IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC(I) 12

Suit No 7 of 2017

Between

B2C2 Ltd

… *Plaintiff*

And

Quoine Pte Ltd

… *Defendant*

JUDGMENT

[Civil Procedure] — [Costs] — [Principles]

[Civil Procedure] — [Interim payments]

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B2C2 Ltd
v
Quoine Pte Ltd

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Singapore International Commercial Court — Suit No 7 of 2017 and Summons 44 of 2019
Simon Thorley IJ
29 August 2019

12 September 2019 Judgment reserved.

Simon Thorley IJ:

Introduction

1 Judgment was given on 14 March 2019 in *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 (the "Main Judgment"). The action, which was heard in the Singapore International Commercial Court ("SICC") having been transferred from the High Court, succeeded both in breach of contract and breach of trust but, for the reasons given in that judgment at [254]–[257], I held that B2C2 was not entitled to an order for specific performance. Its remedy lay only in damages. The Main Judgment therefore dealt solely with liability and not with any issue relating to the assessment of loss which had been the subject of a previous order for bifurcation. Nor did it deal with the assessment of costs.

2 The Defendant has appealed against the finding of liability and the appeal is listed to be heard in October 2019.

3 There was a subsequent judgment of this Court, *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 204, given on 14 May 2019 following written submissions on the appropriate form of the Order. As a result of the directions given in that judgment, evidence has been filed and written submissions made in relation to a number of outstanding issues which led to an oral hearing on Thursday, 29 August 2019.

4 The issues which arose for consideration were set out in paragraph 7 of a letter from the Registry to the parties dated 2 July 2019:

(a) The question of costs.

(b) The limitation of liability issue.

(c) The question of whether there should be an interim payment and, if so, in what sum.

(d) The question of what protection, if any, should be given to the Defendant in respect of any sums ordered to be paid by way of costs and/or interim payment of damages.

(e) The question of any election between damages at common law or in equity.

(f) Whether there should there be a stay of the assessment of damages once the question of an interim payment has been decided pending the outcome of the appeal to the Court of Appeal?

5 During the course of the hearing I informed the parties of the conclusions that I had reached on each issue and indicated that I would give full written reasons in due course. These are my reasons.

Issue 1: Costs

The approach to costs in a transfer case

6 The principal dispute between the parties lay in the correct approach to the award of costs under O 110 r 46 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), which regulates the award of costs in the SICC, following a trial in the SICC in circumstances where the case was commenced in the High Court and subsequently transferred to the SICC pursuant to O 110 r 12.

7 Order 110 r 46 provides (so far as is relevant):

> **46.**—(1) The unsuccessful party in any application or proceedings in the court must pay the *reasonable* costs of the application or proceedings to the successful party, unless the Court orders otherwise.
>
> …
>
> (6) Order 59 (costs) does not apply to –
>
> (a) proceedings in the [SICC]
>
> …
>
> [emphasis added]

8 At the outset, it should be noted that at the time of transfer, the parties were invited to indicate whether they wished the costs regime of O 59 (which applies to proceedings in the High Court) or that of O 110 r 46 (which governs proceedings in the SICC) to apply subsequent to the date of transfer. Both parties expressed a preference that the SICC regime in O 110 r 46 should apply and accordingly this was ordered by an Order dated 20 February 2018.[1]

9 As the discussion on O 59 in *Singapore Civil Procedure 2018: Vol 1* (Foo Chee Hock, gen ed) (Sweet & Maxwell, 2018) at para 59/0/2 makes plain,

[1] SIC/ORC 8/2018

that Order is based upon the old English O 62 and employs expressions well known to both English and Singaporean practitioners such as party and party costs, indemnity costs, and solicitor and own client costs. Where, however, costs are to be assessed on the standard basis, O 59 r 27(2) provides that:

> On a taxation of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred …

10 On the face of it, such language is not dissimilar to the language of O 110 r 46 but there are recognised differences in policy underlying the approach to costs under O 59 and under O 110 r 46. The approach to costs in O 59 r 27(2) is conditioned by the Guidelines contained in Appendix G to the Supreme Court Practice Directions, which seek to regulate the assessment of standard basis costs in the Supreme Court. The standard fee ranges specified in Appendix G will often be lower, sometime significantly lower, than the actual fees incurred even if these fees are "reasonable" in the widest sense of that word. This is due to the social policy concern of enhancing access to justice as reflected in the observations of the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 at [34]:

> "Ultimately, *our* legal regime on costs recovery is calibrated in a manner such that full recovery of legal costs by the successful party is the exception rather than the norm. What we need to bear in mind is that this state of affairs is not something which exists to prejudice the winning party in litigation, but is a manifestation of the law's policy of *enhancing access to justice for all.* Put another way, unrecovered legal costs is something which is part and parcel of resolving disputes by seeking recourse to *our* legal system and all parties who come before our courts must accept this to be a *necessary incidence* of using the litigation process. It is in this light that the general rule must be understood.
>
> [emphasis in original]

11 There is no equivalent to Appendix G in the SICC Practice Directions. Paragraphs 152(2) and (3) of those Directions identify the matters which the Court may take into account in assessing reasonable costs for the purposes of O 110 r 46:

> (2) In assessing costs, the Court:
>
> > (a) shall have regard to Order 110, Rule 46(1) of the Rules of Court, which provides that the reasonable costs of any application or proceeding in the SICC be borne by the unsuccessful party to that application or proceeding unless the Court orders otherwise; and
> >
> > (b) may, in particular, as set out in Order 110, Rule 46(1):
> >
> > > (i) apportion costs between the parties if the Court determines that the apportionment is reasonable, taking into account the circumstances of the case;
> > >
> > > (ii) take into account such circumstances as the Court considers relevant, including the conduct of the case;
> > >
> > > (iii) order costs to be paid by counsel… personally, or by a person who is not a party to the application or proceeding;
> > >
> > > (iv) order interest on costs; or
> > >
> > > (v) make any ancillary order, including the time and manner of payment.
>
> (3) In relation to sub-paragraph (2)(b)(ii) above, the circumstances which the Court may take into consideration in ordering reasonable costs of any application or proceeding under Order 110, Rule 46(1) of the Rules of Court include:
>
> > (a) the conduct of all parties, including in particular –
> >
> > > (i) conduct before, as well as during the application or proceeding;
> > >
> > > (ii) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and
> > >
> > > (iii) the manner in which a party has pursued or contested a particular allegation or issue;

> (b) the amount or value of any claim involved;
>
> (c) the complexity or difficulty of the subject matter involved;
>
> (d) the skill, expertise and specialised knowledge involved;
>
> (e) the novelty of any questions raised;
>
> (f) the time and effort expended on the application or proceeding.

12 As Vivian Ramsey IJ observed in *CPIT Investments Ltd v Qilin World Capital Ltd and another* [2018] 4 SLR 38 ("*CPIT*") at [15], it is clear from the above that the provisions of O 110 r 46 were intended to introduce a simpler regime to that applicable in O 59. I respectfully agree and consider that this is due to slightly different policy considerations which underlie litigation in the SICC. The SICC is a court empowered to resolve commercial disputes on the international stage. The parties come before the SICC either by consent or if the High Court orders the transfer of an appropriate case, they will normally be commercial entities, and there will be an international dimension to the disputes. Whilst the social policy of enhancing access to justice underlies, and should underlie, the approach to assessing reasonable costs in international commercial litigation, there are other policy considerations in play as well. Commercial disputes are, as the name suggests, focussed on commerce and the making of money. Paragraph 152(3) sets out considerations which commercial people would understand as being factors which are intended to enable the court to draw a proper and clear line as to what expenditure is necessary to succeed in the litigation and what is in excess of that expenditure. A successful commercial litigant should not be out of pocket if it has prosecuted its claim or defence sensibly and, more specifically, without enhancing the cost of the litigation as a means of seeking to oppress the losing party.

13 The SICC website makes clear that the SICC was established to "serve as a companion rather than a competitor to arbitration as it seeks to provide parties in transnational business with one more option among a suite of viable alternatives to resolve transnational commercial disputes". More specifically, it was established to enable litigants "to take advantage of a well-designed court-based mechanism which will enable parties to avoid one or more of the following problems often encountered in international arbitration" which relevantly includes, for our purposes, the "over-formalisation of, delay in, and rising costs of arbitration."[2]

