IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC(I) 14

Originating Summons No 1 of 2019 (Summons No 1035 of 2019)

Between

BXS

… Plaintiff

And

BXT

… Defendant

JUDGMENT

[Civil Procedure] — [Costs]

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BXS
v
BXT

[2019] SGHC(I) 14

Singapore International Commercial Court — Originating Summons No 1 of 2019 (Summons No 1035 of 2019)
Anselmo Reyes IJ
15 August 2019

11 September 2019 Judgment reserved.

Anselmo Reyes IJ:

Introduction

1 I refer to my judgment in *BXS v BXT* [2019] SGHC(I) 10 dated 20 June 2019 and adopt the abbreviations in that judgment. I now deal with the costs of the matters that I have determined. That means considering three questions:

(a) Who should bear the costs of SIC/OS 1/2019 ("OS 1"), HC/SUM 1035/2019 ("SUM 1035"), and HC/SUM 5770/2018 ("SUM 5770")?

(b) What should the amount of those costs be?

(c) What interest should run on such costs?

OS 1 was the Plaintiff's application to set aside the Final Award. SUM 1035 was the Defendant's application to strike out OS 1. SUM 5770 was the

Defendant's application, pending the provision by the Plaintiff of security for costs ordered by the Singapore court and pending the hearing of SUM 1035, for an extension of time to file an affidavit in response in OS 1. Following my suggestion at a case management conference, OS 1 and SUM 1035 were heard together.

2 By letter to the court dated 4 July 2019 the parties agreed to file sequential submissions on the costs of the three applications mentioned. The Defendant was to file its submissions within 21 days after the court's directions and the Plaintiff was to do so within 14 days thereafter. By letters dated 22 August 2019, the parties indicated that they were content for me to decide on costs based on their written submissions alone.

Discussion

Who should bear the costs of the three applications?

3 The Defendant having prevailed in OS 1 and SUM 1035, it is clear (and the Plaintiff has not really disputed) that the Plaintiff should bear the Defendant's costs of those two applications.

4 Given the Assistant Registrar's directions on 30 January 2019 that the costs of SUM 5770 be in the cause, the Plaintiff should also bear the Defendant's costs of that application.

What should the quantum of costs be?

5 The parties are far apart on this question. The Defendant asks for S$70,000 all-in as its reasonable costs of the three applications. The Plaintiff says that this amount is excessive and suggests that S$15,800 would be more appropriate.

6 The parties have both referred me to *CPIT Investments Limited v Qilin World Capital Limited and another* [2018] SGHC(I) 2 ("*CPIT*"). The Defendant has drawn my attention to Vivian Ramsay IJ's dictum to the effect that, in SICC cases, "the unsuccessful party must pay the reasonable costs of the proceedings to the successful party, unless the court orders otherwise (O 110 r 46(1) of the ROC)" (*CPIT* at [14]). Ramsay IJ went on to say that "the court may, in particular ... take into account such circumstances as the court considers relevant, including the conduct of the case (O 110 r 46(3))". The Plaintiff, on the other hand, has highlighted the passage where Ramsay IJ stated (*CPIT* at [27]):

> ... under the SICC costs regime in O 110 r 46 of the ROC, costs before the date of transfer, 28 June 2016, should, in this case, be assessed taking account of the fact that the High Court regime under O 59 would have applied before that date and, consequently, the appropriate weight ought to be given to Appendix G in assessing the reasonable costs under the SICC costs regime in O 110 r 46. As for post-transfer costs, in assessing reasonable costs, I consider that Appendix G is one of a number of factors which may be taken into consideration.

"Appendix G" refers to Appendix G to the Supreme Court Practice Directions, and is entitled "Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore".

7 The Defendant submits that S$70,000 is reasonable for the following reasons:

(a) The Plaintiff behaved in a "highly culpable" manner by raising unmeritorious arguments in OS 1 and SUM 1035, constantly attempting to "derail timelines and/or frustrate the Singapore proceedings," and generally conducting itself in a manner that "generated unnecessary costs".

(b) The amount of S$70,000 is proportionate to the sum at stake, since the Final Award required the Plaintiff to pay the Defendant THB 91,153,182.62 (approximately S$4,010,740.04), together with costs of US$647,112.51 and interest.

(c) A significant amount of work had to be done by the Defendant, including the filing of 3,278 pages of documents, the submission of 105 authorities, and seven court attendances (that is, pre-trial conferences, a case management conference, and the substantive hearing of OS 1 and SUM 1035).

The foregoing factors are said to have led the Defendant to incur legal fees and disbursements in OS 1 amounting to S$116,733.84 in total. The legal fees comprise S$94,295.65 in fees for Rajah & Tann ("R&T"), and S$15,510.72 in fees for Allen & Overy (Asia) Pte Ltd ("A&O"). The disbursements consist of S$5,785.20 in e-litigation fees, and S$1,142.27 in miscellaneous expenses.

8 The Defendant acknowledges that, if Appendix G were applicable, it would be entitled to between S$19,000 and S$34,000 for the three applications and S$6,927.47 for disbursements in connection with OS 1. The lower bound of $$19,000 is calculated by adding the figures of S$1,000 for SUM 5770, S$6,000 for SUM 1035, and S$12,000 for OS 1. The upper bound of S$34,000 is calculated by adding the figures of S$2,000 for SUM 5770, S$20,000 for SUM 1035, and S$12,000 for OS 1. The Defendant says that, although the substantive hearing of OS 1 and SUM 1035 together only lasted for half a day, the two applications had been set down for a whole day.

9 The Defendant nonetheless submits that I should depart from the Costs Guidelines in Appendix G for the following reasons:

(a) OS 1 was transferred to the SICC on 8 March 2019. Accordingly, only the costs of SUM 5770 (which would be relatively minimal) should be subject to Appendix G.

(b) It is true that a party is only allowed to claim for the costs of two solicitors under Appendix G and the Defendant is claiming for three solicitors. But the Plaintiff also made use of three solicitors.

(c) The Defendant should be entitled to claim the costs of A&O as the latter had acted as the instructing solicitors for R&T in the Singapore court proceedings. This arrangement ensured proper coordination of the Defendant's efforts in the litigation proceedings in Thailand and Singapore arising out of the Final Award.

Reliance is placed on the same factors to justify the reasonableness of the S$70,000 claimed

10 The Plaintiff in contrast argues that Appendix G is relevant as the Plaintiff had "specifically highlighted its costs concerns at the outset when the High Court initiated the transfer of the case" to the SICC. According to the Plaintiff, it noted at the pre-trial conference on 7 March 2019 that its agreement to the transfer of OS 1 "was contingent on there being no difference in hearing and court fees". The Plaintiff says that, in consequence, it should not now be subject to a different costs regime.

11 The Plaintiff further says that, even though three solicitors had acted for each party, it does not follow that the Defendant (or for that matter the Plaintiff, if it had prevailed) should be entitled to recover the costs of more than two solicitors. Nor does the fact that R&T as the Defendant's Singapore solicitors

received their instructions from A&O mean that the Defendant should be able to recover the costs of two sets of solicitor firms.

12 The Plaintiff denies that it had acted so as to "unnecessarily vex" the Defendant. In any event, the Plaintiff observes that much of the "culpable" conduct alleged by the Defendant arose in connection with other applications. For example, the Defendant has complained of the Plaintiff's behaviour in HC/SUM 5769/2018 ("SUM 5769") which concerned the Defendant's security for costs application; as well as HC/OS 1267/2018 ("OS 1267"), including HC/SUM 4820/2018 ("SUM 4820"), which concerned the Defendant's application for an anti-suit injunction to prevent the Plaintiff from continuing proceedings to set aside the Final Award in Thailand. SUM 5769, OS 1267 and SUM 4820 are (the Plaintiff points out) distinct applications from the three under consideration here. The costs of those applications have been separately determined by the Singapore court and should not be relevant to my decision on the costs of OS 1, SUM 1035 and SUM 5770. The Plaintiff adds that in OS 1267 it was ordered to pay indemnity costs to the Defendant. Therefore, it would "unduly prejudice" the Plaintiff if the Defendant were allowed to rely again on the same matters that had led to an order for indemnity costs against the Plaintiff in OS 1267.

13 The Plaintiff submits that, applying Appendix G, the Defendant's reasonable costs (including disbursements) should be a total of either S$15,000 or S$15,800, comprising:

(a) for SUM 5770, either no order as to costs or at most S$800, as that application was uncontested;

(b) for SUM 1035, the amount of S$7,000; and

(c) for OS 1, the amount of S$8,000.

14 Given what the Plaintiff says was the parties' understanding at the time when this case was transferred to the SICC (namely, that there should be no difference in the way that costs are taxed as a result of the transfer), I should be guided by Appendix G in assessing the Defendant's reasonable costs pre- and post-transfer. In any event, *CPIT* itself states that, when the SICC assesses post-transfer costs, Appendix G should be treated as a relevant factor. Further, Appendix G should not be regarded as a straitjacket. Appendix G cautions in its paragraph 2 that the Costs Guidelines therein are solely:

> … intended to provide a general indication on the quantum and methodology of party-and-party costs awards in specified types of proceedings in the Supreme Court, taking into account past awards made, internal practices and general feedback.

