IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF KUALA LUMPUR
(COMMERCIAL DIVISION)
SUIT NO: WA-22NCC-178-04/2022

BETWEEN

ABS SOLUTION (S) PTE LTD
(Company No.: 201409747N) … PLAINTIFF

AND

1. LIM TECK HOE
(NRIC No.: 761116-14-5647)

2. EE KAI XIN
(NRIC No.: 850626-06-5588)
Trading as M CAN ENTERPRISE
(Company No.: 001418971U) ... DEFENDANTS

Broad Grounds

[1] In this action, the Defendants *vide* Enclosure 16 are seeking for security for costs amounting RM 200,000.00 against the Plaintiff. The Defendants essentially relied on the three following reasons in support of this application:

(i) the Plaintiff is a foreign litigant;

(ii) the Plaintiff does not have any assets in Malaysia; and

(iii) the amount of RM 200,000.00 is fair and reasonable.

[2] On the other hand, the Plaintiff premised its case on fraud and conspiracy, contending that they are the victim of fraud at the material times. The mere fact that the Plaintiff is a foreign litigant as well as not having any assets in Malaysia does not automatically entitled the Defendants to interim measures such as security for costs.

[3] The Plaintiff further cited that they have a 'reasonably good prospect of success' in this action and by virtue of the alleged fact that they have lost RM 6,637,737.00 ('**RM 6 million**') to the Defendants pursuant to the scam, this application for security for costs praying for further sum of RM 200,000.00 against them is thus oppressive in nature.

[4] However, after considering of the facts of this case, it is my considered view that this is not a proper case fit for such interim measures being granted against the Plaintiff.

Court's decision

[5] First, the law on security for costs is trite. Order 23 rule 1 of the Rules of Court 2012 ('**ROC**') provides that it is in the Court's discretion to decide on whether to grant security for costs. This discretion must be exercised in a just manner and due considerations must be given to the circumstances of the case. The aforesaid provision is worded in the following fashion:

Security for costs of action (O. 23 r. 1)

(1) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court-

(a) that the plaintiff is ordinarily resident out of the jurisdiction;

...

then, if, having regard to all the circumstances of the case, the Court thinks it just to do, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

[6] This proposition of law is also reflected in the oft-cited case of **Kasturi Palm Products v. Palmex Industries Sdn Bhd [1986] 2 MLJ 310** where Justice Mohamed Dzaiddin explained:

> Order 23 Rule 1(i) provides that the Court may order security for costs "if, having regard to all the circumstances of the case, the Court thinks it just to do so." "These words have the effect of conferring upon the Court the real discretion and indeed the Court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff may be ordered to provide security for costs. It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs." (Supreme Court Practice 1985 Vol. 1 p.384). In exercising its discretion, it is clear that the Court will have regard to all the circumstances of the case. For the circumstances, see per Lord Denning M.R. in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273.

[7] In regard to the preliminary objection, the Plaintiff's primary complaint is that there has been a considerable delay on the part of the Defendants in making this application for security for costs. According to the Plaintiff, the writ was served to the Defendants on 7.5.2022. This application for security for costs was filed on

15.8.2022 which is approximately 3 months after the date of service of writ and also approximately 2 months after the date of service of Plaintiff's reply to defence (13.6.2022).

[8] The Plaintiff then seek to draw the attention of the Court on the fact that there were five case managements being conducted on previous occasions, *viz* 7.5.2022, 24.5.2022, 27.6.2022, 5.7.2022 and 15.8.2022. The Plaintiff argues that the present Court has during the second case management directed the parties to file the interlocutory applications (if any) on or before 21.6.2022. Although extension of time was granted to the parties during the third and fourth case management to file discovery application and also third-party notice application, the dateline given was only until the end of the week of 5.7.2022. Hence, it is the Plaintiff's case that the Defendants did not signify their intention to file this application until the very last case management on the 15.8.2022. This has thus resulted in unjustified delay and also in breach of the Court's directions.

[9] With respect to the Plaintiff, it has not been shown to this Court that the Plaintiff's complaints are prejudicial to its interest in any way. This application for security for costs was in fact filed at the stage where this action is still at its infancy. Whilst the present Court is aware that there is a slight delay on the part of the Defendants in filing this application, the Court does not see any prejudice is thereby caused to the Plaintiff. Hence, the preliminary objection is dismissed.

