IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 09

Suit No 6 of 2019 (Summons No 13 of 2020)

Between

SK Lateral Rubber & Plastic Technologies (Suzhou) Co Ltd

… *Plaintiff*

And

Lateral Solutions Pte Ltd

… *Defendant*

JUDGMENT

[Civil Procedure] – [Costs] – [Security]

TABLE OF CONTENTS

SK Lateral Rubber & Plastic Technologies (Suzhou) Co Ltd
v
Lateral Solutions Pte Ltd

[2020] SGHC(I) 09

Singapore International Commercial Court – Suit No 6 of 2019 (Summons No 13 of 2020)
Roger Giles IJ
30 March 2020

17 April 2020 Judgment reserved.

Roger Giles IJ:

1 The defendant/counterclaimant, Lateral Solutions Pte Ltd ("Lateral"), applies for an order that the plaintiff/counterdefendant, SK Lateral Rubber & Plastic Technologies (Suzhou) Co Ltd ("SKL"), furnish security for its costs to the end of the trial. For the reasons which follow, the application should be dismissed.

Facts

The parties

2 SKL is a company established under the laws of the People's Republic of China. Its business includes the manufacture and sale of polymer parts ("parts") used in electronic consumer goods. Lateral is a Singapore incorporated company, engaged in the supply of electronic components for such

goods. Lateral has no manufacturing facilities of its own, and outsources the components from companies such as SKL.

Background to the dispute

3 In 2011, SKL and Lateral entered into an agreement ("the Agreement") under which SKL was to manufacture and supply parts for Lateral, which Lateral would in turn supply to Apple and perhaps others. Business was done for some years, but the relationship deteriorated and ended in acrimony in 2017.

4 SKL claims USD 10.3 million from Lateral, for parts supplied and for tooling procured, equipment purchased and expenses incurred for the manufacture of parts.

5 Lateral's defence to the parts claim is that, by virtue of "operational realities" and a course of discussion and conduct, payment of SKL's invoices was due only when Lateral's cash flow permitted it to pay ("the cash flow defence"). To this is added that one Wei Fengpin, said to be the controller of SKL, had engaged in conduct intended to damage Lateral's business and "take it out as a competitor" in favour of other entities he controlled. It is alleged that Wei himself is responsible for Lateral's cash flow problems and its subsequent inability to pay, and that the proceedings themselves are part of a scheme to drain Lateral's finances ("the Wei conduct"). As to tooling, the defence appears to be that SKL was not entitled to payment unless Lateral's customer had agreed to pay for the tooling and had paid, or until Lateral was being paid for the parts produced by the tooling. The claims as to equipment and expenses were simply denied.

6 SKL's reply to the defence includes that the Wei conduct is not relevant.

7 Lateral counterclaims against SKL on a number of grounds. First, it says that it paid USD 1.1 million for parts supplied, which parts were then found to be defective, and that SKL had refused to repay it. Secondly, it says that SKL owes it USD 1.3 million, such sums being the amount paid to a casings supplier for casings required by SKL for the manufacture of parts. SKL had allegedly agreed to repay Lateral but had so far failed to do so. Thirdly, Lateral claims that it owns a large number of items of equipment purchased and held by SKL for the manufacture of parts. Lateral claims damages for wrongful detention or conversion of the equipment. Fourthly, Lateral says that SKL wrongfully ceased to supply parts under the Agreement, which it alleges by discussion and conduct was or became a long term supply agreement, and claims damages for its breach.

Procedural history

8 The proceedings were commenced in the High Court in October 2017. In November 2017 it was ordered by consent that SKL provide security for Lateral's costs up to the conclusion of discovery in the sum of $30,000. The security was duly paid into court ("the initial security"). By the end of February 2018, particulars of the claim had been requested and given and the pleadings had closed.

9 In April 2018, SKL applied for summary judgment. The hearing of the application was delayed by an application to amend the defence and counterclaim and applications to file affidavits. An amended defence and counterclaim was allowed, and in January 2019 the application for summary judgment was dismissed by Kannan Ramesh J on the basis that Lateral had a defence of set-off against SKL's claim.

10 In May 2019, the defence and counterclaim was again amended. Over the next five months particulars were requested and given of the defence and counterclaim and of the reply and defence to counterclaim, with a number of disputed applications. Following amendment of the claim, the defence and counterclaim was also again amended. Lists of documents were filed in November 2019.

11 In December 2019 the proceedings were transferred to the SICC. Order 24 of the Rules of Court ("the Rules"), relating to discovery, was to continue to apply. There was no condition relating to security for costs.

