

**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE**

[2023] SGHC(I) 15

Originating Application No 2 of 2023 (Summons No 13 of 2023)

Between

(1) W. Power Group EOOD

... Claimant

And

(1) Ming Yang Wind Power
(International) Co. Ltd

... Defendant

JUDGMENT

[Civil Procedure — Costs — Security]

TABLE OF CONTENTS

THE NATURE OF THE PROCEEDINGS	1
THE RELEVANT RULES AND LEGISLATION	3
THE PARTIES' SUBMISSIONS	4
CONSIDERATION.....	8
THE QUANTUM OF SECURITY	9
CONCLUSION.....	11

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W Power Group EOOD
v
Ming Yang Wind Power (International) Co Ltd

[2023] SGHC(I) 15

Singapore International Commercial Court — Originating Application No 2 of 2023 (Summons No 13 of 2023)

Thomas Bathurst IJ
4 September 2023

29 September 2023

Judgment reserved.

Thomas Bathurst IJ:

1 By a summons filed on 30 May 2023 Ming Yang Wind Power (International) Co. Ltd (“**the defendant**”) the defendant in proceedings SIC/OA 2/2023 sought an order that the claimant, W. Power Group EOOD (“**the claimant**”) provide security for its costs of the proceedings. The defendant sought security of S\$80,000 to cover its costs up to the commencement of the trial.

The nature of the proceedings

2 The claimant is a company registered in Bulgaria. It described itself in the Statement of Claim as an international developer engaged in investing and developing wind farms in Bulgaria, Romania and other countries.

3 The defendant is a Chinese company incorporated in Hong Kong and is a wind turbine manufacturer engaged in the design, manufacture, construction, sales and services of wind turbines in the global market.

4 The claimant alleges that the claimant and defendant entered into a joint venture agreement on 3 July 2011 to establish a joint venture company for the purpose of developing two wind farm projects. It claimed that pursuant to the joint venture agreement, a joint venture company, MW Wind Power OOD (“**MW Wind Power**”) was established, the claimant holding one third of the shares in the company and the defendant holding the remaining two thirds.

5 The claimant claims the defendant breached its obligation under the joint venture agreement essentially by failing to secure financing for the one of the two wind farm projects (“**Project 2**”) and by withdrawing a performance guarantee for the same project. It claims as a result it was unable to exercise its rights under the joint venture agreement to sell its shares in the joint venture company after the second year of its operation at a price sufficient to pay all principal and accumulated interest of the joint venture company's borrowings. It claims as a result of the defendant's breach of the joint venture agreement, it suffered a loss of profits in the amount of €37.5 million.

6 The defendant has filed a somewhat detailed defence to the claim. Broadly speaking it states that following changes to the legal and regulatory regime introduced by the Bulgarian government which negatively affected renewable energy projects such as Project 2, Project 2 was no longer viable and the parties agreed not to proceed with it sometime in 2012. It denies any breach of the joint venture agreement and asserts the claimant is estopped from enforcing the agreement and has waived its right to do so. It also claims that the

alleged causes of action are barred by s 6(1) of the Limitation Act 1959 and the claimant does not have standing to sue in respect of any alleged breaches of the joint venture agreement in relation to Project 2.

7 The above is an extremely broad summary of the claims which have been made and the defences to it but it is sufficient for the purpose of the present application.

The relevant rules and legislation

8 This being a case transferred to the Singapore International Commercial Court (the “**SICC**”), the parties agreed that the domestic Rules of the Supreme Court (*ie*, the Rules of Court 2021) apply. The relevant rule is Order 9 r 12 which for relevant purposes is in the following terms:

Security for costs

12.—(1) The defendant may apply for security for the defendant's costs of the action, if the claimant —

(a) is ordinarily resident out of the jurisdiction;

...

(2) If the claimant is a company, section 388 of the Companies Act also applies.