[10] As regards to the merits of this application, the Defendants relied heavily on the arguments that the Plaintiff is a foreign litigant having no assets within the jurisdiction of this Court and the cases of **Aeronave SPA & Anor v. Westland Charters Ltd and Ors [1971] 3 All ER 531** as well as **Adarsh Pandi v. Viking Engineering Sdn Bhd [1996] 1 LNS 350** are therefore relevant to support their contention.

[11] In this regard, I must emphasise that I have no issue with the fact the Plaintiff is an entity carrying its business in Singapore and that its sole director being a Singaporean also residing in Singapore. These two facts are generally undisputed by the parties. Nonetheless, in my view, the Defendants need to furnish more convincing reasons in support of this application. Although **Aeronave (*supra*)** said that it is the usual practice of the Court to permit security for costs against a foreign litigant, this case continues to emphasise that the exercise to determine whether such interim measure is indeed necessary in a particular case is still "a matter of discretion" of the Court. The word 'discretion' is always a sensitive notion and the Court will often ensure this power is not to be exercised willy-nilly.

[12] Also, the Court in **Adarsh (*supra*)** said that such interim measure is generally more likely to be granted against the Plaintiff if they do not have any asset within the jurisdiction of this Court. However, the Court in **Adarsh (*supra*)** used the phrase 'more likely' and this does not necessarily mean the Defendant is entitled as of right to security (see **PT Karya Sumiden Indonesia v. Oceanmasters Marine Services Sdn Bhd & Anor [2016] 7 MLJ 589** per Justice

Nallini Pathmanathan). To my mind, the mere fact that the Plaintiff did not have any asset in this country must still be considered in light of the circumstances of the case.

[13] At present, I am of the view that there is nothing that prevents the Defendants from recovering the costs in the event the Plaintiff's action is dismissed. Certainly, the Defendants can seek recourse via the Reciprocal Enforcement of Judgments Act 1958 ('**REJA**') as Singapore is one of the reciprocating countries under the Act (see the First Schedule of REJA). It is not shown to me that there is a real risk or danger that the Defendants will be unable to recover the costs against the Plaintiff. In the premises, this argument must fail and I associate myself with the views expressed in the recent case of **Wei Her Pte Ltd v. Ooi Teik Seng & Anor [2021] 1 LNS 101** where the High Court said:

> [14] Thus, I hold that the Plaintiff being a foreign company and Singapore being listed in REJA would not be sufficient in itself or together constitute sufficient reasons for security for costs. These two factors without more are not sufficient.

[14] Further, I must highlight that the Defendants have apparently misconceived on the aspect of burden of proof in this security for costs application. It is submitted in paragraph 15 of its written submissions that "*the Plaintiff has not adduced any evidence at all to show that there is no risk of the Defendants being unable to recover costs from the Plaintiff*" (see similarly paragraph 7 of Defendants' Affidavit in Response).

[15] In my view, the burden is not rested on the Plaintiff to prove the negative. Instead, the burden is actually rested on the Defendants since they are the party who *assert* that there is a risk of them not being reimbursed with the costs of this action. As such, it is the Defendants' burden to furnish evidence and to convince the present Court as to why there is a risk that they will not be able to recover the costs in the event the Plaintiff's action is dismissed. They must furnish evidence to support their assertion and justify as to why security for costs is rightly demanded against the Plaintiff (see **section 101 Evidence Act 1950**). In **Kejuruteraan Taipan (M) Sdn Bhd v. Loh & Loh Construction Sdn Bhd [2007] 1 MLJ 578**, the Court explained:

> In my judgment, since it is the defendant who is applying for security for costs, therefore the defendant has the legal burden to justify to the court as why they are entitled to security for costs. It is not the Plaintiff to satisfy the court as to why they should not furnish the security for costs.

[16] As regards to the contention that the Plaintiff did not demonstrate a sound financial standing in the latest financial year, I agree with the Defendants' argument but only to a certain extent. Based on the affidavits, it seems to me that the Plaintiff indeed only furnishes income declarations for the financial year of 2018 and 2019. These income declarations do not in any manner indicate the Plaintiff is financially sound at the present juncture in year 2022.

[17] In this regard, the Plaintiff argues that they were actually able to pay a huge sum of RM 7,474,378.00 ('**RM 7 million**') to the Defendants between May to August back in year 2020 and this

demonstrates that they are ‘capable’ financially. Again, I find this RM 7 million payment only showcases their financial standing back in year 2020 and this does not reflect the Plaintiff is financially sound at the present juncture in year 2022. Hence, whilst I agree with the argument that the Plaintiff did not demonstrate their financial capability in year 2022, I must still find this point against the Defendants.