12 A case management conference was held on 2 March 2020. This application, and a cross-application by SKL for security for its costs of the counterclaim, were foreshadowed. Directions were given for filing the applications and the exchange of affidavits and written submissions, ending on 27 March 2020, the decision of the applications to be on the papers. In the event, SKL did not file an application.

13 Pursuant to leave given on 2 March 2020, on 6 March 2020 the defence and counterclaim were amended yet again. Until then, Lateral's defence to the parts claim had been that payment of SKL's invoices was due only when Lateral received payment from its customers ("the pay when paid defence"). In the amendments, it became the cash flow defence. Other directions were given, and have been given, leading to a trial fixed for seven days commencing on 21 July 2020.

The present application

14 On 3 November 2017, Lateral wrote to SKL requesting the initial security in the sum of $40,000, giving as the basis for the request that SKL was "domiciled in China" and "it does not appear that [it] has any assets of a permanent nature in Singapore". SKL's reply on 7 November 2019 made no comment on these assertions, and simply said that it was agreeable to the request, but in the sum of $30,000. The consent order followed.

15 On 27 February 2020 Lateral wrote to SKL, saying that SKL had not disputed the earlier assertions and that it (Lateral) was entitled to further security for costs to the end of the trial. SKL replied on 2 March 2020, declining to provide the security and saying:

> "As you know, the SICC approaches the issue of security for costs by foreign plaintiffs differently. Moreover, since SIC 6 was first commenced in October 2017, SKL has conducted its litigation properly at all times. SKL had earlier furnished security voluntarily in order to avoid unnecessary costs, and has complied with every cost order made. There is thus no cause for concern that SKL might not voluntarily comply with any award of costs."

16 Lateral's application was filed on 13 March 2020. Security for costs was claimed on two bases for the power to order it: in shorthand, later more fully described -

(a) that SKL would be unable to pay Lateral's costs if ordered to do so ("the impecuniosity basis"); and

(b) that SKL is ordinarily resident out of the jurisdiction ("the foreign plaintiff basis").

17 Lateral's submissions included that, by providing the initial security, SKL admitted that Lateral was entitled to the further security for costs now sought. SKL took issue with that submission, saying that it provided the initial security as a matter of expediency with a view to getting a resolution by an application for summary judgment.

18 It is not necessary to go into SKL's motives. Lateral's submission cannot be accepted. For either of the bases, the court must first be satisfied that the power to order security for costs has been enlivened by satisfaction of a requisite condition for its exercise, and must then consider the exercise of a discretion to order the provision of the security. The condition is found, and the discretion is exercised, on the facts now appearing. The facts of incorporation and domicile in China and absence of permanent assets in Singapore may be accepted, but otherwise the entitlement to further security must be made out.

The Impecuniosity Basis for the power to order security

19 The impecuniosity basis rested on s 388 of the Companies Act (Cap 50, 2006 Rev Ed), providing –

> "Where a corporation is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given."

20 Lateral's case for SKL's inability to pay costs was narrow. It had two planks.

21 First, the affidavit in support of the application referred to payment of costs ordered against SKL in three of the many applications in the High Court, being SUM 1623 in the amount of $20,000; SUM 1626 in the amount of $1000; and SUM 3623 in the amount of $2500. It was said that the last amount of $2500 was paid more than two months after it was ordered, after "repeated chasers". In submissions, it was said that SKL's payment of costs had been "erratic to say the least".

22 SKL's responsive affidavit pointed out that it had duly paid the other costs amounts, that the $2500 was really $1250 because costs ordered to be paid by Lateral were set off against it, that the passage of time was due to debate over the setting off, and that the passage of time also included (and Lateral was told of) compliance with Chinese regulatory controls for transfer of money out of China.

23 Copies of the extensive correspondence were provided. Lateral's submission is excessive. In my view, nothing adverse to SKL's ability to pay costs as stated in s 388 is to be drawn from the course of payment of the interlocutory amounts.

24 Secondly, Lateral referred to paragraphs in SKL's affidavit asserting, without detail, likely effect on its business of the current COVID-19 pandemic, and stating that in such circumstances it would be unjust to require SKL to provide security "especially since any cash flow issues that SKL may experience in the current economic climate is also largely attributable to Lateral's failure or refusal to pay SKL…". Lateral magnified this in submissions to an admission that SKL "may be experiencing cash flow issues".

