

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

[2023] SGHC 195

Suit No 1233 of 2020

Between

Razer (Asia-Pacific) Pte Ltd

... Plaintiff

And

Capgemini Singapore Pte Ltd

... Defendant

FOUNDATIONS OF DECISION

[Civil Procedure — Costs]

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Razer (Asia-Pacific) Pte Ltd
v
Capgemini Singapore Pte Ltd

[2023] SGHC 195

General Division of the High Court — Suit No 1233 of 2020
Lee Seiu Kin J
18 January 2023

19 July 2023

Lee Seiu Kin J:

Introduction

1 In the previous tranche of this suit (“Suit 1233”), I found the defendant liable for breach of contract and negligence against the plaintiff for misconfiguration of a server file, leading to a leak of the plaintiff’s non-public consumer data. This decision concerned the assessment of the costs to be awarded to the plaintiff, and it raised the question of the level of specificity required to plead a contractual entitlement to indemnity costs.

Facts

The parties

2 The plaintiff, Razer (Asia-Pacific) Pte Ltd (“Razer”), is a company incorporated in Singapore. It is in the business of high-performance gaming

hardware, software, services and systems, financial technology services, and digital payments.¹

3 The defendant, Capgemini Singapore Pte Ltd (“Capgemini”), is a professional services company incorporated in Singapore. It provides information technology consultancy services.²

Background

4 Razer commenced Suit 1233 on 29 October 2020. Razer claimed that Capgemini, acting through its employee, Mr Argel Cabalag (“Mr Cabalag”), was responsible for the disabling of security settings on Razer’s Kibana application.³ This caused unauthenticated access to the Kibana application, resulting in a leak of non-public information relating to Razer’s customers (“the Data Leak”): *Razer (Asia-Pacific) Pte Ltd v Capgemini Singapore Pte Ltd* [2022] SGHC 310 (“*Razer (Asia-Pacific)*”) at [29].⁴ One Mr Bob Diachenko published an article on LinkedIn titled, “Thousands of Razer customers order and shipping details exposed on the web without password”.⁵ Consequently, the Data Leak received media coverage on multiple websites over the course of September 2020: *Razer (Asia-Pacific)* at [27]–[28].⁶

5 Razer claimed that Capgemini had breached the express and implied terms of the agreements between them: *Razer (Asia-Pacific)* at [34]–[35].

¹ Statement of Claim (“SOC”) at para 1.

² SOC at para 2; Defence at para 5.

³ SOC at paras 16–17.

⁴ Agreed Bundle of Documents Vol 3 (“3AB”) at p 534.

⁵ 3AB at pp 614–619.

⁶ Agreed Bundle of Documents Vol 4 pp 35–121, 125–194, 209–245, 267–283, 289–295, 330–339, 407–410; 3AB pp 623–626, 684–696.

Further, Capgemini’s alleged contractual breaches caused the Data Leak between 18 June 2020 and 9 September 2020 and caused Razer to suffer, among other things, reputational damage, which caused its sales revenue to decrease significantly: *Razer (Asia-Pacific)* at [36].⁷ For context, these agreements referred to the consulting services agreement (“CSA”) and the Data Processing Addendum (“DPA”) which Razer had entered into with White Sky Labs (Singapore) Pte Ltd (“WSL”) on 1 March 2019 and 20 March 2019, respectively. On 1 June 2020, after Capgemini acquired WSL, Capgemini assumed the obligations of WSL under the agreements: *Razer (Asia-Pacific)* at [4], [15] and [18].

6 In the alternative, Razer claimed that Capgemini was negligent when assisting Razer to resolve its inability to log into and access the Kibana server and/or its application (the “Login Problem”) on 18 June 2020,⁸ and/or that Capgemini was vicariously liable for the injury, loss, and damage sustained as a result of Mr Cabalag’s negligence: *Razer (Asia-Pacific)* at [19] and [39].⁹ The resulting negative press caused Razer to suffer loss of profits and loss of chance to secure potential business opportunities: *Razer (Asia-Pacific)* at [40].¹⁰

7 I gave my decision on liability on 9 December 2022: see *Razer (Asia-Pacific)* at [122]. I found that Mr Cabalag’s assistance on the Login Problem was covered under the statement of work for “Adaptive Managed Services” and was performed in his capacity as an employee of Capgemini: *Razer (Asia-Pacific)* at [122]. Further, Capgemini had breached the terms of cl 3 of the CSA

⁷ SOC at para 23.

