IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 12

Originating Application No 8 of 2023 (Summons No 14 of 2024)

Between

Transpac Investments Limited

… *Claimant*

And

TIH Limited

… *Defendant*

JUDGMENT

[Civil Procedure — Costs — Security]

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Transpac Investments Ltd
v
TIH Ltd

[2024] SGHC(I) 12

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Sir Henry Bernard Eder IJ
24 April 2024

29 April 2024 Judgment reserved.

Sir Henry Bernard Eder IJ:

Introduction

1 This is an application by the defendant ("TIH") for further security for costs in the sum of $500,000. This is in addition to the security previously provided voluntarily on 29 August 2023 by FC Legal Asia LLC on behalf of the claimant ("TIL") by way of a Solicitors' Undertaking for Security for Costs for the sum of $100,000 for TIH's costs up to the completion of discovery (*ie*, the 1st Undertaking).

2 In short, TIH submits that TIL is a BVI company whose financial position has been shrouded in secrecy and whose ultimate beneficial owner, Cliff Leong, the son of Chris and Mary Leong, has not suggested that he will have any difficulty providing security as sought.

Applicable Principles

3 The applicable principles are well established. In summary:

(a) Given that this is a "transfer" case, TIH's application for security for costs is made pursuant to Rules of Court 2021 ("ROC 2021") and not the Singapore International Commercial Court Rules 2021.

(b) Pursuant to O 9 r 12 of the ROC 2021, a defendant may apply for security for the defendant's costs of the action if the claimant is "...ordinarily resident out of the jurisdiction...". The claimant is a BVI company and ordinarily resident out of the jurisdiction; and therefore the jurisdiction of the court to order security for costs is engaged.

(c) However, the fact that TIL is ordinarily resident out of the jurisdiction does not, of itself, mean that an order for security must or even should be granted. As per the Court of Appeal's decision in *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 at [14]:

> 14 It is settled law that it is not an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. The court has a complete discretion in the matter: see *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534. It seems to us that under r 1(1)(a), once the pre-condition, namely, being "ordinarily resident out of the jurisdiction", is satisfied, the court will consider all the circumstances to determine whether it is just that security should be ordered. *There is no presumption in favour of, or against, a grant. The ultimate decision is in the discretion of the court, after balancing the competing factors. No objective criteria can ever be laid down as to the weight any particular factor should be accorded. It would depend on the fact situation.* Where the court is of the view that the circumstances are evenly balanced it would ordinarily be just to order security against a foreign plaintiff.
>
> [emphasis added]

In short, it remains to consider in each case "...whether it is just to order security for costs having regard to all the relevant circumstances...": see,

for example, *Siva Industries and Holdings Ltd v Foreguard Shipping I Singapore Pte Ltd* [2017] SGHCR 5 at [4].

(d) In considering whether it is just to make an order for security, the courts have identified various relevant circumstances which are typically taken into account including whether the company's claim is *bona fide* and not a sham; whether the company has a reasonably good prospect of success; whether there is an admission by the defendants on the pleadings or elsewhere that money is due; whether the application for security was being used oppressively; and the lateness in taking out the application: see, for example: *Cova Group Holdings Ltd v Advanced Submarine Networks Pte Ltd and another* [2023] 5 SLR 1576 ("*Cova Group Holding*"); *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118; *SW Trustees Pte Ltd (in compulsory liquidation) and another v Teodros Ashenafi Tesemma and others (Teodros Ashenafi Tesemma, third party)* [2023] 5 SLR 1484 ("*SW Trustees*"); *Tjong Very Sumito and others v Chan Sing En and others* [2011] 2 SLR 360 ("*Tjong Very Sumito (HC)*"). As the cases make plain, these stated circumstances are typically considered and taken into account by the courts in deciding whether or not to order security – but they are, of course, non-exhaustive.

(e) When taking into account the aforementioned list of non-exhaustive factors set out above in *Cova Group Holding*, the General Division of the High Court in *SW Trustees* at [19] noted that the court must keep in mind the three key purposes of security for costs, namely – "(a) to protect the defendant, who cannot avoid being sued, by enabling him to recover costs from the plaintiff out of a fund within the jurisdiction in the event that the claim against him by the plaintiff proves

> to be unsuccessful; (b) to ensure, within the limits of protecting the defendant, that the plaintiff's ability to pursue his claim is not stifled; and (c) to maintain a sense of fair play between the parties even amidst the cut-and-thrust of civil litigation".

