

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Hamid Sultan Abu Backer, JCA; Zabariah Yusof, JCA; Rhodzariah Bujang, JCA

Ling Khee Ming v Ling Shew Kue @ Ling Chai Yuen and Another

Citation: [2018] MYCA 267 **Suit Number:** Civil Appeal No. N-02(NCVC)(W)-2555-12/2017

Date of Judgment: 08 August 2018

Litigation & court procedure – Costs – Security for costs – Meaning & scope – Application for security for costs in reliance of section 44 of Courts of Judicature Act 1964, rule 27 of the Rules of Court of Appeal, Order 23 of Rules of High Court 2012

JUDGMENT

[1] The respondents in this appeal has filed an application for security for costs in reliance of section 44 of **Courts of Judicature Act 1964 (CJA 1964)**, Rule 27 of the **Rules of Court of Appeal (RCA 1994)** as well as Order 23 of **Rules of High Court 2012 (RC 2012)**. The application (Enclosure 15) sets out the prayer as well as the grounds. For convenience, we *inter alia* repeat the application in *verbatim* and it read as follows:

“NOTIS USUL**(Jaminan untuk kos)**

SILA AMBIL PERHATIAN bahawa pada 1 haribulan Jun, 2018 pukul 9 pagi/ petang, atau dengan seberapa segera selepas itu yang dia boleh didengar, peguamcara bagi Responden-Responden yang dinamakan di atas akan mengusulkan Mahkamah supaya Mahkamah membuat suatu perintah berdasarkan Seksyen 44 Akta Mahkamah Kehakiman 1964, Kaedah 27 Kaedah-Kaedah Mahkamah Rayuan 1994 dan Aturan 23 Kaedah-Kaedah Mahkamah 2012 dan untuk perintah-perintah, arahan-arahan, dan relif-relif bahawa:-

1. Perayu membayar wang sebanyak RM40,000.00 atau suatu jumlah yang yang difikirkan adil oleh Mahkamah yang Mulia ini sebagai jaminan untuk kos dalam tempoh 14 hari dari tarikh perintah ini;
2. Rayuan ini dibatalkan sekiranya Perayu-Perayu gagal membayar wang jaminan yang

ditetapkan oleh Mahkamah yang Mulia ini dalam tempoh empat belas (14) hari dari tarikh perintah ini;

3. Kos;

4. Apa-apa relif-relif dan/atau perintah selanjutnya yang difikirkan adil dan suaimanfaat oleh Mahkamah yang Mulia ini.

Alasan ringkas bagi menyokong permohonan ini adalah seperti berikut:-

1. Pada 17.11.2017, Mahkamah Tinggi Malaya di Seremban selepas mendengar keterangan saksi-saksi dan hujahan-hujahan kedua-dua pihak telah menolak tuntutan Perayu dengan kos sebanyak RM40,000.00 dibayar kepada Responden-Responden.
2. Perayu kemudian merayu ke Mahkamah Rayuan melalui Notis Rayuan bertarikh 13.12.2017.
3. Peguamcara Responden-Responden telah menghantar notis bertarikh 19.1.2018 kepada peguamcara Perayu supaya Perayu membayar kos yang diawardkan oleh Mahkamah Tinggi, sekiranya tidak, Responden-Responden terpaksa memfailkan permohonan untuk jaminan kos.
4. Sehingga hari ini, Perayu telah enggan, gagal dan ingkar untuk membayar kos yang jumlahnya sebanyak RM40,000.00.
5. Responden-Responden akan diprejudiskan jika Perayu tidak membayar kos yang telah diperintahkan serta tidak memberi sekuriti untuk kos bagi rayuan ini yang dianggarkan sebanyak RM20,000.00.

Alasan-alasan terperinci permohonan ini adalah seperti yang terangkum dalam Afidavit Sokongan Ling Shew Kue @ Ling Chai Yuen yang diikrarkan pada 13 Februari 2018 dan yang difailkan bersama-sama dengan permohonan ini.”