14 The fact that there may be a perception that the actual costs of arbitrations may be rising does not detract from the similarity of the objectives of the SICC to those of international arbitration. Similar provisions to O 110 r 46 exist in the rules of international arbitration centres, for example Rules 40.2(e) and 42 of the UNCITRAL Arbitration Rules 2013. To my mind, an analogy with costs regimes in arbitration proceedings is more appropriate than an analogy with the established costs regimes in England or Singapore. Parties in SICC cases may or may not be familiar with the costs regimes that exist in such countries. They may or may not be familiar with concepts such as indemnity costs, party and party costs and so on. What O 110 r 46 of the ROC and para 152 of the SICC Practice Directions are clearly indicating is that successful litigants before the SICC can expect to receive reasonable compensation for the expenditure that they have properly incurred. Just as any unreasonable escalation of costs in arbitration proceedings can be excluded from an award of "reasonable" costs so also can any unjustifiable expenditure in proceedings before the SICC. The concept of proportionality has a place in

[2] https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc

both – the costs incurred should not be disproportionate with the value of the claim: see Lawrence Teh, "Costs Recovery in the SICC: A Different Regime" *SICC News* (2018).

15 The Defendant, however, submitted that, although the parties had agreed that O 110 r 46 rather than O 59 should apply post-transfer, since there had been no express agreement by the parties additionally to disregard Appendix G, it should continue to be relevant post-transfer and that due weight should therefore be accorded to Appendix G in a transfer case.

16 Vivian Ramsey IJ considered a similar submission in *CPIT* at [21]-[27]:

> 21 I do not consider that para 99B of the Supreme Court Practice Directions or Appendix G to the Supreme Court Practice Directions automatically apply to proceedings in the SICC. It is the SICC Practice Directions and not the Supreme Court Practice Directions which apply to proceedings in the SICC, which are governed by O 110 of the ROC. In relation to costs, from the context of the matters referred to [in] para 99B and Appendix G, it is evident that they are referring to the costs regime under O 59 and party-and-party costs which are dealt with under that order. As stated earlier (at [15] above), the costs regime in the SICC under O 110 r 46 adopts a different approach from the costs regime under O 59.
>
> 22 The Defendants sought to place some reliance on the decision in *[Teras Offshore Pte Ltd v Teras Cargo Transport (America)* LLC [2017] 4 SLR 38 ("*Teras*")] where reference was made (at [62]) to the costs guidelines in Appendix G. In *Teras*, the claims for costs appeared to be based on the costs guidelines, and that claim was found to be "unobjectionable". That however does not support the position that the costs guidelines apply to all SICC proceedings. The costs based on the costs guidelines in Appendix G were applied in Teras merely because they were determined to be reasonable. Nothing more can or should be inferred from that decision.
>
> 23 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.

24 Of course, it remains open for the High Court or the SICC to make express orders that Appendix G continues to be relevant post-transfer. In this connection, the provisions of O 110 rr 12(5)(*d*) and 12(5)(*e*) are of relevance. They provide:

> (5) Where a case is transferred —
>
> …
>
> (*d*) the court ordering the transfer may make such consequential orders as it sees fit; and
>
> (*e*) the court to which the case is transferred may make such consequential orders as it sees fit, provided that such orders are not inconsistent with any orders made by the court ordering the transfer.

25 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.

26 In the present case, based on the court's records of the relevant hearings that have taken place, there was neither mention of Appendix G nor agreement or an order that the Appendix G would continue to apply. In fact, as reflected in the court's records, the matter expressly mentioned on transfer related to O 110 r 12(5)(*c*), which provides that: "unless the court ordering the transfer otherwise directs, the parties must continue to pay the hearing fees and court fees payable in the court where the case was commenced".

27 I am of the view that under the SICC costs regime in O 110 r 46 of the ROC, costs before the date of transfer, 28 June 2016, should, in this case, be assessed taking account of the fact that the High Court regime under O 59 would have applied before that date and, consequently, the appropriate weight ought to be given to Appendix G in assessing the reasonable costs under

> the SICC costs regime in O 110 r 46. *As for post-transfer costs, in assessing reasonable costs, I consider that Appendix G is one of a number of factors which may be taken into consideration.*
>
> [Emphasis added]

17 It does not appear that in the *CPIT* case any consideration was given at the time of transfer as to whether O 59 or O 110 r 46 was to apply post-transfer as was the case here. However, whilst in this case there was an order that O 110 r 46 should apply, Appendix G was not specifically mentioned. In a case such as the present, whilst I agree with Vivian Ramsey IJ's observation highlighted in [25] of *CPIT* above and I also agree with the highlighted passage in [27], that the Court retains the discretion to take Appendix G into consideration in an appropriate case, it will, I think, be rare for this to be done to any great extent in a case where there has been a specific order that O 110 r 46 and not O 59 should apply. In my judgment, it would be inconsistent with an order that O 110 r 46 should apply post-transfer for any significant weight to be attached to Appendix G, if, by this, is meant that a figure which, absent reference to Appendix G, is considered to be (commercially) reasonable would be increased or decreased by reference to Appendix G. I consider that an order that the provisions of O 110 r 46 will apply post-transfer serves (save in a special case) to focus attention on the guidelines in para 152 of the SICC Practice Directions and not on Appendix G.

18 Accordingly, in the circumstances of the present case, which I shall consider in more detail below, I do not consider that it is appropriate to place any material weight on Appendix G.

Assessment of costs in the present case

19 By any standards this was a complex case, both factually and legally. I do not propose in this Judgment to recite the details of the complexities which

are covered fully in the Main Judgment, a judgment which ran to 258 paragraphs in over 100 pages. It is sufficient for present purposes to note that the Plaintiff raised claims in both breach of contract and breach of trust. The Defendant relied on six defences, including the defence of unilateral mistake which raised novel questions of law in relation to mistake in relation to computer programs. The factual investigation into the relevant computer programs was technically complex and was rendered more difficult owing to the confidential nature of the Plaintiff's trading software. Since the Plaintiff and Defendant were in competition as market makers on the Defendant's trading platform, it was necessary for independent experts to be instructed to report on the software and it was most convenient for this to be done in Lisbon. The written closing submissions were extensive.

20 Throughout the course of the proceedings both parties' counsel assisted the Court in seeking to minimise the costs of what was bound to be an expensive action. A number of case management conferences were required and neither side acted unreasonably in raising the interlocutory issues that had to be determined. The trial lasted five days and was conducted efficiently. Had the Defendant been successful on some but not all of the defences, it might have been necessary to consider whether it had acted reasonably in pursuing them all but I do not consider that the Plaintiff acted unreasonably in any respect in the way in which it prosecuted its claims and dealt with the defences.

21 Turning then to the specifics of para 152(3) of the SICC Practice Directions:

(a) There is nothing in the manner in which the Plaintiff conducted itself which can be said to have been unreasonable. The costs were

increased by the number and nature of the defences but this increase cannot be laid at the Plaintiff's door.

(b) The precise amount of the claim has yet to be assessed but the claim for an interim award is of the order of US$4m – a not insubstantial sum.

(c) The subject matter involved – understanding how the computer programs worked – was technically complex.

(d) This therefore required expert reports from independent highly-skilled computer programmers.

(e) Novel questions arose both legally and factually.

(f) I have indicated the significant amount of time and effort required both in the interlocutory hearings and at trial.

22 All in all, I am satisfied that the costs which would have had to be incurred in prosecuting this action were likely to be well above the norm. This does not mean that every item of expenditure is reasonable but it does mean that figures which appear to be high may be reasonable in the circumstances of this case.

23 The costs incurred by the Plaintiff have been broken down into the following:

(a) Pleadings pre-transfer: The Plaintiff claims S$35,000. Appendix G sets out the range as being between S$5,000 and S$20,000. The pleadings were not that complex or voluminous. I set the figure at S$12,500.

(b) Disbursements pre-transfer: The Plaintiff also claims S$1,640.80 in respect of disbursements incurred in the period pre-transfer. Paragraph 16 of its Reply Submissions on Costs explains how this sum was arrived at and the Plaintiff is entitled to this sum.

(c) Pleadings post-transfer: The Plaintiff claims S$25,000. In asserting that this figure is reasonable, the Plaintiff draws attention to the fact that the Defendant's costs estimate for the entirety of pleadings was S$70,000. I do not consider that this is a helpful analogy in this instance as the Plaintiff's pleadings were significantly less complex than those of the Defendant. I set the figure at S$17,500.

(d) Case Management Conferences ("CMC"): The Plaintiff claims S$30,000 and the Defendant suggests that S$10,000 is reasonable particularly on the basis that more than one application was considered at a given CMC. There is substance in this and I set the figure at S$15,000.