Summary of issues

4 TIH submits that TIL essentially acknowledged that it is liable to furnish security by voluntarily furnishing security of $100,000 on 29 August 2023 for the period up to completion of discovery. To be clear, I do not accept that submission: it does not follow from the fact that TIL provided such security voluntarily that it was liable to do so still less that it is liable to provide the further security now sought. Whether or not the court should now make an order for further security depends on the applicable principles as summarised above and the relevant circumstances in play which I turn to consider below.

5 In short, the defendant submits that this is a clear case for security for costs to be awarded for the following main reasons:

(a) TIL is a company that is ordinarily resident out of jurisdiction;

(b) TIL's claims in this action have a low prospect of success;

(c) There is real reason to believe that TIL will be unable to pay TIH's costs;

(d) TIH is likely to be put to significant inconvenience and expenses in enforcing costs against TIL; and

(e) providing security for costs will not stifle TIL's claims in this suit.

6 Although TIL accepts that it is a BVI company and therefore a company registered out of the jurisdiction, it otherwise disputes all of the above. In addition, in inviting the court to reject the application, TIL relies upon (a) the imminence of the trial which is due to start on 27 May 2024 for nine days and (b) TIL's delay in making the present application.

7 Taking these points slightly out of turn, I should say at the outset that I do not propose to say much about item (b) *ie,* TIH's submission that TIL's claims have a low prospect of success save to note that whilst I readily accept that the strength or weakness of a claimant's claim is a potentially relevant factor, it is plain from the authorities that an application for security for costs should not be made the occasion for a detailed examination of the merits of the case; and that the parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure: see *Ong Jane Rebecca v Pricewaterhousecoopers* and others [2009] 2 SLR(R) 796 at [22]–[23]; *SK Lateral Rubber & Plastic Technologies (Suzhou) Co Ltd v Lateral Solutions Pte Ltd* [2020] 4 SLR 72 at [36]. Given that the case involves numerous factual and legal issues and that the trial is due to commence within the next few weeks with an estimate of some nine days, it would, in my view, be inappropriate at this stage to engage in such an exercise.

8 I deal with the other points relied upon by the parties below.

TIL is a company that is ordinarily resident out of jurisdiction

9 As stated above, the mere fact that TIL is out of the jurisdiction is not, of itself, a sufficient reason to grant an order for security.

10 In the case of a "foreign" claimant, the starting point is that "[s]ecurity will not usually be required from a person permanently residing out of the jurisdiction if he has substantial property, whether real or personal, within it, but the property should be of a fixed and permanent nature, which can certainly be available for costs": see *Tjong Very Sumito (HC)* at [38], upheld in *Tjong Very Sumito and others v Chan Sing En and others* [2011] 4 SLR 580 at [57]–[58] and [60].

11 Here, TIL submits that it does have substantial property within the jurisdiction which would be available to pay any adverse order for costs in the form of (a) TIL's shares in TIH; (b) the so-called Bond Account (see [15]–[16] below); and (c) certain other assets by way of investment with certain financial institutions. I deal with each below.

TIL's shares in TIH

12 It is common ground that TIH is a company listed on the Singapore Exchange Limited. According to the evidence submitted by TIL, it (*ie*, TIL) has 24,576,126 shares (being 10.17% of the entire issued share capital of TIH) in TIH with an approximate market price of $4,177,041.42; and that the 10.17% stake in TIH, based on the net asset value of TIH (as stated in TIH's Annual Report 2023), would be worth $12,326,040. It appears that the foregoing is not disputed by TIH.

13 In *Tjong Very Sumito (HC)* at [38]–[39], the High Court held that where shares in Singapore-incorporated companies are being put up as evidence of the claimant's assets within jurisdiction, evidence of their value and existence should be provided. In this regard, TIL submits that it has satisfied this evidential burden.

14 However, in my view, the foregoing does not assist TIL for the following reasons:

(a) First, the evidence is that these shares are "thinly traded". As such, whatever their current notional market value may be, it is a matter of some uncertainty as to how or when such shares might be sold and what price might be achieved in any sale at some future date.

(b) Second, although the evidence is that TIL must give notice of the sale of any shares, it appears that it could sell its shares at any time.

