IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC(I) 08

Suit No 7 of 2017 (Summons No 14 of 2018)

Between

B2C2 Ltd

… *Plaintiff*

And

Quoine Pte Ltd

… *Defendant*

JUDGMENT

[Civil Procedure] — [Costs] — [Security for costs]

B2C2 Ltd
v
Quoine Pte Ltd

[2018] SGHC(I) 08

Singapore International Commercial Court — Suit No 7 of 2017 (Summons No 14 of 2018)
Simon Thorley IJ
13 June; 12 July 2018

18 July 2018 Judgment reserved.

Simon Thorley IJ:

Introduction

1 On 14 May 2018, the Defendant filed an application for security for costs in this ongoing litigation. I have already given two judgments on interlocutory matters; the first, on 27 December 2017 (*B2C2 Ltd v Quoine Pte Ltd* [2017] SGHC(I) 11), on an application for summary judgment under O 14 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "Rules") and the second, on 20 March 2018 (*B2C2 Ltd v Quoine Pte Ltd* [2018] SGHC(I) 04), on the question of disclosure of confidential information.

Background facts

2 It is not necessary for the purpose of this judgment to rehearse the facts in any further detail, beyond the following.

3 The Defendant is a Singapore registered company which operates a currency exchange platform (the "Platform") enabling third parties to trade virtual currencies for other virtual currencies or for fiat currencies such as Singapore or US dollars. The two virtual currencies involved in this action are Bitcoin ("BTC") and Ethereum ("ETH").

4 The Plaintiff is a company registered in England and Wales trading *inter alia* as an electronic market maker providing liquidity on exchange platforms by actively buying or selling at the prices it quotes for virtual currency pairs, thereby generating trading revenue.

5 On 19 April 2017, the Plaintiff placed a number of ETH/BTC orders on the Defendant's platform, of which seven orders are the subject of this litigation.

6 According to the Defendant, sometime after 23:30 on that day, a "technical glitch" arose on the Platform as a result of which those orders were met at a rate approximately 250 times the then market rate previously quoted for ETH/BTC exchange. On discovering this, the Defendant unilaterally reversed the trades, which the Plaintiff contends constituted a breach of the agreement between them.

7 The action was originally commenced in the Singapore High Court but was subsequently transferred to the Singapore International Commercial Court ("SICC") on 24 August 2017.

8 In response to the plaintiff's application for summary judgment (referred to at [1] above), the Defendant put forward a number of proposed defences, two of which I held to be arguable. These were referred to in the judgment under the headings "Issue (b): The Risk Disclosure Statement argument" and "Issue (c):

Unilateral mistake at common law". Of the other proposed defences, I said this at [29]:

> Since the matter is to go to trial, I shall not give any reasoning in relation to the other issues. However, as I indicated, based on the material before me at present, I am not persuaded that any of the other defences could succeed if both issues (b) and (c) did not. It is however a matter for the Defendant and its advisers, having heard the arguments on this hearing, to decide whether they would like the trial judge to rule on those defences.

9 Since that date, the Defendant has decided to have all the issues considered at trial with the consequence that the current estimate of the length of trial is about six days.

10 Prior to the transfer into this Court, the Defendant sought security for costs from the Plaintiff and the parties agreed that the Plaintiff would provide the sum of S$80,000 as security for costs up to the date of trial by way of a solicitor's undertaking. This was done on 27 July 2017 and, on the Plaintiff's part, it was expressly stated that such security was given without any acknowledgment or admission in relation to the Defendant's entitlement to any further security and that it reserved its position in this regard.

The present application

11 By this application, the Defendant seeks a further sum of S$70,000 in respect of the costs up to the commencement of trial and S$120,000 for the Defendant's costs of the trial. The application is based on the following grounds:

(a) The Plaintiff, being a UK company, is a foreign registered company that is ordinarily resident out of the jurisdiction.

(b) The Plaintiff does not have a place of business in Singapore and has no fixed assets here.

