IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 12

Originating Summons No 9 of 2019

Between

(1) BYL
(2) BYM

… *Plaintiffs*

And

BYN

… *Defendant*

JUDGMENT

[Arbitration] — [Costs]

TABLE OF CONTENTS

Version No 1: 27 Oct 2020 (22:41 hrs)

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BYL and another
v
BYN

[2020] SGHC(I) 12

Singapore International Commercial Court — Originating Summons No 9 of 2019
Anselmo Reyes IJ
17 February 2020, 13 April 2020

11 May 2020 Judgment reserved.

Anselmo Reyes IJ

Introduction

1 On 3 March 2020, by my judgment in *BYL and another v BYN* [2020] SGHC(I) 06, I dismissed the Plaintiffs' application to set aside an International Chamber of Commerce ("**ICC**") Partial Award dated 30 April 2019 ("**ICC Award**") pursuant to an arbitration before the ICC ("**ICC arbitration**"). This is my judgment on the costs of the Plaintiffs' abortive setting aside application. The parties agreed the following directions for the assessment of costs:

(a) Parties to submit their respective written submissions on costs, limited to 20 pages, within 14 days of the relevant court order.

(b) Parties to submit their reply submissions on costs, if any, limited to 10 pages, within 14 days thereafter.

(c) The issue of costs to be determined on the basis of the parties' written submissions and without the attendance of solicitors and oral argument.

2 There is no dispute on the incidence of costs. The Defendant having prevailed, the Plaintiffs accept that they should pay the Defendant's costs. But there is a wide divergence on quantum. The Plaintiffs say that the Defendant's costs should be no more than S$15,000, while the Defendant says that their costs should be S$235,000 (inclusive of disbursements).

3 When the Deputy Registrar transferred the Plaintiffs' setting aside application to the Singapore International Commercial Court ("**SICC**") on 29 November 2019, he left open the question:

> whether the High Court costs scale and Order 59 of the Rules of Court should continue to apply to the assessment of costs in respect of all proceedings in and arising from HC/OS 992/2019 [that is, the Plaintiffs' setting aside application] after its transfer to the [SICC].

The direction recognises that the costs of civil proceedings in the High Court are assessed by reference to Order 59 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("**ROC**") and the Costs Guidelines in Appendix G of the Supreme Court Practice Directions ("**Appendix G**"), while costs before the SICC are assessed under ROC Order 110 rule 46. The latter regime requires that, unless the SICC otherwise orders, an unsuccessful party must pay the "reasonable costs" of the successful party (see *CPIT Investments Ltd v Qilin World Capital Ltd and another* [2018] 4 SLR 38 ("***CPIT***"), which provides guidance on applying the "reasonable costs" standard, especially in transfer cases). I read the Deputy Registrar's direction as leaving the proper regime for assessing costs, whether pre- or post-transfer, to the SICC.

Version No 1: 27 Oct 2020 (22:41 hrs)

4 The Plaintiffs have submitted that, to the contrary, the Deputy Registrar's direction means that I must assess pre-transfer costs in accordance with Appendix G and can only decide whether to apply Appendix G or ROC Order 110, rule 46 to post-transfer costs. I am unable to accept that reading of the Deputy Registrar's direction. That is because the Deputy Registrar did not simply reserve to the SICC the question of "whether [Appendix G] should continue to apply to the assessment of costs in respect of proceedings in and arising from [the Plaintiffs' application] after its transfer to the [SICC]". The Deputy Registrar instead went out of his way to insert the word "all" before "proceedings". From that, it seems to me evident that the Deputy was leaving it to me to determine, at an appropriate time after the transfer of the case to the SICC, if the Appendix G regime should continue to apply to all or any part of the proceedings in or arising from the Plaintiffs' application.

5 Following the transfer of the Plaintiffs' application to the SICC, a case management conference ("**CMC**") took place before me on 20 January 2020. In its Proposed Case Management Plan (the "**Defendant's Plan**") submitted just before the CMC, the Defendant estimated its costs as at the time of the CMC to be US$72,000 (about S$103,680). It indicated that its overall costs inclusive of the substantive hearing of the Plaintiffs' application would be in the region of US$250,000 (about S$360,000). By a letter dated 14 February 2020 (the "**February letter**") to the SICC, the Plaintiffs' solicitors in the ICC arbitration estimated that the Plaintiffs' costs of the setting aside application would come to between S$800,000 and S$900,000 and that the Plaintiffs' costs as at the CMC were between S$400,000 and S$500,000.

Version No 1: 27 Oct 2020 (22:41 hrs)

Discussion

6 The Plaintiffs submit that I should have regard to Appendix G in assessing what the Defendant's reasonable costs should be. For a one day originating summons hearing, Appendix G specifies costs of S$15,000. The Defendant counters that I should ignore Appendix G, because the amount of S$15,000 is "excessively low given the circumstances of the case".

7 The Defendant has broken down its claim for S$235,000 as follows:

(a) Fees of TSMP Law Corporation ("**TSMP**") (the Defendant's Singapore counsel): S$133,400.

(b) Fees of [BBB] (the Defendant's counsel in the ICC arbitration): US$58,240 (about S$84,300).

(c) Fees of [AAA] (the Defendant's Indian law counsel): INR78,650 (about S$l,500).

(d) Disbursements: approximately S$15,700.

I begin by assuming that the Defendant's costs of the Plaintiffs' setting aside application, whether pre- or post-transfer, are to be assessed by the "reasonable costs" standard in ROC Order 110, rule 46.

8 The Defendant justifies the claim for [BBB]'s fees by stressing that it was a central plank of the Plaintiffs' application that the contacts between [BBB] and [N] ([BBB]'s lead counsel for the Defendant in the ICC arbitration) on the one hand and "SA" (the arbitrator whose conduct was called into question) on the other, gave rise to apparent bias vitiating the ICC Award. It

Version No 1: 27 Oct 2020 (22:41 hrs)

was thus reasonable, according to the Defendant, to have instructed [BBB] to prepare [N]'s affidavit in the setting aside application. Duplication of work between [BBB] and TSMP (the Defendant adds) was kept to a minimum as TSMP's role was primarily to advise on Singapore law aspects of the setting aside application. No further particulars of the amount claimed by way of [BBB]'s fees have been given. The Defendant justifies the claim for [AAA]'s fees on the basis that it was necessary to instruct Indian counsel to advise on the affidavit on Indian law (the "**Indian law affidavit**") which the Plaintiffs adduced in support of their application. It was eventually decided that the Defendant would not file a responsive affidavit on Indian law, but that (the Defendant says) should not negate the reasonableness of having consulted [AAA]. No details of the disbursements claimed have been provided.

9 As far as [BBB]'s fees are concerned, I am prepared to accept that there was an attempt to minimise duplication of work on [N]'s affidavit between TSMP and [BBB]. However, what was required for [N]'s affidavit was a factual account of [BBB]'s and [N]'s dealings with SA during the period said to give rise to apparent bias. [BBB]'s fees of S$84,300 for producing a straightforward narrative of events from [N] seem to me excessive. Much of that narrative had in any event already been set out in answer to the Plaintiffs' challenge to SA within the ICC arbitration. I would therefore only allow S$28,100 (one-third of S$84,300) for [BBB]'s fees. Although disbursements have not been itemised, I am prepared to accept that, in a transnational case involving parties and legal representatives in different jurisdictions (including Singapore and India), there are likely to be significant disbursements. But even then, in the absence of particulars, S$15,700 seems to me excessive. I would only allow a third of the sum claimed (S$5,300). On the charge for [AAA]'s advice in connection with the Indian law affidavit, I agree that it was reasonable to instruct [AAA] to

Version No 1: 27 Oct 2020 (22:41 hrs)

comment on the Indian law affidavit and that the S$1,500 charged for so advising was reasonable.

10 That leaves the claim of S$133,400 for TSMP's fees. There is unfortunately no breakdown of that figure. Nonetheless, in light of what has actually happened in these proceedings, some surmises can be made in an attempt to put that figure in perspective.

11 By the CMC, the parties' affidavits for the substantive hearing in this matter had mostly been filed. [N]'s affidavit is dated 23 September 2019. The Plaintiffs' Indian law affidavit is dated 5 December 2019. Therefore, [AAA] would have been consulted and its fee of S$1,500 incurred in December 2019 or January 2020 before the CMC. I gave leave at the CMC for the filing of a supplemental affidavit containing extracts (to be agreed among the parties) from the transcripts of the ICC arbitration and from the submissions made during those proceedings. The Plaintiffs filed such affidavit of jointly agreed extracts on 10 February 2020. Apart from those activities, all that remained to be done between the CMC and the substantive hearing was the preparation of the parties' written opening submissions, the delivery of oral arguments in the course of a hearing set down for four hours, and the preparation of cost submissions. These would all be tasks for TSMP. It might therefore be inferred that most (if not all) of the Defendant's disbursements should have been incurred before the CMC. This suggests that the amount of about S$29,720 (namely, S$133,400 (the overall amount of TSMP fees claimed)) minus S$103,680 (taking that figure as an estimate of the Defendant's total costs as at the CMC (see further [12] below) essentially represents TSMP's legal fees in the post-CMC period. I would regard S$29,720 as reasonable for the carrying out of what remained to be done by TSMP as from the CMC.

Version No 1: 27 Oct 2020 (22:41 hrs)

12 That leaves TSMP's pre-CMC fees to be determined. It is not altogether clear whether the estimate of about S$103,680 in the Defendant's Plan for costs up to the CMC included: (a) the S$84,300 claimed for [BBB]'s fees, (b) the S$1,500 claimed for [AAA]'s fees, and (c) some or most of the S$15,700 claimed for disbursements. The S$103,680 estimate conceivably includes [BBB]'s and [AAA]'s fees and perhaps disbursements, since (as discussed in [11] above) these items would have been incurred by the time of the CMC and the Defendant's Plan appears to be comparing total costs of US$72,000 (S$103,680) at the time of the CMC with total costs of US$250,000 (S$360,000) at the conclusion of these proceedings. One cannot, however, rule out the possibility that disbursements had not been fully quantified (in part or perhaps even in whole) at the time of the CMC and were simply lumped together in an approximate manner into the projected US$250,000 total costs at the end of the day. I will assume in the Defendant's favour that the latter was the case. If so, that would mean that about S$17,880 (that is, S$103,680 minus S$84,300 minus S$1,500) in TSMP fees had been incurred as at the CMC. That amount seems reasonable to me. It is consistent with the Defendant's submission that, in the pre-CMC stage, TSMP's engagement was primarily confined to advising on Singapore law.

13 There would still be S$85,800 (that is, S$133,400 minus S$17,880 minus S$29,720) of the Defendant's claim for TSMP's fees left unaccounted. But, without a breakdown of that balance, I am unable to assess whether such amount was reasonably incurred. The problem is that the facts as known, the total cost estimates in the Defendant's Plan, and the costs now being claimed do not all easily sit with each other. If the cost estimate of S$103,680 in the Defendant's Plan did not include [BBB]'s and [AAA]'s fees or disbursements, then in the absence of explanation it is difficult to see how so much could

Version No 1: 27 Oct 2020 (22:41 hrs)

reasonably have been incurred in terms of TSMP fees pre-CMC when (according to the Defendant's submissions) TSMP's role was primarily to advise on aspects of Singapore law in connection with [N]'s affidavit and presumably the Defendant's conduct of its case before the Singapore court. The Singapore law involved is well-known and (as I noted in my judgment on the setting aside application) was not really in dispute. On the other hand, if the cost estimate of S$103,680 included [BBB]'s and [AAA]'s fees as I have surmised in [12] above, then in the absence of explanation it is difficult to see how S$115,520 could reasonably have been incurred by way of TSMP legal fees given what remained to be done in the case following the CMC. There may be valid justifications for the S$85,800. But these have to be articulated by the Defendant and cannot be left to the court's speculation. Parties preparing cost submissions in future SICC cases, might bear in mind what Vivian Ramsey IJ stated in *CPIT* (at [41]):

> It is obviously essential that the court is provided with a sufficient breakdown of the costs so that the paying party can make appropriate comments on the reasonableness of the costs and understand the work carried out for those costs. In the end, the Plaintiff's written submissions and the breakdown of the lump sum into seven lump sums for identified periods provided the bare minimum of information for the paying party to provide comments and the court to assess reasonable costs. It is evident that a more detailed costs schedule identifying the work with costs broken down into hours spent at hourly rates would provide a better basis for assessments.

14 Doing the best that I can with the available information, I would therefore assess the Defendant's reasonable costs for the entirety of the Plaintiffs' setting aside application as follows:

TSMP's legal fees up to the CMC	S$17,880

Version No 1: 27 Oct 2020 (22:41 hrs)

TSMP's legal fees post-CMC	S$29,720
[BBB]'s fees for preparing [N]'s affidavit	S$28,100
[AAA]'s fees for advising on the Indian law affidavit	S$1,500
Disbursements	S$5,300

The latter items add up to S$82,500.