Preliminaries and Observations:

[2] When dealing with security for costs, courts and counsel must not forget that access to justice is a ‘fundamental guarantee’ under the **Federal Constitution**. The courts under the Federal Constitution are in place to give a right of hearing at all stages and not to create obstacle by reason of security for costs, etc. in particular to the poor, needy and oppressed. Thus, the issue on security for costs cannot be arbitrarily exercised purely based on case laws without knowing the means of payment of the litigant whether it be a person and/or company. The need to consider the ‘means of payment’, in the context of the ability to pay security for costs to seek justice is an important criteria within the framework of the Federal Constitution as the Constitution is supreme and Acts such as CJA 1964 as well as Rules of Court are meant to facilitate the entrenched right of access to justice.

[3] In consequence, in opposing an application for security for costs at the appeal stage, it is

incumbent for the respondent to aver that the appellant has the means to pay and where practical provide evidence of such means. Once such an averment is there, the appellant can disclose his income or asset inclusive of his liquidity position to pay or to resist the application. Such an averment as well as response is important for the court in the event it is minded to order security for costs to decide what should be the fair amount taking into consideration the jurisprudence related to access to justice. In some cases, security for costs in the form of a guarantee or pledge of a security, limited to the amount ordered by the court may suffice, provided it is reasonable to do so.

[4] In the instant case, the learned counsel for the applicant in the submission relies on an English case which has no relevance to our Constitution and statutory framework to access to justice, to say:

“[8] The law is that the amount of security will extend to past costs (*Procon Ltd v Provincial Building Co. Ltd and others* [1984] 2 AER, 368).”

[5] It must be emphasised that courts must be extremely slow in relying on cases outside our jurisdiction when the Constitution as well as statutory formula of that jurisdiction is not the same, more so when the issue is related to fundamental guarantees.

Jurisprudence for Security for Costs

[6] A security for costs order and the decision of the courts may be inextricably inter-twined for persons as well as companies. For company, a liberal approach has been adopted pursuant to section 351 of the **Companies Act 1965 (CA 1965)**. In addition, Rule 17 of the **RCA 1994** will often be relied upon for security in relation to past costs. In the instant case, the applicant relies on section 44 of the **CJA 1964**, Rule 27 of **RCA 1994**, Order 23 of **RC 2012** and also Rule 17 of **RCA 1994**, the relevant part reads as follows:

S. 44 of the CJA 1964

“44. (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.”

Rule 27, RCA 1994

“27. (1) All applications to the Court shall unless otherwise provided be made by motion and shall be heard in open court.”

Order 23 of RC 2012

“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 a 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.

(2) The Court shall not require a plaintiff to give security by reason only of subparagraph (1)(c) if he satisfies the Court that the failure to state his address or the misstatement thereof was made innocently and without an intention to deceive.”

Rule 17 of RCA 1994

“17. (1) Notice of appeal may be given by filing within the time limited for bringing the appeal four copies of the notice of appeal in the Registry of the High Court at the place where the judgment, order or decision complained of was made or given by paying the prescribed fee and by lodging in Court at the same time the sum of five hundred ringgit as security for the costs of the appeal:

Provided that the Court may at any time, in any case where it thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs relating to the matters in question in the appeal:

Provided further that no deposit by way of security for costs shall be required if the appeal is brought by the Government of Malaysia or any State Government.”

Meaning of Security for Costs

[7] The security for costs mentioned in section 44 of **CJA 1964** relates to security for the subject matter of the appeal. The security for costs mentioned in Rule 17 of **RCA 1994** relates to security for costs of the appeal as opposed to the subject matter of the appeal. There is a nuance between the term for security for costs of the subject matter, proceedings (see Order 23 of **RC 2012**) and appeal, even though the terminology ‘security for costs’ is used for all three types of costs. The jurisprudence and distinction related to section 351 of **CA 1965**, section 44 of **CJA 1964** and Rule 17 of **RCA 1994**

is not one and the same. All these provisions may be subject to Order 23 as the appeal is rehearing process and the court has wide powers to make relevant orders as it deem fit under section 69 of **CJA 1964**. We will elaborate on the principles related to security for costs further in our judgement.

