IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF KUALA LUMPUR, MALAYSIA
ORIGINATING SUMMONS NO.: WA-24C(ARB)-7-02/2021

BETWEEN

CRCC MALAYSIA BERHAD
(Company No.: 1022568-D) ... PLAINTIFF

AND

DSG PROJECTS MALAYSIA SDN BHD
(Company No.: 200901037594) (880725-V) ... DEFENDANT

GROUNDS OF JUDGMENT

Introduction

[1] This is an application by the Plaintiff pursuant to s 19H of the Arbitration Act 2005 ('**AA 2005**'); O. 7, O. 28, O. 45 r. 6 and O. 92 r. 4 of the Rules

of Court 2012 ('**RoC 2012**') and/ or the inherent jurisdiction of the Court for, *inter alia*, the following relief:

(a) that the decision by the learned Arbitrator, Mr. Chong Thaw Sing ('**Arbitrator**') dated 14.12.2020, pursuant to the application for security for costs under s 19(2)*(e)* AA 2005 by the Plaintiff as the claimant in the arbitration proceedings in ordering the Defendant as the respondent in the said proceedings to deposit RM250,000.00 to be held jointly by the parties' solicitors ('**Interim Measures**'), be enforced as if it is a judgement or Order of the High Court;

(b) that in the event the above prayer is allowed, the Defendant shall pay security for costs of RM250,000.00 to the Plaintiff's solicitors to be held as stakeholders within 14 days from the date of the Order; and

(c) that if the Defendant fails to adhere to the Order, enforcement proceedings may be taken against the four directors of the Defendant so as to compel them to adhere to the Order.

[2] The cause papers which were filed in this application are as follows:

(a) the Plaintiff's Originating Summons ('**O.S.**') dated 10.2.2021 (encl. 1);

(b) the Affidavit In Support affirmed by Tan Kean Cheong, the Plaintiff's Manager on 10.2.2021 (encl. 3);

(c) the Affidavit in Reply ('**AIR**') affirmed by Luke Furler, the Defendant's Director on 1.3.2021 and 10.3.2021 (encls. 4, 5 and 6);

(d) the Plaintiff's AIR affirmed by the same deponent on 16.3.2021 (encl. 7);

(e) the Defendant's AIR No. 2 affirmed by the same deponent on 25.3.2021 (encl. 8); and

(f) the Plaintiff's Supplementary Affidavit affirmed by the same deponent on 16.4.2021 (encl. 18) setting out the chronology of events as agreed by the parties' solicitors in **"Exhibit-1"** and as directed by the Court on the hearing date.

[3] Having considered the cause papers and the parties' written and oral submissions, I had dismissed the Plaintiff's application with costs of RM4,000.00, subject to allocator.

[4] The Plaintiff has lodged an appeal against the decision of this Court and I now provide my full reasons.

Background Facts

[5] By a Letter of Award dated 15.6.2015 ('**LoA**'), the Plaintiff has appointed the Defendant as the nominated sub-contractor for "*The Construction And Completion Of Interior Fitout Works For Retail*" for the project known as "*Cadangan Pindaan Kepada Pelan Bangunan (Rujukan BP.T3.20072009) Bertarikh 28.01.2009 Kepada Cadangan Pembangunan Bercampur Yang Terdiri Dari 1 Blok Pangsapuri, Pangsapuri Servis Dan Hotel Tingkat 65 Tingkat Yang Mengandungi 3 Tingkat Basemen Tempat Letak Kereta, 1 Tingkat Basemen Ruang Niaga Dan Servis, 1 Tingkat Lobi Utama Dan Ruang Niaga, 6 Tingkat Podium Ruang Niaga, Tempat Letak Kereta Dan Kemudahan Hotel, 1 Tingkat Podium Kemudahan Rekreasi (Hotel, Pangsapuri Servis Dan Pangsapuri), 2 Tingkat Kemudahan Rekreasi Dan Ruang Mekanikal (Pangsapuri Dan Pangsapuri Servis), 10 Tingkat Hotel (190 Bilik), 16 Tingkat Pangsapuri Servis (160 Bilik) Dan 29 Tingkat Pangsapuri (128 Unit) Di Atas Lot 230 (Asal Lot 35), Seksyen 58, Jalan Lumba Kuda, Off Jalan Ampang Dalam Bandaraya Kuala Lumpur*" for the lump sum price of RM15,988,000.00.

[6] On 15.1.2020, the Plaintiff wrote to the Defendant alleging that there was delay and/ or slow progress in the completion of the Defendant's work despite the numerous reminders to expedite the same. According to the Plaintiff, there is a 569 days delay for the completion of the retail Mock-up and 227 days delay for the completion of Section 1 (Retail). The Plaintiff claimed that pursuant to Clause 13.0 of the LoA, the Defendant was liable to pay liquidated damages ('**LD**') in the sum of RM2,845,000.00 for the retail Mock-up and RM11,350,000.00 for Section 1 (Retail).

[7] The Defendant refused to pay the LD and subsequently filed an application for a Judicial Management Order at the Shah Alam High Court on 20.1.2020 vide O.S. No. BA-28JM-1-01/2020 ('**JM Application**').

[8] On 24.6.2020, the Plaintiff obtained leave from the Shah Alam High Court to initiate or proceed an arbitration proceeding against the Defendant. On the next day, the Plaintiff initiated the arbitration

proceeding against the Defendant. The hearing of the arbitration was fixed on 28.6.2021 to 2.7.2021.

[9] Then, on 23.9.2020, the Defendant's solicitors wrote to the Plaintiff's solicitors to inform that the Plaintiff had filed an application for leave to convene creditors' meetings and for a restraining order to restrain legal proceedings against the Defendant under ss 366 and 368 of the Companies Act 2016 [*Act 777*] ('**CA 2016**') vide O.S. No.: WA-24NCC-441-09/2020 ('**O.S. No. 441**') at the Kuala Lumpur High Court.

[10] On 1.10.2020, the Defendant's solicitors sent another letter to the Plaintiff's solicitors, this time to inform that the Defendant had obtained order in terms of the application in O.S. No. 441 on 25.9.2020. In the light of the said order, the Defendant had requested for the JM Application to be withdrawn and the Court had accordingly struck out the JM Application on 29.9.2020.

[11] On the same day i.e. 1.10.2020, the Plaintiff made an *Application For An Order Of Interim Measures (Section 19(2)(e) of the Arbitration Act*

2006)" to move the Arbitral Tribunal to make an order for security for costs in the sum of RM2,135,000.00 or any other amount that the Tribunal deems just and proper to be paid by the Defendant into the joint account held by the parties' solicitors within 14 days from the date of the order ('**Security for Costs Application**').

[12] The Plaintiff's solicitors submitted their written submissions dated 15.10.2020 to the Tribunal, to which the Defendant's solicitors had replied on 6.11.2020, with regards to the Security for Costs Application.

[13] The Arbitrator had duly considered the submissions and on 14.12.2020, he delivered an 18-page decision containing the following **Ruling**:

> "*29. In the circumstances of the fact narrated above, the Tribunal is minded to order the Respondent to deposit* ***RM 250,000.00*** *to be held jointly by the solicitors of the Claimant and the Respondent.*
>
> *30. The parties, however, are given the liberty to make another application to the Tribunal either to revoke or to*

enhance, the security should there be material changes in the Respondent's company affair after the Scheme of Arrangement is approved by the creditors or if there is material change in the status of the Respondent that could jeopardize this arbitral proceeding.".

[14] On 6.1.2021, the Plaintiff's solicitors wrote to the Defendant's solicitors stating that the banks have informed that it is not permissible for two law firms or two unrelated individuals to open a joint bank account due to the banks' policy. The Plaintiff proposed for the security for costs to be deposited to the Plaintiff's solicitors account to be held as a stakeholder. The Defendant did not reply to the letter.

[15] This was followed by a letter from the Plaintiff's solicitors to the Tribunal dated 25.1.2021 to explain the situation and to request the Tribunal to invoke its power under Article 26(5) of the UNCITRAL Arbitration Rules 2010 to modify the Ruling by amending the mode of payment of the security for costs and to insert a timeline for the Defendant to make such payment. The Plaintiff had also sought an unless order in respect

of this matter and for the Defendant's counterclaim to be struck out should the Defendant fail to comply within the time stipulated.

[16] On 1.2.2021, the Tribunal sent an e-mail to the Defendant's solicitors to remind them that the Defendant has yet to comply with the Ruling as well as the Tribunal's directions since 20.11.2020 for the Defendant to pay the 2nd Security. The Arbitrator said, among others, that "*It is imperative that I remind you that as the counsel to the respondent you are duty bound to bring the directions from the tribunal to your client's attention and implementation. The Claimant could enforce the Tribunal ruling by way of court action if your client is unwilling to comply with the ruling. But the Tribunal's 2nd security ought to be paid within 30 days.*".

[17] Since the Defendant still failed and/ or refused to comply with the Ruling, the Plaintiff filed the instant application on 10.2.2021 to enforce the Tribunal's decision under the provisions as cited in the O.S..

[18] On 15.3.2021, the Plaintiff's solicitors wrote to the Tribunal to apply, pursuant to, among others, para 30 of the Ruling, for certain reliefs

which tantamount to a modification of the terms of the Interim Measures (‘**Modification Application**’).

[19] At the case management (‘**CM**’) on 19.3.2021 before the Tribunal, the Plaintiff withdrew the Modification Application.

The Plaintiff’s Submissions

[20] The Plaintiff asserted that it is its statutory right to file the application for the enforcement of the Interim Measures so that it can become binding. The reasons put forth in support of the application is due to the failure and refusal of the Defendant to comply with the Interim Measures despite numerous reminders by the Plaintiff and the Arbitrator. In fact, the Tribunal has directed the Plaintiff to file the instant application in the court.

[21] On the issue raised by the Defendant that the Tribunal did not specify the deadline by which the security for costs must be paid, it was

submitted with reference to sub-s 54(2) of the Interpretation Acts 1948 and 1967 [*Act 388*] and *Damai Motor Kredit Sdn Bhd & Anor v Kementerian Kerja Raya Malaysia* [2014] MLRAU 371 that, as the Ruling is silent about the time prescribed to do an act, the act shall be done within a reasonable time or with all convenient speed.

[22] With regards to all the objections raised by the Defendant, Ms. Eunice Kwong argued that these are devoid of merits and are an afterthought.

The Defendant's Submissions

[23] The Defendant's counsel submitted at length on the history of the amendments to the AA 2005, especially vide ss 7 and 8 of the Arbitration (Amendment) (No. 2) Act 2018 [*Act A1569*] which amended s 19 AA 2005 and inserted the new ss 19A to 19J, respectively. These new provisions are said to be similar to Articles 17 to 17J of the *UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006* ('**UNCITRAL Model Law**').

