

Qilin World Capital Ltd v CPIT Investments Ltd and another appeal
[2018] SGCA(I) 4

Case Number : Civil Appeals Nos 126 and 145 of 2017
Decision Date : 11 July 2018
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; Bernard Rix IJ; Dyson Heydon IJ
Counsel Name(s) : Martin Roderick Edward SC, Renganathan Nandakumar, Nandhu and Yap Yongzhi, Gideon (RHTLaw Taylor Wessing LLP) for the appellant in CA 126 of 2017 and the respondent in CA 145 of 2017; the appellant in CA 145 of 2017 and the respondent in CA 126 of 2017 absent and unrepresented.
Parties : Qilin World Capital Ltd — CPIT Investments Ltd

Civil Procedure – Costs – Singapore International Commercial Court

11 July 2018

Judgment reserved.

Dyson Heydon IJ (delivering the judgment of the court):

Introduction

1 These reasons concern the costs of certain proceedings both at trial and on appeal. In the proceedings from which the present appeal was brought, CPIT Investments Ltd (“CPIT”) brought claims against Qilin World Capital Ltd (“Qilin”) arising from a loan agreement (“the Loan Agreement”) secured by certain shares. CPIT asserted that Qilin had wrongfully disposed of these shares when it was not entitled to do so under the Loan Agreement, and thus held the proceeds on constructive trust for CPIT. On 17 July 2017, the learned trial judge (Vivian Ramsey IJ) made an order that Qilin held HK\$31.25m on constructive trust for CPIT and granted related relief. But he also dismissed CPIT’s claim that Qilin’s conduct had caused a very large fall in the value of certain other shares owned by CPIT which were not used as security for the loan (see *CPIT Investments Ltd v Qilin World Capital Ltd* [2017] 5 SLR 1 (“*CPIT v Qilin (trial judgment)*”).

2 By Civil Appeal No 126 of 2017 (“CA 126”), Qilin appealed against the orders relating to the constructive trust. By Civil Appeal No 145 of 2017 (“CA 145”), CPIT appealed against the order rejecting its claim that Qilin was responsible for the fall in the value of its shares.

3 On 5 March 2018, the trial judge made costs orders reflecting CPIT’s success before him. He ordered Qilin to pay S\$47,906.20 by way of costs and disbursements for interlocutory applications, S\$384,000.00 as costs for the rest of the proceedings, and S\$28,600.26 plus HK\$648,427.57 as disbursements for the proceedings, excluding interlocutory applications (see *CPIT Investments Ltd v Qilin World Capital Ltd* [2018] SGHC(I) 02 (“*CPIT v Qilin (costs judgment)*”).

4 On 6 March 2018, this court allowed Qilin’s appeal and dismissed CPIT’s appeal (see *Qilin World Capital Ltd v CPIT Investments Ltd* [2018] SGCA(I) 01).

5 That disposed of all issues between the parties except costs.

The submissions of the parties

6 On 23 April 2018, CPIT's solicitors informed Qilin's solicitors that on 20 April 2018 they had been discharged as CPIT's solicitors and they had no instructions to file costs submissions on behalf of CPIT. On 24 April 2018, Qilin's solicitors filed written submissions concerning costs. Thereafter, the Registry informed CPIT by letter that if it had any views on the issue of costs, it should provide these views to the court by 21 June 2018. No response was received.

7 It is desirable at the outset to note that in their letter of 23 April 2018, CPIT's solicitors contended in effect that it was not open to Qilin to seek the costs, or all the costs, of the proceedings at trial. They requested Qilin's solicitors to bring the following points to this court's attention, which they have done:

(a) The direction from the Court of Appeal on 10 April 2018 was for parties to deal with the question of costs of the appeals. It did not include the costs of the proceedings below, which was not the subject of Qilin's Notice of Appeal in CA 126.

(b) The trial judge held that Qilin was in breach of the terms of the Loan Agreement by disposing of the shares used as security (see *CPIT v Qilin (trial judgment)* at [79] and [91]).

(c) The trial judge also found that Qilin was in repudiatory breach of the Loan Agreement and that CPIT was entitled to terminate the Loan Agreement as it did on 4 January 2016. Qilin did not appeal against this finding.

(d) The trial judge dismissed Qilin's counterclaim for loss arising from CPIT's allegedly wrongful repudiation of the Loan Agreement. Qilin did not appeal against this finding.

(e) Apart from the fact that Qilin's counterclaim had been dismissed, the Court of Appeal only ordered CPIT to return the money that Qilin had paid to CPIT pursuant to the lower Court's judgment in favour of CPIT. CPIT's solicitors suggested this was relevant to how costs would be affected by an offer to settle made by Qilin on 29 November 2016.

8 It is desirable to put to one side an interesting question: do persons who were once solicitors for a party to litigation but have since been discharged have any entitlement to be heard?

9 As to point (a), the fact that the costs of the first instance proceedings were absent from Qilin's Notice of Appeal is not surprising. The Notice of Appeal was filed on 20 July 2017. The decision of the trial judge on costs was published on 5 March 2018. Despite the fact that the costs of the proceedings below are not mentioned in the Notice of Appeal, the court is entitled and empowered to deal with the costs of the proceedings below. Even if the Notice of Appeal is to be regarded as deficient in this respect, it is a deficiency which could readily be cured by amendment. In the circumstances an amendment is not necessary.

10 As to points (b)-(d), these factors do not deal with the fact that the result of Qilin's appeal was to deprive CPIT entirely of the fruits of its victory at trial. The fact that certain findings were made against Qilin, and the fact that no appeal was brought in these respects by Qilin, overlooks the difficulties that appeals are made against orders, not findings. The orders of the trial judge in favour of CPIT have been set aside. The failure of Qilin in some respects at trial was not such as to justify departing from the principle that, *prima facie*, costs follow the event. Nevertheless, Qilin's failure in relation to certain aspects of its case will be considered in relation to one of Qilin's arguments (see [23]–[24] below).

11 Point (e) will be referred to later.

The trial judge's costs orders

12 In dealing with the issue of costs, the trial judge issued a closely reasoned judgment which contains a careful exposition of the principles applicable to costs in the Singapore International Commercial Court. These reasons for judgment on costs should not be read as taking issue with the trial judge's reasoning on costs. They simply have a different starting point. His reasoning on costs begins with a particular view of how the substantive issues in the litigation should be resolved. This court's reasoning begins with a different view of how the substantive issues should be resolved.

13 It is worth noting that, with regard to the costs of the proceedings at first instance, Qilin has sought to be compensated in amounts which are substantially similar to those awarded by the trial judge to CPIT, subject to adjustments to reflect its success on appeal.

14 Qilin's success in its appeal has the consequence that the trial judge's costs orders in favour of CPIT must be set aside, subject to any material consideration urged by CPIT to the contrary. Since nothing has been urged apart from the five points summarised above, there is no reason why the trial judge's costs orders should not be set aside. It is now necessary to examine what orders should be made in their place.

Interlocutory applications

15 There were six interlocutory applications where costs were ordered to be in the cause. The sums claimed by Qilin correspond with those ordered by the trial judge in favour of CPIT after the conclusion of the trial, save in relation to one component. It is reasonable to uphold Qilin's claim, save in relation to that component. The component concerns High Court Summons No 171 of 2016 ("SUM 171"). In disposing of that application, the trial judge awarded CPIT S\$2,000 in costs and S\$400 in disbursements. Qilin submitted that it should be awarded S\$3,500 in costs and S\$550 in disbursements. Qilin submitted that the trial judge's award of S\$2,000 plus S\$400 in disbursements to CPIT was reduced from CPIT's claim for S\$3,000 plus S\$494 "given that the application related to the *alter ego* argument that had been dismissed in the Merits Judgment". Qilin continued: "Having won on appeal, Qilin is entitled to increased costs and disbursements because it had to address the *alter ego* arguments that were dismissed in the Merits Judgment". In our view, Qilin is not entitled to any costs at all for SUM 171. That involved an application by CPIT for leave to serve the writ and statement of claim out of the jurisdiction. Naturally, Qilin did not appear at this hearing. It made no submissions. It filed no affidavits. It incurred no costs. It is also unclear what basis Qilin has for contending that it is entitled to S\$550 in disbursements. So far as Qilin incurred costs on the *alter ego* issue at the trial, there is no reason why the relatively low figures involved should not be treated as subsumed in the overall costs order for the proceedings at first instance excluding the interlocutory applications. Hence Qilin is entitled to the costs and disbursements ordered by the trial judge to CPIT below, save for those relating to SUM 171. This totals S\$41,500 in costs and S\$4,022 in disbursements.

