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

[2021] SGHC 38

Originating Summons No 683 of 2018

Between

(1) BTN
(2) BTO

… *Plaintiffs*

And

(1) BTP
(2) BTQ

… *Defendants*

JUDGMENT ON COSTS

[Arbitration] — [Setting aside]
[Civil Procedure] — [Costs] — [Indemnity costs]

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BTN and another
v
BTP and another

[2021] SGHC 38

High Court — Originating Summons No 683 of 2018
Belinda Ang Saw Ean JAD
5 January 2021

16 February 2021 Judgment reserved.

Belinda Ang Saw Ean JAD:

Introduction

1 The plaintiffs' application in HC/OS 683/2018 ("OS 683") to set aside a partial arbitral award was dismissed with costs by the High Court on 16 September 2019. The High Court's decision is reported in *BTN and another v BTP and another* [2020] 5 SLR 1250) ("HC Judgment"). The plaintiffs' appeal was also dismissed on 23 October 2020 (see *BTN and another v BTP and another* [2020] SGCA 105 ("CA Judgment"). As for the costs of the appeal, the Court of Appeal awarded the defendants costs fixed at the sum of $55,000 inclusive of disbursements on 3 November 2020.

2 Following the conclusion of the matters before the Court of Appeal, the defendants' counsel, Mr Chew Kei-Jin ("Mr Chew"), applied to the High Court on 9 December 2020 to fix the quantum of costs. As parties were unable to

amicably resolve the quantum of costs, both Mr Chew and counsel representing the plaintiffs, Ms Koh Swee Yen ("Ms Koh"), tendered their respective submissions on the appropriate quantum of costs for OS 683. This supplementary judgment pertains to the quantum of costs for OS 683.

3 It is important to bear in mind that the High Court dismissed OS 683 with costs. Unless the court orders otherwise, a dismissal with costs means that the party and party costs would be taxed on a standard basis. Notably, the defendants tried to persuade the Court of Appeal to order costs on an indemnity basis for OS 683, but the Court of Appeal declined, stating in clear terms that it would not disturb the costs order below. Therefore, it is impermissible for the defendants to try to re-argue before this court for higher quantum of costs by seeking to switch the basis of the costs ordered from standard to indemnity basis. All the defendants are permitted to do is to persuade this court not to follow the range of costs in the costs guidelines (as contained in Appendix G of the Supreme Court Practice Directions ("the Costs Guidelines")) which is derived from party and party costs on a standard basis. To be clear, a decision not to follow the Costs Guidelines does not translate into determining the quantum of costs from a different basis from the one ordered. This costs judgment will decide on the appropriate quantum of costs based on a standard basis. In doing so, this costs judgment will take the opportunity to explain why, in the present case, this court ordered costs on the standard basis in September 2019 rather than subscribe to the position on indemnity costs now advocated by the defendants.

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Whether costs should be on a standard or indemnity basis in failed applications to set aside an arbitral award

4 Mr Chew seeks full costs in the total sum of $285,308.41 (inclusive of disbursements of $6,183.56)[1]. He makes several points to persuade this court not to apply the Costs Guidelines. It is convenient here to mention that Ms Koh argues that the Costs Guidelines should apply as there is no basis whatsoever in the circumstances of the present case to depart from an award of costs on a standard basis.

5 Essentially, Mr Chew urges this court to adopt the Hong Kong approach in assessing the quantum of costs on an indemnity basis. He argues that the plaintiffs in commencing OS 683 had put the defendants to considerable costs to fend off what were unmeritorious proceedings that ought not have been brought in the first place bearing in mind that the parties had agreed to resolve their disputes in arbitration and to honour any award made in the arbitration. Underlying this contention is the question of whether indemnity costs should be awarded against a party who unsuccessfully applied to set aside or resist enforcement of an arbitral award as a matter of course, save where there were exceptional circumstances. I will first deal with Mr Chew's reliance on Hong Kong authorities before discussing his other points in the context of the conventional approach to seeking indemnity costs on the basis of applying costs principles under Order 59 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").

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1 DCS at para 2.