(e) Discovery: The Plaintiff claims S$50,000 and justifies the sum on the basis that it includes the costs incurred in relation to the inspection of the Plaintiff's confidential documents by the Defendant's independent expert in Lisbon. The Defendant submits that most of the work done on discovery was done by the Defendant and that it would not be fair for the Defendant to bear the additional costs due to the stringent confidentiality regime that was sought by the Plaintiff. I accept the first point but the Plaintiff did have to make applications for further discovery. I do not accept the latter point. The confidentiality regime was, in the circumstances of this case, justified. It inevitably served to

increase the costs but this is not something for which the winning party should be penalised. I set the sum at S$42,500.

(f) Factual and Expert Affidavits of Evidence-in-Chief: The Plaintiff claims S$150,000 in respect of the preparation of the Plaintiff's factual affidavits and expert reports and in reviewing the Defendant's equivalent affidavits and reports. It seeks to justify this large sum in relation to five witnesses and nine AEICs on three main grounds. First, it accuses the Defendant's approach to the case as having been to "throw the proverbial kitchen sink" in that it raised all six defences and sought also to raise wide-ranging allegations of market manipulation. Second, it contends that the difficulty of the task of preparing the evidence was increased because of the Defendant's change of position which resulted in late amendments to the pleadings. Third, in relation to the expert reports, it points to the necessity to instruct an independent expert not only to review the Plaintiff's programs but to deal with the fact that the Defendant's expert reports went beyond the scope of the agreed list of issues. In response, the Defendant draws attention to the fact that although there were six defences, the factual bases for these overlapped and were dealt with by only one witness, Mr Boonen. Further, the need for the amended pleadings was communicated to the Plaintiff more than two months before the AEICs were due to be served and the Plaintiff's expert reports did not extend much beyond the agreed issues. There is some substance in all these assertions from both parties. The fact, however, remains that this was a complex action, the factual matrix was intricate and the issues covered by the experts involved a detailed understanding of the workings of computer programs. Taking all these factors into account, I set the sum at S$120,000.

(g) Preparations for Trial: The Plaintiff claims S$150,000 and draws attention to the fact that it was responsible for the preparation of the 14 trial bundles. The Defendant contends that S$50,000 would be appropriate. The figure of S$150,000 does strike me as being on the high side but I accept that a greater burden would have been placed on the Plaintiff than the Defendant and that preparation for cross-examination would not have been straightforward. I set the figure at S$100,000.

(h) Trial and Closing Submissions: The Plaintiff claims S$210,000. The Defendant asserts that S$80,000 would be reasonable. The trial was a five-day trial and the written closings of each party were around 200 pages in length. Because of the complexity of the action and the number of issues which arose, the Court required (and received) significant assistance from both the oral and written submissions. In consequence the Court did not see fit to place a page limit on the written closings. The fact that both turned out to be of a similar large size is perhaps the best indication of the measure of work that was involved. I do not consider that either Appendix G or the amount of the awards in previous SICC cases afford much assistance in the circumstances of this case. I set the figure in this case at S$180,000.

(i) Interlocutory Applications: In some cases a specific order for costs was made at the time but there were a number which resulted in orders of costs in the cause. In respect of the latter, since the Plaintiff has succeeded in the action it is entitled to an award of costs in relation to each of those. The Plaintiff claims S$50,000 in relation to the application for summary judgment, S$15,750 in relation to the discovery application, S$15,000 on the applications relating to the bifurcation of the dispute and to expert evidence, S$10,000 for each of the two

applications for further and better particulars and S$2,000 on the Application for Directions. In total therefore these come to S$102,750. The Defendant raises a number of points which relate to the fact that the Plaintiff was not wholly successful on some of these applications but, the order having been made that overall on these applications the proper order was that costs ought to be in the cause, these points cannot serve to reduce the amount of the award. The Defendant is, however, correct in urging that care must be taken in ensuring that there is not an element of double counting in respect of applications heard on the same occasion. Drawing heavily on Appendix G, it suggests that the overall figure should be S$32,000. I do not propose to deal with each application separately. The parties both conducted themselves properly and the hearings, primarily by video-link, were conducted with efficiency. Complex matters did however arise, particularly on the summary judgment application and on the expert evidence application. For the reasons given above in the circumstances of this case I do not consider that the provisions of Appendix G should serve to lower a figure which I conclude is reasonable. Taking matters in the round, I have concluded that a figure of S$75,000 is reasonable for all the interlocutory matters involved.

