2021
Belinda Ang Saw Ean JAD, See Kee Oon J and Chua Lee Ming J
24 November 2021

24 November 2021

Belinda Ang Saw Ean JAD (delivering the judgment of the court *ex tempore*):

1 The registration of a foreign judgment under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, Rev. Ed 1985) ("RECJA") can be set aside if "an appeal is pending" or if the party to the appeal "is entitled and intends to appeal" against the foreign judgment: s 3(2)(*e*) RECJA, read with O 67 r 9(3) of the Rules of Court (2014 Rev Ed) ("Rules of Court"). The appellant, Tan Hock Keng ("Mr Tan"), seeks to set aside the registration of a consent judgment granted in Malaysia in November 2019 ("2019 Consent Judgment") on that basis.

2 In proceedings below ("RA 83"), he relied on a Malaysian application ("Malaysia OS 455"), claiming that it was an appeal against the 2019 Consent Judgment and therefore grounds for setting aside the registration of the 2019

Consent Judgment. His arguments were rejected by the judge below ("the Judge"). Now, he points to an entirely different set of proceedings filed in Malaysia ("Malaysia Suit 437") as the "appeal" that should suffice to set aside the registration of the 2019 Consent Judgment. Malaysia Suit 437 was not before the Judge in proceedings below. In fact, it was not mentioned in Mr Tan's Appellant's Case (dated 13 September 2021) either. This is entirely unsurprising since Malaysia Suit 437 was only commenced on 29 September 2021, and evidence of its filing was sought to be admitted belatedly through an application made on 18 October 2021 ("SUM 26").

3 Needless to say, we are not persuaded by Mr Tan's attempts to rely on Malaysia Suit 437 before us. It is not for him to come before an appellate court as if it were a second court hearing RA 83 on different facts to recast and advance an entirely different case. We dismiss SUM 26 and his appeal. Our reasons are as follows.

Brief facts and proceedings below

4 There was a long-running dispute between the respondent ("MTB"), a Malaysian company called Pilecon Engineering Berhad ("PEB**"**), Mr Tan and some related parties. Mr Tan, a director at PEB, was caught up in the dispute because he had provided a guarantee to MTB for PEB's debts in 2015. Following negotiations that concluded in a settlement agreement and pursuant to that settlement, the parties entered into the 2019 Consent Judgment on 8 November 2019 for the sum of RM 60m with interest thereon. Enforcement of the 2019 Consent Judgment was subject to the terms of two letters dated 30 October 2019 and 6 November 2019.

5 When the last tranche of payments due under the 2019 Consent Judgment was not paid in time, Mr Tan made an application in the High Court of Malaya in Kuala Lumpur (Malaysia OS 455) seeking, amongst other things, a declaration that the 2019 Consent Judgment was valid and binding and an extension of time to comply with his obligations under the 2019 Consent Judgment. Mr Tan did not seek variation of any other part of the 2019 Consent Judgment. Malaysia OS 455 was dismissed by the High Court of Malaya in Kuala Lumpur on 6 May 2021 because (a) the 2019 Consent Judgment was final and binding on the parties; (b) the extension sought was unilateral and in the context of a consent judgment, and (c) the court did not have jurisdiction to grant the extension. Malaysia OS 455 is pending appeal and due to be heard on 15 March 2022.

6 MTB, in turn, applied to register the 2019 Consent Order as a judgment of the Singapore High Court in OS 1113/2020. Mr Tan applied to set the registration aside on 28 December 2020 in HC/SUM 5562/2020 ("SUM 5562"). SUM 5562 was allowed and on appeal (RA 83), the Judge overturned the assistant registrar's decision in SUM 5562.

7 Patently, after RA 83 was allowed in MTB's favour, Mr Tan filed Malaysia Suit 437 against MTB, this time to seek, in the main, rectification of the 2019 Consent Judgment so that it properly reflects the intention of the parties. Mr Tan now alleges "patent and latent ambiguity as to the terms of the 2019 Consent Judgment and "serious doubt as to whether the 2019 Consent Judgment fully and accurately reflected the settlement agreed to between the parties". Put another way, Malaysia Suit 437 directly challenges the validity of the 2019 Consent Judgment. In that regard, it is diametrically the opposite of Malaysia OS 455 which sought a declaration *affirming* the validity and binding

nature of the 2019 Consent Judgment. As stated earlier at [2], Malaysia Suit 437 is a development that came about after the decision in RA 83 and Mr Tan wishes to rely on this Malaysian action as a ground of appeal.