Paragraph 3 of Appendix G stresses that:

> The precise amount of costs awarded remains at the discretion of the judicial officer making the award, who may depart from the amounts set out in these Costs Guidelines depending on the particular circumstances of each case …

15 Taking Appendix G then as a starting point, I would be prepared to assess the costs of OS 1, SUM 1035 and SUM 5770 on the higher end of the ranges identified by the Costs Guidelines. That is because, until the substantive hearing of OS 1 and SUM 1035, it seemed as if the Plaintiff intended to take every conceivable point in challenging the Final Award. It was only at the substantive hearing that Plaintiff's counsel sensibly focused on a few key points. This belated narrowing down to the Plaintiff's real points, however, meant that the Defendant had to incur costs in preparing to meet all the arguments that the Plaintiff seemed minded to deploy almost to the end. Regarding SUM 5770, although the Plaintiff rightly says that the application was unopposed, the

Plaintiff did not make this known to the Defendant until just before the parties' attendance before the Assistant Registrar on 30 January 2019. By then, the Defendant would have incurred costs in preparing for SUM 5770 and explaining why the Defendant should be granted an extension of time for filing an affidavit in response in OS 1. The Plaintiff says that on 7 January 2019 it had told the Defendant over the telephone that it would not be filing an affidavit in SUM 5770. But that is different from saying that it would not be contesting SUM 5770. In those premises, by reference to Appendix G, the Defendant's reasonable costs (excluding disbursements) should be around S$34,000. Inclusive of disbursements of S$6,927.47 (which I accept as reasonable), the Defendant's total allowable costs using the higher end of the ranges in Appendix G would be around S$40,000 (more precisely, S$40,927.47) inclusive of disbursements.

16 Plainly, the S$70,000 claimed by the Defendant, being 175% more than the S$40,000 obtained through applying Appendix G, is too high and thus unreasonable. The question then is whether I should depart from Appendix G for the reasons given by the Defendant. In my opinion, it would not be appropriate to do so.

17 As far as solicitors are concerned, both parties made use of three solicitors. That indicates that both parties regarded the matter as important. This is hardly surprising. International arbitration awards are not susceptible to appeal. They may be set aside or refused recognition or enforcement on limited grounds. Consequently, where significant amounts are at stake, parties on both sides of an international commercial arbitration are likely to expend substantial resources in pursuing or resisting applications to set aside awards or have them recognised and enforced. However, the resultant greater use of resources has

already been taken into account by applying the higher end of the ranges in Appendix G.

18 Nor do I think that it would be appropriate to depart from Appendix G because the Defendant opted to instruct R&T through A&O rather than directly. The Defendant is at liberty to organise its defence of the Final Award as it deems fit, such as by employing two firms of solicitors in two different jurisdictions rather than a single firm in the seat of arbitration (in this case, Singapore). However, I do not think that the Plaintiff should bear the extra costs of the Defendant's decision to also engage A&O.

19 In so far as the Defendant also relies on the Plaintiff's alleged culpable conduct, I agree with the Plaintiff that the matters raised largely concern different applications from the three being considered here. Any culpable conduct in connection with those separate applications will no doubt have been considered by the courts undertaking the taxation of those applications. For the purposes of the three applications under consideration here, I would accept that, before the substantive hearing of OS 1 and SUM 1035, the Plaintiff showed itself to be difficult and uncooperative. However, that attitude will also have already been factored in by taking the higher end of the range in Appendix G.

20 Finally, it is not necessarily the case that the reasonable costs approach posited in *CPIT* will yield a different result from that obtained by reference to Appendix G. In this case, I do not think that S$70,000 all-in would be a reasonable amount even under the approach in *CPIT*. The figure of S$40,000 arrived at by applying the higher end of the ranges in Appendix G strikes me as more likely to be the reasonable costs of OS 1, SUM 1035 and SUM 5770. The Plaintiff's setting aside application and the Defendant's striking out application raised overlapping issues. Neither application was unusually complex or

difficult. S$70,000 would be excessive for what were in effect straightforward mirror applications. In those circumstances, whichever approach one takes, whether that of *CPIT* or Appendix G, the outcomes should not differ drastically, if at all. Indeed, Appendix G and the reasonable costs approach in *CPIT* can serve as reality tests against which results obtained by employing one or the other method can be validated.

21 For the foregoing reasons, I assess the Defendant's reasonable costs at S$40,000 all-in.

What rate of interest should be payable on the Defendant's costs?

22 The Plaintiff has not really disputed that simple interest of 5.33% per annum should run on the costs determined here. 5.33% is the default rate applicable to costs in ordinary Singapore court proceedings (see paragraph 77(7) of the Supreme Court Practice Directions). That was also the rate awarded by the arbitrator on the amounts which the Plaintiff was ordered to pay to the Defendant under the Final Award.

Conclusion

23 The Plaintiff is to pay the Defendant's costs of S$40,000. Simple interest at 5.33% per annum is to run on the amount of S$40,000 from the date of this judgment until payment by the Plaintiff.

Anselmo Reyes
International Judge

Koh Choon Guan Daniel, Er Hwee Lee Danna Dolly (Yu Huili), Ng Wei Ying (Eldan Law LLP) for the plaintiff;
Tan Beng Hwee Paul, Pang Yi Ching, Alessa and David Isidore Tan Huang Loong (Rajah & Tann Singapore LLP) for the defendant.