[24] The crux of the Defendant's arguments in opposing the Plaintiff's application was summarised by the learned counsel as follows:

(a) the enforcement of the Interim Measures is incompatible with the powers conferred upon the Court as provided under subpara 19I(1)*(b)*(i) AA 2005 in that the enforcement of the Interim Measures is contrary to the powers of the Court to grant security for costs, and contrary to the substantive law on security for costs in Malaysian law;

(b) the enforcement of the Interim Measures is contrary to public policy. Applying subpara 19I(1)*(b)*(ii) read together with subpara 39(1)*(b)*(ii) AA 2005, enforcement of the Interim Measures is contrary to the fundamental principles of law on security for costs, and justice for a respondent in a security for costs claim;

(c) in relation to prayer 2 of the O.S., the Plaintiff cannot alter or vary the conditions of the Interim Measures in the manner that the

Plaintiff has sought to do vide the present application. Such an application for variation should be addressed to the Tribunal. In this regard, the Plaintiff had in fact requested the Tribunal to vary the Interim Measures, only to subsequently withdraw its request at the last moment; and

(d) in relation to prayer 3 of the O.S., if the Court is minded to grant the order as sought by the Plaintiff, the Court cannot impose a penal notice in the order for enforcement as it is contrary to the Interim Measures.

Findings of the Court

[25] Section 19 AA 2005 empowers the arbitral tribunal to order interim measures as it deems necessary in a particular case and paras 19(2)*(a)* to *(e)* prescribe the categories of interim measures that can be the subject of such an order. The relevant excerpt of the provision for present purposes is shown below:

"***19. Power of arbitral tribunal to order interim measures***

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to –

…

(c) provide a means of preserving assets out of which a subsequent award may be satisfied;

…

(e) provide security for the costs of the dispute.".

[26] Para 19(2)*(e)* as quoted above is the equivalent of the former para 19(1)*(a)* AA 2005 and is an additional provision which is not found in

Article 17 of the UNCITRAL Model Law. Although security for costs could be encompassed under para 19(1)*(c)* AA 2005, the legislature has seen it fit to include an express provision for this form of interim relief to dispel any doubt that the arbitral tribunal is empowered to issue orders for security of costs as are applicable in litigation (see *UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 & 2018) and the AIAC Arbitration Rules*, Datuk Professor Sundra Rajoo & Special Contributor Dr. Thomas R. Klötzel, Sweet & Maxwell, 2019 at pp 311 and 321).

[27] Apart from the inherent powers of the Court, the Plaintiff's application is premised on s 19H of the AA 2005 and O. 7, O. 28, O. 45 r. 6 and O. 92 r. 4 of the RoC 2012.

[28] Section 19H of the AA 2005 provides as follows:

> "***Recognition and enforcement***
>
> ***19H.*** *(1) Subject to the provisions of section 19I, an interim measure issued by an arbitral tribunal shall be recognized as*

binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall immediately inform the court of any termination, suspension or modification of that interim measure.

(3) The court where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.".

[29] In the same textbook *UNCITRAL Model Law & Arbitration Rules* (*supra*, at pp 346 - 347), the learned author provided an overview of s 19H AA 2005 which begins with the following passage:

"*19H.1 Section 19H of the AA 2005 covers the recognition and enforcement of interim measures and preliminary orders. It reproduces Article 17H of the UNCITRAL Model Law verbatim, save for section*

19H(2) which replaces the word "promptly" with "immediately", and section 19H(3) which replaces "court of the State" with "High Court".

19H.2 *Prior to the 2018 Amendments, the former section 19(3) of the AA 2005 provided that any orders made pursuant to the former section 19 may be enforced under the provisions of sections 38 and 39 of the AA 2005. This means that the rules applicable to recognition and enforcement of awards applied to interim measures issued by an arbitral tribunal.*

19H.3 *The 2018 Amendments introduced specific provisions to the AA 2005 on the recognition and enforcement of interim measures. This is of some importance in the context of emergency arbitrator proceedings. Prior to the 2018 Amendments, interim measures issued by emergency arbitrators were not subject to recognition and enforcement. Indeed, emergency arbitrators were not even mentioned in the AA 2005. As noted above, the 2018 Amendments introduced the concepts of emergency arbitrator to the AA 2005 by modifying the definition of an "arbitral tribunal".*".

[30] Sub-s 19H(1) AA 2005 is expressed to be subject to the provisions of s 19I which prescribes the grounds for refusing the recognition or enforcement of an interim measure. For purposes of the arguments put forth by the Defendant, attention is drawn to subparas 19I(1)*(b)*(i) and (ii) and subpara 39(1)*(b)*(ii) of the AA 2005 which are quoted below:

> "***Grounds for refusing recognition or enforcement***
>
> ***19I.*** *(1) Recognition or enforcement of an interim measure may be refused only –*
>
> *…*
>
> *(b) if the High Court finds that –*
>
> *(i) the interim measure is incompatible with the powers conferred upon the Court, but the Court may decide to reformulate the interim measure to the extent necessary, without modifying its substance, to adapt it to the Court's powers and procedures*

for the purposes of enforcing that interim measure; or

(ii) any grounds set forth in subparagraph 39(1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

…

Grounds for refusing recognition or enforcement

39. *(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked –*

(b) if the High Court finds that –

(i) …

(ii) the award is in conflict with the public policy of Malaysia.".

[31] The wordings of s 19I AA 2005 "*… more or less expresses Article 17I of the UNCITRAL Model Law, save for minor in-house drafting stylistic*

changes" and the grounds of refusal as set out in the same provision "*… follow those contained in Article 36 of the UNCITRAL Model Law, Article V of the New York Convention as well as section 39 of the AA 2205. This means that the case law pertaining to enforcement refusals under section 39 of the AA 2005 may provide guidance in determining whether a refusal of the recognition or enforcement of an interim measure will be justified.*" (see *UNCITRAL Model Law & Arbitration Rules* (*supra*, at p 351).

[32] Subpara 19I(1)*(b)*(i) of the AA 2005 is similar to Article 17I(1)(b)(i) of the UNCITRAL Model Law which reads:

> "*Article 17I (1) Recognition or enforcement of an interim measure may be refused only:*
>
> …
>
> *(b) If the court finds that:*
>
> *(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim*

measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance;".

