

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 44 of 2019

BETWEEN:

CHEN MEI-HUAN

Claimant and Respondent

and

(1) VICTORY SUCCESS HOLDINGS LTD

Applicant

(2) ALAN ZHAN

(3) PECKSON LTD

(4) MACAU HOTEL DEVELOPERS LTD

(5) MACAU TOURISM AND AMUSEMENT CO LTD

Defendants

Appearances:

Determined on paper with written submissions from Mr. John McDonnell QC and Mrs. Dancia Penn OBE QC

2021 February 12

[1] **JACK, J [Ag.]:** On 17th January 2021 the claimant (“Madame Chen”) applied for a stay of the judgment which I handed down as long ago as 30th November 2020. It followed my refusal to consider an oral application for a stay at the hearing where I determined consequential matters on 14th January 2021.

[2] Madame Chen is concerned that Victory Success might sell the hotel to a purchaser for value without notice. Such a sale would, she submits, render her appeal nugatory. Despite the length of time since I handed down my judgment no such risk has eventuated. No evidence has been adduced about Macau conveyancing practice. Thus, it is unclear to me that there is no means by which Madame Chen’s interest in the hotel can be protected in the event that her appeal succeeds. Normally one would expect it to be possible to place a restriction or caveat

on the title. At any rate it is for Madame Chen to establish that she would be otherwise unprotected.

[3] Madame Chen is also concerned that Victory Success might carry out works of demolition which would damage the value of the hotel. Victory Success is the subject of an injunction in the Macau courts. (In proposed corrections to this judgment, Madame Chen's counsel suggest that this is inaccurate in that there is in fact no injunction. There has, however, been some procedure before the Macau courts to prevent their taking legal possession of the hotel.) Although Victory Success did start some works of demolition earlier in the proceedings, none have since occurred.

[4] In para [97] I cited the principles for a stay as follows:

“As regards a longer stay, the principles on which a stay of execution should be granted were stated by the Court of Appeal in **C-Mobile Services Limited v Huawei Technologies Co Ltd**¹ to comprise five principles:

“(i) The court must take into account all of the circumstances of the case.

(ii) A stay is the exception rather than the general rule.

(iii) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.

(iv) In exercising its discretion, the court applies, what is in effect, a balance of harm test in which the likely prejudice to the successful party must be carefully considered.

(v) The court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

These elements are self-explanatory and apply in virtually all applications in varying degrees. The Court carries out a balancing exercise in considering the elements and no one element is decisive. The degree of importance attached to each element will vary according to the facts of each case.”

¹ BVIHCP2014/0017 (delivered 2nd October 2014, unreported) at para [30] (Blenman JA) as summarized by Webster JA in *Novel Blaze Ltd (in liquidation) v Chance Talent Management Ltd* [2020] ECSCJ No 233, BVIHCVAP 2020/0006 (delivered 9th July 2020) at para [10].

- [5] In the subsequent paragraphs of that judgment, I discuss the different considerations and indicated an adverse view to the granting of a stay. Having now read the submissions on appeal, that remains my view. As to (i), Madame Chen lost comprehensively before me. She will have to overturn a large number of points if her appeal is to succeed. As to (iii), the appeal has not yet been rendered nugatory, despite the passage of time since the end of November. The appeal is to be heard in, now, one and a half weeks' time. There is no cogent evidence of harm. As to (iv), if the appeal is not rendered nugatory, there is no prejudice.
- [6] As to (v), it is invidious in the current case for me to consider the prospect of an appeal against this judgment of mine succeeding. That is not always the case. Sometimes it will be obvious that there are issues which render an appeal arguable. For example, in **PT Ventures SGPS Ltd v Vidatel Ltd**² I had to determine as a substantive matter whether an arbitration award given in Paris was enforceable in this Territory. The award was being challenged before the Court of Appeal of Paris, but no decision had been rendered.³ I had determined in earlier summary judgment proceedings⁴ that the challenges to the award were arguable. It therefore followed that the Paris Court of Appeal might disagree with my assessment and overturn the arbitral award. An appeal to our Court of Appeal, if that occurred, was bound to succeed. Other cases will turn on points of law which are highly arguable either way.
- [7] The current case does not fall into those sorts of categories. My decision was a fact-specific determination. So far as the grounds of appeal are concerned, these largely go over the evidence dealt with by me in the judgment. It is not appropriate for me to argue the rights and wrongs of the grounds of appeal with the appellant. My judgment must stand on its own merits and demerits. If I have erred, it is for the Court of Appeal to put me right.
- [8] It is said that "Mr. Xu was present throughout the virtual hearing, together with a well-qualified Chinese interpreter, ready to answer any questions which the Learned Judge or the other parties wished to put to him." I was wholly unaware of that. (His name was apparently on the list of attendees at the virtual hearing, but that is not a document I would see.) Mr. McDonnell QC did not tell me Mr. Xu was present virtually. If he had, then obviously I would have asked

² [2020] ECSCJ No 277, BVIHC (COM) 2015/0117, 2019/0067 (13th August 2020).

³ It has since been. The Paris Court of Appeal shared my assessment of French law: Arrêt du 21 janvier 2021 (Pôle 5, Chambre 16), RG 19/10666.

⁴ [2020] ECSCJ No. 89 (16th March 2020).

counsel for Victory Success whether they wanted to cross-examine him and heard submissions on the matter. I am told that the possibility of Mr. Xu attending virtually was mentioned at the directions hearing on 1st September 2020, but I would have had no recall of that over two months later when the substantive application was argued. (Since distributing this judgment in draft, I have been shown the transcript of the hearing on 1st September. It appears that in fact nothing was said about cross-examining Mr. Xu. The issue of cross-examination was raised in connection with expert evidence of foreign law. There was therefore nothing for me to remember or forget from that hearing in relation to Mr. Xu. It is now said the reference to cross-examining Mr. Xu was in fact to a witness statement made prior to 1st September hearing, but I do not remember that either.)

- [9] It is my practice at the beginning of virtual hearings to run through all the participants to ensure that the electronic communication is working, but I have no recollection of Mr. Xu being one of the participants. I do recall Mr. Ng attending virtually with, I think, an interpreter, but not the names of the other Chinese participants, apart from a Ms. Lo (or possibly a Ms. Lam), who I think was a solicitor based in Hong Kong.
- [10] Turning then to proposition (ii) of **C-Mobile**, in my judgment there is no reason to treat this as an exception to the general rule. It is for Madame Chen to convince the Court of Appeal to grant a stay, if one is to be granted. It is unclear why this was not sought on 6th January 2021, when the matter came before Pereira CJ for directions.
- [11] Accordingly, I refuse the application for a stay.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar