IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 98

Originating Summons No 96 of 2017

Between

Otto Ventures Pte Ltd

… Plaintiff

And

ECYT Law LLC

… Defendant

GROUNDS OF DECISION

[Legal profession] - [Solicitor's undertaking] – [Construction of undertaking]

[Arbitration] – [Security for costs] – [Court's powers over release of security after final award]

TABLE OF CONTENTS

Otto Ventures Pte Ltd
v
ECYT Law LLC

[2017] SGHC 98

High Court — Originating Summons No 96 of 2017
Pang Khang Chau JC
12 April 2017

28 April 2017

Pang Khang Chau JC:

Introduction

1 This case raises the following issues:

(a) Where a solicitor gives an undertaking to hold a sum of money "as security for costs in our clients' account" without any elaboration concerning the terms governing the release of such security, what is the extent of his duty concerning release of the security after the liability for and quantum of costs are determined?

(b) Where an arbitrator has ordered the claimants to provide security for the respondent's costs in the arbitration, and the arbitrator's final award provides for costs be taxed and assessed by the Registrar of the Supreme Court without dealing with the release of the

said security, what are the court's powers in relation to the said security?

Background

2 The plaintiff in the present application ("Plaintiff") is the respondent in Singapore International Arbitration Centre ("SIAC") Arbitration No. 52 of 2015 ("the Arbitration"). The defendant in the present application ("Defendant") is the firm of solicitors representing the claimants in the Arbitration ("the Arbitration Claimants").

3 The Arbitration was heard by a sole arbitrator ("the Arbitrator") who made two orders requiring the Arbitration Claimants to provide security for the Plaintiff's costs in the Arbitration. The security was provided in the form of two letters of undertaking from the Defendant to the Plaintiff's solicitors. The letter of undertaking dated 16 October 2015 provides:

> 2. Please be informed that we have received $50,000.00, being the security for costs pursuant to the Order for Direction No. 2, from our clients.
>
> 3. We undertake that we will hold the said $50,000.00 as security for costs in our Clients' Account.

The letter of undertaking dated 14 March 2016 is in similar terms. I shall refer to these two letters collectively as "the Undertaking".

4 The Arbitrator's orders for security for costs did not prescribe the form of the security nor did they specify how the security should be dealt with after the termination of the Arbitration. The orders merely provided that the security "is to be furnished in a manner and form acceptable to the Respondent".

5 On 15 August 2016, the Arbitrator issued his final award ("the Final Award") which provided, *inter alia*, that:

> The Claimants shall bear all the legal costs and expenses incurred by the Respondent with reference to this arbitration;
>
> …
>
> This is a Final Award on all issues in dispute in this arbitration including liability for cost and expenses of the arbitration and the Tribunal's fees and expenses. The quantum of legal costs and expenses are to be agreed between the Claimants and the Respondent, failing which they shall be taxed and assessed by the Registrar of the Supreme Court.

6 Pursuant to the Final Award, the Plaintiff's costs in the Arbitration were taxed and assessed by the Registrar as $175,200. On 21 December 2016, the Plaintiff's solicitors wrote to the Defendant in the following terms:

> 2. By way of service, please find enclosed the Registrar's Certificate in HC/BC 168/2016. The aggregate sum of S$175,200 is due and payable to our client, as shown in the breakdown in the Registrar's Certificate.
>
> 3. With reference to your letters of undertaking dated 16 October 2015 and 14 March 2016, which are enclosed for your reference, we note that your firm is holding the sum of S$100,000 as security for our client's costs.
>
> 4. In the circumstances, kindly let us have payment of (a) the sum of S$100,000 from your firm, and (b) your client's payment of the remaining sum of $75,200 within seven (7) days hereof, failing which our client will take all necessary action(s) to enforce the Registrar's Certificate without further reference to you and/or your clients.

7 On 9 January 2017, the Defendant wrote to the Plaintiff's solicitors requesting that the payment of costs be held in abeyance until the proceedings in Originating Summons 1187 of 2016 ("OS 1187/2016") were completed. (OS 1187/2016 is an application by the Arbitration Claimants to set aside the Final Award.) The Plaintiff did not accede to this request.