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The approach in Hong Kong

6 The Hong Kong courts adopt a default rule that indemnity costs will be granted when an arbitral award is unsuccessfully challenged in court proceedings unless special circumstances can be shown. The Hong Kong approach was first elucidated in *A v R* [2010] 3 HKC 67 ("*A v R*"), a decision of Reyes J in the Hong Kong Court of First Instance. As Reyes J explained, there are three considerations for the approach adopted. First, a person who obtains an award in his favour pursuant to an arbitration agreement should be entitled to expect that the court will enforce the award as a matter of course (at [67]). Hence, applications by an award debtor to appeal against or set aside an arbitral award should be regarded as exceptional events, and where such a party unsuccessfully makes such an application, the court will normally award indemnity costs, absent special circumstances (at [68] to [72]). Second, an unmeritorious challenge against an award is incompatible with the award debtor's duty to assist the court in the just, cost-effective and efficient resolution of a dispute (at [69]). Third, the losing party (award debtor) should bear the full costs consequence of bringing an unsuccessful application. The winning party (the award creditor) should not be made to incur costs arising from the losing party's attempt to challenge the award, when it had already won the arbitration, as this would encourage the bringing of unmeritorious challenges to the award (at [70] and [71]).

7 *A v R* was affirmed by the Hong Kong Court of Appeal in *Gao Haiyan and another v Keeneye Holdings Ltd and another* [2012] HKCU 226 ("*Gao Haiyan*") at [13], for the same reasons stated by Reyes J. So far, there appears to be no clear guidance from the Hong Kong courts as to what matters qualify as "special circumstances" and would result in a departure from the making of

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an order on indemnity costs. In *Gao Haiyan*, Hon Tang VP, delivering the judgment of the appellate court, stated (at [14]):

> The fact that the [award debtor's] case is not unarguable is not a special circumstance. Had it been clearly hopeless, that would have been an additional reason for ordering indemnity costs.

The approach in Singapore

8 The usual course is to award a successful litigant party and party costs on a standard basis. Costs on an indemnity basis is dependent upon there being exceptional circumstances to warrant a departure from the usual course of awarding costs on a standard basis. As seen in *A v R*, the Hong Kong approach starts from the opposite premise and decidedly reverses the burden of proof for indemnity costs in applications to set aside an arbitral award, thereby making indemnity costs the default position and requiring special circumstances (the terminology in Singapore is "exceptional circumstances") to depart from this course.

9 Counsel has not drawn my attention to any local case that had followed the default rule in proceedings arising out of or in connection with arbitral proceedings. In my view, the Hong Kong approach contradicts the costs principles set out in O 59 of our ROC. In Singapore, an unsuccessful application to set aside an arbitral award or to resist enforcement of the same is *not* treated as a category of exceptional circumstances in which indemnity costs may be ordered by a Singapore court under O 59. Separately, the Hong Kong court's approach in justifying indemnity costs is intended to give effect to the underlying objectives of its Civil Justice Reform, one of which is the cost-effective and efficient resolution of a dispute (*A v R* at [69]; *Gao Haiyan* at [7] and [10]). While these considerations are also acknowledged in Singapore in variant forms when the court evaluates how the party conducted its case in the

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litigation, they are not absolute trumps. There are other factors in O 59 r 5 that must be considered.

10 An order for indemnity costs is appropriate only in exceptional circumstances (see *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 at [32]. O 59 r 5 sets out several non exhaustive factors which a court exercising its discretion would take into account in considering whether it is "appropriate" to make an exceptional award of indemnity costs.

Decision on quantum of costs for OS 683

11 I now turn to consider whether the defendants' overall complaints constitute exceptional circumstances for the purpose of assessing costs on an indemnity basis in the present case. As stated at [3] above, it is impermissible for the defendants to relitigate this issue since the Court of Appeal had already denied the defendants' application for indemnity costs, leaving the High Court's costs order untouched. In any case, I do not think that there are exceptional circumstances warranting indemnity costs. The defendants' complaints in brief are as follows: (a) OS 683 was an unmeritorious application; and (b) the plaintiffs' conduct in OS 683, in particular, bringing a "novel" jurisdictional challenge, and in mounting other grounds of challenges, added to the complexity of the proceedings and protracted the same, thereby causing the defendants to incur substantial costs, including the expense of instructing senior counsel.