The issues on appeal

8 There are two main issues on appeal:

(a) Should SUM 26 be allowed?

(b) Does OS 455 (including the appeal against its dismissal at first instance) qualify as a pending appeal for the purposes of s 3(2)(*e*) of the RECJA?

Issue 1: Whether SUM 26 should be allowed

9 SUM 26 is Mr Tan's application for leave to adduce further evidence in aid of the appeal the cause papers for Malaysia Suit 437. His intention is to make use of Malaysia Suit 437 as a (new) factual and legal reason to set aside the registration of the 2019 Consent Judgment. We do not allow his application for leave.

10 As a starting point, we acknowledge that Malaysia Suit 437 is strictly speaking, an action that was commenced after the decision in RA 83 and evidence of it may, pursuant to s 41(5) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") be *given* to the Appellate Division without leave. That said, whether this court *receives* the evidence remains within its discretion: s 41(3) of the SCJA. Such was the reasoning of the Court of Appeal in *BNX v BOE and another appeal* [2018] SGCA 29 ("*BNX*") at [97] as well, relying on O 57 r 13(2) of the Rules of Court at that time, which is similarly

worded to the present s 41(3) of the SCJA. *BNX* affirmed that in considering whether to *receive* on appeal further evidence as to matters that have occurred after the date of the hearing below, the traditional *Ladd v Marshall* [1954] 1 WLR 1489 requirements would still apply but with regard to the special context of new developments arising after the earlier decision has been rendered. In particular, the first requirement (non-availability of evidence at the earlier proceedings) was adapted for those circumstances because if applied in its original form, it would always be satisfied in the s 41(5) SCJA context. The test was therefore framed as such (*BNX* at [99]):

> (a) first, ascertain what the relevant matters are, of which evidence is sought to be given, and ensure that these are matters that occurred after the trial or *hearing below*;
>
> (b) second, satisfy itself that the evidence of these matters is at least potentially material to the issues in the appeal; and
>
> (c) third, satisfy itself that the material at least appears to be credible.
>
> [emphasis added]

11 In particular, we note and adopt the rationale for this adaptation, as stated in [98] of *BNX.* There, citing their decision in *Zhu Xiu Chun (alias Myint Myint Kyi) v Rockwills Trustee Ltd (administrators of the estate of and on behalf of the dependants of Heng Ang Tee Franklin, deceased) and other appeals* [2016] 5 SLR 412 (at [58]), the Court of Appeal explained that:

> The justification behind admitting further evidence as to matters occurring after the date of the judgment is that the further evidence 'materially affects the basis of the earlier decision' and 'the change must substantially affect a basic assumption made at the trial'.

What this quoted passage means is that it is not enough that the further evidence *notionally* affects the basis of the earlier decision. It is not enough that it has *notionally* arisen after the earlier decision. The further evidence *must* at the very least relate to the decision that is appealed against. Absent that, the appellate court would be reluctant to exercise its discretion to receive the evidence.

12 Here, the primary question before the Judge in RA 83 was whether Malaysia OS 455 would qualify as a pending appeal for the purposes of s 3(2)(*e*) of the RECJA. The Judge's decision too, was entirely about Malaysia OS 455. SUM 26 however, seeks to offer Malaysia Suit 437 as an *alternative circumstance for* what would qualify as an "appeal" for the purposes of s 3(2)(*e*) of the RECJA. Malaysia Suit 437 then, is not simply a development that affects the basis of the Judge's decision. It attempts to offer an entirely new basis for the legal inquiry. There is nothing to "affect" since it does not relate to the Judge's decision at all.