[18] In my view and at the risk of being repetitious, the Defendants are seeking for an interim measure of security for costs. As such, the Defendants actually bear the burden to prove why there is a risk that they will not be paid / they will not be able to recover the costs of the action. The Defendants must adduce evidence to prove *this assertion* as there is no authority of law that says a business entity is presumed to be not financially sound.

[19] For example, the Defendants may adduce evidence and argue that the Plaintiff is, for instance, in financial distress, in liquidation, or in whatever relevant reasons and that justify as to why there is a real risk / danger that they will not be able to recover the costs. Instead, what the Defendants had shown to me is the copy of business profile search result extracted from the Accounting and Corporate Regulatory Authority of Singapore (ACRA) where they premised their argument on the ‘sales revenue’ section which was recorded with no value.

[20] To my mind, this search result *vis-à-vis* ‘sales revenue’ does not reflect the Plaintiff’s financial standing. As pointed out to me by the Plaintiff, the reason for the ‘sales revenue’ being recorded with no

value was because they have met the 'small company' criterion for audit exemption in Singapore. As such, this business profile search result does not support the Defendants' contention on this particular point. It does not indicate that the Plaintiff is in a poor financial standing and most importantly, it does not indicate the Defendants are at the risk of not being paid with the costs of this action in the future.

[21] Hence, I am of the view that the onus of proving this particular point has not been discharged on the balance of probability by the Defendants. In fact, the cases cited to me by the Defendants, i.e. **Doree Industries (M) Sdn Bhd & Ors v. Sri Ram & Co & Ors [2007] 1 MLJ 722** and **Tan Bon Kiat v. Lau Kok Guan @ Low Kok Guan & Ors [2020] MLJU 1434** actually fortified my findings particularly on the aspect of burden of proof concerning this particular argument. In **Doree Industries (*supra*)**, it says:

> [13] **Once it is established that it will be unable to pay the costs**, the onus is on the plaintiff to satisfy the court why security for costs should not be ordered.
>
> (*Emphasis added is mine*)

[22] At present, it is the Defendants who at the outset actually failed to prove on the balance of probability that there is a risk that they will be unable to recover the costs if the Plaintiff's action is dismissed. Significantly, there is nothing to suggest that the Plaintiff will not furnish costs if they failed in their action against the Defendants. When it is not established that they (the Defendants) do not suffer such risk of "being unpaid", the burden of proof will never be shifted

to the Plaintiff. Therefore, based on the aforesaid findings, I am of the view that Defendants' argument must fail.

[23] Besides, the Defendants claimed that the sum of RM 200,000.00 as security for costs is fair and reasonable. It is the Defendants' case that the Plaintiff's claim is valued at RM 6 million in the main suit and as such, this demand of RM 200,000.00 for security for costs does not in any manner signify an attempt to stifle the Plaintiff's action. In fact, there is no evidence to suggest that the Plaintiff is unable to raise funds to meet the demand for security for costs. With respect, I disagree.

[24] At the outset, it is indeed the burden of the Plaintiff to prove that why this demand for security for costs is one which stifles its claim (see **Customer Loyalty Solutions Sdn Bhd v. Advance Information Marketing Bhd & Anor [2017] MLJU 1919**). The Plaintiff needs to convince the Court that the application herein seeking for security for costs only serves to stifle its claim. In light of this, the Plaintiff seeks to highlight to the Court that their action against the Defendants is a genuine claim and there is a strong likelihood that they will succeed in its claim. As such, this application for security for costs aims to stifle Plaintiff's action.

[25] Undoubtedly, I must reiterate that I am not incline to deal with the merits of the case at this juncture since this application sought to deal with the matter concerning security for costs (see **Taimoku Corporation v. Mutiara Motors Performance Products Sdn Bhd [2020] MLJU 568**). However, in the exercise of its discretion in a security for costs application, the Court is required to consider

the circumstances of the particular case and this may include assessing the Plaintiff's case *in limine*. In **Macon Charter BV v. Inai Kiara Sdn Bhd & Ors [2017] MLJU 467**, the High Court explained:

