Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd
[2008] SGHC 230

Case Number : Suit 36/2006, SUM 5155/2008

Decision Date : 10 December 2008

Tribunal/Court : High Court

Coram : Leo Zhen Wei Lionel AR

Counsel Name(s) : Thrumurgan s/o Ramapiram (Thiru & Co) for the plaintiff; Tito Shane Isaac, Justin Chan (Tito Isaac & Co LLP) for the defendant

Parties : Ho Pak Kim Realty Co Pte Ltd — Revitech Pte Ltd

10 December 2008 Judgment reserved

AR Leo Zhen Wei Lionel:

Introduction

1 This is the second application by the defendant, Revitech Pte Ltd ("the defendant"), for security for costs. Both the plaintiff, Ho Pak Kim Realty Co Pte Ltd ("the plaintiff"), and the defendant had applied for security for costs earlier in the proceedings. The plaintiff's application was dismissed on 21 August 2006 and the defendant's application was similarly dismissed on 6 September 2006.

2 This summons raises the issue of whether the court can find a plaintiff company to be impecunious, for the purposes of s 388(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("s 388(1)"), if the said company fails to file audited accounts (as required by law) for an extended period of time such that there is no satisfactory way of determining its true assets and liabilities. In the event that the condition in s 388(1) is met, there is the further issue of whether the court should exercise its discretion to order security for costs where there is a complete overlap between the defence and the counterclaim by the same defendant, and where the application for security for costs was only taken out after some delay.

Background

3 This suit, which has been ongoing since 2006, concerns a construction dispute. The plaintiff is the main contractor of a project, known as "Proposed erection of 5 storey flats (22 Units) with basement carpark and swimming pool on Lots 114-41 MK22 at 89 Kovan Road" ("the Project"), that was completed on 18 March 2005. The defendant is the owner of the Project. Essentially, the plaintiff's claim is for underpayment in relation to the sum certified by the project architect, as well as for an alleged undervaluation by the defendant of the works carried out and materials delivered by the plaintiff. The defendant denies underpaying the plaintiff, and takes the position that the plaintiff was, in fact, overpaid. Accordingly, the defendant counterclaims for a sum corresponding to the alleged overpayment.

Principles relating to an application for security for costs under s 388(1)

4 The defendant's application for security for costs is made pursuant to s 388(1), which reads:

> **Security for costs**

> **388.** (1) Where a corporation is plaintiff 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 his defence*, require sufficient security to be given for those costs and stay all proceedings until the security is given. [emphasis added]

In any application for security for costs under s 388(1), the court must first determine if there is "credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his defence". In *Re Unisoft Group Ltd (No 2)* [1993] BCLC 532, the court held that the above quoted phrase simply means that the defendant has to show that the plaintiff company *would* be unable, and not *may* be unable, to meet its debts when an order for costs is made against it. If the defendant fails to adduce credible testimony to this effect, the inquiry ends and the application for security for costs should be dismissed.

5 If the court is satisfied that there is credible evidence that the plaintiff will be unable to pay the defendant's costs, the court's discretion is invoked. The court will then consider *all the relevant circumstances* and decide whether it would be *just* to order that the plaintiff provide security for costs. The above stated position was clearly enunciated by the Court of Appeal in *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1999] 1 SLR 600 ("*Creative Elegance*") at [13]:

> On the other hand, under s 388 *the condition is as follows: if it appears by credible testimony that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendant if successful in his defence. Once the condition under the respective provision is satisfied, the court's discretion is invoked*, and in exercise of that discretion the court decides whether or not to order security for costs against the plaintiff. In such an event, *whether the discretion is one under O 23 r 1(1)(a) or under s 388 the same principles are applicable: the court considers all the circumstances and decide whether it is just to order the plaintiff to provide security for costs and the extent of such security*. It is true that O 23 r 1(1)(a) spells out expressly that 'if, having regard to all the circumstances of the case, it is just to do so', the court may order the plaintiff to give security for the defendant's costs, whereas s 388 is silent in that respect. However, such words are implicit in the latter provision. The making of an order for security for costs under s 388 is a matter of discretion and in exercising its discretion the court will have regard to all the relevant circumstances and considers whether it is just to make the order. [emphasis added]

My decision

Whether the court's discretion to order security for costs is invoked

6 The first matter that I have to determine is whether the condition in s 388(1) has been fulfilled, *ie*, is there credible testimony that there is reason to believe that the plaintiff will be unable to pay the defendant's costs? In order to answer this question, it is important to ascertain what constitutes credible testimony that a plaintiff company is impecunious.

7 As stated in *Singapore Civil Procedure 2007* (G P Selvam ed) (Sweet & Maxwell Asia, 2007) at para 23/3/19, credible testimony is usually found in the form of a supporting affidavit which credibly and reasonably shows the inability of the plaintiff company to pay the costs of the successful defendant. The fact that a company is in liquidation is *prima facie* evidence that it is unable to pay the defendant's costs, unless evidence to the contrary is given (see *Northampton Coal, Iron & Waggon Co v Midland Waggon Co* (1878) 7 Ch D 500; *Pure Spirit Co v Fowler* (1890) 25 QBD 235). In a similar vein, the Court of Appeal in *Ho Wing On Christopher and Ors v ECRC Land Pte Ltd (in*

liquidation) [2006] 4 SLR 817 recognized (at [72]) that the public policy in favour of limiting uninhibited access to the courts by companies, as opposed to a natural person, is "*a fortiori* where the company in question is already in insolvent liquidation":

> When one is dealing with a company rather than a natural person, public policy is in favour of *limiting*, rather than encouraging, uninhibited access to the courts. This is *a fortiori* where the company in question is already in insolvent liquidation. In such cases, the high likelihood that a successful defendant's costs will be unrecoverable requires the law to give greater protection to the defendant rather than the claimant company. [emphasis in original]

Nevertheless, in *Frantonios Marine Services Pte Ltd and Anor v Kay Swee Tuan* [2008] 4 SLR 224 ("*Frantonios*"), Chan Seng Onn J made clear (at [33]) that s 388(1) *does not* require that there must be a winding up application against the plaintiff before it could be applicable. Chan J went on to state (at [34]) the various considerations that he thought were relevant to a determination of whether there is credible evidence that a plaintiff company is unable to pay the defendant's costs:

> In considering whether credible evidence existed to give reason for the court to believe that the plaintiff corporation would be able to pay the defendant's costs, the court would generally *include in its consideration the cash position and the financing and credit facilities available to the plaintiff corporation, its assets and liabilities* (both current and long term), including any enforceable legal debts or obligations owing by third parties to the plaintiff corporation but not some non-legally binding offers or avenues of financial assistance to the plaintiff corporation from interested third parties or based on some kind of goodwill. [emphasis added]

8 It is self-evident that a plaintiff company's cash position, available financing and credit facilities, as well as its assets and liabilities would be crucial in determining whether the company is impecunious. The most obvious way for the court to gain insight on such matters is through an examination of the plaintiff company's audited accounts. In this respect, *Halsbury's Laws of Australia* (Butterworths, 1995) states at para 325-9670 that:

> *A plaintiff corporation seeking to resist an application for security should place before the court a full and frank statement of its assets and liabilities*, including those of its shareholders. [emphasis added]

The difficulty in the present case is that the plaintiff has not filed audited accounts for the last four years (*ie*, since the year 2004). The plaintiff also did not produce bank statements or any other evidence of its current assets and liabilities apart from a bare assertion, albeit stated on oath, by one of its directors, Ho Soo Fong ("Ho"), that the company was solvent and capable of paying the defendant's costs. When I questioned the plaintiff's counsel, he informed me that the plaintiff *could not produce*, at this time, accounts for the four years since 2004. When pressed further, he also confirmed that the plaintiff was required, in law, to file audited accounts periodically but had failed to do so. However, plaintiff's counsel argued that while the plaintiff is admittedly poorly administered, this did not mean that it is insolvent or impecunious.

9 The plaintiff primarily sought to rely on letters of award relating to three ongoing projects, at 1 Rosyth Road ("Rosyth project"), 150 Braddell Road ("Braddell project") and 5 Daisy Avenue ("Daisy Avenue project"), to show that it is solvent and capable of paying the defendant's costs. The defendant pointed out that all three projects had been awarded by related companies, and suggested that the letters of award may have been "created to show a value in the Plaintiffs when in effect there was none", and that the awards are "suspicious" and "merely a sham" (see Affidavit in Reply for Security for Costs of Abhishek Murthy at [18], [19] and [34]). Despite the defendant's allegations, I

am not convinced that there is evidence indicating anything untoward about the award of the three projects to the plaintiff. It is not uncommon for businesses to operate through related companies or subsidiaries, and there is nothing *prima facie* wrong or suspicious in the awarding of a project to a related company.

10 Further, the plaintiff has provided documents from third parties which show that it has been active in the Rosyth project since September 2008, and in the case of the Braddell project, since June 2008. The plaintiff's involvement in these projects thus appears to have begun before there was any intimation by the defendant of a security for costs application. The defendant's attack on the *bona fides* of the contract in relation to the Daisy project (on the ground that only 30% of the contract sum has been certified) is also unsupported since that contract is administered by an architectural firm that certifies payment in accordance with the contract and there is simply no evidence that this professional firm is a colluding party.

11 Although I do not doubt the *bona fides* of the three ongoing projects, I am not satisfied that this revenue stream means that the plaintiff will necessarily be able to satisfy a court order for costs should the defendant succeed at trial. Without the benefit of examining the plaintiff's audited accounts, bank statements, or a statement of its assets and liabilities, it is practically impossible for the court to determine whether the plaintiff has sufficient assets to cover its liabilities. While the plaintiff may have shown a viable revenue stream, this stream of income could be dwarved by its existing liabilities. This is especially so given that there are inter-company transactions between the plaintiff and its related companies, and the value of inter-company liabilities is currently indeterminate. If the plaintiff's existing liabilities exceed its assets and the revenue stream from the various projects, an order for costs in favour of the defendant, at trial, could well be left unsatisfied.

12 I am cognizant of the fact that s 388(1) requires that I be satisfied that there is *credible evidence that the plaintiff will be unable to pay* the defendant's costs if the defence succeeds. Thus, even though I am of the view that there is insufficient evidence to prove that the plaintiff *is* solvent, this fact may not be sufficient to satisfy the condition in s 388(1). However, it cannot be the case that the court's discretion to exercise security for costs can *never* be invoked when there is an acute lack of evidence as to the financial position of the plaintiff. A plaintiff should not be allowed to resist a security for costs application by simply hiding behind its own failure to file proper audited accounts. As held in *San Heines Investment Ltd v THL (Holdings) Co Ltd & Anor* [2001] 1 HKC 39 ("*San Heines*") at 42:

> The applicant still *has to produce credible evidence* – be it *direct or circumstantial – from which it may reasonably be inferred that the respondent will be (not may be) unable to pay the costs*. Only then does the onus shift to the respondent. If the applicant does not produce such evidence the application fails. [emphasis added]

I am of the view that credible testimony that a plaintiff will be unable to pay the defendant's costs can come in the form of both direct *and circumstantial evidence*. To my mind, where it can be shown that the plaintiff has been derelict in its duty to file audited accounts for an extended period of time and there is no other evidence showing that the plaintiff currently has assets and/or revenue in excess of its liabilities, this is certainly circumstantial evidence that the plaintiff may be impecunious. In order to counter the weight of this circumstantial evidence, the plaintiff will have to produce other material which evidences its allegedly solvent financial position. In this respect, s 108 of the Evidence Act (Cap 97, 1997 Rev Ed) states:

> **Burden of proving fact especially within knowledge**

> **108.** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

It would thus be appropriate to place the burden of producing evidence of the plaintiff's financial position on the plaintiff in cases such as the present one since this information would obviously be especially within its knowledge. Conversely, the defendant is severely handicapped in procuring evidence to show that the plaintiff is impecunious when there are no audited accounts in existence and no bank statements are furnished.

13 I will emphasize that a lack of audited accounts is merely circumstantial evidence from which a court *can* infer that a plaintiff company is impecunious. Whether such an inference should be made will depend on the facts of each particular case. In itself, a lack of audited accounts may well not, in the vast majority of cases, be sufficient to fulfil the condition in s 388(1). Nevertheless, I do not have to decide this point since there are other pieces of circumstantial evidence in the present case that corroborate the inference that the plaintiff will be unable to pay the defendant's costs should the defendant succeed at trial.

14 While it is undisputed that the plaintiff has made payment of more than $180,000 in costs orders to the defendant, it is pertinent that none of the cheques in payment were made out of the plaintiff's bank account. All the cheques were made out by related parties, and the various cost orders were only complied with after some delay. In fact, on two occasions, the defendant had to take up winding up applications against the plaintiff before cheques were issued, by related parties, to satisfy the costs orders. Further, the defendant's director Abhishek Murthy testified in his affidavit dated 24 November 2008 at [40] and [42] that:

> 40 … In a matter unconnected with these proceedings, the Plaintiffs were sued by one Presscrete Engineering Pte Ltd ("Presscrete") in a case coming under MC Suit No. 7304 of 2000R. Presscrete obtained judgment against the Plaintiffs in the said matter. The judgment sum was in the region of $20,000.00.
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> …
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> 42 Pursuant to the failure of the Plaintiffs to satisfy Judgment, Presscrete sought and obtained an order to garnish payments from the Defendant to the Plaintiffs. Before formal garnishee proceedings were instituted against the Defendants, *Presscrete informed me that they had first attempted to garnish the Plaintiffs' bank accounts. Unfortunately, there were no and/or insufficient funds therein*. Thereafter, Presscrete *tried to seize the Plaintiffs' assets*. *Having failed* to recover the judgment sum in this way, Presscrete then *decided to garnish the payments from the Defendants to the Plaintiffs*.
>
> [emphasis added]

15 The circumstances highlighted above suggest that the plaintiff does not have substantial funds in its bank accounts. The fact that no bank statements have been produced supports such an inference. Taken together with the plaintiff's failure to file audited accounts for the past four years, I have serious doubts as to whether the plaintiff has sufficient assets and/or revenue to satisfy the defendant's costs should the defendant succeed at trial. Further, the plaintiff looks to have difficulty in raising finance of its own, since it has been relying on "generous benefactors" to satisfy the various costs orders made against it, and even then, only satisfying such costs orders after some delay. In this respect, the holding of the High Court in *Frantonios* (at [33]) is instructive:

If there was a need to rely on third-party benefactors to pay the first defendant's operational expenses and debts and *to meet the potential legal costs of the defendant* in the event of an unsuccessful claim by the first plaintiff, that *would indicate that the first plaintiff did not itself have the financial resources to pay the costs of defendant*, and accordingly the condition in s 388 would be satisfied. [emphasis added]

16 On the facts before me, it appears that the plaintiff's director, Ho, and his family are the driving force behind the plaintiff and its related companies. The Ho family also appears to be involved in financing the plaintiff's claim. After all, it was Ho, together with one Ho Soo Kheng, who issued the cheque (in his personal capacity) satisfying the most substantial cost order of some $114,899.57. As discussed above, there is no evidence that the plaintiff has assets and/or revenue in excess of liabilities, and all its existing projects are with related companies. In these circumstances, there is genuine concern that the plaintiff could be used as a vehicle to pursue litigation through the financial resources of "interested parties" who would stand to benefit should the cause of action be successful, but who would not be at risk of liability as to costs. As held in *Frantonios* at [53]:

53 Where the condition in s 388 is satisfied (*ie*, that the impecunious plaintiff corporation is unable to pay the costs of the successful defendant), it normally follows that the corporation's own costs of pursuing the *claim must be financed by the directors, shareholders or other interested parties* (collectively called "interested parties"). If these interested parties believe that the plaintiff corporation has a viable or meritorious cause of action and they wish to shoulder the risk of that litigation, then it is only fair that they should not only provide funds for the corporation's legal fees and associated expenses for the litigation, but they should also, if so ordered by the court, provide funds to enable the plaintiff corporation to provide security for costs of the defendant in the event the plaintiff corporation's action fails, since there is no real possibility that the plaintiff corporation itself will be able to satisfy the defendant's costs. *The interested parties' evaluation of risk should not be allowed to proceed on the basis that if the plaintiff corporation were to succeed, the interested parties stand to gain (albeit indirectly) but if the action is lost, the interested parties can simply walk away leaving the defendant saddled with unpaid costs that the plaintiff corporation will not be able to pay anyway*. These interested parties are essentially hiding behind the impecunious plaintiff corporation, only financing the plaintiff's side of the litigation costs but ignoring the plight of the defendant, who would not be able to reach the interested parties to satisfy its unpaid legal costs. That in my view would be hard to justify in principle and would not be fair. *Interested parties not prepared to provide the funds to meet the security for costs orders, generally ought not to be allowed to finance and launch litigation using the impecunious plaintiff corporation as a shield*. [emphasis added]

17 In the totality of the circumstances, I am of the view that there is sufficient circumstantial evidence to constitute credible testimony, for the purposes of s 388(1), that there is reason to believe that the plaintiff will be unable to pay the defendant's costs if the defendant is successful in his defence. Accordingly, the court's discretion to order security for costs is invoked.

Whether the court's discretion to order security for costs should be exercised

18 I now turn to the question of whether the court should exercise its discretion to order security for costs in this case. Counsel for the plaintiff submitted that in the event the court believed that the plaintiff was not able to pay the defendant's costs, the court should nevertheless not exercise its discretion to order security for costs because:

(a) The defendant's counterclaim is based entirely on its defence to the plaintiff's claim.

(b) The application for security for costs was made a late stage of the proceedings.

(c) The plaintiff's claim had a good prospect of success.

The defendant's counterclaim is based entirely on its defence to the plaintiff's claim

19 It is not seriously disputed that the defendant's counterclaim is based entirely on its defence. Where there is an overlap between the defence and the counterclaim, the granting of security would amount to indirectly aiding the pursuit of the counterclaim (see *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR 427 ("*Wishing Star*")). In *Wishing Star*, the Court of Appeal held (at [16], [19] and [20]) that:

> 16 In our opinion, in the context of this case, *two critical factors weigh heavily in favour of WSL*. First is the delay in JTC taking out the application. Second, the *counterclaim of JTC is based entirely on its defence* to the claim of WSL.
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> …
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> 19 Next, it is undeniable that JTC's defence to the claim and its counterclaim are launched from the same platform. The time and work required for the trial of the counterclaim would be substantially the same, whether or not the claim of WSL is stayed. In short, no significant additional costs would be incurred by JTC if we were to allow the action to proceed. In such circumstances, we were *unable to see what purpose it would serve in staying the action of WSL*. Costs incurred in defending the action could be regarded as costs necessary to prosecute the counterclaim. Indeed, *granting security in this situation could amount to indirectly aiding JTC to pursue its counterclaim*.
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> 20 This is a factor which could be taken into account and is supported by authorities. In *B J Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43, a case under the UK Companies Act 1985, the English Court of Appeal, in reversing the decision of the court below, emphasised that "there can be no rule of thumb as to the grant or refusal of an order for security". Among the reasons advanced by Bingham LJ to refuse an order for security was this (at 53):
>
> > I am persuaded that it would be wrong to do so here because the costs that these defendants are incurring to defend themselves may equally, and perhaps preferably, be regarded as costs necessary to prosecute their counterclaim.
>
> [emphasis added]

20 In the present case, the defendant admits, in its Further Arguments at [11], that "the Defendants' defence is entirely subsumed in its counterclaim". However, relying on the decision of *PT Muliakeramik Indahraya TBK v Nam Huat Tiling & Panelling Co Pte Ltd* [2006] SGHC 154 ("*Mulia*"), the defendant argues that this fact is not fatal to its application for security for costs. In *Mulia*, Assistant Registrar Teo Guan Siew held (at [17] to [19]) that:

> 17 It is very common for a defendant to plead by way of counterclaim similar matters that are found in the defence. Typically, under the counterclaim, the defendant will repeat the paragraphs found in the defence. Mr Kronenburg's submission, if accepted, will mean that in all these cases, regardless of the respective merits of the parties' case and the circumstances in each individual case, such a defendant will invariably be deprived of security for costs.

18 The courts in *JTC v Wishing Star* and *BJ Crabtree* were concerned that even if the plaintiff's claim is stayed in the event that the order for security is not complied with, the same matters raised in the claim will still be tried because of the counterclaim. While that is true, the other scenario where security for costs is provided should also be considered. The effect of that would be that the defendant's costs for defending the plaintiff's action will be secured. If the plaintiff's claim is a weak one and other circumstances exist such as difficulties of enforcement, it is arguably justifiable that the defendant's costs should be protected, albeit the security may go indirectly to supporting the defendant's counterclaim at the same time.

19 In my view*, the fact that the defence is entirely subsumed within the counterclaim cannot be a decisive factor against ordering security*. It remains a mere factor to be taken into account in the court's exercise of discretion. This conclusion is supported by O 23 r 1 itself, which says that security should be ordered only if it is just having regard to all the circumstances of the case. In fact, the conclusion is also supported by the decisions in *JTC v Wishing Star* and *BJ Crabtree*. In the former, the overlap of the defence and counterclaim was expressly stated by the Court of Appeal to be just one of the two critical factors that weighed heavily against ordering security.

[emphasis added]

21 I agree that *Wishing Star* does not stand for the proposition that a defendant's application for security for costs should inevitably fail where the defence is entirely subsumed within the counterclaim. In the words of Bingham LJ in *BJ Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* [1990] 59 Build LR 43:

> At the outset it is right to record, as has been held on a number of occasions, that the question whether any order should be made is a discretionary question even under section 726, and it is a *discretion to be exercised in the interests of justice having regard to the peculiar features of the case before the court. It cannot be too firmly emphasised that there can be no rule of thumb as to the grant or refusal of an order for security in these circumstances*. [emphasis added]

However, a complete overlap between the defence and the counterclaim, while not decisive, is a *critical factor* against granting security for costs. In *Wishing Star*, Chao Hick Tin JA held the fact of the counterclaim being based entirely on the defence to be one of two "critical factors" which "weighed heavily" against granting security for costs in that case. The weight attached to this factor is evident on an examination of [23] of *Wishing Star*:

> *We recognised that WSL did not have any meaningful assets in Singapore other than holding a 55% share in a company in Singapore with a paid-up capital of $10,000*. Neither was it shown that WSL had any substantial assets in Hong Kong, its place of incorporation. Thus, there *could well be difficulties in enforcing a Singapore judgment on costs in China where WSL has most of its assets*. These are, no doubt, factors on the other side of the scale. *But balancing these against the two factors* mentioned above, namely, lateness in the application and the *overlap between the claim and the counterclaim*, and their consequent effects, we *had no hesitation at all in concluding that the situation favoured the refusal of any security for costs*. It would not be just to make the order. [emphasis added]

On the facts before me, I find *Wishing Star* to be indistinguishable. As such, the overlap between the defence and the counterclaim weighs heavily against an exercise of the court's discretion to order security for costs.

The application for security for costs was made at a late stage of the proceedings

22 The plaintiff also relies on the delay in taking out the application for security for costs as a factor weighing against the exercise of the court's discretion to grant security for costs. In *Wishing Star*, the Court of Appeal considered lateness in applying for security for costs to be one of two critical factors (the other critical factor being the overlapping nature of the defence and the counterclaim) that justified a refusal of security for costs in that case (see *Wishing Star* at [16] and [23]). The issue of delay in making an application for security for costs was also discussed in *Ooi Ching Ling Shirley v Just Gems Inc* [2002] 3 SLR 538 ("*Ooi Ching Ling*"), where the Court of Appeal observed at [20] that:

> 20 Finally, *every application for further security should be made promptly*. If it is made so late that the *bulk of the costs have already been incurred, the application might well be refused*. Of course, if the *delay is satisfactorily explained, then the position could be different*. [emphasis added]

In line with the court's reasoning in *Ooi Ching Ling*, it would follow that the impact of lateness in applying for security for costs would depend largely on whether the bulk of costs had already been incurred and whether the delay was satisfactorily explained.

23 While this matter was commenced in 2006 and is currently in progress for a third tranche, the bulk of costs for the third tranche (in respect of which the security application is made) have not yet been incurred, and costs for the first and second tranches have been settled. Although the bulk of costs for the third tranche have not yet been incurred, I note that the defendant has had several opportunities to make this application, yet failed to do so. At least since the pre-trial conference held on 1 September 2008 where trial dates (for the third tranche) were given, the defendant should have been alive to the possibility of an application for security for costs if it was concerned about the costs of defending the action. However, the first intimation of the defendant's intention to apply for security for costs only came more than one and a half months later, at the next pre-trial conference held on 24 October 2008, wherein directions were given that the defendant was to file the said application by 31 October 2008.

