IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 100

Suit No 1328 of 2014

Between

Seraya Energy Pte Ltd

… Plaintiff

And

Denka Advantech Private Limited

… Defendant

And

Denka Advantech Private Limited

… Plaintiff in Counterclaim

And

Seraya Energy Pte Ltd

… Defendant in Counterclaim

And

YTL PowerSeraya Pte Limited

… Third Party

Suit No 1329 of 2014

Between

Seraya Energy Pte Ltd

… *Plaintiff*

And

Denka Singapore Private Limited

… *Defendant*

And

Denka Singapore Private Limited

… *Plaintiff in Counterclaim*

And

Seraya Energy Pte Ltd

… *Defendant in Counterclaim*

And

YTL PowerSeraya Pte Limited

… *Third Party*

(*Consolidated pursuant to Order of Court dated 17 June 2015*)

SUPPLEMENTARY JUDGMENT ON COSTS AND DISBURSEMENTS

[Civil Procedure]–[Costs]–[awarded]

Seraya Energy Pte Ltd
v
Denka Advantech Pte Ltd and another suit (YTL PowerSeraya Pte Ltd, third party)

[2019] SGHC 100

High Court — Suit Nos 1328 and 1329 of 2014
Woo Bih Li J
5, 21 March, 5 April 2019

18 April 2019 Judgment reserved.

Woo Bih Li J:

Introduction

1 The background to this action is set out in my judgment dated 2 January 2019 in *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd and another suit (YTL PowerSeraya Pte Ltd, third party)* [2019] SGHC 02 ("the 1st Judgment"). Subsequent to that, I determined the extent of the liability and quantum in a supplementary judgment dated 29 January 2019 in *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd and another suit (YTL PowerSeraya Pte Ltd, third party)* [2019] SGHC 18 ("the 2nd Judgment").

2 Thereafter, I heard the parties on costs and disbursements of the action. I will use the same definitions as in the 1st Judgment.

The Offer to Settle

3 It transpired that on 31 October 2016, Denka had made an offer to settle ("the OTS") SE's claims. The offer remained open for five months and was withdrawn on 31 March 2017. The first day of the trial was 7 November 2017, more than seven months after the OTS was withdrawn.

4 Under O 22A r 9(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), a defendant who has made an offer to settle, which is not withdrawn and has not expired before the disposal of the claim, is entitled to costs on an indemnity basis from the date of service of the offer if the plaintiff does not accept the offer and the plaintiff obtains judgment which is not more favourable than the terms of the offer. In that scenario, the plaintiff is entitled to costs on the standard basis to the date the offer was served. This provision is subject to any order which the court may otherwise make.

5 On the other hand, under O 22A r 9(5), where an offer to settle has been made and notwithstanding anything in the offer, the court has full power to determine by whom and to what extent any costs are to be paid. This provision is without prejudice to various provisions including O 22A r 9(3).

6 As the OTS was withdrawn and was not kept open for acceptance until the disposal of the claim, I initially decided on 5 March 2019 that each party was to bear its own costs of the action.

7 However, upon hearing further arguments, I am of the view that more weight should be given to the fact that the OTS had remained open for acceptance for five months and less weight to the fact that it was withdrawn

after five months. After all, there was no suggestion by SE that it would have accepted the OTS had it not been withdrawn.

8 Under the 2nd Judgment (at [4]–[5]), SE was entitled to receive/retain:

(a) $1,850,000 being the aggregate sum received from three bank guarantees (on 22 December 2014); and

(b) $77,911.72 from DAPL.

9 On the other hand, SE was liable to pay DSPL $1,097.72. The nett mount which SE was entitled to was therefore $1,926,814 (excluding interest and costs).

10 Under the OTS, SE would have been entitled to receive/retain:

(a) $1,850,000; and

(b) $ 792,450.

The total would have been $2,642,450 (excluding interest and costs).

11 The difference between the principal amounts offered under the OTS and awarded under the 2nd Judgment was $715,636 or about 37% of the principal amount under the 2nd Judgment. In absolute and in percentage terms, this was not a small difference even though the maximum aggregate amount of SE's claim was about $31m and the total sum offered, *ie*, about $2.642m, was less than 10% of the maximum claimed.

12 Accordingly, I am of the view that, in principle, Denka should be awarded some costs.

Quantum of costs

13 Denka sought $2m as costs on an indemnity basis and $1.2m as costs on a standard basis. Denka stressed that SE had itself sought $1.2m as costs against Denka on a standard basis. This was based on complexity, novelty and importance of the issues on quantum which pertained to the enforceability of certain provisions on liquidated damages which appeared to be prevalent in electricity retail contracts between commercial parties.

14 Using O 22A r 9(3) as a guide and considering the court's discretion under O 22A r 9(5) ROC, it is open to the court to award SE costs on a standard basis up to the date the OTS was served and award costs to Denka on an indemnity basis thereafter even though the OTS was withdrawn after five months.