(c) Although there is a bilateral enforcement regime between Singapore and the UK, if it will be necessary to enforce any order as to costs, this would involve the expense of instructing solicitors in the UK.

(d) The order for security will not stifle the Plaintiff's claim.

12 The Plaintiff opposes the making of the order on the following grounds.

(a) In contrast to O 23 r 1, foreign residency is not a ground for ordering security for costs under O 110 r 45 of the Rules.

(b) On the facts of this case it would not be just to order security because:

(i) the Plaintiff is an established company, both in the UK and globally, with over $6 million of paid-up capital and millions of dollars in retained earnings;

(ii) it has an aggressive growth strategy in South-East Asia, particularly in Singapore;

(iii) there are no grounds for suggesting that the Plaintiff will not comply with any order for costs since the Plaintiff has throughout the action complied with all orders and directions of the Court;

(iv) enforcement through the UK courts will be a relatively easy matter if the Plaintiff did not comply with orders made by the Court; and

(v) the Plaintiff's case is a strong one.

(c) In any event, the Plaintiff contends that the quantum sought is far too high and that the security already provided is adequate. In particular, any increased costs were due to the Defendant's decision to continue pursuing all issues raised.

Order 23 r 1 and O 110 r 45 of the Rules

13 Order 23 r 1 of the Rules applies to applications for security for costs in the High Court and the relevant part of the rule provides as follows:

> **Security for costs of action, etc. (O. 23, r. 1)**
>
> 1.—(1) Where, on the application of a defendant to an action or other proceeding in the Court, *it appears to the Court* —
>
> (*a*) *that the plaintiff is ordinarily resident out of the jurisdiction*;
>
> (*b*) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;
>
> (*c*) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or
>
> (*d*) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,
>
> then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.
>
> [emphasis added]

14 Order 110 r 45 is however the rule which applies to cases in the SICC. The relevant parts of the rule provide:

> **Security for costs (O. 110, r. 45)**
>
> 45.—(1) Subject to this Rule, Order 23 (security for costs) is to apply to proceedings in the Court.
>
> (1A) Order 23, Rule 1(1) and (2) does not apply to proceedings in the Court.
>
> (1B) The Court may, on the application of a defendant to an action or other proceeding in the Court, order the plaintiff to give security for the defendant's costs of the action or other proceedings, if —
>
> (*a*) it appears to the Court that —
>
> (i) the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person, and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so;
>
> (ii) the plaintiff's address is not stated, or is incorrectly stated, in the originating process, and the plaintiff fails to satisfy the Court that the omission or misstatement was innocent and made without intention to deceive;
>
> (iii) the plaintiff has changed the plaintiff's address during the course of the proceedings with a view to evading the consequences of the litigation;
>
> (iv) the plaintiff is a corporation or some other entity, and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so; or
>
> (v) the plaintiff has taken any step in relation to the plaintiff's assets that would make it difficult to enforce an order for costs against the plaintiff; and
>
> (b) the Court thinks it just to do so, having regard to all the circumstances of the case.

> (2) *To avoid doubt, in proceedings in the Court, the plaintiff may not be ordered to give security for the defendant's costs solely because —*
>
> (*a*) the plaintiff is an individual who is ordinarily resident out of the jurisdiction; or
>
> (*b*) *the plaintiff is a corporation or some other entity —*
>
> (i) *that is constituted under the law of a country other than Singapore*;
>
> (ii) whose central management or control is exercised outside Singapore; or
>
> (iii) whose place of business is outside Singapore.
>
> (2A) Paragraph (2) does not apply to a case transferred to the Court, unless the High Court orders otherwise when ordering the transfer of the case to the Court.
>
> (3) In this Rule, "plaintiff" includes a defendant who brings a counterclaim or a third party action.
>
> [emphasis added]

15 So far as concerns an action commenced in the SICC, the position is clear. Order 23 r 1(1) and (2) of the Rules do not apply. The mere fact that the plaintiff is a foreign company does not entitle the defendant to obtain security; it must demonstrate that one or other of the threshold conditions set out in O 110 r 45(1B)(*a*) of the Rules applies and then the Court has a discretion whether or not to order security on the basis of the facts of each individual case.

