IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 5

Originating Application No 10 of 2023

Between

(1) DBX
(2) DBY

… *Applicants*

And

(1) DBZ

… *Respondent*

JUDGMENT

[Arbitration — Costs]

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v
DBZ

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8 February 2024 Judgment reserved.

Roger Giles IJ:

Introduction

1 Judgment in these proceedings was given on 15 November 2023: *DBX and another v DBZ* [2023] SGHC(I) 18. The Applicants were ordered to pay the Respondent's costs. The parties were unable to agree on the amount of the costs. I have received the Respondent's written submissions on costs and the Applicants' submissions in reply. This is the determination of the amount of the costs.

2 When the proceedings were transferred to the Singapore International Commercial Court ("the SICC"), the learned Deputy Registrar directed that the costs regime under O 21 of the Rules of Court 2021 ("the ROC") and Appendix G to the Supreme Court Practice Directions 2021 ("the Costs Guidelines") should apply to the assessment of pre-transfer costs, and the costs regime under

O 22 of the Singapore International Commercial Court Rules 2021 ("the SICC Rules") should apply to the assessment of post-transfer costs.

3 The Respondent claims: (a) costs of $187,000, made up of $65,000 for pre-transfer costs, $115,000 for post- transfer costs and $7,000 for preparation of the costs submissions; and (b) disbursements of $7,709.38 and HKD151,978.26, the latter amount being the costs of instructing its Hong Kong law expert, Mr Stephen Tisdall. The Applicants respond with amounts of $16,288 for pre-transfer costs and $45,000 for post-transfer costs; they do not take issue with the amount of $7,000 for preparation of the costs submissions nor the amounts for disbursements.

Pre-transfer costs

4 There is substantial agreement on the basis for assessment of the pre-transfer costs.

5 The successful party is entitled to "a reasonable amount in respect of all costs reasonably incurred" (O 21 r 22(2) of the ROC). Whether costs were reasonably incurred is assessed objectively by considering whether the costs were incurred in a way corresponding to the level of effort that is generally accepted as being likely to be expended for the particular type of work in question; whether costs are a reasonable amount is also assessed objectively by considering whether the overall amount corresponds to the level of costs generally accepted as being likely to be incurred for the particular type of dispute: *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 ("*Senda*") at [50]. The objective standard is because costs awarded under O 21 of the ROC are assessed "at such a level as would enable a litigant with reasonable merits to pursue justice", so that the level of recoverable costs in

each case is "shaped by the normative question of what *ought* to be the amount of costs a successful party can recover for the particular work done in the context of the dispute in question, irrespective of the level of costs the successful party may have actually incurred in the legal proceedings" [emphasis in original] (*Senda* at [47]).

6 In its assessment of pre-transfer costs, the court is guided by the factors in O 21 r 2(2) of the ROC, and by costs precedents and the Costs Guidelines; the regard to costs precedents tends to awarding the same levels of costs in similar or comparable cases, while the Costs Guidelines represent the level of fees which members of the public and the legal profession would generally accept as reasonable (*Senda* at [48]–[49]). But these are guides only, and the court may depart from the Costs Guidelines or apply an uplift if, guided by the factors in O 21 r 2(2), the circumstances of the case so warrant (*Senda* at [14]; *CBX and another v CBZ and others* [2022] 1 SLR 88 at [28] and [34]).

7 The indicative range in the Costs Guidelines for a full day arbitration Originating Application is $13,000 to $40,000.

8 Without saying what figure within the range it takes as the starting point, the Respondent submits that an uplift is warranted. The Respondent's submissions are extensive, and I summarise their principal points. The matter was complex (two awards, four discrete setting aside grounds, the need for foreign law evidence, and a novel question of whether the corrections postponed the commencement of the three month period); it was factually detailed (over 500 pages of exhibits to the Applicants' affidavits, and many more materials necessitated in the Respondent's opposition to the application); the complexity was compounded by the Applicants' unreasonable conduct of the application in a number of respects; the Respondent had to expend substantial time, with a

team of four counsel, to meet the complex and detailed application with its own extensive materials, its actual time and time costs being over 140 hours and $86,492.50 in total; and finally, an uplift giving the amount of $65,000 is proportionate to the award debt at stake, which is almost $14m. There is added reference to two cases in which pre-transfer costs exceeding the range in the Costs Guidelines had been awarded, namely *CJM and others v CJT* [2021] 5 SLR 222 ("*CJM*") and *Lao Holdings NV v Government of the Lao Peoples' Democratic Republic and another matter* [2023] 4 SLR 77 ("*Lao Holdings*").