[33] The Defendant's counsel had painstakingly traced the discussions by the UNCITRAL Working Group on Arbitration which ultimately led to the above formulation of Article 17I(1)(b)(i) so as to offer a proper understanding of our subpara 19I(1)*(b)*(i) of the AA 2005. For the sake of brevity, I shall not repeat these discussions except to state the sources of reference relied upon by the Defendant i.e. the Report of the Working Group on Arbitration on the work of its 33rd, 37th, 38th and 42nd sessions (A/CN.9/485, A/CN.9/523, A/CN.9/524 and A/CN.9/573), Report of the Secretary-General (A/CN.9/WG.II/WP.110) and Note by the Secretariat (A/CN.9/WG.II/WP.119).

[34] With regards to the test for public policy under the AA 2005, as submitted by the Defendant, this is well established; a conflict of public policy must be something that shocks the conscience, clearly injurious to the public good, wholly offensive, or where a fundamental principle

of law and justice is engaged (see the decision of the Federal Court in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1 which was also cited by the Defendant and was applied by this Court in *Kris Heavy Engineering & Construction Sdn Bhd v. EP Engineering Sdn Bhd* [2019] MLRHU 1536*, Johawaki Development Sdn Bhd v. Majlis Agama Islam Wilayah Persekutuan & Another Case* [2020] MLRHU 483*, SJIC Bina Sdn Bhd v Iskandar Regional Development Authority and another case* [2020] MLJU 2366 and *Sunway Creative Stones Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd & Another Case* [2021] 2 MLRH 78).

[35] The general provisions which are applicable and the procedure to be followed where proceedings are commenced by O.S. are set out in O. 7 and O. 28 RoC 2012.

[36] O. 45 r. 6 RoC 2012 applies to a judgment or order which requires an act to be done and where the time within which the act is to be done is either specified in the judgment or order or otherwise. For ease of reference, the provision is re-produced in its entirety below:

"***Judgment or order requiring act to be done: Order fixing time for doing it (O. 45, r. 6)***

6. (1) Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court shall, without prejudice to Order 3, rule 5, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time as may be specified therein.

(2) Where, notwithstanding Order 42, rule 6(1), or by reason of Order 42, rule 6(2), a judgment or order requiring a person to do an act does not specify a time within which the act is to be done the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.

(3) An application for an order under this rule shall be made by notice of application and such notice of application shall, notwithstanding anything in Order 62, rule 10, be served on the person required to do the act in question.".

[37] The Plaintiff relied on the case of *The State Government Of Johor Darul Ta'zim v. Johor Coastal Development Sdn Bhd* [2014] MLRAU 416 to support its submission that this Court has the power under O. 45 r. 6 RoC 2012 to order the Defendant to make payment of the security for costs within a specified time so that all the uncertainty or confusion can be resolved.

- **Prayer 1 in the O.S.**

[38] The Defendant firstly submitted on the general principles of Malaysian law on security of costs in that it can be granted based on –

(a) the inherent jurisdiction of the court but the court has no power to order a party who is in substance the defendant to provide security for costs (see *Maatschappij Voor Fondsenbezit and another v Shell Transport And Trading Company and others* [1923] 2 K. B. 166, *Visco v Minter* [1969] 2 All E.R. 714, *Goldquest International Ltd v Teh Leong Kiat* [2003] 2 CLJ 404

and *Customer Loyalty Solutions Sdn Bhd v Advance Information Marketing Berhad & Anor* [2017] 1 LNS 1894);

(b) O. 23, r. 1 of the RoC 2012 where, basically, only a defendant or a responding party can seek security for costs against a plaintiff or a claiming party:

> "***Security for costs of action (O. 23, r. 1)***
>
> *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;*
>
> *(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is 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 originating summons 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, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

…

(2A) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court that –

(a) a party, who is not a party to the action or proceedings (which is referred to as a "non-party"), has assigned the right to the claim

to the plaintiff with a view to avoid his liability for costs; or

(b) the non-party has contributed or agreed to contribute to the plaintiff's costs in return for a share of any money or property which the plaintiff may recover in the action or proceedings,

and the non-party is a person against whom a costs order may be made, then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the non-party to give such security for the defendant's costs of the action or other proceedings as the Court thinks just.

…

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceedings in question, including the proceedings on a counterclaim.

…",

and where there is a counterclaim, the plaintiff is entitled to seek security for costs because the roles have been reversed. The relevant question would then be, whether the respondent to the original claim is now in the position of a claimant/ plaintiff because of the counterclaim. In the case of *Gater Assets Ltd v Nak Naftogaz Ukrainly* [2007] EWCA Civ 988, which was also cited in paras 15 and 23 of the Interim Measures, the English Court of Appeal held (with my added emphasis) that:

> "*[**33**] In any event, the case of the counterclaim indicates that a 'claim' can exist outside a claim form itself. The jurisprudence in relation to counterclaims and security for costs may be in some flux. In the early case of Neck v Taylor [1893] 1 QB 560, it was held that while a claimant might be able to obtain security for costs of a counterclaim which was wholly distinct from his own claim, he could not do so where the counterclaim arose out of the same matter or transaction as the claim. Lord Esher MR said (at 562):*

'the Court . . . will in that case consider whether the counter-claim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and, if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly.'

*[**34**] That reads like a rule of discretion rather than of jurisdiction, and so this court decided in Samuel J Cohl Co v Eastern Mediterranean Maritime Ltd, The Silver Fir [1980] 1 Lloyd's Rep 371 at 374, where Lawton LJ said:*

*'What Lord Esher M.R. was saying was that there is a discretion to award security for costs even in cases which arise out of the same subject-matter. But **if the counterclaim is a defence and nothing more then normally the discretion should not be exercised in favour of ordering security**.'*

*[**35**] The court there took a more pragmatic view of the overall situation, even to the extent of departing from the view of the commercial judge below, who had seen the fact that the same issues arose there on both sides as*

counting against the claimant alone. However, this court on that ground thought that ***justice required that security for costs be awarded in the same amount on both claim and counterclaim****. Lawton LJ said:*

> *'In my judgment, where, as in this case,* ***both parties carry on business outside the jurisdiction****, both are claiming against the other as parties who have been badly treated and have suffered damage, and it was mere chance that one started the arbitration before the other could get in a claim, then both should be treated alike.'*

*[**36**] In Hitachi Shipbuilding and Engineering Co Ltd v Viafiel Cia Naviera SA [1981] 2 Lloyd's Rep 498 this court took the analysis a stage further by asking both whether there was a formal and a substantive counterclaim. Donaldson LJ (at 508) said that* ***the existence of a counterclaim undoubtedly gave jurisdiction to order security for costs against the respondent to an arbitration, but as a matter of discretion he would only so order to the extent that the counterclaim involved additional costs beyond that of the claim****. Ackner LJ (at 510) formulated the*

overall question as: 'are the respondents in the position of the plaintiff?'

*[**37**] Subsequently this court has held, as an alternative to the solution in The Silver Fir, that **where claim and counterclaim are linked neither party should get security for costs**: see B J Crabtree (Insulation) Ltd v GPT Communications Systems Ltd (1990) 59 BLR 43.*"; and

(c) s 580A of the CA 2016 which states that:

"***580A. Security for costs***

(1) Where a company is the plaintiff in any action or other proceedings and if it appears by a credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if the defendant is successful in his defence, the Court may order the plaintiff to give sufficient security for all the costs and to stay all action or proceedings until the security is given.

(2) The Court may direct the costs of any action or proceedings to be borne by the party to the action or proceedings.".

[39] Mr. Lee Shih emphasised that the common legal principle across the inherent jurisdiction of the court and the abovementioned statutory provisions is that only a defendant or a responding party can seek security for its costs against a plaintiff or a claiming party.

[40] Following from the above, the Defendant next submitted that the enforcement of the Interim Measures is incompatible with the powers conferred upon the Court as there is an incompatibility with the powers of the Court when applying its own laws in relation to security for costs. It is not within the powers of the Court to be able to grant an award for security for costs against a responding party and therefore, the argument goes, to enforce the Interim Measures would be contrary to the powers of this Court.

[41] It was further contended that the enforcement of the Interim Measures is against the public policy of Malaysia because –

(a) it is contrary to the principles behind the power to grant security for costs whereby the fundamental principles of law and justice are subverted by the Interim Measures;

(b) the Interim Measures would shock the conscience as it amounts to severe injustice being done towards the Defendant; and

(c) it would set a bad precedent and open the floodgates as claimants in arbitration proceedings, and plaintiffs in civil suits would assert that they are able to obtain security for costs for the claims they bring against the responding parties.

[42] In rebuttal of the Defendant's contentions as aforesaid, Ms. Eunice Kwong argued that –

(a) it is common for a plaintiff/ claimant to request for an order for security for costs against a defendant/ respondent when the defendant/ respondent has raised a counterclaim and the court

has even gone to the extent of striking out the defendant's/ respondent's counterclaim in an arbitration when the defendant/ respondent failed to comply with the Interim Measures (see *AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd* [2020] 11 MLJ 281);

(b) the Security for Costs Application was made due to the Defendant's financial status and the fact that the Defendant has made a counterclaim for the sum of RM1,295,542.30 against the Plaintiff;

(c) the Defendant has failed to prove how the granting of security for costs to the Plaintiff is against public policy when the Arbitrator had given the opportunity to the parties to submit in the Security for Costs Application and had granted the Interim Measures after considering the merits of the application and the defence raised by the Defendant;

(d) the Defendant is estopped from raising the issue of public policy

in the instant application; and

(e) the objections /issues raised by the Defendant are not bona fide but with the intention to oppress the Plaintiff and/ or delay, defeat or frustrate the arbitration claim initiated by the Plaintiff by evading its obligation to pay the security for costs and the arbitration costs.

[43] After careful consideration of the parties' averments and submissions, the following are my findings:

(a) Generally, the legal principle is that an application for security for costs is made by a defendant/ respondent against a plaintiff/ claimant with the exception where there is a counterclaim exceeding the principal claim sum.

(b) In this case, the Agreed Chronology of Events (see **"Exhibit-1"** in encl. 18) shows that <u>at the time of filing of the Security for Costs Application on 1.10.2020</u>, the Defendant has not filed its

Statement of Defence and Counterclaim. Contrary to the Plaintiff's submission, the Statement of Defence and Counterclaim was filed only on 19.11.2020 wherein the Defendant claimed, among others, the sum of RM1,295,542.30 being the unpaid amount under the Final Account. Further, in Tab-19 of the Plaintiff's Bundle of Authorities and Documents, it had enclosed a Skeleton Bill Of Costs. In item 8 of the Skeleton Bill Of Costs, the Plaintiff had placed a sum of RM50,000.00 for "*Perusing and considering the Respondent's Defence*". There is no reference to a Counterclaim. Therefore, the grounds on which the Security for Costs Application were premised do not relate to the Defendant's Counterclaim, which was non-existent at the time when the Security for Costs Application was made. Security for costs cannot be required from the Defendant at the time when the Security for Costs Application was made because at that stage, the Defendant was compelled to the arbitration and was merely on a defensive mode.