8 On 15 February 2017, after the Plaintiff commenced the present application, the Defendant wrote to the Law Society of Singapore ("Law Society") to seek guidance from the Council of the Law Society on whether the Defendant was bound to release the security to the Plaintiff against the Arbitration Claimants' instructions, in the absence of an order from either the court or the Arbitrator to do so. The Law Society replied on 21 February 2017 that as the matter was already before the court, the Advisory Committee considered that it should not give guidance without the court's clearance.

9 On 22 February 2017, the Defendant wrote to the Plaintiff's solicitors, informing them that the Arbitration Claimants were agreeable to the transfer of the $100,000 to the Plaintiff's solicitors on the latter's undertaking that they would hold the sum as security for costs and would not release the sum to the Plaintiff unless and until OS 1187/2016 was finally disposed of in the Plaintiff's favour. The Plaintiff did not take up the offer.

Decision

10 After hearing parties on 12 April 2017, I ordered the Defendant to release the security for costs to the Plaintiff. I now provide my grounds of decision.

Summary of parties' arguments

11 The Defendant argued that:

(a) based on the terms of the Undertaking, the Defendant merely undertook to hold the $100,000 in the Defendant's clients' account;

(b) the Undertaking does not contain any term which obliges the Defendant to release the said amount to the Plaintiff once the Final Award is issued;

(c) in this regard, the Undertaking is to be contrasted with the undertaking considered in *PT Bumi International Tankers v Man B&W Diesel S E Asia Pte Ltd* [2004] 3 SLR(R) 69 ("*PT Bumi*") which included the phrase "hereby undertake to pay".

12 The Defendant further submitted that, on its true construction, the Undertaking is an undertaking by the Defendant to hold the $100,000 until the Arbitrator makes an order on how the security for costs should be dealt with.

13 The Plaintiff argued that:

(a) a solicitor's undertaking creates a personal obligation on the part of the solicitor which the solicitor is required to honour notwithstanding any contrary instructions from his client;

(b) an undertaking to hold a sum of money as security for costs necessarily gives rise to an obligation to pay out the money upon the Arbitration's conclusion;

(c) there is therefore no need to seek a further order from the Arbitrator;

(d) further, having issued the Final Award, the Arbitrator is *functus officio* and is no longer in a position to make any further orders concerning the disposal of the security for costs.

Issues arising for determination

14 The issues arising for determination in the present application are:

(a) whether, on a true construction of the Undertaking, the Defendant is presently obliged to pay the $100,000 over to the Plaintiff; and

(b) whether the matter should be remitted to the Arbitrator for the Arbitrator to make a further order concerning the disposal of the security for costs.

I shall deal with these two issues in turn although, as will be apparent from the ensuing discussion, there is some overlap between the two issues.

Issue 1 – Whether the Undertaking obliges the Defendant to release the security to the Plaintiff

15 As a starting point, I agree with the Plaintiff that a solicitor's undertaking is a personal undertaking by the solicitor, as opposed to an obligation undertaken on behalf of clients. This means that a solicitor cannot cite his client's instructions (or, conversely, their absence) as an excuse for not honouring his undertaking – see *Re A Solicitor, ex parte The Singapore Bar Committee* [1932] SSLR 195 and *Law Society of New South Wales v Waterhouse* [2002] NSWADT 204 at [13]. However, accepting this proposition merely means that I should ignore the Arbitration Claimants' contrary instructions to the Defendant when evaluating whether the Defendant is obliged to release the security to the Plaintiff. It brings me no closer to determining whether the Defendant has assumed such an obligation in the Undertaking.

16 I also agree with the Defendant's submission, relying on *PT Bumi* at [5], that a solicitor's undertaking must be governed by the terms set out in the undertaking itself. Similarly, this proposition does not really advance the Defendant's case. In *PT Bumi*, the solicitor's undertaking contained an express term that it would be discharged "upon payment of the sum above and/or if the Defendants are paid all their costs without having to call on this undertaking, whichever is earlier". The court in *PT Bumi* held that it would not intervene to discharge the undertaking before the conditions for discharge were fulfilled because that would run against a clear and express undertaking freely given. In the present case, the Undertaking does not contain any express term to the effect that the security may only be released to the Plaintiff upon a further order from the Arbitrator. It would therefore not run against the clear and express terms of the Undertaking if the court were to find that, on its true construction, payment out of the security is not conditional upon a further order from the Arbitrator.