(j) Disbursements post-transfer: The Plaintiff claims S$76,150.68 in respect of all post-transfer disbursements save for its expert's costs which were paid in Pounds sterling and amounted to £52,961.99. The Defendant contended at the hearing that it was unable to take a meaningful position on the magnitude of these disbursements without a further breakdown and itemisation of the disbursements. I do not accept that that is an appropriate stance to take. The objective is to allow "reasonable costs". There is no suggestion that these sums were not the

sums actually paid out by the Plaintiff. Experienced practitioners can readily form a view as to whether any particular item falls outside the boundaries of reasonableness. A way of testing this would be for the Defendant to have regard to the sums it incurred in respect of the items and to draw the Court's attention to any surprisingly high figure. The Plaintiff can then be required to justify that figure, but I do not consider that it is necessary or appropriate for any greater detail to be provided in relation to each figure. No specific objection was taken to any particular figure and I therefore allow the sums claimed. The figure of £52,961.99 should be converted into Singapore Dollars at the exchange rate prevailing on the date the relevant invoices were paid.

24 Accordingly, I order that the Defendant do pay to the Plaintiff by way of costs and disbursements the sums set out above. Payment will be on the terms specified under Issue 4 below.

Issue 2. Limitation of Liability

25 In paras 25 and 26 of its Defence, the Defendant asserted that, if it was liable to the Plaintiff in respect of any cause of action, that liability was limited by reason of a limitation of liability clause in the Agreement.

26 The clause in question reads as follows:

> **Trading & Order Execution**
>
> …
>
> > The [Defendant] and its affiliates assume no responsibility for any loss or damage incurred by members or users [including the Plaintiff] as a result of their use of The Platform or for a member's or user's failure to understand the nature and mechanics of virtual currencies or the markets under which such virtual currencies operate. The [Defendant] provides its

> Users and Members a service via which they can exchange, buy, sell and/or store certain virtual currencies, and [the Defendant] and its affiliates makes no representations or warranties concerning the value, stability, or legality of supported virtual currencies.
>
> **Representations and Warranties**
>
> …
>
> You agree to defend, indemnify and hold harmless the [Defendant], its officers, directors, employees, agents and third parties for any losses, costs, liabilities and expenses (including reasonable attorney's fees on a solicitor and his own client basis) relating to or arising out of your use of the Platform or services, including any breach by you of this Agreement or other terms and conditions posted on the website from time to time.
>
> **Owner Responsibilities**
>
> …
>
> You assume full responsibility and you assume all risk for the use of the services, and you are solely responsible for evaluating the accuracy, completeness, and usefulness of all services, products, communications, and other information. In no event the [Defendant] or its affiliates will be liable for any incidental, consequential, or indirect damages (including, but not limited to, any deaths, threats, torts or injuries committed by any other users, damages for loss of data, loss of programs, cost of service interruptions or procurement of substitute services) directly or indirectly arising out of the use or inability to use the services, even if the [Defendant], its agents or representatives know or have been advised of the possibility of such damages. **Notwithstanding anything to the contrary contained herein, the [Defendant's] liability to you by the [Defendant], its affiliates, for any cause whatsoever, and regardless of the form of the action, will at all times be limited to the amount paid, if any, by you for the services herein.**
>
> [Emphasis added]

27 In broad terms, the Defendant contends that on its true interpretation the passage highlighted in bold constitutes an all-encompassing clause serving to limit the Defendant's liability as operator of the Platform to any "user or

member" of the Platform regardless how that liability arose or by whom the claim was brought.

28 The Plaintiff however asserts that, properly construed, any purported indemnity relates only to loss suffered which arises from the use of the Platform by a "user or member" which was in breach of the terms of the Agreement. It does not extend to exempt the Defendant from its own breach of contract or breach of trust. Further, it asserts that if the Defendant's suggested construction was correct it would have the effect of limiting the Defendant's liability for its own wrongdoing such as to absolve the Defendant from all duties and liabilities under the Agreement, which would defeat its main purpose and would be unenforceable pursuant to the terms of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA"). Finally, it submits that if the clause was effective to limit the Defendant's liability for damages for breach of contract, this limitation would not apply to its liability for breach of trust.