(c) Although there was no Counterclaim by the Defendant at the time

of filing of the Security for Costs Application, the Arbitrator nonetheless considered the Statement of Defence and Counterclaim at the time when he made the Ruling. This is what the Arbitrator said in para 23 of the Interim Measures:

> "*While it is the Respondent's contention that right for security for costs vests with the respondent i.e. the "respondent only rule," an exception does exist where the English court in the case of Gater Assets Ltd v Nak Naftogaz Ukrainiy (supra) allowed a claimant to apply for security for costs. The caveat to this exception is the defendant or respondent has filed a substantial counterclaim exceeding the primary claim. However, this exception to the rule would not apply in this instant case as the Respondent's counterclaim is a mere 8.7% of the Claimant's claim.*"

Based on the above passage, the Arbitrator acknowledged that the counterclaim by the Defendant did not exceed the amount claimed by the Plaintiff. In other words, this is not a case where an exception to the "*respondent only rule*" has been established.

(d) The Arbitrator was not satisfied that the Plaintiff has established that the Defendant was impecunious. However, the Arbitrator was concerned with the aftermath of the proposed scheme of arrangement where, the Plaintiff, after narrating the recent developments in the Defendant's group of companies with the JM Application and O.S. No. 441, had submitted as follows (see paras 6, 8 and 11 of the Interim Measures with my added emphasis):

> "*6.* ***The Claimant submits that all of these applications are proofs of the Respondent's apparent impecuniosity or insolvency. The ramification to the Respondent's creditors if the scheme of arrangement is approved is the real likelihood and high possibility that the Respondent will be unable to pay the Claimant if it succeeds in the final award on the merit and the costs so awarded by the Tribunal****. Under the proposed scheme of arrangement, the assets of the DSG Group including the Respondent's company in Malaysia will be pooled together with DSG Group's other subsidiary companies in Singapore and other jurisdictions.*

From this pool of assets, DSG Group is belief will use it to pay up its creditors including those which are creditors of other subsidiary companies. In this regard, ***the Claimant submits that its interest will be adversely affected by the proposed scheme of arrangement. It is the contention of the Claimant, with this scheme the interest of the Respondent's creditors are exposed****. Todate, the Respondent had failed to propose any feasible and/or concrete scheme that protect the interest of the creditors of the Respondent's company in Malaysia if DSG Group wide restructuring exercise is approved. There was also no indication that this group wide exercise includes injection of fund into the Respondent's company to meet the need to pay the Respondent's creditors in Malaysia. On the other hand,* ***the proposed scheme of arrangement suggests that the Group will take the assets and resources of the subsidiary companies including the Respondent's to elsewhere outside of Malaysia. Such scheme of arrangement if approve will undoubtedly jeopardize the interest of the Malaysia based creditors as these assets previously of the***

***Respondent's company will now be vested in the DSG Group in Singapore**. The Claimant believes such a scheme of taking the assets of a Malaysian company out of its jurisdiction is against the law.*

…

*8. Therefore, **the Claimant is of the view that the security for costs application is justifiable and has merits as it is highly likely that enforcing a costs award against DSG Group in Singapore would be fraught with legal difficulties and uncertain than would normally be expected**. Further the Claimant is concerned that this scheme that consolidates the Respondent's assets to that of the Singapore holding company and its other subsidiaries will **impact the ability of the Respondent to satisfy the award and/or the costs should the Claimant succeed in this reference**.*

…

11. In this instant case, the Claimant sought an order for security for costs of RM 2,135,000.00. It was

suggested that the sum is fair and reasonable as it anticipates ***the case for recovery of LAD*** *is highly technical requiring the testimony of delay expert. Moreover, the Claimant expect voluminous records and documents where the counsel would require to spend substantial time and effort to conduct the case. Besides the highly technical issue requiring testimony of an expert, their witnesses are also based abroad and significant expenses will be incurred in relation to their travel, accommodation and fee. …*".

The Arbitrator went on to find (again, with my added emphasis) that:

"*26. It is apparent,* ***the factual matrix for now does not suggest impecuniosity of the Respondent's company****. The cash balance in the bank is sufficient to satisfy any costs award. Moreover, as his lordship Gopal Sri Ram JCA (as he then was) said that a company need not have ready access to cash in order to satisfy a court that it is able to pay the costs of an action it brings, in the event of a failure. It need only satisfy the court that is has sufficient assets to satisfy an*

order of costs against it. ***Based on the present fact, I find no reason to agree with the Claimant that the Respondent is unable to pay its costs if it succeeded in this proceeding****.*

27. ***Nonetheless, it does concern this Tribunal the situation is very fluid between now and the conclusion of this proceeding with a final award****. It is unfortunate* ***the Respondent did not address the Tribunal on what the proposed scheme of arrangements entails****. Based on the Claimant's narrative, pooling the assets of the DSG Group of companies in Singapore and Malaysia tantamount to taking the Respondent's assets out of the reach of its Malaysia based creditors including the Claimant.* ***Therefore, after the scheme of arrangement if the proposal narrated by the Claimant in its submission is approved, the assets of the Respondent may no longer be available to pay any costs award in the Claimant's favour. In such a situation, it would appear reasonable and just for this Tribunal to order the Respondent to deposit security for costs.***".

Based on the above excerpts from the Interim Measures, the Tribunal evidently did not grant the Interim Measures premised on the Defendant's counterclaim but rather as security of costs for the Plaintiff to pursue the Plaintiff's claim of LD against the Defendant.

(e) The cases submitted by the Plaintiff can be distinguished on the following grounds:

(i) *Haidakota (M) Sdn Bhd v. Tan Tiam Chai & Another Appeal* [2008] 2 MLRA 754 is a case where the **application for security for costs was made by the defendants against the plaintiff** and the Court of Appeal held that in the circumstances of the case, it would be oppressive to require the plaintiff as the alleged victim of serious wrongs of breach of fiduciary duties and voluntarily assisting in such breach by the defendants, to be required to furnish security for costs to the defendants.