17 I note that a standard form for a solicitor's undertaking for security for costs can be found in Form 116 in Appendix A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). The operative part of Form 116 reads:

> … we, the solicitors for the appellant, undertake to hold the sum of $ by way of security for your costs of the appeal / application* and, *if costs are payable to the respondent under any order made by the Court of Appeal, to release to you the said amount without set-off unless the Court of Appeal otherwise orders.*
>
> [emphasis added]

18 Since the italicised text in the foregoing quotation is absent from the Undertaking, an argument could be made that such an omission is deliberate and that the court should construe the omission as signifying an intention to exclude from the Undertaking any obligation to release the security. On the

other hand, it would also be possible to argue that the italicised text represents the general understanding among legal practitioners on how an undertaking for security for costs would operate in practice – *ie,* that the security would be released to the other party upon liability for costs being ascertained, without the need for a further order from the relevant tribunal. At the end of the day, it does not appear fruitful to place too much emphasis on the differences in wording between the Undertaking and the form of undertaking prescribed in the ROC. In my view, each undertaking falls to be construed in light of the actual words used in the undertaking having regard to the specific context surrounding the giving of the undertaking.

Principles governing the construction of solicitors' undertakings

19 Generally, the principles governing the construction of contracts are also applicable to the construction of solicitors' undertakings. In *People's Parkway Development Pte Ltd v Ramanathan Yogendran* [1990] 2 SLR(R) 338 at [12], the High Court construed a solicitor's undertaking using the principles of contractual interpretation laid down in *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989 ("*Reardon Smith Line*"). In *Barclays Bank Plc v Weeks Legg & Dean (a firm)* [1999] 1 QB 309 ("*Barclays Bank*"), the English Court of Appeal applied the first of five principles of contractual interpretation summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*Investors Compensation Scheme*") to the construction of a solicitor's undertaking, namely:

> Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

> [see *Investors Compensation Scheme* at 912, cited in *Barclays Bank* at 331]

In *Barclays Bank*, the English Court of Appeal also found it necessary to imply a term into a solicitor's undertaking in order to give it business efficacy.

20 The English Court of Appeal also held in *Reddy v Lachlan and anor* [2000] Lloyd's Rep 858 ("*Reddy*") that any ambiguity in a solicitor's undertaking is to be construed in favour of the recipient of the undertaking. It should be highlighted that in England, the *Guide to the Professional Conduct of Solicitors 1996* ("the Guide") expressly provides in Principle 18.07 that "An ambiguous undertaking is generally construed in favour of the recipient" and *Reddy* specifically cited Principle 18.07 of the Guide in its reasoning. Although there are no provisions in Singapore equivalent to Principle 18.07 of the Guide, I am of the view that a similar result would obtain in Singapore as I do not doubt that the *contra proferentum* rule concerning the interpretation of contracts applies also to the construction of solicitors' undertakings.

The Undertaking, properly construed, includes an obligation to release the security

21 Applying the principles discussed above, the construction of the Undertaking which the Defendant contends for simply cannot stand. To recap, the Undertaking states:

> We undertake that we will hold the said [sum] *as security for costs* in our Clients' Account.
>
> [emphasis added]

If the Defendant were right that the Undertaking only obliged the Defendant to hold the money in its clients' account and did not oblige the Defendant to pay

the money to the Plaintiff, the phrase "as security for costs" in the Undertaking would be rendered otiose.

22 Therefore, the Undertaking should be construed in a manner which gives the phrase "as security for costs" some meaningful content. This means that the Defendant's obligations under the Undertaking necessarily goes beyond merely holding the money in its clients' account. The meaning to be assigned to the phrase should, to paraphrase *Investors Compensation Scheme*, be the meaning that would be conveyed to a reasonable person having the background knowledge available to the parties at the time the Undertaking was given.