25 The paragraphs in the affidavit appear to have been tied to the suggestion therein that the request for security "has the potential to oppress and stifle SKL's claim", and a submission to that effect was made by SKL. But they point at most to a possible impact upon SKL of COVID-19 or of Lateral's failure to pay, and a possibility of consequential financial stringency. They are well short of credible testimony giving reason to believe that SKL will – note, will - be unable to comply with an adverse costs order.

26 The requisite condition for the impecuniosity basis has not been made out.

The Foreign Plaintiff Basis for the power to order security

27 In the SICC, the provision of security for costs is governed by O 110 r 45 of the Rules. Order 23 r 1(1) of the Rules, which includes the condition of a plaintiff ordinarily resident out of the jurisdiction, does not apply (O 110 r 45(1A) of the Rules), the conditions in O 110 r 45(1B) of the Rules enlivening the power do not include a foreign plaintiff condition, and O 110 r 45(2) of the Rules specifically excludes ordering security for costs solely because the plaintiff is a corporation constituted under the law of a country other than Singapore, or whose central management and control is exercised outside Singapore, or whose place of business is outside Singapore. In this respect, the SICC Rules recognise the international nature of proceedings commenced in the SICC.

28 However, these proceedings were not commenced in the SICC; they are a transfer case. Order 110 r 45(2A) of the Rules provides that the exclusion above mentioned does not apply to a transfer case unless the High Court orders otherwise when ordering the transfer, which it did not. As explained in *B2C2*

Ltd v Quoine Pte Ltd [2018] 5 SLR 105 ("*B2C2*") at [28]-[30], since the plaintiff sued in the High Court where being ordinarily resident out of the jurisdiction is a condition for ordering security for costs, the defendant should not lose its entitlement to security by virtue of the transfer; so there should notionally be added to the conditions in O 110 r 45(1B) that where the plaintiff is ordinarily resident out of the jurisdiction, the principles applicable in the exercise of the discretion are those established under Order 23.

29 This was common ground in the application. It was not disputed that SKL is ordinarily resident out of the jurisdiction for the purposes of the application, and the question came down to the exercise of the discretion to order security for costs. It was also common ground that all the circumstances are considered to determine whether it is just that security should be ordered, without a presumption in favour of, or against, an order: *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 at [14] (*"Jurong"*).

Exercise of the court's discretion

Ordinarily resident out of jurisdiction

30 The significance of the plaintiff being ordinarily resident out of the jurisdiction is that where the plaintiff does not have assets within the jurisdiction and if it does not comply with a costs order, the defendant is likely to encounter inconvenience, delay and expense, and perhaps difficulty, in seeking to enforce the order in a foreign state. This, however, can be informed by evidence, and in *B2C2* at [34] a bilateral enforcement regime between Singapore and the United Kingdom was regarded as reducing the weight to be given to the inconvenience, delay and expense.

31 Lateral's affidavit evidence did not identify any particular difficulty in or considerations regarding enforcement in China, beyond saying that there is no reciprocal agreement on enforcement between China and Singapore. SKL agreed that there was no such agreement, but in its affidavit evidence pointed to a Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore ("the Memorandum"), as "providing a framework for a simplified process of recognising and enforcing" Singapore judgments in the Chinese courts and vice versa.

32 The Memorandum was signed in August 2018. It is not a binding document, but it details the principles and process by which Singapore money judgments in commercial cases, including costs judgments, may be recognised in China. They will be recognised on the basis of reciprocity. The Memorandum states, although not exhaustively, the limited grounds on which such judgments may be challenged in the Chinese courts, and that the Chinese courts will not review the merits. The documents to be submitted are described, and the courts of the People's Republic will recognise the judgments in accordance with domestic law. If the judgment is recognised, the Chinese enforcement procedures are available.

33 The predictable submissions were on the one hand, that the Memorandum had no binding legal effect and, in the absence of evidence of an established practice, provided no assurance that Lateral would be able to enforce a costs order in China; and on the other hand, that from the understanding in the Memorandum, enforcement would be "a relatively straightforward matter". I do not accept Lateral's submission so far as it was meant that the Memorandum is of no utility, but equally SKL's submission is over-stated. The Memorandum

is an important contribution to inter-State enforceability, matching other like memoranda, and gives assistance to and confidence in ability to enforce a Singapore judgment in China. But it does not obviate some inconvenience and perhaps delay in comparison with domestic enforcement, or additional expense in taking steps in a foreign legal environment. This remains as a factor, although the Memorandum reduces its weight, in favour of ordering security.

34 Other factors to which the parties referred may be summarised as –

(a) the strength of SKL's claim;

(b) possible cash flow issues; and

(c) overlap between the claim and the counterclaim.