> [15] In order to ascertain the relevant considerations for the Court to take into account in order to make a finding whether it is just or not to order security for cost, the Court in *Luminous Crossroads Sdn Bhd v Lim Kong Huat Construction* [2002] 5 CLJ 100 had applied the case of *Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd* (that was also referred to by Justice Dzaiddin in *Kasturi Palm Products*), which held that:
>
> > "The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for *Triplan* helpfully suggests some of the matters which the court might take into account, **such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively — so as to try to stifle a genuine claim.** It would also consider whether the company's want of means has been brought about by any conduct of the defendants, such as delay in payment or delay in doing their part of the work." (emphasis added)

[26] At present, I am of the view that the Plaintiff's claim in this action is substantiated with basis. Although the Defendants alleged that the Plaintiff fails to plead some material facts which are in favour of the

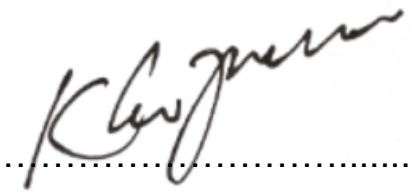
Defendants, the extent of the viability of the defence will be dealt with at length later during the trial. Likewise, the Plaintiff bears the burden to establish their claim during the trial.

[27] However, without delving much into the merits of the case, suffice to say that it seems to me there is a certain sum of monies being paid into the Defendants' account and no goods are being delivered to the Plaintiff. Based on the cause papers filed at this early stage of the proceedings as well as the exhibits in the present application for security for costs, it appears to me that the Plaintiff's action is a genuine claim. There are invoices which are in support of Plaintiff's allegation and there appears to be admissions in the statement of defence that monies were being received by the Defendants. On the contrary, the Defendants' assertion that they are a mere intermediary/introducer in the entire transaction is not supported with any evidence in the affidavit. As such, the argument of 'likelihood of success' by the Plaintiff is not a bare assertion or one which is without basis.

[28] Hence, in light of the foregoing, it seems to me that the Plaintiff has allegedly 'lost' a sum of RM 6 million and is now being asked to further furnish a sum of RM 200,000.00 as the security for costs. To my mind, I am inclined to agree with the Plaintiff that this application has the tendency to "oppress" and "stifle" the Plaintiff's genuine claim.

[29] In the premises, based on, *inter alia*, the above reasons, it is my judgment that the Defendant's application for security for costs is dismissed with costs fixed at RM 5,000.00 subject to allocator.

Dated on the 11th day of October 2022.



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KHO FENG MING

Registrar

High Court of Malaya

Kuala Lumpur, Commercial Division

NCC2

COUNSEL:

1. Mr. Jonathan Khaw for the Plaintiff
   Messrs. Chern & Co.
2. Ms. Vivien Fan together with Mr. Raymond Mah (Ms. Thineshvary-pupils in Chamber) for the Defendants
   Messrs. Mah Weng Kwai & Assoc.

CASE REFERENCE:

1. *Adarsh Pandi v. Viking Engineering Sdn Bhd* [1996] 1 LNS 350
2. *Aeronave SPA & Anor v. Westland Charters Ltd and Ors* [1971] 3 All ER 531
3. *Customer Loyalty Solutions Sdn Bhd v. Advance Information Marketing Bhd & Anor* [2017] MLJU 1919
4. *Doree Industries (M) Sdn Bhd & Ors v. Sri Ram & Co & Ors* [2007] 1 MLJ 722
5. *Kasturi Palm Products v. Palmex Industries Sdn Bhd* [1986] 2 MLJ 310
6. *Kejuruteraan Taipan (M) Sdn Bhd v. Loh & Loh Construction Sdn Bhd* [2007] 1 MLJ 578
7. *Macon Charter BV v. Inai Kiara Sdn Bhd & Ors* [2017] MLJU 467
8. *PT Karya Sumiden Indonesia v. Oceanmasters Marine Services Sdn Bhd & Anor* [2016] 7 MLJ 589
9. *Taimoku Corporation v. Mutiara Motors Performance Products Sdn Bhd* [2020] MLJU 568
10. *Tan Bon Kiat v. Lau Kok Guan @ Low Kok Guan & Ors* [2020] MLJU 1434
11. *Wei Her Pte Ltd v. Ooi Teik Seng & Anor* [2021] 1 LNS 101

LEGISLATION REFERENCE:

1. Order 23 rule 1 of the Rules of Court 2012
2. Reciprocal Enforcement of Judgments Act 1958 (Schedule 1)
3. Section 101 Evidence Act 1950