(ii) The scenario in *AMDAC*'s case (*supra*) was that BYD Auto Industry Co Ltd ('**BYD**') was the claimant whilst AMDAC (M) Sdn Bhd ('**AMDAC**') was the respondent in the arbitration proceedings. **AMDAC had filed a counterclaim but it did not pay the requisite deposit towards the arbitration costs *vis-à-vis* the counterclaim**. In accordance with r 13(6) of the KLRCA Arbitration Rules, the arbitrator consulted the Director for the KLRCA and terminated the counterclaim. AMDAC then applied to set aside the final arbitration award under ss 37 and 42 AA 2005. This is clearly a case of non-payment of the deposit imposed in respect of the counterclaim by a respondent in an arbitration proceeding with a specific rule in the KLRCA Arbitration Rules which can be invoked on the matter.

(iii) In *RHB Bank Bhd v. Bactra Properties Sdn Bhd & Ors (No 2)* [2011] 1 MLRH 130, the **plaintiff applied for security for costs from the first defendant pursuant to s 351 of**

the Companies Act 1965 [*Act 125*] and the first defendant had already filed a defence and a counter claim at the time when the plaintiff's application was made.

(iv) In *Raju Rajaram Pillai (t/a Dhanveer Enterprise) v MMC Power Sdn Bhd & Anor* [2000] 6 MLJ 551, the **defendants applied for security for cost against the plaintiff**, an Indian citizen with an address in Mumbai, India, and this was granted by the Senior Assistant Registrar ('**SAR**'). The decision by the SAR was upheld by the High Court and in arriving at that conclusion, the appellate court considered the provision of O. 23 of the Rules of the High Court 1980.

(f) The affidavit evidence has not established that there is mala fide on the part of the Defendant. Moreover, the Plaintiff had made the Modification Application and on its own accord, had withdrawn the same (see the discussion in respect of prayers 2 and 3 of the O.S. in the ensuing paras).

[44] Following from the foregoing findings, in my view, enforcement of the Interim Measures should be refused on the ground that the Interim Measures are incompatible with the powers conferred upon the Court by its laws, whether procedural and/ or substantive. Although subpara 19I(1)*(b)*(i) AA 2005 gives the power to the Court to reformulate the Interim Measures to the extent necessary to adapt it to the Court's powers and procedures for the purposes of enforcing the same, the Plaintiff made no submissions at all regarding this power. Moreover, the power is discretionary as denoted by the use of the word "*may*" in the subpara and no reasons were offered for the Court to exercise this discretion in the Plaintiff's favor.

[45] For the sake of completeness, it should be made clear that the Defendant is not estopped from relying on the public policy ground in opposing the present application. Such ground is expressly provided for in subparas 19I(1)*(b)*(ii) and 39(1)*(b)*(ii) of the AA 2005 and there is nothing to prohibit the Defendant from having recourse to these provisions in defending the instant application. However, there is no

necessity for the Court to consider this ground of challenge as the decision in relation to the ground premised on subpara 19I(1)*(b)*(i) AA 2005 suffice in dealing with prayer 1 of the O.S..

- **Prayers 2 and 3 in the O.S.**

[46] The Plaintiff justified the inclusion of prayers 2 and 3 in the O.S. on the ground that it is due to the Defendant's own refusal, reluctance and/ or uncooperative stance to comply with the Interim Measures. Without these prayers, the Defendant would continue to exploit the Interim Measures and any order of the Court.

[47] Mr. Lee Shih invited this Court to compare the Interim Measures which the Plaintiff sought to enforce as per prayer 1 in the O.S. as against prayers 2 and 3 of the O.S.. Having done so, I agree with the Defendant's counsel that the Interim Measures and prayers 2 and 3 in the O.S. differ in these aspects:

(a) in prayer 2, the Plaintiff sought to change the payment terms of the Interim Measures by seeking that payment be made to the Plaintiff's solicitors, instead of into a joint account held by the parties' solicitors;

(b) in prayer 2, the Plaintiff wanted to impose a time frame of 14 days for the Defendant to make payment of the security for costs whereas the Interim Measures did not specify a duration within which the Defendant has to make such payment; and

(c) in prayer 3, the Plaintiff sought to compel or obtain enforcement against the Defendant's Directors in the event that the Defendant fails to comply with the time limit as stated in subpara (b) above.

Evidently, none of the terms as stated in prayers 2 and 3 in the O.S. are encompassed in the Ruling. Therefore, prayers 2 and 3 of the O.S. are, in reality, the Plaintiff's attempt to vary or modify the Interim Measures, which in my considered view, is a matter that should be

brought before the Tribunal.

[48] Crucially, the Plaintiff did in fact submit a letter dated 15.3.2021 ('**15.3.2021 Letter**') to the Arbitrator explaining the Defendant's failure to pay the security for costs; that an application has been filed in this Court to enforce the Interim Measures and the Defendant's grounds for opposing the application; and that the Defendant has no intention whatsoever to comply with the Ruling. The 15.3.2021 Letter goes on to say the following:

> "*Due to the change of circumstances and admission by the Respondent in their affidavit, we hereby apply to this Tribunal as pursuant to Paragraph 30 of the Tribunal's rulling and Article 26(5) of the UNCITRAL Arbitration Rules (2010) to grant the reliefs as below:*
>
> *(1) The Respondent shall deposit the Security for costs in the sum of RM250,000.00 to the Claimant's solicitors, Messrs. Ricky Tan & Co within 10 days from the date hereof;*

(2) The Claimant's solicitors shall hold the Security for costs as a stakeholder and shall release the said sum to the party as directed by the Tribunal; and

(3) In the Respondent do not comply with paragraph (1) above within the time stipulated, the Respondent's counterclaim shall be struck out forthwith.

We humbly submit that the aforesaid reliefs are imperative and necessary so that the parties' interest can be protected.

We submit that the Respondent's series of conduct is clearly an abuse of the Tribunal's power and process to circumvent their obligation to pay the security for costs and also the 2nd security by using the Scheme of Arrangement as an excuse to defeat and/or jeopardize the arbitral proceeding.