⁸ SOC at paras 28–30.

⁹ SOC at paras 33–40.

¹⁰ SOC at paras 23(a) and 26.

dated 1 March 2019 and cl 7 of the DPA dated 20 March 2019: *Razer (Asia-Pacific)* at [56]. In the alternative, Capgemini was negligent in its response to the Login Problem (*Razer (Asia-Pacific)* at [56]). I ordered Capgemini to pay Razer a sum of US\$6,518,738.81 in damages: *Razer (Asia-Pacific)* at [160].

8 On 18 January 2023, I delivered my decision on costs. The grounds of my decision are as follows.

The parties' cases

9 The crux of the parties' disagreement was whether I should order indemnity costs against Capgemini.

10 Razer's case was three-fold. First, by virtue of cl 12 of the CSA and cl 12 of the DPA (the "Indemnity Clauses"), it was contractually entitled to costs and disbursements on an indemnity basis.¹¹ In the alternative, Capgemini's wasteful conduct in Suit 1233 warranted an award of costs and disbursements on an indemnity basis.¹² Finally, at minimum, Razer submitted that it was entitled to costs and disbursements on an indemnity basis from 27 June 2022,¹³ pursuant to O 22A r 1 of the Rules of Court (2014 Rev Ed) ("the ROC"). Razer had sent an offer to settle on that date ("the OTS"), the terms of which were more favourable than the court's decision in Suit 1233 on 18 January 2023.¹⁴

11 In response, Capgemini argued that Razer did not clearly and properly plead that it would be pursuing a contractual remedy of indemnity costs under

¹¹ Plaintiff's Costs Submissions dated 16 January 2023 ("PCS") at paras 4(b), 11–13.

¹² PCS at paras 4(d), 16–30.

¹³ PCS at para 4(e).

¹⁴ PCS at paras 4(e), 31–34.

the Indemnity Clauses: see *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA (Yeh Mao-Yuan, third party)* [2015] 4 SLR 1019 (“*Telemedia*”) at [30]. Therefore, the Indemnity Clauses were only one relevant factor in the court’s exercise of discretion in determining the costs to be awarded to Razer.¹⁵ Further, notwithstanding the Indemnity Clauses, the court should award costs on a standard basis because Razer had acted unreasonably.¹⁶ However, even if the court awards indemnity costs, the quantum of the costs should be reasonable and limited, by virtue of the wording of cl 12 of the CSA, and O 59 r 27(3) of the ROC.¹⁷ Finally, Capgemini avers that the OTS was not a genuine attempt by Razer to reach an amicable settlement, given Razer’s repeated non-disclosures during the discovery process and leading up to the trial.¹⁸

The decision

12 In summary, I awarded costs to Razer on an indemnity basis. In the alternative, Razer had a separate right to indemnity costs from 27 June 2022 on the basis of the OTS. I detail my decision below.

Relevant legal principles

Contractual entitlement to indemnity costs

13 In my earlier decision of *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd and other suits* [2020] SGHC 204 (“*NSL Oilchem*”), I summarised at [198] the relevant principles where parties had made a contractual agreement on costs:

¹⁵ Defendant’s Costs Submissions dated 17 January 2023 (“DCS”) at paras 8–9.

¹⁶ DCS at paras 11–26.

¹⁷ DCS at paras 27–33.

¹⁸ DCS at paras 33–34.