9 The Applicants' reply submissions do not canvass these submissions. Their contention is that $65,000 is inconsistent with the level of pre-transfer costs that had been awarded in comparable cases, referring to three cases: *CNA v CNB and another and other matters* [2023] 5 SLR 264 ("*CNA*"), *CJM* and *Lao Holdings.* The Applicants take from *CNA* and *CJM* that the pre-transfer costs awarded were within the range of 18% to 25% of the actual pre-transfer costs incurred, giving a range for this case of $15,568.65 to $21,623.13. They submit that under the Costs Guidelines, the maximum pre-transfer costs would be $16,288, a sum arrived at by taking the proportion of the actual pre-transfer costs of $86,492.50 to the actual post-transfer costs of $125,940, being 40.72%, and applying it to the $86,492.50. This, they argue, is within the range for this case derived above, and accordingly should be adopted as the amount which accords with the Costs Guidelines; or, as a fallback, if an uplift were to be applied "to account for the complexities and unique circumstances of OA 10", the uplift should not take the amount beyond the top of the range of $21,623.13.

10 A difficulty with the Respondent's submissions is: an uplift from what? The Costs Guidelines' range of $13,000 to $40,000 is a daily tariff for the complete proceedings, and there must be adjustment because the pre-transfer costs are for only part of the proceedings. As was done in, for example, *CNA* at

[26]–[30] and *Lao Holdings* at [97]–[98], a suitable basis is the ratio between pre-transfer costs and post-transfer costs, namely 40.72% as submitted by the Applicants, giving a starting range of $5,293.60 to $16,288. An uplift to $65,000 is a considerable departure from the guidance of the Costs Guidelines, which the Respondent's submissions mask. Nor is an uplift to that extent supported by regard to *CJM* or *Lao Holdings.* In *CJM*, the starting point was $12,000, with the actual pre-transfer costs of $92,500 being broadly comparable to this case, and the uplift was to $25,000. In *Lao Holdings,* which was a bigger and more complex case than this case, the pre-transfer costs of $42,000 were fixed at just over half the upper end of the Costs Guidelines' amount for the whole proceedings: the equivalent in this case would be in the order of $17,000. It is not easy to find guidance in other cases, as the circumstances vary greatly and true comparability is evasive: any merit in the Respondent's submissions comes rather from the reasons put forward for an uplift, but from a figure within the starting range above-mentioned.

11 The Applicants' submissions have a different difficulty. Their core is the range of 18% to 25% of actual pre-transfer costs derived from the two cases. But only two cases, in which the percentage of the actual pre-transfer costs must depend on the particular circumstances, including the amount of the actual pre-transfer costs (for example, in *CNA*, they were $266,127, and an uplift would be constrained by their magnitude), scarcely warrant an across-the-board percentage in other cases. It is necessary to look to the circumstances of this case in considering occasion to depart from the Costs Guidelines, but the Applicants' submissions do not do so or respond to the reasons put forward by the Respondent.

12 The pre-transfer work is described by the Respondent as including reviewing the Applicants' affidavits and expert report; reviewing the underlying

arbitration material on which the Applicants relied, the service history of the Notices of Arbitration, the awards, and the corrections; sourcing and instructing a suitable expert on the Hong Kong law issues; preparing the Respondent's responsive affidavits; and attendance at two Registrar's case conferences. The description, which is not challenged by the Applicants, appears sound, and I accept it with the qualification that the Respondent's responsive affidavits of its CEO and Mr Tisdall were filed a month after the transfer of the proceedings and (as the description of the post-transfer work at [15] below shows) the preparation of the responsive affidavits would have spanned the transfer.