16 A difficulty however arises in the case of an action transferred from the High Court. Order 23 r 1(1) of the Rules again does not apply, yet O 110 r 45(2) (but *not* O 110 r 45(1B)) is expressly disapplied by virtue of O 110 r 45(2A) of the Rules. So, on a literal reading, O 110 r 45(1B) of the Rules still sets out the threshold conditions, one of which which must be met in order to obtain security, and these do not include the mere fact that the plaintiff is a foreign company. Yet, the prohibition against ordering security on the sole ground that

the plaintiff is a foreign company (as contained in O 110 r 45(2)) is excluded by O 110 r 45(2A) of the Rules.

17 Ms Rachel Low, on behalf of the Plaintiff, contends that the exclusion of O 110 r 45(2) of the Rules does not obviate the need for the Defendant to show that one or other of the threshold conditions had been met and that the purpose underlying the exclusion is to preserve any security for costs orders made prior to transfer. Any other interpretation, she says, will make the approach to transfer cases the same as the approach mandated under O 23 r 1 of the Rules, which expressly does not apply.

18 Mr Paul Ong, for the Defendant, submits that the effect of the exclusion is to add a further threshold condition to O 110 r 45(1B) of the Rules which is the same as that in O 23 r 1(1)(*a*) of the Rules, *ie*, "that the plaintiff is ordinarily resident out of the jurisdiction". He further contends that this does not serve merely to reinstate O 23 r 1 of the Rules since the threshold conditions in the two rules are different. He urges upon me that it would be wrong to interpret the rules as denying a defendant who had been initially sued in the High Court of the protection that O 23 r 1(1)(*a*) of the Rules provides merely because the action has been transferred.

19 Neither counsel directed my attention to any authority concerning this issue. However, subsequent to the hearing of the application, the Court was made aware of a ruling on security for costs on 6 February 2017 by Henry Bernard Eder IJ in *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* (Singapore International Commercial Court Suit No 1 of 2016) ("*Teras*"). This was another case which had been commenced in the High Court and then transferred to the SICC. The application for security was made by the plaintiff

in that action seeking security for costs from the defendant, a foreign entity, in respect of a counterclaim raised by the defendant.

20 Accordingly, the parties were given an opportunity to consider this decision and to make written submissions on it, if they were so minded. Both parties did so.

21 I first set out in brief the salient facts of *Teras*. The grounds of the plaintiff's application were that:

(a) the defendant was a foreign entity with no known assets within the jurisdiction;

(b) the defendant's financial position was precarious; and

(c) the defendant's counterclaim held little or no weight.

22 Having heard the parties' arguments, Eder IJ gave a short *ex tempore* judgment. He held that the application for security was to be decided under O 110 r 45 and not O 23 of the Rules. In relation to the fact that the defendant was a foreign corporation, he said this:

> … [I]t is important to note that this matter is now before the [SICC] and that there is an important distinction listed under O 110 r 45(1B) that security for costs would not – should not – be ordered in the SICC solely because the plaintiff is a corporation that is incorporated outside Singapore. It appears to be common ground, and as I understood Mr Doraisamy accepted, that in order to obtain an order for security for costs in these circumstances, the burden lies on the plaintiff in this case to show, first, that the defendant is unable to pay the costs of the plaintiff if ordered to do so, and secondly, having regard to all the circumstances, whether it is just that the defendant be ordered to provide the relevant security.

23 The learned judge went on to conclude, first, that there was a strong likelihood that the defendant would not be able to pay any sums due but, secondly, that the issues arising on the counterclaim were in substance the same as the issues arising on a pleaded defence of set-off. He therefore declined to order security.