The general rule is that costs are awarded on an indemnity basis only in exceptional circumstances: *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274. That said, the position differs when there is a contractual agreement on costs. In such situations, the question turns to whether the party seeking indemnity costs relies on the court's *statutory discretion to award costs* (e.g. *Abani Trading Pte Ltd v BNP Paribas* [2014] 3 SLR 909 ("*Abani Trading*") or directly sues on the basis of its *contractual entitlement* (e.g. *Mansfield v Robinson* [1928] 2 KB 353, cited and adopted in *United Overseas Bank Ltd v Sin Leong Ironbed & Furniture Manufacturing Co (Pte) Ltd* [1988] 1 SLR(R) 76 at [16] ("*UOB v Sin Leong*"). If the court's discretion is relied on, the contractual arrangement between the parties would be a relevant factor in the court's exercise of its discretion. The court will tend to exercise such discretion to uphold the contractual bargain entered into by both parties unless it would be manifestly unjust to do so: *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA (Yeh Mao-Yuan, third party)* [2015] 4 SLR 1019 at [29] ("*Telemedia*"). If a party relies on its contractual entitlement, such an agreement will generally be upheld: *UOB v Sin Leong* at [16]. ...

[emphasis in original]

14 However, where a party seeks to enforce its contractual rights directly under a costs agreement, such a cause of action would have to be clearly and properly pleaded: *Telemedia* at [30]; also see *Abani Trading* at [66]. In such a case, the party pursues a contractual remedy and must plead their entitlement to indemnity costs under contract: *Telemedia* at [66].

Offer to settle

15 Order 22A rule 9 of the ROC provides that where an offer to settle is made by the plaintiff but not accepted by the defendant and the plaintiff obtains a judgment "not less favourable than the terms of the offer to settle", the plaintiff would get his costs from the defendant up to the date of the offer to settle on a standard basis and the plaintiff's costs on an indemnity basis from the date of the offer to settle "unless the court otherwise orders": Singapore Civil Procedure 2021 (Sweet & Maxwell, 2021) ("SCP") at para 22A/9/1.

16 What is “favourable” must be determined on the terms of the offer to settle. A more “favourable” sum offered in settlement means “more in terms of dollar value than what has been awarded”: *Tan Shwu Leng v Singapore Airlines Limited and another* [2001] SGHC 51 (“*Tan Shwu Leng*”) at [96]. However, “[i]n an offer to settle which contains many terms, the sum offered in settlement is only one factor to be taken into account in determining whether the plaintiff’s judgment is more favourable than the offer to settle”: *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 (“*CCM Industrial*”) at [40]; also see SCP at para 22A/9/3.

Analysis

Contractual entitlement to indemnity costs

17 Razer’s contractual entitlements to indemnity costs are found in cl 12 of the CSA and cl 12 of the DPA. I have reproduced them here for convenience.

18 Clause 12 of the CSA reads:

Each party shall indemnify and hold harmless the other party and, at either party’s request, defend the other party, its subsidiaries and affiliates from and against all claims, liabilities, damages, losses and expenses, including, but not limited to reasonable legal fees and costs of suit (collectively “Claims”), arising out of or in connection with any negligent, malicious or wilful act or any negligent, malicious or wilful omission of the other party, its employees, agents, suppliers or subcontractors, including but not limited to, liability arising from any injury or death to persons or loss of or injury to property resulting from the other party’s failure to fulfil any obligation under this Agreement. In any addition and without prejudice to the foregoing, WhiteSky shall indemnify and hold harmless the Client and, at the Client’s request, defend the other party, its subsidiaries and affiliates from and against all Claims arising out of or in connection with (i) any breach of its representations, warranties, covenants or obligations under clauses 4.4, 9, 10 or 11 of this Agreement; or (ii) any claim brought by a third party in connection with the Services (including a claim that

any Services infringes the intellectual property or other proprietary rights of such third party).

