IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(I) 13

Suit No 4 of 2020

Between

(1) Tamar Perry
(2) Solid Fund Private Foundation

… *Plaintiffs*

And

(1) Bonnet Esculier Servane Michele Thais
(2) Jacques Henri Georges Esculier

… *Defendants*

Counterclaim

Between

(1) Bonnet Esculier Servane Michele Thais
(2) Jacques Henri Georges Esculier

… *Plaintiffs in Counterclaim*

And

(1) Tamar Perry
(2) Solid Fund Private Foundation

… *Defendants in Counterclaim*

JUDGMENT

[Civil Procedure — Costs]

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Perry, Tamar and another
v
Esculier, Bonnet Servane Michele Thais and another

[2022] SGHC(I) 13

Singapore International Commercial Court — Suit No 4 of 2020
Simon Thorley IJ
18 August 2022

29 August 2022 Judgment without an oral hearing.

Simon Thorley IJ:

Background

1 This judgment on costs concerns my decision in *Perry, Tamar and another v Esculier, Bonnet Servane Michele Thais and another* [2022] SGHC(I) 10 (the "Substantive Judgment") which was handed down on 15 July 2022. Unless otherwise stated, I shall adopt the abbreviations used therein.

2 At the end of the Substantive Judgment (see [204]), I directed that the Plaintiffs should pay the Defendants' costs of this action and that the parties should seek to agree an order as to costs. If the Plaintiffs wished to contest the matter, they were to write in within seven days of the Substantive Judgment, and, thereafter, file written submissions within 21 days.

3 On 22 July 2022, the Plaintiffs wrote in to the court. They accepted that the appropriate order was that they should pay those costs, but they disputed that the Defendants were entitled to their full costs owing, *inter alia*, to the Defendants' alleged conduct at trial and their raising of irrelevant issues. On 18 August 2022, the parties' written submissions were filed and they agree that I should resolve the dispute between them on the basis of written submissions and dispense with the need for an oral hearing.[1]

4 Although the parties are in substantial agreement as to the correct approach to be taken in assessing costs under O 110 r 46 of the Rules of Court (2014 Rev Ed) (the "ROC"), they are unable to agree on the quantum. The Defendants' solicitor-and-client bill of costs amounts to S$940,000 in costs together with S$293,065.60 in disbursements. The Plaintiffs do not dispute that these were the expenses incurred by the Defendants but contend that in the circumstances of this case an award of S$600,000 (all-in) would be the reasonable and proper sum to award.

5 When this action was transferred to the Singapore International Commercial Court (the "SICC") on 19 June 2020 it was ordered that the costs were to be assessed in accordance with O 110 r 46 of the ROC. This was following written submissions by the parties including a letter from the Plaintiffs' solicitors dated 5 June 2020, paragraph 2 of which acknowledged that under that Rule the unsuccessful party should pay the reasonable costs of the successful party. It went on to state that whereas in assessing pre-transfer costs the costs guidelines at Appendix G of the Supreme Court Practice Directions ("Appendix G") applicable to the assessment of costs under O 59 of the ROC

[1] Plaintiffs' Costs Submissions (17 Aug 2022) ("PCS") at para 1; Defendants' Costs Submissions (17 Aug 2022) ("DCS") at para 1.

were likely to be taken into account, it would not in general be appropriate to place any material weight on Appendix G in relation to post-transfer costs. This position is not maintained in the Plaintiffs' written submissions before me now, which also raise several other considerations which I am invited to take into account.

The parties' contentions

6 In their written submissions, the Plaintiffs, relying primarily on the decision in *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2022] SGHC(I) 6 ("*Lao Holdings*") at [76]–[85], contend as follows:[2]

> 7. The SICC and Singapore Court of Appeal have established the principles concerning costs before the SICC:
>
> > 7.1. The starting point in assessing SICC costs are the costs incurred by the successful party (S&C costs).
> >
> > 7.2. The costs actually incurred are then subject to attenuation for reasonableness.
> >
> > 7.3. "Reasonableness" is assessed in line with the SICC Practice Directions, which essentially makes provision for the principle of proportionality (broadly speaking, the proportion between the claim amount and costs allowed).
> >
> > 7.4. This approach does not pave the way for S&C costs.
> >
> > 7.5. There is nothing to preclude the SICC from taking account of [Appendix G] when assessing reasonable costs under O 110 r 46 of the ROC.
> >
> > 7.6. The burden lies on the party asserting the use of Appendix G to show that the work which was carried out in the SICC is no different from the "usual run of similar cases [in the Singapore High Court]".
> >
> > 7.7. The relevance given to Appendix G in assessing post-transfer costs will depend on the circumstances of each case. While it is not appropriate to use Appendix G as a starting point in assessing SICC costs, the guidelines remain relevant, and depending on the facts

[2] PCS at para 17.