23 The first piece of relevant background knowledge is that the Arbitration Claimants were impecunious. The second piece of relevant background knowledge is that the Arbitrator had chosen not to prescribe the form and manner for the Arbitration Claimants' provision of security for costs but had left this to be agreed between parties. The third piece of relevant background knowledge is that it is well known among legal practitioners that the entire rationale of security for costs is so that a successful defendant/respondent will have a fund within the jurisdiction against which he can enforce the costs awarded in his favour – see *Singapore Civil Procedure 2017*, Vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) ("*Singapore Civil Procedure*") at para 23/0/2; Jeffrey Pinsler SC, *Singapore Court Practice 2017*, Vol 1 (LexisNexis, 2017) at para 21/1/1. It therefore follows that, in the context of security given by way of a solicitor's undertaking, the entire rationale for security for costs would be defeated if the solicitor's client retains the right to veto or delay the release of the security to the successful defendant/respondent. It would also be contrary to the rationale for security for costs if the solicitor who gave the undertaking is under no obligation to release

the security to the successful defendant/respondent, leaving the latter unable to recover his costs from the very sum of money that was designated as security for his costs. Such security would be no security at all.

24 From the foregoing three background facts, a reasonable person in the Plaintiff's position would have understood the phrase "as security for costs" in the Undertaking to carry with it the obligation to release the security to satisfy the costs ordered in favour of the Plaintiff should the Plaintiff successfully defend the Arbitration Claimants' claims in the Arbitration.

25 The conclusion that I have reached finds support in the case of *Hawkins Hill Co. v Want* (1893) 69 LT 297 ("*Hawkins Hill*"), a case cited in successive editions of *Singapore Civil Procedure* since the publication of its first edition in 2003. In *Hawkins Hill*, the liquidator of the plaintiff company gave the following undertaking:

> We, the undersigned, the liquidators of the above-named plaintiff company, hereby *undertake to set apart* out of the assets of the said company *a sum sufficient to meet* the costs (if any) which the said plaintiffs may be liable to pay to the defendants in this action.
>
> [emphasis added]

Even though the words used in the undertaking merely referred to an obligation to hold "a sum sufficient to meet the costs (if any)", and there were no words expressly referring to an obligation to pay, the undertaking was regarded by the court as giving rise to an obligation to pay out the costs secured by the undertaking. Compared to *Hawkins Hill*, the case for finding an obligation to pay in the present case is even stronger as the Undertaking contains the words "as security for costs" – words which would convey to a reasonable person that the solicitor giving the undertaking is assuming certain obligations normally associated with the concept of security for costs.

26 I reached the foregoing conclusion based on the natural meaning of the words "as security for costs", as objectively ascertained in context, without relying on the *contra proferentum* rule or on implied terms. For completeness, I would add that, if it were necessary to do so, I would have been prepared, given the factual matrix, to either apply the *contra proferentum* rule or imply a term in the Plaintiff's favour.

27 Once it is established that the Undertaking includes an obligation to pay, the next question is whether this obligation is conditional upon a further order by the Arbitrator to release the security to the Plaintiff. To answer this question, we need to go back to the words of the Undertaking. The only qualifications or conditions concerning the sum held by the Defendant pursuant to the Undertaking are the words "as security for costs". There are no words in the Undertaking to the effect that the Defendant's obligations are conditional upon a further order from the Arbitrator. In the absence of any words limiting or qualifying the Defendant's obligation in relation to the security for costs, the Defendant's obligation to pay pursuant to the Undertaking is unconditional –*ie*, the Defendant's obligation to pay arises once the Arbitration Claimants' liability to the Plaintiff for costs is crystallised and ascertained. Had the Defendant intended its obligation to pay under the Undertaking to be conditional upon a further order from the Arbitrator, the Defendant could have easily inserted words to this effect in the Undertaking.

28 At this point, I should point out that I accept the possibility that a different conclusion could have been reached if the Arbitrator had indicated either:

(a) in his order for security for costs that the release of the security is conditional upon a further order from the Arbitrator; or

(b) in the Final Award that the Arbitrator was reserving the question of disposal of the security to be dealt with by a subsequent order from him.

In the former case, the conditions set out in the Arbitrator's order for security for costs would be part of the context informing the construction of the Undertaking. Support for this proposition may be found in *Hawkins Hill* where, despite the unlimited nature of the words used in the undertaking ("the costs (if any) which the said plaintiffs may be liable to pay to the defendants"), the English Court of Appeal held that the liquidator who gave the undertaking was liable only to the extent of £200, which was the amount of security sought by the defendants in their summons for security for costs. In the latter case, the Plaintiff would be bound under the Final Award not to enforce the costs order against the security until further order from the Arbitrator. In the event, since neither of these scenarios had occurred, the Undertaking falls to be construed solely in the manner discussed at [21]-[26] above.