[emphasis in original omitted; emphasis added in italics]

19 Clause 12 of the DPA reads:

[Capgemini] shall, at all times during and after the term of the Agreement, *indemnify [Razer] and its Affiliates against losses, damages, costs or expenses and other liabilities (including legal fees) incurred by [Razer] and its Affiliates arising out of or in connection with any (a) breach of [Capgemini’s] obligations under this DPA, (b) [Capgemini’s] negligence or wilful misconduct or (c) any Security Incident.*

[emphasis in original omitted; emphasis added in italics]

20 It was undisputed that the Indemnity Clauses were engaged, in light of my decision in *Razer (Asia-Pacific)*. Clause 12 of the DPA was engaged as Capgemini had breached cl 7 of the DPA: *Razer (Asia-Pacific)* at [56]. Clause 12 of the CSA was engaged as cll 3(ii)(a) and 3(ii)(c) had been breached, and these were occasioned by the failure of WSL (which Capgemini acquired in March 2020 and whose obligations Capgemini had assumed) to “[perform] its services to an appropriate standard of proficiency, skill and quality” and the failure to use “reasonable methods and due care” to “protect against harmful code”: *Razer (Asia-Pacific)* at [4] and [82].

21 However, Capgemini contended that Razer could not rely on its contractual entitlements under the Indemnity Clauses because it did not satisfy the requirement set out by the High Court in *Telemedia* at [31] – ie, Razer did not “clearly and properly plead” that it would be pursuing a contractual remedy of indemnity costs under the Indemnity Clauses. Specifically, Capgemini argued that the pleadings “only [made] reference to [Razer’s] reliance on the

Indemnity Clauses but [did] not specifically plead indemnity costs based on the relevant contractual provisions”.¹⁹

22 In *Telemedia*, the High Court did not go into the details of what must be specifically pleaded in order to rely on a contractual right to obtain indemnity costs, because the issue did not arise on the facts of that case. The High Court simply stated that the general principles governing pleadings would apply (*Telemedia* at [31]). In my judgment, when determining whether a party has sufficiently pleaded its contractual right to indemnity costs, the court must bear in mind the purpose of a pleading. Its fundamental purpose is to give the opposing party notice of the case against it so that it is not taken by surprise or prejudiced by an unexpected claim: *Vestwin Trading Pte Ltd and another v Obegi Melissa and others* [2006] 3 SLR(R) 573. Where a party seeks to rely on its contractual entitlement to costs, including the specific term of the contract in one’s pleading will allow the other party to make an informed decision at the early stages of the trial as to whether there is a need to adduce evidence to address the enforceability or applicability of that contractual provision: *Abani Trading* at [66]. Based on the foregoing, the relevant test to determine the sufficiency of the pleading would be whether the defendant can reasonably say that the plaintiff has expressed the intention to invoke a specific contractual term to recover costs against the defendant on an indemnity basis.

23 I now come to the present facts. The pleading in question was set out in paras 24 and 25 of Razer’s Statement of Claim, which I reproduce below:

24. [Razer] shall rely on the full terms, meaning and effect of the indemnity clause in Clause 12 of the CSA, pursuant to which *inter alia* [Capgemini] agreed to indemnify and hold [Razer] harmless from all claims, liabilities, damages, losses and expenses, including but not limited to reasonable legal fees

¹⁹ DCS at paras 8–9.

and costs of suit, arising out of or in connection with any negligent, malicious or wilful act, or negligent, malicious or wilful omission by [Capgemini], its employees, agent, suppliers or subcontractors. Clause 12 of the CSA states:

...

25. [Razer] shall also rely on the full terms, meaning and effect of the indemnity clause in Clause 12 of the DPA, pursuant to which [Capgemini] agreed to indemnify, *inter alios*, [Razer] against losses, damages, costs or expenses (including legal fees) incurred by [Razer] arising out of or in connection with [Capgemini's] breach of the DPA, [Capgemini's] negligence or wilful misconduct, or any Security Incident (as defined in Clause 1.1 of the DPA).