Section 388 of the Companies Act 1967 (2020 Rev Ed) (the “***Companies Act 1967***”) provides as follows:

Security for costs

388.—(1) Where a corporation is claimant 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 the defendant's defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

The parties' submissions

9 The defendant made five points in support of its application. The first was that the claimant was ordinarily resident outside the jurisdiction so what it described as the threshold in Order 9 r 12(1)(a) was met.

10 There was no dispute between the parties that the claimant was resident outside the jurisdiction. However, there was a dispute as to the effect. The defendant accepted the Court retains a discretion to refuse to grant security, even if that threshold was met but submitted that if the factors weighing for and against the grant of security were otherwise evenly balanced, then in those circumstances security should be granted. It referred to the decision of the Court of Appeal in *Jurong Town Corporation v Wishing Star Ltd* [2004] 2 SLR(R) 427 at [14] (“*Jurong Town Corporation*”) in support of that proposition.

11 By contrast the claimant submitted that *Jurong Town Corporation* was a domestic case and similar principles do not apply in cases where neither of the parties have a presence in Singapore. In that context the claimant referred to the decision of the High Court in *Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017 (“*Zhong Da*”). That case involved a challenge under s 24 of the International Arbitration Act 2002 (Cap 143A, 2002 Rev Ed) (“*IAA*”) to set aside a final award in an arbitration at the Singapore International Arbitration Centre, the defendant in the arbitration proceedings being an Indian company and the claimant being incorporated in China. The Court observed that in the particular circumstances in agreeing to the foreign arbitral forum, the defendant should have been mindful and must have been taken to have agreed that any future order to set aside the arbitral award would take place outside the jurisdiction in which the parties were resident. The Court stated the situation was different to that considered in *Jurong Town Corporation*

and held in those circumstances (*ie*, in a case where parties seek relief under the *LAA*) where the factors for and against the granting of security were evenly balanced, it would ordinarily be just to dismiss the application for security: *Zhong Da* at [13].

12 As I am of the view that the factors are not evenly balanced it is unnecessary to resolve this issue.

13 The second matter relied upon by the defendant was that the evidence demonstrated the impecuniosity of the claimant. Counsel for the claimant referred to the witness statement of Mr Jonathon Mann (“**Mr Mann**”) filed on behalf of the claimant in which Mr Mann referred to the claimant's audited financial statements for 2012 which showed the claimant was entitled to receivables of up to BGN 1,141,000 (approximately S\$860,000) which he said far exceeded the costs of the proceedings.¹

14 Counsel for the defendant pointed to the financial statements which showed the company had liabilities which exceeded the amount of the receivables and its cashflow statement for that year which demonstrated that as at the end of 2012 it was not carrying out any commercial activities. In the defendant's written submissions reference was also made to the fact that in March 2018, March 2019 and March 2020, declarations were made by Mr Mann

¹ Witness Statement of Jonathan Mann dated 30 June 2023 at para 8; Witness Statement of Ye Fen dated 30 March 2023 at Exhibit YF-8 (exhibiting a copy of the claimant's financial statement for the year 2012 with English translation).

on behalf of the claimant under the Bulgarian Accountancy Act declaring that the claimant had not carried out any business activities in those years.²

15 Counsel for the defendant also submitted there was no basis for stating that the receivables shown in the 2012 accounts, the only ones provided, are still due to the claimant.

16 The defendant next submitted that it would not be able to enforce a judgment for costs against the claimant without considerable difficulty, uncertainty, risk or delay. In its written submissions, it referred to the uncertainty of enforcing a judgment in Bulgaria. At the hearing counsel for the defendant noted the claimant's reliance on the provisions of Article 8 of the Hague Convention on Choice of Court Agreements 2005 (the “***Choice of Court Convention***”) to which both Singapore and Bulgaria are parties and which was said by the claimant to significantly ameliorate difficulties of enforcement. Counsel for the defendant submitted that such an arrangement would be meaningless if the claimant had no assets against which any judgment could be enforced.