12 Mr Chew elaborates that the work done by the defendants include a review of over 2100 pages of affidavits filed by the plaintiffs, preparing the two affidavits of the defendants' own witness, preparing written skeletal submissions and speaking note, reviewing written submissions filed by the

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plaintiffs, preparing for and attending the two hearings, and drafting supplementary written submissions following the hearing.

13 The question is whether the complaints (*ie,* grounds) outlined in [11] above constitute exceptional circumstances for the purpose of assessing costs on an indemnity basis. It is convenient here to remind that Ms Koh argues that there is no basis whatsoever in the circumstances of the present case to depart from an award of costs on a standard basis and that the Costs Guidelines should apply. She proposes the figure of $38,000 including disbursements of $6,183.56 as the quantum of costs for OS 683. She points out that the hearing of OS 683 had taken place over less than two days and parties had submitted supplementary submissions of only 8 pages each after the hearing. Section III(A)(iii) of the Costs Guidelines provides for costs at $15,000 per day for contentious originating summonses before the High Court. There is no good reason to depart from this range of costs as the application was relatively straightforward. She added that the defendants sought indemnity costs for the appeal but this was rejected by the Court of Appeal. There is every reason for this court to keep to the Court of Appeal's view on costs. She also argues that the burden on a party seeking an order for indemnity costs is a high one (*Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274 ("*Joseph Tan*") at [97]), and that the defendants have not met this threshold.

14 I agree that the defendants have not shown exceptional circumstances to warrant an order for indemnity costs. Their complaints outlined in [11] above do not constitute exceptional circumstances for the purposes of indemnity costs. As the complaints are all connected and intertwined, the discussions here will address all the complaints as a whole.

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15 The discretion to award indemnity costs is a judicial one. Its exercise is not confined by reference to categories of cases (like *A v R*) in which it has been thought appropriate to make an order for costs to be assessed on an indemnity basis. The High Court in *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 ("*Airtrust*") has helpfully reviewed the case law and identified the following non-exhaustive categories of conduct which may provide good reason to order indemnity costs (at [23]):

(a) where the action is brought in bad faith, as a means of oppression or for other improper purposes;

(b) where the action is speculative, hypothetical or clearly without basis;

(c) where a party's conduct in the course of proceedings is dishonest, abusive or improper; and

(d) where the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process.

As emphasised in *Joseph Tan* at [99], a critical requirement for indemnity costs is the existence of some conduct that takes the case out of the norm.

16 Mr Chew argues that OS 683 was an unmeritorious application. He stops short of labelling the proceedings as an abuse of the court's process. In my view, an application that turns out to be unmeritorious is not necessarily an unarguable case that hints of bad faith or one that reflects no more than an attempt to delay or impede payment. Here, the facts of the present case and the conduct of the plaintiffs as litigants were not such as to render a costs order on an indemnity basis appropriate**.** I find that the plaintiffs had conducted their case in an economical way without undue prolongation of the hearings or submissions.

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Conversely, the defendants' conduct needs some scrutiny. Instructing senior counsel at the last minute to defend the defendants in the second hearing speaks of two things: first, that the jurisdictional challenge was arguable in their opinion; and second, a freshly appointed senior counsel would invariably go over the arguments covered by Mr Chew in the first hearing. A senior counsel's participation at the last minute would extend the hearing somewhat.

Conclusion

17 In the premises, the plaintiffs are to pay the defendants costs of and in relation to OS 683 fixed at $50,000 plus disbursements of $6,183.56.

Belinda Ang Saw Ean
Judge of the Appellate Division

Yeo Khirn Hai Alvin SC, Koh Swee Yen, Low Sze Hui, Jasmine (Liu Sihui) and Quek Yi Zhi, Joel (Guo Yizhi) (Wongpartnership LLP) for the plaintiffs;
Chew Kei-jin, Tan Silin, Stephanie (Chen Silin), Yeo Chuan Tat (Yang Quanda) and Tyne Lam (Ascendant Legal LLC) for the defendants.

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