Pre-trial conferences and case management conferences

16 In relation to pre-trial conferences and case management conferences, Qilin claimed a total of S\$11,500 in costs. It claimed S\$500 for each of the seven pre-trial conferences, S\$1,000 for each of five case management conferences held before trial, and S\$3,000 for one case management conference held after trial for the purpose of the parties making submissions on costs. Given the length and nature of the proceedings, these claims are reasonable. Hence Qilin's claim for S\$11,500 succeeds.

Other proceedings at first instance

17 Qilin sought costs in the sum of S\$50,000 for the proceedings in the High Court up until 28 June 2016, when the dispute was transferred to the SICC. The trial judge felt it was appropriate to award CPIT S\$50,000 for this period, but deducted S\$5,000 from this sum to account for the aspects of CPIT's claim which had failed (see *CPIT v Qilin (costs judgment)* at [45]). It is reasonable to award Qilin S\$50,000 in respect of this period, given that it has successfully resisted all of CPIT's claims.

18 Qilin sought costs in the sum of S\$206,000 for the period from 28 June 2016 up to the commencement of the trial on 13 December 2016. The trial judge awarded CPIT S\$210,500 for the same period (see *CPIT v Qilin (costs judgment)* at [46] and [47]). Qilin's claim is thus reasonable and is accepted.

19 Qilin also sought costs in the sum of S\$300,000 for trial and post-trial matters. The trial judge awarded CPIT only S\$128,500 for the equivalent period (see *CPIT v Qilin (costs judgment)* at [47]). Two factors support the size of Qilin's claim, at least to a degree.

20 One factor is that Qilin incurred the costs of engaging Senior Counsel. The complexity of the case and the size of the sums in dispute justified that course.

21 The second factor is that the trial judge was dealing with a state of affairs in which CPIT had defeated Qilin on one issue, but Qilin had won on a claim involving a much greater monetary sum. This court has to deal with a state of affairs in which Qilin's defeat on the first issue has been reversed, but its victory on the second issue has been confirmed.

22 Qilin also relied on two other factors. One is that at trial it "had to address a greater number of issues, *eg*, the *alter ego* issue". The other supposed "issues" are not specified. No allowance should be made for them. Some allowance should be made for the *alter ego* issue. It is included in the figure of S\$225,000 awarded below.

23 The other factor on which Qilin relied to justify its claim for S\$300,000 was that "the costs should reflect that Qilin had made CPIT an offer to settle". The offer was made on 29 November 2016, shortly before the trial began. Qilin's submissions were very brief: "as CPIT has obtained a judgment not more favourable than the terms of the [offer to settle], the [c]ourt should take into consideration the [offer to settle] in awarding costs". The submission did not explain how the judgment was not more favourable to CPIT than the offer to settle, or, cast another way, that the judgment was more favourable to Qilin than its offer to settle. The offer to settle required CPIT to pay HK\$1.25m in interest; the outcome of the proceedings is that CPIT is not required to do this. In that respect, the outcome was less favourable to Qilin than the offer to settle. The offer to settle also required CPIT to relinquish its claims on the remaining shares used as security for the Loan Agreement which Qilin had not disposed of. In that respect, the outcome of the proceedings is about the same as that of the offer to settle, had it been accepted. The offer to settle also required each party to bear its own costs. In this respect the outcome of the proceeding is much worse for CPIT than the offer to settle.