> of each case, may be appropriate to adjust costs downwards.
>
> [footnotes omitted]

7 For their part, the Defendants accept that the test is one of reasonableness and submit:[3]

> 4. The SICC has made clear that, ordinarily (see [*Lao Holdings*]):
>
> > (a) the overriding and primary policy in the SICC is to compensate the successful party, as far as it is reasonable, for costs incurred in the pursuit of a claim or maintenance of a defence that is meritorious (*Lao Holdings* at [75]);
> >
> > (b) the starting point, therefore, in assessing costs in the SICC must be the costs actually incurred by the successful party, *ie* the costs payable by the successful party to its solicitors, and its experts or consultants where relevant, which is then subject to a single attenuation for "reasonableness", with "reasonableness" assessed in line with the considerations laid out in the SICC Practice Directions (*Lao Holdings* at [83]–[84]); and
> >
> > (c) it would generally be inappropriate to use Appendix G of the Supreme Court Practice Directions 2013 … in quantifying costs in the SICC, as that is contrary to the principles on which O 110, r 46 is grounded (*Lao Holdings* at [85]).
> >
> > [footnotes omitted]

Considerations to be taken into account

8 The Plaintiffs submit that as matters turned out in this case, regard should be had to Appendix G and that, additionally, the award of costs should be reduced to take into account:

(a) that the Defendants' costs schedule was disproportionate to the value of the claim;

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[3] DCS at para 4.

(b) that the Defendants were unsuccessful on the JL Transfer issue;

(c) that the Defendants refused to admit numerous uncontentious points of the Plaintiffs' case; and

(d) that there were wasted trial dates.

Appendix G

9 The Plaintiffs acknowledge that their submission in relation to Appendix G is inconsistent with the stance that they had taken at the time of transfer. In their written submissions,[4] the Plaintiffs assert that as matters turned out the issues that had appeared to the parties as making the SICC the more appropriate forum for resolving the dispute had not proved to be such and that a trial in the High Court would have been just as appropriate.

10 In support of their submission in paragraph 7.6 set out in [6] above the Plaintiffs rely on observations of the Court of Appeal in *CBX and another v CBZ and others* [2021] 1 SLR 88 ("*CBX*") and of the SICC in *Kiri Industries Ltd v Senda International Capital Ltd and another* [2022] 3 SLR 174 ("*Kiri*"). Those decisions make it plain that the onus is on the losing party to demonstrate that work that was carried out was "no different from the usual run of similar cases" (*Kiri* at [55]) and that "the court must have regard to the usual run of similar cases and not be misdirected by the amount a party with deep pockets and a great sense of entitlement is willing to spend" (*CBX* at [36]).

11 The Plaintiffs also emphasise that the international issues that arose turned out to be ones which the High Court "would have been capable of dealing

[4] PCS at para 15.

with".[5] This is not the test. All the judges of the High Court are also judges of the SICC. It is not a question of capability but of suitability. In order to place any significant weight upon Appendix G, the court must be satisfied that the case in question is a "run of the mill" commercial case suitable for resolution in the High Court. In such circumstances, it may be that it would be appropriate to compensate the successful party on the basis of the Appendix G scale, which it is acknowledged may well not compensate the successful party for its reasonably incurred costs.

12 In this case, the only connection with Singapore was that the sums in question had been frozen in a Singapore bank account. No party to the action was Singaporean and the dispute was whether Swiss or Hong Kong law should apply. The claim was a novel one which required the court to focus on the possibility that one investor in what turned out to be a Ponzi scheme could seek redress from another such investor. The authorities all appeared to work on the basis that this was not the case whether under Swiss law or the common law (see the Substantive Judgment at [128], [129], [148] and [149]). The history of the matter was complex involving antecedent proceedings in Hong Kong and criminal investigations in Switzerland.

13 By no stretch of the imagination could this case be classified as a "run of the mill" commercial case. The international nature and complexity of the case was such that in an earlier decision I accepted a submission by the Plaintiffs that this case constituted an "offshore" case (see *Perry, Tamar and another v Esculier, Bonnet Servane Michele Thais and another* [2020] 5 SLR 245 at [64]–[75]). This enabled the Plaintiffs to instruct and be represented by an English Queen's Counsel, Mr Paul Chaisty QC in addition to their Singapore lawyers.

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5 PCS at para 16.

The complexity was reinforced by the Defendants' decision to instruct Mr Colin Liew as co-counsel with Ms Aurill Kam of Legal Clinic LLC. I was grateful for the assistance I received from all counsel in seeking to resolving the issues.

14 I therefore reject the submission that this case was akin to a "run of the mill" commercial case and therefore do not consider it to be a case where it would be appropriate to place weight upon Appendix G in assessing reasonable costs.