(c) Third, as submitted by TIH, the financial position of TIL is shrouded in mystery. As stated above, TIL is a company incorporated in the BVI. It does not file publicly available financial statements and there is no publicly available information on its cash holdings, assets or what its liabilities are. It has refused to disclose TIL's financial position despite TIH's request to do so. I note that some information has been obtained by way of company searches conducted by TIH on TIL in the BVI which show the existence of certain charges in favour of certain banks over assets that TIL may have in Singapore, Hong Kong, and Liechtenstein although it remains unclear to me whether these charges would cover TIL's shares in TIH. Be that as it may, the important point is that there is no satisfactory up to date information as to TIL's current financial position; nor as to its likely financial position going forward.

Bond Account

15 According to TIL, it has US$11,563,469.34 in a Bond Account with Bank Pictet in Singapore. On this basis and in light of the clear wording of Clause 2 of a Bond Deed that TIL's maximum liability for any contingent claims

(which the sum in the Bond Account is earmarked for) is limited to US$10 million, TIL submits that the excess of the amount above US$10 million (*ie,* US$1,563,469.34) is more than sufficient to meet any adverse costs orders if necessary, even if one takes into account a ballpark range of volatility of -5% to +5% on the US$11,563,469.34.

16 However, I do not consider that the existence of this Bond (or more specifically the current "excess") is of assistance to TIL. First, it appears that there is an important issue between the parties as to whether TIL is entitled to draw upon the Bond to satisfy an adverse costs order; and it is quite impossible for the court to resolve that issue on this present application. Second, whether the "ballpark range of volatility" suggested by TIL is correct is a matter of some uncertainty. Third, I repeat what I have already stated with regard to TIL's financial position. In short, it is simply impossible to know whether the "excess" currently above the US$10 million would or would not be available to satisfy an adverse costs order.

TIL's other assets

17 Third, TIL submits that it has substantial assets in the form of investments maintained with various financial institutions referred to as LGT, CSSG and CSHK totalling US$15,771,264.26, which, according to TIL, are largely low-risk. Although TIL accepts that there are charges over these funds pursuant to secured credit facilities extended to TIL, TIL has confirmed that it has not taken out any loans under these facilities and that no liabilities were created vis-à-vis these moneys. TIL further submits that TIH has provided no evidence that TIL would be unable to pay off any loans taken up under the secured facilities to trigger liabilities vis-à-vis TIL's moneys, or that any default

of a loan would trigger liabilities large enough to wipe out the entire amount of US$15,771,264.26.

18 I accept that the existence of these funds is, on its face, potentially significant. Viewed in isolation, it suggests the existence of more than sufficient funds to pay an adverse costs order in favour of TIH. However, there remain important difficulties – and questions. First, the refusal or, at least, failure of TIL to provide full information as to its current financial position makes it quite impossible to verify what is asserted on affidavit on behalf of TIL with regard to the status of these moneys. Second, as TIL accepts, there are in place existing charges over TIL's assets in Singapore, Hong Kong, and Liechtenstein, in favour of LGT, CSSG and CSHK – including these moneys. Whatever the current position with regard to these moneys may be, the fact is that they remain encumbered by these charges and that TIL may borrow against them at any time.

19 For all these reasons, I am unpersuaded that TIL has assets within the jurisdiction which are of a fixed and permanent nature, which can certainly be available to pay an adverse order for costs.

20 The above points strongly in favour of an order for security.

Whether there is reason to believe that TIL will be unable to pay TIH's costs and/or TIH is likely to be put to significant inconvenience and expenses in enforcing costs against TIL?

21 It is convenient to take these two points relied upon by TIH together.

22 The starting point is, as I have said, that TIL's financial position is clouded in mystery. On the evidence before me, I cannot say that TIL is currently unable to pay an adverse costs order that the court may make.

However, I am equally unpersuaded that TIL will be able or at least be willing to pay any such adverse costs order. In that context, I bear in mind that there was previously a significant delay in TIL paying a sum of money pursuant to a previous court order. Further, as I have already concluded, TIL is a foreign claimant without any assets within the jurisdiction which are of a fixed and permanent nature, which can certainly be available for costs. In such circumstances, it would seem that any adverse order for costs would, at the very least, potentially face considerable obstacles and be difficult to enforce within Singapore.