24 In a letter dated 12 July 2018 from the Plaintiff, it was submitted that *Teras* constituted authority for the fact that O 23 of the Rules does not apply to the question of security for costs in the SICC and that, properly interpreted, O 110 r 45 does not permit security for costs to be ordered solely on the ground that the plaintiff is a foreign corporation even in a transfer case. The fact that no mention was made in that decision of O 110 r 45(2) was consistent with the Plaintiff's submission that it did not add to or subtract from what was contained in O 110 r 45(1B) of the Rules.

25 In a letter dated 12 July 2018 from the Defendant, it was contended that Eder IJ's decision was distinguishable because both the parties had proceeded on the basis that security would not be ordered merely because the relevant party was a foreign entity and there was thus no argument as to how O 110 r 45 ought to be interpreted in the light of O 110 r 45(2A). As appears from the extract from the judgment cited above at [22], the case proceeded on the basis of the defendant's impecuniosity, which was a ground for ordering security under O 110 r 45(1B)(*a*)(iv) of the Rules.

26 From the available material, it does indeed appear that there was no argument on the correct interpretation of O 110 r 45 in a transfer case. No mention was made of O 110 r 45(2) or r 45(2A). The point that was taken in this case was not, apparently, raised in *Teras*. In those circumstances it would, I

believe, be wrong to hold that it was authority for the proposition contended for by the Plaintiff. The matter has now been fully argued before me and I must therefore decide the question.

27 The interrelationship of the wording of O 110 r 45 of the Rules does not make for ease of interpretation. A provision inserted for the avoidance of doubt (*ie*, O 110 r 45(2)) is then excluded (via O 110 r 45(2A)), rather than expressly added to the categories contained in O 110 r 45(1B). However, I am satisfied that this is the effect of the language.

28 The spirit underlying O 110 r 45 of the Rules as a whole is that where a case is commenced in the SICC, this will be because the case is international in nature. It is therefore likely to include foreign corporations so this fact should not be material in assessing whether to order security. The focus should be on the plaintiff's status and/or conduct rather than its nationality. Conversely, in a transfer case, the parties would not have at the outset agreed to litigate in the SICC. The plaintiff had elected to sue the defendant in the High Court where "foreignness" is a relevant consideration in determining whether to order security against the plaintiff, and the defendant should not lose this right by virtue of transfer.

29 In my judgment therefore, the overall effect of the wording of O 110 r 45 of the Rules is that the fact that the plaintiff is ordinarily resident out of the jurisdiction is to be notionally added to the threshold conditions of O 110 r 45(1B). So doing does not have the effect of re-applying the entirety of O 23 r 1(1) and r 1(2) (which is not permitted under O 110 r 45(1A)) since, although similar, the threshold conditions are not the same.

The circumstances of the case

30 The principles to be applied in considering the exercise of discretion in cases where a foreign plaintiff is involved have been established under O 23 of the Rules. I was referred to the observations of the Singapore Court of Appeal in *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 at [14]:

> … There is no presumption in favour of, or against, a grant. The ultimate decision is in the discretion of the court, after balancing the competing factors. No objective criteria can ever be laid down as to the weight any particular factor should be accorded. It would depend on the fact situation. *Where the court is of the view that the circumstances are evenly balanced it would ordinarily be just to order security against a foreign plaintiff.* [emphasis added]

31 This was amplified upon by the Singapore High Court in *Pacific Integrated Logistics Pte Ltd v Gorman Vernel International Freight Ltd* [2007] 1 SLR(R) 1017 at [5]:

> To begin with, it is well accepted that proof of a plaintiff's residence outside Singapore is a *threshold condition* under O 23 r1(1)(*a*), rather than a conclusive indicator that security should be ordered: see *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 ("*Wishing Star*") at [14]. ***Although security will not follow as a matter of course whenever a foreign plaintiff is involved, it will generally be ordered where the circumstances are evenly balanced***: see *Wishing Star* at [14]. ***This results not from an inherent presumption or predisposition in favour of granting security but, rather, as a matter of discretion because a plaintiff's foreign residence will often tip the finely-balanced scales of justice in favour of such an order***: see also *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1998] SGHC 171 at [3]; *Aeronave v Westland Charters Ltd* [1971] 1 WLR 1445 at 1448–1449 … [emphasis in original in italics; emphasis added in bold italics]