Jurisprudence Relating for Security for Costs

[8] In dealing with security for costs, it is essential to note that there is a distinction between security for costs for the costs of the appeal (Order 23 of **RC 2012** and rule 17 of **RCA 1994**) as opposed to security for costs in relation to the subject matter (s. 44 of **CJA 1964**) of the dispute. That is to say, one is costs related to costs of appeal and not party to party costs and the other is security related to the subject matter. When an application relates to subject matter, the court can order the whole of the judgment sum or part thereof or that related to the subject matter to be placed as security and that has nothing to do with costs of appeal. If this distinction is not appreciated in the proper perspective it will lead to convoluted arguments resulting in convoluted jurisprudence.

[9] The right to appeal in Malaysia is a constitutional as well as a statutory right. In consequence, the Rules Committee for security for costs has fixed only a minimum sum of RM1,000.00 currently as the bench mark for access to justice. In **Hadkinson v Hadkinson** [1952] 2 ALL ER 567, which is not related to security for costs, Lord Denning as a general point of public importance, had this to say:

“No matter how badly a litigant has behaved, nevertheless, generally speaking, if he has a right of appeal, he has a right be heard, for the simple reason that, if he is not heard, his right of appeal is valueless.”

[10] When dealing with security for costs, it is important to note that Order 23 rule 1 of **RC 2012** relates to security for costs in respect of costs in the proceedings and that application can only be made by the defendants against the plaintiff. In addition when there is an appeal from the subordinates court to the High Court, the Rules Committee headed by the Chief Justice of Malaysia (CJ) and consisting members of the Judiciary, Attorney General’s Chamber as well as the Bar Council has deem it fit to fix security for costs in respect of the appeal at RM1,000.00 [see Order 55 rule 3 of **RC 2012**], unless the court otherwise orders. That is to say notwithstanding the costs order of the appeal process upon hearing of the appeal may be more than RM1,000.00. The Rules Committee in view of the prevalent responsibility of the Judiciary under the Federal Constitution to provide access to justice have kept costs elements to the bare minimum. Similarly, Rule 17 of **RCA 1994** is a mirror of Order 55 rule 3 of **RC 2012**. In essence, when it relates to access to justice, the courts are required to be careful in awarding excessive amount as a form of guaranteed indemnity of actual costs of the appeal. Order 55 rule 3 and Rule 17 of **RCA 1994** do not support a proposition for security for costs in the nature of guaranteed indemnity. If that is the case the Rules Committee would have clearly stated so. Cases outside our jurisdiction must be read with caution, where the constitutional framework may not be the same and rules as to costs may not be determined by the stakeholders of justice, namely the Judiciary, Attorney General’s Chamber and the Bar Council.

[11] Rule 17 of **RCA 1994** makes provision for the Court of Appeal in deserving cases to order further security of costs for the payment of past costs. The threshold to satisfy this part of the rule is

high and it will usually be exercised in a case where plaintiff or defendants on the face of record has no merit or appears to be vexatious. It is not sufficient just to demonstrate to the court that the appellant is impecunious to meet with costs, as such an approach will not be sufficient to balance with the jurisprudence relating to access to justice. That is to say that the poor, needy inclusive of natives, etc. should not be refused access to justice just because they cannot pay the past costs related to costs on party to party basis ordered by the trial court.

[12] In the instant case, from the affidavits filed, it is clear that the applicants are not seeking for costs in relation to the subject matter, and in consequence reliance of Section 44 of **CJA 1964** is misconceived.

[13] The starting point to appreciate the underlying jurisprudence for security for costs does not originate from Rule 17 of **RCA 1994** but Order 23 of **RC 2012**.

[14] Order 23 of **RC 2012** sets out a very restrictive test and a genuine citizen pursuing a claim cannot be ordered to pay security for costs. [See **Brisking Industries Sdn Bhd & Anor v MBF Insurans Berhad** [2008] 1 LNS 260; see Janab's Key to Civil Procedure 5th ed. pages 398 to 402].

[15] When making an application for security for costs under Rule 17 of **RCA 1994**, it is incumbent upon the applicant to satisfy one of the requirements set out in Order 23 rule 1 of **RC 2012**, failing which it may not be a fit application for the Court of Appeal to exercise its jurisdiction as stated in the said rules. That is to say, the test for a 'fit' application necessarily must satisfy the criteria in Order 23 of **RC 2012 per se**. The strict provision of Order 23 has everything to do with access to justice, the Federal Constitution and the right of appeal under the legislation. Thus, Rule 17 of **RCA 1994** must be read together with Order 23 of **RC 2012** to appreciate the underlying jurisprudence for security for costs as well as access to justice. Ultimately, the decision whether or not to allow an order for security for costs as well as the quantum is entirely vested with the discretion of the court. The said discretion cannot be arbitrarily exercised.

[16] As a general rule, a plaintiff or defendant in an appeal ordinarily resident in Malaysia cannot be subject to an application for security for costs purely, on the grounds of impecuniosity. Even if the plaintiff or appellant is a corporate entity, security for costs will not be ordinarily given. The English Court of Appeal in the case of **Keary Developments Ltd. v Tarmac Construction Ltd** [1995] 3 All ER 534, a case related to our equivalent of section 351 of **Companies Act 1965**, laid down the relevant principles in exercising discretion when ordering security for cost which can be found at pages 539 and 540:

“(1) ... the court has a complete discretion whether to order for security, and accordingly it will act in the light of all the relevant circumstances.

(2) The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security... .

(3) The court must carry out a balancing exercise. On the one hand it must weigh the injustice to

the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity... .

(4) In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure... .

(5) The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount... .

(6) Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled... .

(7) The lateness of the application for security is a circumstance which can properly be taken into account... . But what weight, if any, this factor should have and in which direction it should weigh must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiffs without there being an order for security. Nevertheless, it is appropriate for the court to have regard to what costs may yet be incurred.”

[17] **Keary's** case though was related to our equivalent of section 351 of the **CA 1965**, the jurisprudence stated therein related to access to justice, is a safe guideline when considering an application for security for costs with a caveat that the underlying jurisprudence in Order 23 of **RC 2012** is not to be ignored when dealing with an application related to security for costs for proceeding or appeal. The threshold to satisfy a security for costs order under Order 23 of **RC 2012** is much higher than that of section 351 of the **CA 1965** as Order 23 rule 1 of **RC 2012** requirement will not be applicable to that section.

[18] For reasons stated above, we took the view that the applicants' reliance on section 44 of **CJA 1964** and Rule 17 of **RCA 1994** in the instant case were misconceived. In addition, the application under Rule 17 of **RCA 1994** was oppressive and did not satisfy the criteria to be considered as a fit and proper application for security for costs. Further, it is not the function of the Court of Appeal to assist the applicant to recover past costs as the Order of costs could have been enforced by way of enforcement proceedings. Failure to enforce Order of past costs and seeking to obstruct the appeal process may at times tantamount to abuse of process. In the instant case, there was no explanation in the affidavit as to why there was no enforcement proceedings initiated for past costs.

[19] In consequence, we unanimously dismissed the application for security for costs with no order as to costs.

We hereby ordered so.

Dated: 8 August 2018

sgd

DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER

Judge

Court of Appeal

Malaysia

COUNSEL

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LEGISLATION REFERRED TO:

Companies Act 1965, Section 351

Courts of Judicature Act 1964, Sections 44, 69

Rules of Court of Appeal 1994, Rules 17, 27

Rules of High Court 2012, Order 23, Order 23 Rule 1, Order 55 Rule 3

JUDGMENTS REFERRED TO:

Brisking Industries Sdn Bhd & Anor v MBF Insurans Berhad [2008] 1 LNS 260

Hadkinson v Hadkinson [1952] 2 ALL ER 567

Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534

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