29 As indicated in the Main Judgment at [135], resolution of this issue was adjourned to be heard as part of any assessment of damages. On 25 June 2019, however, the Plaintiff issued a Summons for Interim Payment in SIC/SUM 44/2019, in the sum of US$4,186,047.26. This was a sum which would significantly exceed any sum payable if the limitation of liability clause was applicable. Hence it was anticipated that it would be necessary to decide the limitation of liability issue before deciding whether any and, if so, what amount should be ordered to be paid by way of interim payment. Written submissions were therefore filed by both parties on this issue. Having considered the Plaintiff's submissions, the Defendant's solicitors wrote to the Court on 27 August 2019 indicating that it took the view that it was premature to decide the issue in advance of the main hearing of the assessment, particularly in view of the Plaintiff's reliance on the UCTA.

30 The Plaintiff's primary objection to this course related to its request for interim payment since it accepted that, as a general rule, no award for interim payment should exceed the minimum amount that could possibly be awarded on the final assessment. Plainly if the limitation of liability clause was effective the sum involved would be slight. I therefore granted the Defendant an adjournment to take instructions as to whether it wished the issue to be decided at the hearing before the question of an interim award was considered or whether it wished to defer the hearing of that issue to the substantive hearing of the assessment, in which case the hearing on the interim payment would proceed and, if a payment was ordered, the Defendant would not rely on the limitation of liability clause as reducing the amount of the award. This was, of course, on the basis that if the Defendant ultimately succeeded on the issue any sums awarded on the interim award over and above the sum finally awarded would be repaid.

31 The Defendant opted for the latter course and, accordingly, all further argument of the limitation of liability clause is stood over to the assessment hearing.

Issue 3. Interim payment

32 Order 29 r 11(1) of the ROC provides:

> **11.**— (1) If, on the hearing of an application under Rule 10 in an action for damages, the Court is satisfied –
>
> …
>
> (*b*) that the plaintiff has obtained judgment against the defendant for damages to be assessed; …
>
> …
>
> the Court may, if it thinks fit …. order the defendant to make an interim payment of such amount as it thinks just, not

> exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff …

33 Both parties drew my attention to the Court of Appeal decision in *Main-Line Corporate Holdings Ltd v United Overseas Bank* [2010] 2 SLR 986. The Plaintiff asserted that it was not a prerequisite to obtaining an order for interim payment that it had to demonstrate that the Plaintiff was in need of early payment or that it would suffer prejudice in the absence of early payment, but asserted that this was nevertheless the case on the facts. It further asserted that it was financially sound and would be in a position to repay any sums awarded in the event that the Defendant's appeal succeeded or that the limitation of liability issue was decided in the Defendant's favour.

34 The Defendant asserted that the usual basis on which an interim award was made was on the basis of hardship, need or prejudice and that no such factor arose in this case. Where there was no such factor, the Court should be slow to exercise its discretion to order an interim payment and that matters should be left to take their course at the assessment. Furthermore, in exercising its discretion, the Court must consider whether an order for interim payment would cause irremediable harm to the Defendant which could not be made good by eventual repayment.

35 I accept all these points and shall take them into account in exercising the Court's discretion. The factual position is as follows:

(a) The Plaintiff has obtained a judgment in its favour with damages or financial compensation to be assessed.

(b) An appeal has been lodged and this appeal is listed to be heard before a five-judge bench of the Court of Appeal in October 2019. It is

unlikely that the appeal will result in an *ex tempore* judgment. The best assessment is that judgment will be handed down early in 2020.

(c) If the appeal fails, it will be necessary for the assessment to proceed with the necessary financial and other evidence being prepared. It is therefore unlikely that the assessment will be concluded until late 2020 or early 2021; or even somewhat later if the assessment judgment is appealed.

(d) The Plaintiff is a company registered in England and Wales and is therefore a foreign corporation. It has no assets in Singapore. It is, it asserts, well-capitalised with reserves of about S$15m.

(e) Christopher Drake, the Senior Legal Counsel of the Defendant, accepts at para 17 of his affidavit that the Defendant is not itself in a position to pay the sum sought by way of an interim award and that payment would have a severe impact on the Defendant's business.

(f) Dr Stanley Lai SC, who appeared on behalf of the Defendant at this hearing, however confirmed that his instructions were that the Defendant's directors and Japanese parent company had stood by and would continue to stand behind the Defendant and would meet any sums ordered. In particular, he accepted that any interim award would not serve to stifle to appeal.