24 The directions at the pre-trial conference of 24 October 2008 were *not* complied with. The defendant explained, at a pre-trial conference held on 20 November 2008, that it was unable to meet the timelines because it had engaged new foreign experts to explain the plaintiff's alleged inability to pay costs and these experts needed more time to complete their reports. The court granted the defendant an extension of time on this basis, and this application for security for costs was filed on 24 November 2008. However, at [65] of the Affidavit in Reply for Security for Costs of Abhishek Murthy, the defendant clarified that it is using the same experts as before (*ie*, it was not using the new foreign experts). In the hearing before me, counsel for the defendant sought to explain this, submitting that the defendant had engaged the foreign experts on the basis that the plaintiff possessed audited accounts for the years since 2004. In light of the subsequent revelation that no such audited accounts existed, the defendant decided to use the same experts as before. Nevertheless, an examination of the minute sheet of the pre-trial conference held on 20 November 2008 reveals that the defendant was already cognizant, at that time, that the plaintiff could not produce any audited accounts for the years since 2004.

25 As such, I am not convinced that the defendant has provided a satisfactory explanation for its delay in applying for security for costs. In any event, no explanation was proffered on the delay of more than one and a half months between the date the third tranche was fixed for trial (on 1 September 2008) and the defendant's first intimation that it would be applying for security for costs

(on 24 October 2008). In these circumstances, I was of the view that the delay in making the application for security for costs was a factor that weighed against granting security for costs.

The merits of the claim

26 The strength or weakness of the plaintiff's claim is certainly a factor that can be taken into account in determining the issue of security for costs (see *Creative Elegance*; *L&M Concrete Specialists v United Eng Contractors* [2001] 4 SLR 524 ("*L&M Concrete*")). Based on the pleadings, the defendant does not dispute the validity of the 25 interim certificates relied on by the plaintiff. On the face of these certificates, $3.9 million has been certified by the architect as due and payable to the plaintiff, while only $3.3 million has been paid, leaving $600,000 unpaid. In my view, since this $600,000 has been certified as payable but has not been paid, the plaintiff has a reasonable prospect of success as regards this sum. The question of how much the plaintiff can recover will depend on the extent to which the defendant can prove an alleged set-off based on backcharges owing, defective works and liquidated damages. Of course, if the defendant manages to prove its defence and counterclaim in its entirety, there will be nothing due to the plaintiff and the plaintiff would, in fact, owe the sum counterclaimed to the defendant. Nevertheless, the fact remains that the plaintiff's claim appears to be a genuine claim that is deserving of being tested in court. In my view, whether the plaintiff owes the defendant backcharges or damages for defective works is a matter to be decided at trial. This issue did not affect the validity of the plaintiff's claim in relation to work done for which it had been underpaid. In this respect, the observations of Judith Prakash J in *L&M Concrete* at [11] and [12] are instructive:

> 11 Taking the above factors in turn, I was first of all satisfied that United Eng's claim against L&M in respect of the Sinsov project was a bona fide one. There was no doubt that United Eng had done work on the project and that they were entitled to payment. The question in issue was the quantum of such payment. It was clear from the pleadings that about two-thirds of the claimed amount had been recognised as due by L&M and that the dispute would be over the remaining onethird. Whether or not United Eng would succeed in obtaining the full quantum they had sued for was not relevant. What was important was that the claim was a genuine one which was deserving of being tested in court.
>
> 12 The second question was whether United Eng had a reasonably good prospect of success. As far as this was concerned, their prospect of being successful in recovering at least $800,000 was good. Whether they would receive payment depended on whether L&M could prove its counterclaim. This was not a liquidated claim but a claim for damages for delay and there was no admission of liability. Since United Eng had not been the only sub-contractor involved in the project, L&M would have to show first that United Eng had delayed and second, that it was this delay that had caused the whole project to be delayed. Third, L&M would have to prove its damages. All these were issues for L&M to deal with and did not have a direct effect on United Eng's case in relation to the amount of work which they had done.

27 I am wary of entering into a detailed examination of the merits of the case at this stage of the proceedings in light of Chan J's exhortation in *Frantonios* (at [48] to [51]) that this is usually an unprofitable exercise unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure. Nevertheless, on the materials before me, I am satisfied that at least a substantial part of the plaintiff's claim did bear a reasonable prospect of success.

Conclusion

28 Taking into account the overlap between the defence and the counterclaim, the delay in taking

out this application for security for costs, and the fact that a substantial part of the plaintiff's claim did bear a reasonable prospect of success, I find that it is not just in all the circumstances to order the plaintiff to pay security for the defendant's costs. Accordingly, I dismiss the defendant's application. I will now hear the parties on costs.