Proportionality to the value of the claim

15 I do accept, however, as the Plaintiffs submit,[6] that one factor that the court should take into account is the value of the claim and that care should be taken to ensure that a successful party has not spent more on the case than its value merits. Proportionality is a close relation to reasonableness but proportionality in relation to the value of the claim is not the only aspect of proportionality that has to be considered. Reasonableness has to be considered in the round and this will include proportionality in relation to the issues that arise for decision. Where difficult questions of law or fact arise, it may well be reasonable to incur greater costs in relation to a case of a given value than would be the case in relation to a straightforward case of similar value. There is no mathematical test that can be applied and little help will generally be obtained from comparing the sums awarded by way of costs in one case with those in another.

16 In the present case, costs were likely to be higher than in a straightforward case. The issues involved meant that it was necessary to adduce evidence of foreign law and it was reasonable to instruct co-counsel to address

6 PCS at paras 7.3, 8 and 9.

the novel legal propositions. Costs, excluding disbursements, of less than S$1 million do not seem to me on the facts of this case to be disproportionate to the overall claim of some S$10 million. It is to be noted that the Plaintiffs' estimated costs in their costs schedule dated 12 April 2022 excluding disbursements were some S$1.7 million. Whilst I accept that the reasonableness of one party's' expenditure cannot necessarily be judged against another's, in this case it does provide a measure of support for the submission that expenditure of less than S$1 million was not disproportionate to the value of the claim.

17 I therefore do not propose to make any deduction to the sum claimed on the basis that it was disproportional to the value of the claim.

The JL Transfer issue

18 This was a self-standing issue on which the Plaintiffs succeeded (see the Substantive Judgment at [186]–[191]). It is appropriate that there should be a deduction from the costs payable to the Defendants to take this into account. However, the Defendants did not act unreasonably in putting the Plaintiffs to proof of the issue and, overall, the time taken in dealing with this issue was not great when compared to the other issues. I consider that a deduction of 10% would be appropriate.

The refusal to admit uncontentious points

19 The primary objection the Plaintiffs raise in this regard[7] is to the Defendants refusal to admit that Badilla was operating a Ponzi scheme. I considered this in [81]–[87] of the Substantive Judgment. The Plaintiffs' claim was that the scheme had been in operation since before the Defendants made

[7] PCS at para 12.

their first investment in 2014. The Defendants put them to proof of this and I was unable to go any further on the evidence than the finding that the scheme was in existence in 2016. Whilst this is a matter that could have been the subject of an agreed statement by the parties once all the evidence was to hand based upon 2016, I do not consider that the Defendants acted unreasonably in requiring proof of a matter of which they had no knowledge at the time. I do not propose to make any specific deduction in relation to the way the Defendants approached this issue.

20 The remaining issues which the Plaintiffs list at paragraph 13 of their written submissions are minor matters which fall to be considered as part of overall reasonableness below (see [22] below).

Wasted trial dates

21 The trial of this action was seriously affected by COVID. Steps had to be taken to ensure that the giving of evidence by video-link from Switzerland was in accordance with Swiss law. The proposed trial date in January had to be vacated because of additional travel restrictions owning to the Omicron variant. The trial itself was interrupted because both of the Esculiers contracted COVID whilst in Singapore. True it is that some time was wasted because the cross-examination of the First Plaintiff lasted only one day rather than two and a half days but, in the overall context of this case, that is part of the vicissitudes of litigation and not something for which the Defendants should be criticised.

Overall reasonableness

22 The Plaintiffs are correct to assert that the fact that a party has incurred solicitor-and-client costs of a given sum does not mean that that sum is "reasonable". There will generally be aspects of those costs which on closer

inspection would not be considered reasonable as would be identified in a conventional full assessment of costs. It is right that I should take that factor into account in reaching a final conclusion and the matters which the Plaintiffs' list in paragraph 13 of their written submissions are illustrative of such matters:

> 13. Likewise, the Defendants chose not to admit issues that ought to have been uncontentious – increasing the time and costs. These include:
>
> 13.1. The company details (registration number and address) of the companies under Lexinta;
>
> 13.2. The proceedings in Hong Kong;
>
> 13.3. The proceedings in Switzerland; and
>
> 13.4. That the First Defendant was in receipt of funds transferred from the Lexinta Account.
>
> [footnotes omitted]

Conclusion

23 The Defendants are entitled to be paid the disbursements claimed in the sum of S$293,065.60. The claim for costs is S$940,000, which should first be reduced by 10% (*ie*, S$94,000) because of the issue relating to the JL Transfer. I have further concluded that this figure of S$846,000 should be reduced to S$800,000 to take into account overall reasonableness. The Plaintiffs shall therefore pay the sum of S$1,093,065.60 by way of costs and disbursements.

Simon Thorley
International Judge

Paul Chaisty QC (instructed), Yee Mun Howe Gerald and Koh Kuan Hong John Paul (Premier Law LLC) for the plaintiffs/defendants in the counterclaim;
Kam Su Cheun Aurill and Lim Rui Hsien Esther (Legal Clinic LLC), Colin Liew (Colin Liew LLC) (instructed co-counsel) for the defendants/plaintiffs in the counterclaim.