13 What is even more unsatisfactory is that Malaysia Suit 437 is a new development entirely of Mr Tan's own making. He cannot simply fashion new developments on appeal to make up for deficiencies in his case below. He cannot seriously complain that the judgment below is in some way irrelevant, when in truth it has only been rendered irrelevant by machinations entirely of his own making. Chronologically, Malaysia Suit 437 was filed after the decision in RA 83. However, in reality, the substance of the challenge in Malaysia Suit 437 pertains to matters that were already in existence in 2019. Notably, Mr Tan had every opportunity to formulate a case along the lines of Malaysia Suit 437 from as early as 2019 (when the 2019 Consent Judgment was first extracted). Instead, he chose a different path. He filed Malaysia OS 455. Malaysia OS 455 *affirmed* the 2019 Consent Judgment. As we alluded to earlier, Malaysia OS 455

and Malaysia Suit 437 are completely antipodal. The subject matter of SUM 26 is therefore simply not even germane to the decision appealed against in the Notice of Appeal. To be clear, the Notice of Appeal is against the whole of the Judge's decision which is whether Malaysia OS 455 would constitute a pending appeal for the purposes of s 3(2)(e) of the RECJA.

14 To repeat, RA 83 was mounted entirely on Malaysia OS 455; and the Judge's decision too, was entirely about Malaysia OS 455. To allow SUM 26 would be to acquiesce in Mr Tan's attempts to effectively convert an appeal into a second registrar's appeal pursued on entirely different grounds. If allowed, the present matter would not be an appeal arising from dissatisfaction with the Judge's decision on Malaysia OS 455 and/or Malaysia Suit 437. The Judge made no decision about Malaysia Suit 437 at all – it simply did not exist at the time (see [2] above). In these circumstances, the relevance and materiality of Malaysia Suit 437 is dubious.

15 Mr Tan has chosen to go with Malaysia OS 455. He cannot procced on the footing of one discreet circumstance in RA 83 and then introduce a completely different circumstance on appeal. From this perspective, Mr Tan's claim that he would be prejudiced if evidence of Malaysia Suit 437 were not allowed to be adduced is simply self-serving and a non-starter.

16 For the reasons stated, we dismiss SUM 26.

Issue 2: Whether Malaysia OS 455 qualifies as an appeal for the purposes of s 3(2)(*e*) of the RECJA

17 This issue may be answered by reference to three sub questions:

(a) Does Malaysia OS 455 fall within the ordinary meaning of the word "appeal"?

(b) Given that RECJA does not have a statutory definition for "appeal", can the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ("REFJA") definition of "appeal", be imported for present purposes?

(c) Assuming that the REFJA definition of "appeal" applies, does Malaysia OS 455 fall within *that* definition?

The ordinary meaning of the word "appeal"

18 In our view, both parties should have started their analysis with the ordinary meaning of the word "appeal". It is not disputed that RECJA has no statutory definition of "appeal". But that does not immediately call for resort to extrinsic materials beyond the statute or even to case law. "Primacy should be accorded to the text of the provision and its statutory context over any extraneous material": *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [43]. A plain reading of the word "appeal" simply does not encompass Malaysia OS 455.

19 The common understanding of an appeal is that it is a proceeding involving a relationship of superior and inferior court intended to correct an error made in the inferior court. This accords not just with common sensibilities and experience but the same meaning is gleaned from the various legal dictionaries as well (see *Black's Law Dictionary* (Bryan A. Garner gen ed) (Thomson Reuters, 11th Ed, 2019) at p 121; *Words and Phrases Legally Defined* (David Hay gen ed) (Lexis Nexis, 2018) at p 182; *Words, Phrases & Maxims* –

Legally & Judicially Defined (Anandan Krishnan gen ed) (LexisNexis, 2008) at A1700; and *Stroud's Judicial Dictionary of Words and Phrase* (Daniel Greenburg gen ed) (Thomson Reuters, 2012) at p 168).