24 In my judgment, Razer had clearly and properly pleaded that it would enforce its contractual rights directly under the Indemnity Clauses. This was evident from para 24, which stated that Razer would “rely on the full terms, meaning and effect” of cl 12 of the CSA, “pursuant to which ... [Capgemini] agreed to indemnify and hold [Razer] harmless from ... including but not limited to reasonable legal fees and costs of suit”. Similarly, para 25 provided that Razer would “also rely on the full terms, meaning and effect of the indemnity clause in [cl] 12 of the DPA, pursuant to which [Capgemini] agreed to indemnify ... [Razer] against losses, damages, costs or expenses (including legal fees) incurred by [Razer]”. These statements were sufficient to give Capgemini notice that Razer intended to rely on the Indemnity Clauses to recover legal costs on an indemnity basis. Contrary to Capgemini's submissions, it was not necessary for Razer to go beyond that. Therefore, I find that the Indemnity Clauses were sufficiently pleaded.

25 I noted the difference in wording between the Indemnity Clauses. Clause 12 refers to “*reasonable* legal fees and costs of suit” as an illustration of what is covered by the indemnity clause, whereas cl 12 of the DPA makes no reference to the notion of reasonableness. I accepted Razer's argument that cl 12 of the DPA is applicable as the DPA was entered into after the CSA. Even if I

was wrong on this point, cl 12 of the CSA also cited “reasonable legal fees and costs of suit” as merely an illustration of what would fall within the indemnity.²⁰ Therefore, cl 12 of the CSA did not exclude the option of *all* legal fees being indemnified.

26 Razer specifically pleaded, and relied on its contractual entitlement when seeking, indemnity costs for Suit 1233. Applying *UOB v Sin Leong* and *NSL Oilchem*, I held that full indemnity costs, as stipulated in cl 12 of the DPA, was appropriate here. I found no reason to deviate from the bargain struck between two commercial parties dealing at arm’s length: *NSL Oilchem* at [205].

Offer to settle

27 In the alternative, I held that Razer had a separate right to indemnity costs from 27 June 2022, as Razer had sent an OTS to Capgemini on that date. The OTS was not subsequently withdrawn, and it did not stipulate an expiry date. According to the terms of the OTS, Capgemini would be liable to pay Razer a settlement sum amounting to US\$3,000,000, as well as Razer’s costs to be agreed or taxed. The remaining terms of the OTS pertained to Razer’s withdrawal of Suit 1233.

28 It was clear that the outcome of Suit 1233 was less favourable than the terms of the OTS. In my view, the present case was similar to *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439, where the Court of Appeal was concerned only with the sum offered in the offer to settle, comparing it with the judgment sum: *CCM Industrial* at [40]; also see *Tan Shwu Leng* at [96]. In my earlier decision, I found Capgemini liable to pay Razer a total sum of US\$6,518,738.81 in damages: *Razer (Asia-Pacific)* at [160]. These damages far

²⁰ PCS at paras 11–12.

exceeded the settlement sum stated in the OTS, *ie*, US\$3,000,000. I was also unconvinced by Capgemini's arguments that the OTS was not a genuine attempt by Razer to reach an amicable settlement; in my judgment, Capgemini's allegations about Razer's conduct were not relevant. Therefore, applying O 22A r 9 of the ROC, Razer was entitled to costs and disbursements on an indemnity basis from 27 June 2022 onwards.

Conclusion

29 As a final note, and for completeness, I also considered Capgemini's submissions about Razer's allegedly unreasonable conduct in Suit 1233. These arguments did not persuade me to award costs against Capgemini on a standard basis.

30 In the circumstances, I held that Capgemini was liable to pay Razer the costs of the suit on an indemnity basis. In the alternative, by virtue of Razer's OTS, Razer also had a separate right to claim costs on an indemnity basis from Capgemini from 27 June 2022 onwards.²¹

Lee Seiu Kin
Judge of the High Court

²¹ See HC/JUD 108/2023.

Wong Hin Pkin Wendell and Andrew Chua Ruiming (Drew &
Napier LLC) for the plaintiff;
Tan I Kwok Lionel, Tan Zhen Wei Victoria and Samuel Lim Tien
Sern (Rajah & Tann Singapore LLP) for the defendant.