23 As to the possibility of enforcement of an adverse costs order against TIL abroad, I bear in mind the observations of the Honourable Justice Judith Prakash (as she then was) in *Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017 at [19] (citing Professor Jeffrey Pinsler in *Singapore Court Practice 2006* (LexisNexis, 2006) (at p 596)):

> Ideally, *the defendant should not be required to experience the inconvenience and expense of enforcing his judgment in a different jurisdiction. Nor should his entitlement to costs be delayed by the process of enforcement and lengthy procedures which might operate in the foreign jurisdiction.* In these circumstances, the defendant would certainly be in a more unfavourable position than if the plaintiff had provided the necessary funds to cover the defendant's costs. There is also the risk that enforcement in the foreign forum might be successfully challenged so that the defendant is not only deprived of his costs, but incurs additional expense (on the process for reciprocal enforcement) without gain.
>
> [emphasis added]

24 Here, the prospect of enforcement abroad of an adverse costs order against TIL is highly problematic. There is no reciprocal enforcement mechanism between Singapore and the BVI. The evidence indicates that enforcement proceedings in the BVI would likely involve the appointment of a

new set of solicitors in the BVI to commence proceedings to enforce any costs ordered against TIL in SIC/OA 8/2023 ("OA 8"); and that TIH would face significant difficulties and incur additional time and costs before any order could be enforced against TIL. Even then, there is no certainty that this would result in the recovery of any money leaving TIH with little more than a paper judgment if security for costs is not ordered against TIL.

25 All of the above again point strongly in favour of an order for security for costs.

Will an order for security for costs stifle TIL's claims?

26 The affidavit evidence served on behalf of TIL suggests that any order that the court might make for security for costs would somehow stifle the claim. I readily accept that if that were so, this would be a highly relevant factor in deciding whether or not to order security. However, that evidence is vague in the extreme and difficult, if not impossible, to square with TIL's other evidence and forceful submissions that it has, at least at present, substantial assets which are more than sufficient to pay an adverse costs order. As submitted by TIH, TIL cannot have it both ways.

27 In my view, there is no basis whatsoever in the suggestion that an order for security would stifle TIL's claim.

28 Further, TIH submits and I accept that when a company is impecunious, it is those who stand to benefit from the litigation who should provide security. These individuals cannot hide behind the separate personality of the company. As noted in *Frantonios Marine Services Pte Ltd and another v Kay Swee Tuan* [2008] 4 SLR(R) 224 at [53]:

> … If these interested parties believe that the plaintiff corporation has a viable or meritorious cause of action and they wish to shoulder the risk of that litigation, then it is only fair that they should not only provide funds for the corporation's legal fees and associated expenses for the litigation, but they should also, if so ordered by the court, provide funds to enable the plaintiff corporation to provide security for costs of the defendant in the event the plaintiff corporation's action fails, since there is no real possibility that the plaintiff corporation itself will be able to satisfy the defendant's costs. … These interested parties are essentially hiding behind the impecunious plaintiff corporation, only financing the plaintiff's side of the litigation costs but ignoring the plight of the defendant, who would not be able to reach the interested parties to satisfy its unpaid legal costs. That in my view would be hard to justify in principle and would not be fair. *Interested parties not prepared to provide the funds to meet the security for costs orders, generally ought not to be allowed to finance and launch litigation* using the impecunious plaintiff corporation as a shield.
>
> [emphasis added]

29 There is no suggestion here that TIL is impecunious. Indeed, the evidence submitted on behalf of TIL is, on its face, to the contrary. Be that as it may, the position in this case is that it is Cliff Leong, Chris Leong's son, who stands to benefit from this litigation, as the sole ultimate beneficial shareholder of TIL. It has not been suggested that Cliff Leong, Chris Leong, or Mary Leong are unable to provide security for costs in this case, nor that the provision of such security will cause even the slightest inconvenience to them.

30 As such, this reconfirms my view that there is no question of an order for security stifling TIL's claim.

Delay?

31 TIL submits that the application should be dismissed because of TIH's delay in bringing this application for security. In particular, TIH submits:

(a) The 1st Undertaking was provided up to the discovery stage of OA 8, including specific discovery. The court made its ruling on parties' production requests by way of Redfern Schedules on 25 October 2023, and production of documents to each other was completed by 28 November 2023 at the latest. Thus, there would have been a delay of at least two months before TIH first made its request for further security to TIL on 2 February 2024, and a further month to file the present application by way of SUM 14 on 22 March 2024.