20 On that reading, Malaysia OS 455 is not an appeal. The prayers sought in Malaysia OS 455 are as follows:

> 1) A declaration that the consent order entered into by [PEB and Tan] and [MTB and other related parties] … is valid and binding on the parties herein;
>
> 2) A declaration that the amounts due and owing by [PEB and Tan] to [MTB and other related parties] remains in accordance with what was agreed between the parties herein in the 2019 Consent Order;
>
> 3) That [PEB and Tan] shall be given a reasonable extension of time to comply with its obligations pursuant to the 2019 Consent Order;
>
> 4) [PEB and Tan] shall be given relief from forfeiture and accordingly, [MTB] shall not commence and/or proceed with the auction and/or forfeiture proceedings of the properties charged by [PEB and related parties] subject to Order (2) above
>
> …
>
> 5) Costs; and
>
> 6) Any further orders this Honourable Court deems to be fair and just.

21 There was no attempt to bring the 2019 Consent Judgment to a court of superior jurisdiction. And there was no challenge against the RM60m consent judgment. Neither was there any attempt to correct anything about the 2019 Consent Judgment. If anything, Malaysia OS 455 sought to affirm the 2019 Consent Judgment and Mr Tan's commitment to the order is *renewed* in this application (see prayer 1 of Malaysia OS 455). The only difference is that Mr

Tan seeks more time to comply with a judgment that he plainly agrees with. In that regard, we see no reason to disagree with the Judge's characterisation of Malaysia OS 455 as not amounting to an appeal and his decision at [16] of *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 ("the GD").

The applicability of the REFJA definition of appeal

22 For ease of reference, s 2(1) of REFJA states:

> **Interpretation**
>
> **2.** — (1) In this Act, unless the context otherwise requires —
>
> "appeal" includes any proceedings by way of discharging or setting aside a judgment or an application for a new trial or stay of execution;
>
> …

23 As a starting point, statutory definitions from one statute *can* be borrowed and applied to another if the two acts are *in pari materia*: Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at p 482 ("*Bennion*"). *Bennion* (at p 520) adopts the UK Supreme Court's definition of "*in pari materia*" in *R (Miller) v Secretary of State for Exiting the EU* [2017] 1 All ER 593 at [113]:

> **Definition of** '*in pari materia*'
>
> Two or more Acts may be described as *in pari materia* (from the Latin *pars* or *paris*, meaning equal) if:
>
> (a) they have been given a collective title;
>
> (b) they are required to be construed as one;
>
> (c) they have identical short titles (apart from the year); or
>
> (d) they otherwise deal with the same subject matter on similar lines.

24 This is consistent with decisions such as *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1995] SGCA 53 (at [54]), *Chief Assessor and another v First DCS Pte Ltd* [2008] SGCA 15 (at [28]), and *Skyventure VWT Singapore Pte Ltd v Chief Assessor and another and another matter* [2021] SGCA 40 (at [31]) which suggest that statutory meanings for the same words may be borrowed from other statutes if used in the same sense in both statutes.

25 Here, the key word is "appeal". The context is the setting aside of a registered foreign judgment. The question is whether RECJA and REFJA use the word "appeal" in the same sense when setting aside the registration of a foreign judgment. In our view, they do not. RECJA and REFJA seem very alike and both RECJA and REFJA deal with foreign judgments and registering them in Singapore. But when it comes to the registration of judgments, RECJA and REFJA are animated by different concerns: RECJA, by what a court considers "just and convenient" (see s 3(1) RECJA); REFJA, by "substantial reciprocity of treatment" from the foreign country and whether the foreign judgment is "final and conclusive" (see ss 3(1) and 3(2) REFJA). In *that* context, the REFJA's definition of "appeal" appears to inform what the statute means by "final and conclusive" (see s 3(5) REFJA). The word "appeal" in RECJA does not do the same. The general requirement for registration under s 3(1) RECJA is that the court must consider it "just and convenient"; reference to "appeal" under s 3(2)(*e*) RECJA ultimately serves that larger inquiry. In that regard, the word "appeal" in the RECJA and REFJA is couched in two very different inquiries, even as the context (setting aside the registration of a foreign judgment) remains the same.