Therefore, we humbly request the Tribunal to direct an urgent hearing of this application and to invoke its power under Article 43(4) of the UNCITRAL Rule 2010 to terminate the Respondent's counterclaim forthwith.".

[49] Articles 26(5) and 43(4) of the UNCITRAL Arbitration Rules (as revised in 2010) ('**UNCITRAL Arbitration Rules**') as mentioned in the

15.3.2021 Letter read as follows:

> "***Interim measures***
> *Article 26*
>
> *5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.*
>
> *…*
>
> ***Deposit of costs***
> *Article 43*
>
> *4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.*".

[50] According to the Plaintiff, the 15.3.2021 Letter was sent to the Arbitrator with a view of obtaining clarification as regards to the time

period for the Defendant to comply with the Ruling. When I enquired at the hearing as to why the Plaintiff withdrew the Modification Application, Ms. Eunice Kwong said that, during the CM on 19.3.2021, the Arbitrator explained that there is no ambiguity in the Award and even though no specific time was specified in the Award, the costs should be paid within a reasonable time. The learned counsel also said that the Arbitrator offered for the parties to make further submissions, however, in the light of the clarification by the Arbitrator, the Plaintiff was of the view that the Arbitrator had made up his mind and hence, the Plaintiff decided to withdraw the Modification Application.

[51] Whilst it is true, as submitted by the Plaintiff, that the failure of the Tribunal to specify a time period for payment of the costs does not, by itself, mean that the Interim Measures is fatal and/ or unenforceable, although with the benefit of hindsight it is preferable to have included such a time frame, the Award had accounted for the possibility of requiring a modification to the Interim Measures as reflected in para 30. The Plaintiff itself accepted this position as it had cited para 30 of the Ruling and Article 26(5) of the UNCITRAL Arbitration Rules which

speaks of the power of the arbitral tribunal to, *inter alia*, modify an interim measure that the tribunal has granted upon application of any party.

[52] Moreover, the terms in prayer 3 are a precursor for the Plaintiff to seek an order for committal against the Defendant and its Directors. The Interim Measures does not envisage holding the Defendant's Directors liable for any committal proceedings or penal sanctions. If prayer 3 is allowed, the Court would, in effect, be modifying and enhancing the terms of the Interim Measures in favor of the Plaintiff. I do not think that this Court can grant an order as per prayer 3.

[53] In the circumstances, I am in agreement with the Defendant's contention that the proper forum would be for the Plaintiff to apply to the Tribunal to modify or vary the Interim Measures as it deems necessary.

Conclusion

[54] Based on the considerations as outlined above, I thus dismissed the Plaintiff's application with costs of RM4,000.00, subject to allocator.

Dated: **18 February 2022**

(ALIZA SULAIMAN)
Judge
Construction Court 2
High Court
Kuala Lumpur

Counsels/ Solicitors:

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Cases, legislation and other sources referred to in the submissions by learned counsels and in the Grounds of Judgment:

Cases:

AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd [2020] 11 MLJ 281

Customer Loyalty Solutions Sdn Bhd v. Advance Information Marketing Berhad & Anor (Encl 86) [2017] MLRHU 1619

Customer Loyalty Solutions Sdn Bhd v Advance Information Marketing Berhad & Anor [2017] 1 LNS 1894

Damai Motor Kredit Sdn Bhd & Anor v. Kementerian Kerja Raya Malaysia [2014] MLRAU 371

Edmund Charles Liebenberg v. ICB-Griffin Marketing Sdn Bhd & Ors [2011] 9 MLRH 795

Goldquest International Ltd v Teh Leong Kiat [2003] 2 CLJ 404

Government of Malaysia v. Syarikat Ismail Ibrahim Sdn Bhd & Ors [2020] 3 MLRA 77

Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v. Alami Vegetable Oil Products Sdn Bhd [2018] 1 MLRH 535

Haidakota (M) Sdn Bhd v. Tan Tiam Chai & Another Appeal [2008] 2 MLRA 754

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 MLRA 91; [2019] 1 CLJ 1

Johawaki Development Sdn Bhd v. Majlis Agama Islam Wilayah Persekutuan & Another Case [2020] MLRHU 483

Kris Heavy Engineering & Construction Sdn Bhd v. EP Engineering Sdn Bhd [2019] MLRHU 1536

Lim Che En v. Saw Chai Soon [2018] 4 MLRH 247

Maatschappij Voor Fondsenbezit and another v Shell Transport And Trading Company and others [1923] 2 K. B. 166

Raju Rajaram Pillai (t/a Dhanveer Enterprise) v MMC Power Sdn Bhd & Anor [2000] 6 MLJ 551

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Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd [2018] 8 CLJ 291

SJIC Bina Sdn Bhd v Iskandar Regional Development Authority and another case [2020] MLJU 2366

Sunway Creative Stones Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd & Another Case [2021] 2 MLRH 78

The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149

The State Government of Johor Darul Ta'zim v. Johor Coastal Development Sdn Bhd [2014] MLRAU 416

Visco v Minter [1969] 2 All E.R. 714

Legislation:

Arbitration Act 2005, ss 19, 19A to 19J & 39

Arbitration (Amendment) (No. 2) Act 2018, ss 7 & 8

Companies Act 2016, ss 366, 368 & 580A

Interpretation Acts 1948 and 1967, s 54(2)

Rules of Court 2012, O. 7, O. 23 r. 1, O. 28, O. 45 r. 6 & O. 92 r. 4

Other source(s):

Datuk Professor Sundra Rajoo & Special Contributor Dr. Thomas R. Klötzel, *UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 & 2018) and the AIAC Arbitration Rules*, Sweet & Maxwell, 2019