15 I come to the question of how I should approach the assessment of the Defendant's costs: To what extent (if at all) should I apply Appendix G when assessing the Defendant's costs?

16 In principle, the setting aside application having been transferred to the SICC, I ought to assess pre- and post-transfer costs in accordance with Order 110, rule 46. Such approach is especially apt when (as here) the SICC is exercising its jurisdiction under Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) section 18D(2) in relation to an unsuccessful setting aside application. Having already gone through the time and expense of establishing its claim in arbitration proceedings pursuant to the parties' arbitration agreement, the successful party in an arbitration should in the ordinary course of events be entitled to recover its reasonable costs of subsequently defending the award. Where recoverable costs as specified by Appendix G constitute a significant discount to the successful party's reasonable costs, there could be an incentive to the unsuccessful party to delay having to pay on an award by putting

Version No 1: 27 Oct 2020 (22:41 hrs)

up unmeritorious applications to set aside the same. The unsuccessful party would not be bearing the reasonable economic cost of its failed attempt at delay. The successful party would in effect be subsidising the unsuccessful party's attempt to avoid having to honour an award. In the absence of compelling justification, this should not be the normal position.

17 That does not necessarily mean that the SICC should ignore Appendix G when assessing costs in transfer cases. In *CPIT*, Ramsey IJ stated (at [23]–[25]):

> The costs regime under O 110 r 46 of the ROC is applicable to all proceedings in the SICC. Having said that, in cases which are transferred from the High Court to the SICC under O 110 r 12, the costs regime under O 59 would have applied whilst the case was proceeding in the High Court. Thus, in dealing with pre-transfer costs, the SICC is likely to take into account Appendix G in deciding what are reasonable costs under O 110 r 46.
>
> …
>
> However, even absent an agreement by the parties or an order to that effect, although the SICC approach to costs will apply post-transfer, the SICC can, in exercising its discretion on costs, take into account all the circumstances of the case. In this regard, there is nothing to preclude the SICC from taking account of Appendix G even in assessing reasonable costs under O 110 r 46 in a case that was filed in the High Court and transferred to the SICC, unless the parties have agreed to disregard Appendix G altogether. This is in the light of the wording of O 110 r 46 and para 152 of the SICC Practice Directions, which make reference to "reasonable" costs, and the fact that costs are always in the discretion of the court. Of course, the weight to be given to Appendix G in assessing costs is highly dependent on the circumstances of each case.

In *BXS v BXT* [2019] 5 SLR 48 ("***BXS v BXT (Costs)***"), I myself said (at [20]):

> … Appendix G and the reasonable costs approach in *CPIT* can serve as reality tests against which results obtained by employing one or the other method can be validated.

Version No 1: 27 Oct 2020 (22:41 hrs)

18 But, in the circumstances of this case, I doubt that Appendix G can be of real assistance even as a rough-and-ready guide on the appropriate magnitude of costs. There are two reasons for this. First, as the Defendant points out, in contrast to what was highlighted in *BXS v BXT (Costs)* at [14], there has been no understanding or concern among the parties here that there should be "no difference in the way that costs are taxed as a result of the transfer". I am thus less constrained by Appendix G in this case than I was when assessing costs in *BXS v BXT (Costs)*. Second, more fundamentally, it is apparent from the Defendant's Plan and the February letter that both parties had already exceeded the S$15,000 specified by Appendix G even before the CMC. By that stage, the Plaintiffs had already spent close to S$500,000, while the Defendant had spent over S$100,000. The S$15,000 in Appendix G pales in significance by comparison with those numbers. This outcome is hardly surprising. Given what was at stake in the arbitration (INR 761 crores (approximately US$102 million)) and the likely serious consequences if the Plaintiffs' application were successful (including the possibility that the protracted, but now nearly completed, ICC arbitration would have to start afresh with a different arbitrator in SA's place and with all the wasted costs of the initial proceedings hanging in the balance), each side would have appreciated that realistically something substantially more than a relatively modest S$15,000 worth of legal drafting, research and other work was warranted. Such a conclusion by the parties would have been pragmatic and reasonable from a commercial viewpoint.