26 Both RECJA and REFJA, for example, regard fraud as a ground for setting aside the registration of a foreign judgment. But the *legal effect* of the

same words is completely different. Fraud *necessitates* that a court set aside the registration of a foreign judgment under REFJA. But under RECJA, it only grants courts a *discretion* to set aside the same. It is also true that the REFJA is intended to eventually replace the RECJA: Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at 23.005, referring to ss 9 and 10 of the REFJA. But that is predicated on the relevant Ministerial order being made. The only order that has been made to that effect pertains to foreign judgments from Hong Kong. Until a relevant order brings Malaysian judgments within the ambit of the REFJA, Mr Tan's arguments miss the point. The real question is whether the similar subject matter is presently treated in the same way in these separate statutes. As we have stated above, they are not.

27 The Judge recognised this as well. The Judge went into the history of both legislations and he explained their material differences (see the GD at [18] – [22]). Notably, a foreign judgment that is under appeal can still be registered under the REFJA if it is final and conclusive. In contrast, a foreign judgment that is under appeal cannot be registered under RECJA.

28 For these reasons, we would decline to import the REFJA's definition of "appeal" into the RECJA and affirm the Judge's decision (see the GD at [17] – [20]).

Whether Malaysia OS 455 would fall within the REFJA's definition of "appeal"

29 Assuming however, that the REFJA's definition of "appeal" is imported to help interpret the RECJA's s 3(2)(*e*), that still does not help Mr Tan's case.

30 Ultimately, REFJA's definition of "appeal" is an *inclusive* one. Mr Tan, of course, seeks to use this fact to advocate a generous reading of what "appeal" entails. But he forgets that inclusive definitions (as opposed to exhaustive ones) do *not* displace the natural meaning of the word defined. As *Bennion* puts it, "[an] inclusive definition is used to enlarge the meaning of the defined term to cover things that are not or might not otherwise be caught […] The term as used in the Act has its natural meaning (which is left undefined) and in addition has the special meaning given to it by the inclusive definition." (at p 475). This means that the *natural* meaning of appeal still applies to RECJA (see above at [19]).

31 On that reading, all that the REFJA's definition of appeal does is to expand the definition of "appeal" to *include* those listed in *that* statutory definition. It does *not* evince some wider, broader understanding of "appeal" and certainly does not invite the court to conjure a larger notion of appeals in the abstract. Mr Tan's argument, which seeks to rarefy the idea of "appeal" through abstraction, is ultimately unrealistic and more importantly, too far removed from both the statutory language and the ordinary meaning of the word "appeal". Thus, even applying the REFJA's definition of "appeal" to the RECJA context, we cannot see how the term could possibly encompass applications like Malaysia OS 455 bearing in mind its precise scope.

Stay of execution

32 Finally, we should mention that there is no reason to disturb the Judge's discretionary order refusing a stay of execution. Pausing here, we make clear that we also see no reason to disturb the Judge's exercise of discretion that it

was just and convenient to register the 2019 Consent Judgment despite the pending appeal in respect Malaysia OS 455 (at [29] of the GD).

33 Mr Tan's main reasons for seeking a stay of execution (the possibility of prejudice and the possibility of conflicting judgments) are unconvincing. He says that should Malaysia OS 455's appeal turn out in his favour, he will have to "somehow, nullify the full effect of the registered 2019 Consent [Judgment]". The Judge dealt with that contention and we are not persuaded that he was plainly wrong in refusing a stay of execution. There is no stay of execution in Malaysia. And so, absent additional reasons, Singapore should not afford him a stay of execution that Malaysia itself has not granted.

Conclusion

34 For the reasons above, we dismiss both the appeal and SUM 26. As for costs, we order the appellant to pay the respondent costs of both the appeal and SUM 26 fixed at $35,000 (all-in). The usual consequential orders shall apply.

Belinda Ang Saw Ean
Judge of the Appellate Division

See Kee Oon
Judge of the High Court

Chua Lee Ming
Judge of the High Court

Poon Guokun Nicholas, Chan Michael Karfai and Tan Zhi Min Ashton (Breakpoint LLC) for the appellant;
Ng Yeow Khoon and Claudia Marianne Frankie Khoo (Shook Lin & Bok LLP) for the respondent.