35 I deal briefly with a perhaps indirect submission by SKL to the effect that security should not be ordered because its payment of the interlocutory costs orders showed that there was no risk of failure to pay; and a clearer submission that there was reason to think that Lateral was itself not able to meet a costs order against it. I do not think the payment of the relatively small amounts of the interlocutory costs orders is a reliable indicator that payment can and will be made under a much larger costs order at the end of the proceedings, and SKL did not provide evidence of its financial position to back up the submission. The relevance of Lateral's ability or inability to meet a costs order against it was not explained, and is not evident.

The strength of SKL's claim

36 The relative strengths of the parties' cases is a relevant consideration. The court will not enter into a detailed consideration of the merits, unless a high probability of success one way or the other can be clearly demonstrated: *Ong Jane Rebecca v Pricewaterhousecoopers* [2009] 2 SLR(R) 796 ("*Ong Jane Rebecca*") at [22] – [23]. But this does not exclude concluding that the plaintiff has a good chance of success (*Amer Hoseen Mohammed Revai v Singapore Airlines* [1994] 3 SLR(R) 290 at [52]), or noting matters bearing on the relative strengths. Thus in *Tjong Very Sumitomo v Chan Sing En* [2010] SGHC 344 at [42] –[45] the Judge identified implausibility in both the claim and the defence, and in *Sembawang Engineering Pte Ltd v Priser Asia Engineering Pte Ltd* [1992] 2 SLR 290 at [25] the Judicial Commissioner noted that two matters "stand out on the pleadings" from which he was satisfied that the plaintiff's claim was bona fide and had a reasonable prospect of success.

37 At least as to the parts, Lateral does not deny that they were supplied, and it does not seem to deny responsibility to pay for the tooling subject to conditions as to when payment is due. In his reasons on the summary judgment application, Kannan Ramesh J noted that Lateral had not provided any evidence that it had not been paid by Apple, and said that this raised doubts in his mind "about the efficacy of the defendant's argument on the 'pay when paid' obligation". The pay when paid defence has now become the cash flow defence, following those observations and only when the defence was amended for the fifth time. A commercial agreement, for dealings in the millions of dollars, that payment should be made when the debtor was able to pay, would be unusual, and the late pleading of the cash flow defence raises doubts similar to those voiced by Kannan Ramesh J. Whether the defence is made out of course will be

determined on the evidence at the trial, but for the purposes of this application I consider that SKL should be regarded as having the stronger case. That is a factor against ordering security.

38 I take into account Lateral's submission that SKL's assertion of the strength of its claim "does not square with Lateral being given unconditional leave to defend on SKL's application for summary judgment". Summary judgment was refused because the counterclaim provided a defence of set-off. I do not think that, for present purposes, that negates regarding SKL's case as stronger than Lateral's.

Possible cash flow issues

39 SKL submitted that ordering security for costs in the amount sought would stifle its claim, having regard to "the prevailing economic crisis" occasioned by the COVID-19 pandemic and, it asserted, "any want of means" was in part due to Lateral's failure to pay it the amount claimed in the proceedings.

40 As was said by Judith Prakash J (as her Honour then was) in *Ong Jane Rebecca* at [33], "Before the court refuses to order security on the ground that it would unfairly stifle any claim, the court has to be satisfied that the plaintiff concerned does not have the ability to provide the security". SKL's submission has the difficulty that, for the claim to be stifled, SKL would have to be unable to provide the security if ordered, or perhaps be unable to finance continuation of the proceedings if all its money went towards providing the security. It did not say so in evidence, or put forward any evidence of its financial position.

41 I have earlier referred to the paragraphs in SKL's affidavit concerning COVID-19. SKL referred to *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1991] 1 SLR(R) 112 at [32] as an illustration of taking account of the vicissitudes of an economic crisis: the Court there concluded that "in the light of the prevailing economic condition there is no possibility of the appellants providing the security as ordered, and such an order if it remained would undoubtedly stifle their claim". However, I cannot so conclude in this case. The currency of COVID-19 and, in general terms, that it has an economic impact, can be recognised. But there is no evidence of how SKL will or might be affected in its supply chains, manufacturing capability, level of sales, or any other particular way. The unsubstantiated suggestion of possible impact and financial stringency cannot without more, including evidence of SKL's financial condition and that of those standing behind it, found a conclusion that ordering security for costs would stifle its claim.

42 Similarly, while SKL is out of pocket in the amount claimed, there is no evidence on which it can properly be concluded that it is, for that reason, unable to provide the security if ordered or to finance the continuation of the proceedings.