19 The Defendant goes so far as to submit that, since more than US$100 million (S$144 million) is at stake here, I should straightaway find the amount of S$235,000 to be justified. I accept that the amount in dispute is relevant when evaluating whether costs have been proportionately incurred. But proportionality is not the sole factor to be considered when determining the

Version No 1: 27 Oct 2020 (22:41 hrs)

reasonableness of costs. For one, the mere fact that a sizeable amount *x* is involved does not give a party *carte blanche* to spend however much it wishes on whatsoever activities it pleases, provided only that its overall expenditure is within some percentage of *x*. A party would also need to establish that a particular activity was not just a superfluous frill, but a measured and appropriate step towards achieving a relevant legal result.

20 The Defendant further submits that S$235,000 ought to be regarded as reasonable, because the Plaintiffs' own estimated total expenditure of between S$800,000 and S$900,000 is many times more than that. I accept that the Plaintiffs' overall expenditure can be a rough-and-ready yardstick against which to gauge the reasonableness of the Defendant's costs. But such an approach needs to be used with considerable caution. Parties' respective positions may not be symmetrical. For instance, an award is not readily set aside. Thus, in these proceedings, the Plaintiffs had much more heavy lifting to do than the Defendant. The disparity between the parties' expenditures here may simply have reflected that reality. There is also the possibility that both sides to a dispute have been extravagant in terms of the activities undertaken by them in the litigation and the amounts incurred in respect of those activities. In metaphorical terms, parties may opt for a Rolls-Royce or Mercedes Benz level of service to realise their desired result. But I do not think that it would be reasonable to expect an opposing side to bear the cost of the Rolls-Royce or Mercedes Benz service, when a Toyota could have been just as effective. The reasonableness of the individual items claimed by a party would often still have to be established.

21 Accordingly, I assess the Defendant's reasonable costs to be S$82,500 as set out in [14] above.

Version No 1: 27 Oct 2020 (22:41 hrs)

22 Finally, for completeness, I briefly respond to miscellaneous points made by the parties in the course of their submissions:

(a) The Defendant submitted that S$235,000 was reasonable because it was within the estimate of S$360,000 in the Defendant's Plan. However, the projected overall cost of S$360,000 may not itself have been reasonable. That would need to be established for this argument to succeed. Accordingly, little can be inferred about the reasonableness of S$235,000 from the mere fact that the amount is less than S$360,000.

(b) The Defendant suggested that the Plaintiffs conducted the setting aside application in a vexatious manner, with the consequence that greater cost had to be incurred than might otherwise have been so. I am unable to agree that the Plaintiffs have been vexatious. To my mind, the Plaintiffs' conduct has exemplified no more than the usual cut and thrust seen in international commercial litigation.

(c) The Defendant alleged that, outside the confines of the setting aside application, the Plaintiffs have "consistently sought to delay, protract, and vex" the Defendant. The Plaintiffs (it is said) have "brought multiple proceedings in various courts, all of which have been unsuccessful". It is even suggested that the Plaintiffs have attempted to dissipate assets. There has been no evidence of the Defendant's allegations. This court has not investigated the allegations or made any findings regarding them. The bare allegations can hardly constitute support for the costs claimed by the Defendant.

(d) The Plaintiffs contended that S$235,000 was excessive by comparison with the costs (including disbursements) of S$245,877.52

Version No 1: 27 Oct 2020 (22:41 hrs)

awarded by the SICC in *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others* [2020] SGHC(I) 7 ("***DyStar***"). Of the latter amount, the Plaintiffs highlight that only S$145,000 was for professional costs (including preparing cost submissions). This is despite the fact (the Plaintiffs assert) that *DyStar* was of "an altogether different order of complexity". But each case has its unique features. It is consequently an impossible exercise to compare the costs awarded in one set of proceedings with those claimed in another with a view to establishing the reasonableness or otherwise of the latter.

Conclusion

23 The Plaintiffs are to pay the Defendant's costs of S$82,500. Simple interest at 5.33% per annum is to run on the amount of S$82,500 from the date of this judgment until payment by the Plaintiffs.

Anselmo Reyes
International Judge

Davinder Singh SC, David Fong and Sivanathan Jheevanesh (Instructed), Kabir Singh and Tan Tian Yi (Cavenagh Law LLP) for the Plaintiffs;
Thio Shen Yi SC, Niklas Wong and Kevin Elbert (TSMP Law Corporation) for the Defendant.

Version No 1: 27 Oct 2020 (22:41 hrs)