17 Finally the defendant submitted there had been no delay in making the application so as to disentitle it to security. He pointed out that the statement of claim was not served until mid-September 2022 and the proceedings were then delayed whilst the parties were asked to consider transfer to the SICC, with such transfer being ordered on 7 March 2023. He submitted the defendant had

² Witness Statement of Ye Fen dated 30 May 2023 at paras 17–21 and at Exhibits YF-4 (exhibiting the declarations made by Mr Mann on behalf of the claimant under the Bulgarian Accountancy Act) and YF-5 (exhibiting a copy of the Bulgarian Accountancy Act).

indicated its intention to request security at the first case management conference called on 2 May 2023.

18 The claimant sought to place some reliance on the merits of the claim, although as counsel for the claimant stated there was no need for any detailed examination of the facts or circumstances. Counsel for the claimant noted that there was no notice of termination of the joint venture agreement, rather it was alleged that Project 2 was cancelled. He referred to the evidence of Mr Ye Fen at paragraph 24 of his first witness statement that the defendant's 66% shareholding in MW Wind Power was transferred to a company Ming Yang Holdings (Singapore) Pte Limited on 9 September 2015³ and to paragraph 11(3) of Mr Ye Fen's second witness statement referring to an email of 28 April 2017 from Mr Simon Yu on behalf of the defendant to Mr Mann stating that the Ming Yang Group was considering closing Ming Yang Holdings (Singapore) Pte Limited and setting up a brand new subsidiary in Cyprus.⁴ Although it was not made entirely clear, it appears to be contended that such conduct was inconsistent with the joint venture agreement being terminated.

19 The claimant also contended that it was a special purpose vehicle with only one purpose, namely, to execute the joint venture agreement. Counsel for the claimant submitted that if there was a breach of the agreement and if the claimant had no other activities, it would only be natural that its balance sheet "would indeed be in the red". He submitted that if the impecuniosity was caused by the defendant, an application for security should not be used to stultify the claimant's claim.

³ Witness Statement of Ye Fen dated 30 May 2023 at para 24.

⁴ Witness Statement of Ye Fen dated 7 July 2023 at para 11(3).

20 The claimant finally contended that the defendant's delay in bringing the application for security meant that the application should not be granted.

Consideration

21 In light of the evidence it is clear that the requirements of s 388 of the *Companies Act 1967* have been made out. Having regard to the 2012 accounts, the claimant was at that time insolvent and the evidence would suggest that it has not traded since that time. As counsel for the claimant properly conceded at the hearing, in these circumstances the fact that Bulgaria is a party to the *Choice of Court Convention* provides no assistance to the claimant.

22 Nor in my submission has there been any substantial delay in making the application such as to deprive the defendant of its right to security. The only substantive steps which took place prior to the application for security was the filing of the statement of claim and defence and as counsel for the defendant pointed out, the claimant was notified of the application at the first case management conference in the SICC. In these circumstances such delay as there was should not deprive the defendant of security if it was otherwise entitled to it.

23 The only issue which remains is whether security should not be granted because the claimant's case is a meritorious one and more importantly the provision of security would stifle a legitimate claim. Although no authority was cited to me, I am prepared to accept that if it was established that the impecuniosity of the claimant was caused by the conduct of the defendant or if the application was used to stifle a legitimate claim, then security should not be awarded (see *Peng Ann Realty Pte Ltd v Liu Cho Chit and others* [1992] 3 SLR(R) 178 and *Sembawang Engineering Pte Ltd v Priser Asia Engineering*

Pte Ltd [1992] 2 SLR 806; see also *Singapore Civil Procedure 2021* (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021) at para 23/3/5).

24 The difficulty in the present case is that no evidence has been brought to show, on the face of the materials before the court, that the claimant has a good chance of succeeding much less that the claimant's impecuniosity was caused by the conduct of the defendant in the transaction the subject of the proceedings. All that has been done in the claimant's submissions is to repeat the allegations in the statement of claim. Further, although it was suggested in the submissions that the claimant was a special purpose vehicle, there is no direct evidence to support that assertion. Indeed, contrary to that assertion the claimant in its statement of claim stated that it is an international developer engaged in investing in and developing wind farms in Bulgaria, Romania and other countries.⁵

25 In these circumstances it is my view that security should be ordered. In reaching this conclusion, I should add that in my opinion this is not a case where the reasons for and against the grant of security are evenly balanced. It is therefore unnecessary to consider whether if that was not in fact the case, there should be a grant of security.

The quantum of security

26 The defendant seeks security in the sum of S\$80,000 up to the commencement of the trial. The defendant relied on a skeletal bill of costs and disbursements annexed to the statement of Mr Ye Fen which estimated the

⁵ Statement of Claim at para 4.

defendant's costs and disbursements up to the time of trial at S\$325,000.⁶ Counsel for the defendant also referred to the fact that in the case management bundle the claimant estimated its costs up to the time of the case management conference at S\$40,000 and its overall costs if the proceedings go to trial at S\$500,000 (excluding GST). The defendant stated in the case management bundle that its costs up to the time of the case management conference amounted to S\$95,000 (excluding GST).

27 The claimant in its written submission submitted it was for the defendant to put before the Court sufficient material to enable the Court to decide the quantum of the security for costs. It submitted the estimate of S\$325,000 up to trial was pure speculation. I agree that it is only an estimate but I have no reason to doubt that it was not the best estimate that could be given at the present time.

28 It was not disputed that the Court ordered that the costs incurred prior to the transfer to the SICC would be based on the General Division cost regime while costs post-transfer would be determined on the SICC regime of costs. Having regard to the different manner in which costs are assessed in proceedings before the SICC (see *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96) the costs which would be awarded in favour of a successful party would likely be higher than if the whole of the proceedings were heard in the General Division.

29 Appendix G to the Supreme Court Practice Directions 2021 provides guidance for assessing party and party costs for trials in the General Division.

⁶ Witness Statement of Ye Fen dated 30 May 2023 at para 35 and Exhibit YF-10 (exhibiting the skeletal bill of costs prepared by the defendant's solicitors).

For matters such as the present, the guidance provides for a range for pre-trial costs of between S\$25,000 and S\$70,000.

30 Taking all the matters to which I have referred into account and having regard to the complexity of the matter as it appears from the pleadings, in my view the appropriate amount to order up to the time of the trial is S\$70,000 with the defendant having liberty to apply for further and subsequent security if necessary.

Conclusion

31 Accordingly, I would make the following orders:

- (1) the claimant does, within seven (7) days from the date of this Order provide security in the sum of S\$70,000 for the defendant's costs up to the commencement of trial;
- (2) the said security for costs referred to in paragraph (1) above be by way of (a) payment into court; (b) the provision of a banker's guarantee issued by a bank licensed by the Monetary Authority of Singapore to transact banking business in Singapore on such acceptable wording to the defendant; (c) solicitors' undertaking on such acceptable wording to the defendant; or (d) in such manner as this Honourable Court may direct or order;
- (3) pending the claimant's provision of the said security referred to in paragraph (1), all further proceedings in this action be stayed other than the giving of such security;

- (4) the defendants be at liberty to apply for further and subsequent security from the claimant in relation to the action, if necessary;
- (5) the costs of and incidental to this application be paid by the claimant to the defendant; and
- (6) direct the matter be listed for a further case management conference following the provision of such security.

Thomas Bathurst
International Judge

Han Wah Teng (CTLC Law Corporation) for the claimant;
William Ong Boon Hwee, Ivan Lim Jun Rui and Wong Pei Ting
(Allen & Gledhill LLP) for the defendant.