13 I begin with a figure towards the upper end of the range of $5,293.60 to $16,288. That there were two awards added a little to the absence of notice ground, but the other grounds (whether four or really three) were common to both awards, and the grounds were not unusual in applications of this kind. The need for foreign law evidence was also a feature of the proceedings. But these complexities, and the novel question concerning the effect of the corrections, were more matters for the preparation for and conduct of the hearing, and a great impact on the work prior to the transfer of the proceedings is difficult to see. I accept that attention was needed for a considerable volume of materials in the Applicants' case and in the Respondent's case in reply, and that time would properly have been spent in coming to terms with the Applicants' materials and starting on the Respondent's materials prior to the transfer of the proceedings, and that this is a feature contributing to an uplift. I do not think that the matters said by the Respondent to have been unreasonable conduct of the application by the Applicant, a description which I do not accept, went beyond the exigencies commonly encountered in litigation. Having regard to all the Respondent's submissions, abandonment of the Costs Guidelines is not warranted, but a

moderate uplift is. The amount for the pre-transfer costs should be $22,000 (as it happens, but not as a standard, about 25% of the actual pre-transfer costs).

Post-transfer costs

14 There is also substantial agreement on the basis for assessment of the post-transfer costs. It is a subjective approach. The starting point is the costs in fact incurred by the successful party, followed by an inquiry into whether those actual costs are proportionate and reasonable (the touchstone in O 22 r 3(1) of the SICC Rules): the policy of enhancing access to justice underlying the use of the Costs Guidelines is less relevant, and in the SICC "the principal underlying consideration is a commercial one of ensuring that a successful litigant is not unfairly put out of pocket for sensibly prosecuting his claim or defence" (*Senda* at [51]). Once the successful party has provided appropriate evidence of its incurred costs, and information in support of the claimed costs being reasonable, the unsuccessful party has the evidential burden of showing that the claimed costs are not reasonable (*Senda* at [75]).

15 The post-transfer work is described by the Respondent as preparing the Respondent's responsive affidavit; preparation for and attendance at a Case Management Conference (including various Case Management Bundle filings); preparing the Respondent's written submissions; reviewing the Applicants' written submissions; and preparation for and attendance at the hearing. With the reciprocal qualification concerning the preparation of the Respondent's affidavits, again, this appears a sound description. The actual post-transfer costs incurred were $125,940. Hours and rates were provided.

16 The Respondent effectively repeats its earlier submissions in support of the costs being reasonably incurred and reasonable in amount, with some

emphasis on the research needed on the question of the effect of the corrections. I should say that I accept that a deal of time would have been involved in this, and appropriately so – I found the submissions helpful. Again, the Applicants' reply submissions do not canvass these matters. It is said that the assessment should not be limited exclusively to the facts and circumstances of this case, but that reference should be made to comparable cases for the guidance on an appropriate award of post-transfer costs. It is then said that "because an argument can be made that [*CJM*] bears the closest resemblance to OA 10, both in its features and in its complexity", the post-transfer costs should be assessed at the same amount as in that case, namely $45,000.

17 There is really no challenge to whether the actual post-transfer costs were proportionate and reasonable: the Applicants do not attempt to satisfy the evidential burden of showing that they are not. While it can be relevant, looking to the post-transfer costs awarded in a different case, and no more, is at odds with the subjective approach to the assessment of costs under the SICC regime. Looking to the post-transfer costs awarded in *CJM* is of little moment when the actual post-transfer costs were $97,800 but the defendant sought only $45,000; that was awarded, with the court describing it (at [15]) as "wholly reasonable". I see no reason to reject the Respondent's claim of $115,000, reduced from the actual costs of $125,940, as disproportionate and unreasonable post-transfer costs.

Conclusion

18 The Respondent's costs are therefore $144,000 in total for costs, and $7,709.38 and HKD151,978.26 for disbursements.

Roger Giles
International Judge

Ang Cheng Ann Alfonso and James Ch'ng Chin Leong (A.Ang, Seah & Hoe) for the applicants;
Chong Wan Yee Monica, Leau Jun Li and Foo Hsien Weng (WongPartnership LLP) for the respondent.