32 The reason why it will tip the scales is because, if a plaintiff is not within the jurisdiction and does not voluntarily comply with an order for costs against it, the defendant will be put to the inconvenience, delay and expense of seeking

to enforce the order in a foreign state. Of course, the degree of this will vary depending on whether there is a reciprocal agreement on enforcement between that state and Singapore and on the complexity of the foreign process for enforcement.

33 The approach under O 110 r 45 of the Rules in a transfer case should be the same because "foreignness" remains a relevant ground for ordering security.

34 In this case, I consider that the following factors weigh either for or against ordering security.

(a) In favour:

(i) The Plaintiff is a UK (and therefore foreign) corporation and accepts that it has no fixed assets in Singapore.

(ii) Any failure to pay would therefore necessarily result in the inconvenience, delay and expense of seeking to enforce any order. There is, of course, weight that must be attached to this.

(b) Against:

(i) It is common ground that the Plaintiff is an established company. Both parties rely on this. The Defendant relies on this as supporting its submission that an order for security would not serve to stifle the action. The Plaintiff relies on this as supporting its submission that there is no fear that it is not good for the sums that might be awarded in costs. To my mind, greater weight should be attached to the Plaintiff's submission in this case. Even if the Defendant had to enforce in the UK, it would eventually obtain payment.

(ii) The Plaintiff has not conducted itself in a manner which is calculated to induce the belief that it might not voluntarily comply with any award. There is therefore no reason to believe that it would avoid or seek to frustrate an order for costs. I consider that weight should be attached to this. The Plaintiff has conducted this litigation properly at all times and, in particular, voluntarily provided the security so far given without admitting that it was appropriate but to save the costs of a contested application (see [10] above).

(iii) Whilst there would be delay, expense of enforcement and the inconvenience of having to instruct foreign lawyers if that turned out to be necessary, there is a bilateral enforcement regime between Singapore and the UK and the enforcement procedures in UK are tried and tested and efficient. There is substance in this which reduces, but does not remove, the weight that should be attached to the enforcement point mentioned at [(a)(ii)] above.

35 There is also a factor which I consider to be neutral and this is the relative strength of the parties' cases. The Plaintiff contends that the strength of its case should be taken into account because, if it is likely to succeed, the prospects of an award of costs in the Defendant's favour is more unlikely. On the authorities, the Court should not lightly embark on a consideration of the relative strengths of the parties' cases but it was pointed out that this had already been done in this case in the summary judgment application. However, in my judgment on that application, I expressly refrained from making any observations on the strength of the parties' cases save to hold that two proposed

defences were arguable within the principles applicable to O 14 of the Rules. For this reason, no weight should be attached, either way, on the strength of case issue.

36 Taking all these matters into account I conclude that, on the facts of this case, matters are not evenly balanced. The balance lies on the side of not granting security and the fact that the Plaintiff is a foreign corporation does not serve to tip the balance in the Defendant's favour. In the exercise of my discretion therefore, I do not think it is just to make an order for further security.

Quantum

37 Accordingly, it is not necessary to consider the quantum of security to be granted and I shall only say this. In assessing quantum, I do believe that it would be right to take into account the fact that the Defendant is pursuing at trial a number of defences that were considered in the summary judgment application, in relation to which I made the observation set out at [8] above. I would therefore have taken this into account in deciding what level of security, if any, over and above that already provided, would be appropriate.

Conclusion

38 The application is dismissed and I shall hear counsel at the next case management conference on the issue of costs.

Simon Thorley
International Judge

Danny Ong, Sheila Ng and Rachel Low (Rajah & Tann Singapore LLP) for the plaintiff;
Paul Ong, Ivan Lim and Marrissa Karuna (Allen & Gledhill) for the defendant.