24 It might be possible to demonstrate that Qilin has achieved an outcome more favourable than the terms of the offer to settle to a degree sufficient to justify an increase in Qilin's recoverable costs. But Qilin did not attempt to demonstrate this with any clarity. It did not deal with point (e) in the letter from CPIT's solicitors dated 23 April 2018. If CPIT had accepted Qilin's offer, Qilin would have received HK\$1.25m in interest (S\$210,000), but it would have had to bear its own costs to that point. Qilin has not revealed what its *actual* costs were, but its claim for S\$206,000 up to 13 December 2016 is being upheld. That suggests that acceptance of Qilin's offer by CPIT would have left Qilin bearing a loss, given that it would also have had to bear the costs of the interlocutory steps where costs had been ordered to be in the cause up to the date of acceptance. Another matter is

that the basis of Qilin's offer has not been vindicated by events. The basis of the offer was that Qilin was entitled to keep selling the shares used to secure the loan, while also receiving some interest under the Loan Agreement. Yet the trial judge found that Qilin was in breach of the Loan Agreement and that CPIT was entitled to terminate it. His conclusions on these points were not challenged on appeal.

25 In all the circumstances, it is not possible to conclude that Qilin has established that the outcome of the proceedings is so significantly superior to Qilin's offer as to justify an increase in the costs otherwise recoverable.

26 The claim that Qilin receive S\$300,000 in relation to the costs of the first instance proceedings for the period from the commencement of the trial is rejected. A reasonable figure is S\$225,000.

Disbursements arising from the first instance proceedings

27 Qilin claims S\$28,600.26 as disbursements for the proceedings below excluding interlocutory applications. This sum is reasonable, since it corresponds with the amount allowed to CPIT by the trial judge.

28 Qilin also claims S\$74,000 for the costs of engaging an expert on the value of CPIT's shares. That sum is reasonable.

29 Qilin also claims HK\$1,328,089.94 and US\$94,897.40 in legal fees for advice on Hong Kong law from Reed Smith LLP and FisherBroyles LLP respectively. This claim amounts to about S\$350,000.00. CPIT only claimed about HK\$25,000 (or S\$4,200) in legal fees for advice on Hong Kong law. Qilin did not explain how it came to incur such high costs for advice on Hong Kong law. Nor did it clarify which aspects of the proceedings below required extensive advice on Hong Kong law. Apart from brief references in relation to stamp duties in Hong Kong, the trial judge did not mention Hong Kong law in the trial judgment. Given these uncertainties, the court declines to fix the amount of disbursements and instead proposes to order that they be taxed if not agreed.

Costs of CA 126

30 Qilin claims S\$70,000. That seems reasonable.

31 Qilin also claims disbursements of S\$65,218.17. The bulk of that sum comprises a figure of S\$52,000 in estimated hearing fees, but the size of this claim has not been explained. The appropriate order is that the quantum of disbursements be taxed if not agreed.

Costs of CA 145

32 Qilin claimed S\$100,000. CPIT's estimate was identical. It is appropriate to order that Qilin recover S\$100,000. Qilin's claim for disbursements of S\$3,055.37 should be taxed if not agreed.

Orders

33 The court orders:

- (a) CPIT to pay Qilin its costs of S\$170,000 for CA 126 and CA 145.
- (b) CPIT to pay Qilin its costs of S\$534,000 for the proceedings at first instance.

(c) CPIT to pay Qilin's disbursements of S\$106,622.26 for the proceedings at first instance excluding Qilin's claim for legal fees in relation to advice on Hong Kong law.

(d) CPIT to pay Qilin's reasonable disbursements, to be taxed if not agreed, in relation to:

(i) CA 126;

(ii) CA 145; and

(iii) Qilin's claim for legal fees in relation to advice on Hong Kong law.

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