43 For its part, Lateral took up the same matters for the submission that SKL "may be facing cash flow issues", so that there was no assurance of recovering its costs even by enforcement in China. Again, however, the submission rested on unsubstantiated suggestion, insufficient to found a conclusion that SKL is having or will have cash flow issues as a factor in favour of ordering the security.

44 I do not think the evidence warrants regarding stifling the claim or possible financial stringency as factors in the exercise of the discretion.

Overlap between the claim and the counterclaim

45 If the costs incurred by the defendant in defending the claim overlap with the costs incurred by it in prosecuting a counterclaim, that is a factor counting against ordering security for the defendant's costs. It would be unfair for a plaintiff to have to provide security for costs incurred by the defendant in prosecuting a counterclaim, or to be left unable to prosecute its claim although exposed to the counterclaim.

46 SKL submitted that there is a substantial overlap in this case. It did not say there is identity in issues, and there is not. It said that the claim and the counterclaim arose out of the same set of circumstances relating to the Agreement and the parties' relationship and actions thereunder; that both were "launched from the same platform"; and that it was likely that Lateral would have to incur the same costs in establishing its defence as it would incur in proving its counterclaim, since both would require it to go through the course of conduct between the parties. (It referred also to a related case in which SKL and Lateral are amongst the parties. I do not think that case should be taken into consideration.)

47 The expression "launched from the same platform" was taken from *Jurong* at [19]. There, the plaintiff ("WSL") claimed payment for work done under a building contract and damages for wrongful termination of the contract. The defendant ("JTC") pleaded that it had lawfully rescinded the contract and counterclaimed for damages it had suffered. The Court said –

> 19 Next, it is undeniable that JTC's defence to the claim and its counterclaim are launched from the same platform. The time and work required for the trial of the counterclaim would be substantially the same, whether or not the claim of WSL is stayed. In short, no significant additional costs would be incurred by JTC if we were to allow the action to proceed. In such circumstances, we were unable to see what purpose it would serve in staying the action of WSL. Costs incurred in defending the action could be regarded as costs necessary to prosecute the counterclaim. Indeed, granting security in this situation could amount to indirectly aiding JTC to pursue its counterclaim.
>
> 20 This is a factor which could be taken into account and is supported by authorities.

48 Lateral submitted that there was not a "complete" overlap, but did not elaborate further. It said that it could succeed on damages for breach of the Agreement even if it failed on the cash flow defence.

49 Consistent with the rationale of unfairness (see [45] above), a more nuanced approach than comparison of issues is appropriate, and is supported by and apparent in *Jurong*.

50 Some estimation from the pleadings is necessary. In the claim, the supply of parts and purchase of tooling and equipment does not seem controversial. The claim to expenses is blandly denied, but its proof and defence are unlikely to carry much in costs. All claims arise out of the one course of dealings over some years in a corporate supply relationship, with an overlay of personal relationships. The cash flow defence will require a quite extensive canvassing of discussions and dealings between those interested in SKL and Lateral, but the same witnesses can be expected as part of that canvassing to give evidence of arrangements about payment for the casings, the purchase of equipment said by Lateral to be its equipment, and in particular the long-term nature or otherwise of the Agreement (which can be expected to bear upon the

cash flow defence). This evidence will not be compartmentalised into defence or counterclaim. Considering the time and work for the counterclaim, in my estimation while Lateral will incur additional costs in defending the claim over its costs in prosecution of the counterclaim, the increase in costs is not likely to be great.

51 This is a factor against ordering security for Lateral's costs to the end of the trial.

Decision

52 In my opinion, having regard to all the circumstances it would not be just to order security for costs. I have considered ordering security in a lesser amount than the costs to the end of the trial, reflecting the increase above mentioned: *P T Muliakeramik Indahraya TBK v Nam Huat Tiling & Panelling Co Pte Ltd* [2006] SGHC 154 at [11]; *Ong Jane Rebecca* at [27]. On balance, I do not think so.

53 SKL disputed the amount sought. It is unnecessary to consider this.

54 I therefore order that the application be dismissed. SKL is entitled to its costs of the application. I invite the parties to agree on the amount of costs; if there is no agreement, written submissions no more than two pages in length should be exchanged and filed no later than two weeks after the date of these reasons, for decision on the papers.

Roger Giles IJ
International Judge

Jimmy Yim, SC, Kevin Lee, Eunice Lau and Ho Wah Jiang (Drew & Napier LLC) for the plaintiff;
Tan Chuan Thye, SC, Disa Sim, Jared Kok, Chiang Yuan Bo and James Kwong (Rajah & Tann Singapore LLP) for the defendant.