15 However, I also considered two other points. First, it was not entirely unreasonable for SE not to accept the OTS since the total sum offered was less than 10% of the maximum sum claimed and one could not say then that it was obvious that SE would not succeed for the maximum sum claimed. Secondly, Denka had lost on the issue of liability for repudiatory breach of contract. While it is true that this issue would not even have to be considered if SE had accepted the OTS, I place some weight on Denka's conduct in resisting liability for breach of contract.

16 In my view, it was obvious that Denka had reneged on its contractual bargain in the three electricity contracts in question. Denka had sought an accommodation from SE regarding a steam supply agreement and agreed to the terms thereof except for some technical details which remained outstanding. The terms of the accommodation required Denka to enter into the three

electricity contracts with SE. When the price of electricity eventually went against Denka, it reneged on the three electricity contracts and attempted to avoid liability, using arguments which were clearly without merit.

17 Also, as mentioned, while SE lost its claim for liquidated damages, I could not say that its case for such a claim was clearly without merit. Likewise, I could not say that its alternative claim for general damages of a substantial sum which called for the court to disregard a contract for difference, was also clearly without merit.

18 In the circumstances, I am of the view that it would be just and also neater to simply award Denka costs on a standard basis, instead of on an indemnity basis, from the date the OTS was served and no costs to SE from the date the Writ was filed, *ie*, on 19 December 2014 to the date the OTS was served, *ie*, on 31 October 2016.

19 As the Writ was filed on 19 December 2014 and the OTS was served on 31 October 2016 and the first day of trial was on 7 November 2017, I am of the view that I should award Denka 90% of the costs of the action as most of the getting-up costs and work for the trial would have accrued after 31 October 2016. Indeed, that was the position of both sides as well.

20 The question then is what 100% of the standard costs should be before applying the 90% figure.

21 Under Appendix G of the Supreme Court Practice Directions which provides costs guidelines, the daily tariff for a complex contract case is $17,000 daily but this is on a tiered basis, *ie*, 100% for the first five hearing days, 80% for the next five days and 60% thereafter.

22 The trial was for 12 days (and not 13 days as mentioned by one counsel). Applying the guideline in Appendix G will result in the following costs:

(a)	$17,000 x 5 days	$ 85,000
(b)	($17,000 x 5 days) x 80%	$ 68,000
(c)	($17,000 x 2 days) x 60%	$ 20,400
	Total:	$173,400

23 However, in my view the arguments on liquidated damages were complex enough to warrant some increase from the guideline of $17,000 daily although this rate was already the daily tariff for complex contract cases. Furthermore, there should also be an uplift as the maximum amount of SE's claims was for about $31m. As already mentioned, it was not clear that the claim for this sum was without merit, unlike some other cases where it is quite obvious that the sum claimed is without basis. In other words, the potential liability of Denka for this sum was quite real. Likewise, the potential gain for SE was also quite real.

24 Taking these two factors into account, as well as the total sum awarded of about $1.926m under the 2nd Judgment, and the estimated costs figure of $1.2m submitted by each side, I am of the view that it would be just to increase the costs by a factor of 2.5 *ie*, $173,000 x 2.5 = $432,500. 90% of that figure would be $389,250 which I round up to $390,000.

25 I would also mention that, aside from the OTS, parties also argued as to whether the bulk of the work done for the trial was in respect of liability or

quantum. In my view, the issue of liability was much less difficult than the issue of quantum which included the question as to whether the applicable provision on liquidated damages applied and, if not, what the general damages amounted to. In any event, I have taken into account the point that SE had resisted liability.

26 As for disbursements, I am pleased to note that parties have agreed on the quantum thereof although this is on the basis of disbursements for the entire duration of the action. I am of the view that Denka is entitled to disbursements incurred from the date the OTS was served. For the avoidance of doubt, SE is not entitled to the disbursements incurred before the date the OTS was served.

27 In summary, I make the following orders:

(a) I set aside my earlier decision of 5 March 2019 on costs and disbursements.

(b) SE is to pay Denka 90% of the costs of the action, on a standard basis, from the date the OTS was served. This is fixed at $390,000.

(c) SE is to pay Denka the disbursements of the action from the date the OTS was served. This is to be agreed or fixed by the court.

Parties are to agree on such disbursements within 14 days from the date of this judgment, failing which Denka is to write in for an appointment to fix the quantum of disbursements within 21 days from the date of this judgment.

(d) SE is to pay Denka $3,000, all in, for getting up and for work done for submissions on costs and disbursements.

Woo Bih Li
Judge

Chan Kah Keen Melvin, Koh Li Qun, Kelvin (Xu Liqun) and Nguyen Vu Lan (TSMP Law Corporation) for the plaintiff and third party;
Tay Twan Lip Philip and Yip Li Ming (Rajah & Tann Singapore LLP) for the defendants.