(b) At the time the 1st Undertaking was provided on 29 August 2023, any amendments to the Statement of Claim had not been contemplated by TIL. It was on this basis that TIL had agreed to provide $100,000 as security for TIH's costs of OA 8 – for which discovery would have been completed by 28 November 2023. Thus, it is inaccurate for TIH to allege that there is no delay in bringing SUM 14 due to TIL's amendment to its Statement of Claim.

(c) TIH has not shown any good explanations for the delay in making its request for security and the filing of SUM 14.

(d) The delay would cause considerable prejudice to TIL, given that parties are at the doorstep of trial commencing on 27 May 2024 and any such application would only serve to put an obstacle before TIL in proceeding to trial.

32 At first blush, I was rather impressed by this submission. However:

(a) As stated above, the 1st Undertaking was provided up to the discovery stage of OA 8. However, the discovery process was much extended. Contrary to TIL's submission, the discovery process actually

took until 7 April 2024, when TIL finally produced the documents that it was ordered to produce on 4 April 2024, following this court's decision in TIH's application for specific disclosure in SIC/SUM 16/2024.

(b) Thus, the original request for further security on 2 February 2024 was, in fact, made *before* completion of the discovery process.

(c) Thereafter, the evidence before me indicates that, following that request, the parties were engaged in negotiations on the matter until 1 March 2024. When it became clear that TIL would not voluntarily provide security, TIH promptly made its application for security for costs on 22 March 2024 which was still before the discovery process was eventually completed on 7 April 2024.

(d) In any event, as submitted by TIH, TIL has not provided any basis for the assertion that any purported delay in bringing TIH's application for security would prejudice it in any way in meeting any order for security. Nor has it been suggested that those who stand behind TIL would face the slightest inconvenience in providing the security sought – even within the relatively short period before the start of the trial.

Conclusion

33 For all these reasons, it is my conclusion that, in the exercise of my discretion, I should grant an order for further security for costs by TIL.

34 As for quantum, as noted above, TIH seeks further security in the sum of $500,000. TIH submits that that is a reasonable amount in the circumstances and that, having regard to the fact that TIL has itself estimated an additional

$590,000 for its own costs (excluding disbursements) in the Trial Checklist, TIL can hardly complain that TIH's own estimate is excessive.

35 TIL submits that its estimate of its own costs is irrelevant; that the further amount of security claimed by TIH (*ie,* $500,000) is excessive; and that taking the Guide to the Assessment of Costs in the Singapore International Commercial Court into account, the quantum of any order for security should not exceed $200,000–$300,000, in light of the subject matter and nature of the claims in OA 8, the number of witnesses (seven factual and two expert), length of trial (nine days) and the lack of senior counsel / King's Counsel / Registered Foreign Lawyer involved; and taking into account the sum of $100,000 previously provided by TIL under the 1st Undertaking up until the completion of discovery. In support of that submission, TIL also draws attention to the level of security ordered in other recent cases before this court.

36 As for these submissions, my brief observations and conclusions are as follows.

37 First, each case turns upon its own particular facts and circumstances; so, I am not much assisted by the level of security ordered in other cases.

38 Second, the absence of a proper breakdown – even in broad terms – of the figure of $500,000 makes the assessment of an appropriate figure for security problematic. However, the further sum claimed of $500,000 does not, on its face, seem to me unreasonable; and TIL's own estimate of a further amount of costs of $590,000 would seem at least to indicate that TIH's figure of $500,000 is in the right ballpark.

39 Third, I bear in mind that the order for security will, of course, be just that *ie,* it will be limited to an order for security and, at this stage, it seems to me better to adopt a course which ensures, so far as possible, that the amount of security will cover TIH's costs. In the event that TIH is successful at the end of the day, it will, of course, be necessary to consider carefully the appropriate amount of recoverable costs.

40 For these reasons, in the exercise of my discretion, it is my conclusion that TIL must provide security for costs in favour of TIH in the sum claimed *ie*, $500,000 by 15 May 2024 by way of a solicitor's undertaking or otherwise in a form reasonably satisfactory to TIH.

41 It follows that TIL must also pay TIH's costs of this application to be assessed and dealt with at end of the trial together with the costs of this Suit unless otherwise agreed.

Sir Henry Bernard Eder
International Judge

Foo Maw Shen, Chu Hua Yi and Foo Jyh Howe (FC Legal Asia LLC) for the claimant;
Nair Suresh Sukumaran, Noel Chua Yi How and Alex Chia Yao Wei (PK Wong & Nair LLC) for the defendant.