(g) Both parties trade in the cryptocurrency market which is well-known to be volatile.

36 On the basis of the above facts, the Plaintiff asserted that an interim award was justified. The Plaintiff had been kept out of its money already for

over two years and it was likely that a further 18 months at the minimum would elapse before final assessment. Although the Defendant's directors and parent company had stood behind the Defendant, there was no reason to believe that they would continue to do so if the appeal failed. More specifically, it asserted, correctly in my view, that since neither the directors nor the parent company were parties to the action, any judgment against the Defendant could not be enforced against them. Hence it was said that the delay coupled with the uncertainty of payment constituted relevant prejudice which exceeded any prejudice to the Defendant in circumstances where its directors and/or parent company were able and willing to pay.

37 The Defendant contended that no interim award should be made because of the upcoming appeal, the fact that any subsequent delay was not great and the fact that the directors and/or parent company would continue to support the Defendant.

38 In my judgment, unless the Plaintiff can be guaranteed that any sums awarded on the final assessment will be paid by its directors and/or parent company, the balance of these factors is in favour of making an interim award provided that the Defendant can be protected so as to ensure repayment if the appeal succeeds or the limitation of liability issue is decided in its favour.

39 Dr Lai told me that he had no instructions to offer a bank guarantee to ensure payment of any sum that would otherwise have been ordered and thus I concluded that the correct exercise of discretion was to make an interim award in the Plaintiff's favour on terms that ensure that the Defendant can be repaid if necessary.

40 There was little dispute as to the quantum of any award if an award was ordered. The Plaintiff's figure of US$4,186,047.26 was made up of the alleged minimum capital value of the Bitcoin ("BTC") wrongfully removed from the Plaintiff's account based on the average of the high and low prices of BTC and Ethereum ("ETC") on 20 April 2017, together with interest. The Defendant contended that the price should be calculated using the lowest price of BTC as against the highest price of ETH. This figure was US$3,712,226.54, marginally less than the Plaintiff's figure, and was one which the Plaintiff was prepared to accept for the purpose of assessing the award. There was a small dispute on interest which I consider unnecessary to resolve. I set the figure at US$4m.

Issue 4. Protection for the Defendant in relation to any sums paid by way of an interim award or costs.

41 As indicated above, the Plaintiff contended that it was sufficiently stable and capitalised to repay any sums awarded by way of costs or damages and that the Defendant would be adequately protected by the Plaintiff's undertaking to repay if it was ordered to do so. I do not accept this. It is a foreign corporation with no assets in Singapore. Whilst financially stable at present, it does not have assets orders of magnitude greater than the sums involved and it trades in a volatile market. All these factors together do not satisfy me that a mere undertaking to repay is adequate. Mr Ong, who appeared for the Plaintiff in this hearing, also did not have instructions to offer a bank guarantee to support the undertaking to repay. In these circumstances, the best way to hold the ring between the parties was for an order that the sum of US$4m by way of an interim award of damages/compensation together with the sums ordered to be paid by way of costs should be paid into court on or before 30 September 2019. These sums will be held pending further order of the Court and there shall be liberty to both parties to apply.

Issue 6. Stay of further proceedings on the assessment pending judgment on the appeal.

42 In the light of the above, I shall consider Issue 6 before Issue 5. The next step in the assessment will be to prepare evidence on potential losses suffered by the Plaintiff due to it having lost the opportunity to trade using the BTC in question since the date of the incident giving rise to the Defendant's liability on 19 April 2017. This will inevitably involve evidence from financial experts and will occasion both delay and expense. I am satisfied that any further prejudice to the Plaintiff by delay due to a stay pending judgment on the appeal is far outweighed by the prejudice to both parties in the effort and expense in preparing evidence which may prove to have been wasted if the appeal succeeds. All further proceedings in the assessment will therefore be stayed once the money is paid into court pending judgment on the appeal or further order in the meantime. Again there will be liberty to apply.

Issue 5. The Election between damages at common law or in equity.

43 Since there is to be a stay, it makes sense to defer further argument on this issue until after the stay is lifted. It may then not be a live issue.

Simon Thorley
International Judge

Danny Ong, Sheila Ng and Jason Teo (Rajah & Tann Singapore LLP) for the plaintiff;

Stanley Lai SC, Ivan Lim and Marrissa Karuna (Allen & Gledhill LLP) for the defendant.