Issue 2 – Whether the matter should be remitted back to the Arbitrator

29 The Defendant submitted that the court should not "intervene" in the Arbitration by making directions for the release of the security, and that the court should remit the matter back to the Arbitrator instead. The Defendant recognised that the Arbitrator had already rendered the Final Award but argued that:

(a) Under Rule 29.1 of the Arbitration Rules of the SIAC (5th Ed, 1 April 2013) ("SIAC Rules 2013"), the Arbitrator may, within 30 days of an award, be asked to correct any clerical or typographical error or any error of a similar nature in the award.

(b) Under Rule 29.5 of the SIAC Rules 2013, the Registrar of the SIAC may extend the time limit set in Rule 29.1.

(c) The Arbitrator therefore continues to have the power to make an order concerning the release of the security.

30 The Plaintiff countered that the Arbitrator is *functus officio* once he rendered the Final Award and no longer had the power to make further orders concerning the security for costs.

31 Rule 29.1 of the SIAC Rules 2013 is in essence a "slip-rule" serving a function similar to O 20 r 11 of the ROC. My first observation is that the Defendant's reliance on the slip-rule is a clear recognition that the Arbitrator is *functus officio* save for the possibility of having certain types of errors corrected under the slip-rule. My second observation is that, by relying on the slip-rule, the Defendant is alleging that the omission of any express directions in the Final Award concerning the release of the security is not a deliberate choice but an error on the part of the Arbitrator.

32 If it were indeed the case that the Arbitrator had intended to give directions in the Final Award on the release of the security but had forgotten to do so, that could be said to be an error. Whether such an error comes within the scope of the slip-rule is a question on which I need not express a view. The crucial point is that the court should not lightly presume that the Arbitrator had slipped up. The Final Award is entirely consistent with the notion that the Arbitrator had committed no error and had all along intended, by his order that costs be taxed by the Registrar of the Supreme Court, to leave all costs-related matters after taxation to be dealt with by the court.

33 Ultimately, it is for the party who believes that the Arbitrator has committed an error to invoke the slip-rule to have the error corrected. Neither the Defendant nor its clients, the Arbitration Claimants, had done so. If the Plaintiff does not consider the Arbitrator to be in error, it is not for the court to compel the Plaintiff to make an application to the Arbitrator under the slip-rule. Significantly, Rule 29.2 of the SIAC Rules 2013 allows the Arbitrator to invoke the slip-rule on his own motion within 30 days after the date of the award. The fact that the Arbitrator has not done so is strong indication that the Arbitrator did not regard the omission to deal with the release of the security in the Final Award as an error.

34 In the circumstances, it is not the role of the court to presume that the Arbitrator had committed an error. Instead, the evidence points to the conclusion that the Final Award accurately reflects the Arbitrator's intention. Thus when the Final Award states that it is "a Final Award on all issues in dispute in this arbitration including liability for costs and expenses of the arbitration and the Tribunal's fees and expenses", this ought to be treated as an indication that the Arbitrator had no intention of dealing with the disposal of the security for costs in a further order. Therefore, instead of remitting the matter back to the Arbitrator, the correct course for the court to adopt would be to support the Arbitration by following through with the consequences flowing from the Final Award in so far as it is within the court's power to do so.

Conclusion

35 For the reasons given above, it is my conclusion that:

(a) the phrase "as security for costs" in the Undertaking obliges the Defendant to release the security to the Plaintiff once the Plaintiff's

costs in the arbitration are taxed and assessed by the Registrar of the Supreme Court;

(b) in the absence of any words in the Undertaking qualifying the obligation to release the security to the Plaintiff, the obligation is unconditional and does not require a further order from the Arbitrator; and

(c) given the terms of the Final Award, the Arbitrator is *functus officio* and there is no basis for the court to remit the question of disposal of the security to the Arbitrator for further order.

I therefore ordered the Defendant to release the security for costs to the Plaintiff.

Pang Khang Chau
Judicial Commissioner

Tham Wei Chern and Akshay Kothari (Selvam LLC) for the plaintiff;
Anil Murkoth Changaroth and Lim Muhammad Syafiq (ChangAroth Chambers LLC) for the defendant.
