IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(I) 7

Suit No 3 of 2020

Between

(1) Larpin, Christian Alfred
(2) Quo Vadis Investments Limited

… *Plaintiffs*

And

(1) Kaikhushru Shiavax Nargolwala
(2) Aparna Nargolwala

… *Defendants*

JUDGMENT

[Civil Procedure — Costs — Principles — Indemnity costs]

Larpin, Christian Alfred and another
v
Kaikhushru Shiavax Nargolwala and another

[2022] SGHC(I) 7

Singapore International Commercial Court — Suit No 3 of 2020
Roger Giles IJ
2, 10, 29 March 2022; 25 April 2022

25 April 2022 Judgment reserved.

Roger Giles IJ:

1 The judgment on the substantive issues in these proceedings, *Larpin, Christian Alfred and another v Kaikhushru Shiavax Nargolwala and another* [2022] SGHC(I) 4 (the "Main Judgment"), was given on 21 February 2022. This judgment assumes familiarity with the Main Judgment.

2 The proceedings were dismissed, and the Main Judgment concluded (at [218]):

> 218 … It is not easy to see any disposition of costs other than that the plaintiffs pay the defendants' costs, and I also make that order, but with liberty to apply within 21 days if either party seeks a different or additional order; the application may be made by letter to the Registry. I invite the parties, if they are unable to agree on the amount of costs, to propose directions for their determination.

3 By letter dated 2 March 2022, the defendants applied for an additional order "that the Defendants shall be entitled to party-and-party costs on the

indemnity basis (as opposed the usual standard basis) for work done on the matter from 29 March 2021".

4 The defendants' reasons were set out in the letter. The principal reason was that the defendants had, by Calderbank letters dated 6 July 2020 and 29 March 2021, given the plaintiffs the opportunity to discontinue the proceedings on a "no order as to costs" basis, but the plaintiffs had not responded to either letter. The date of 29 March 2021 in the proposed order was evidently taken as the date of the second of these letters. To the Calderbank letters the plaintiffs added the submissions, in summary:

> (a) the plaintiffs having accepted that the price paid for the Villa was a proper price, the real reason for the proceedings must have been to obtain indemnity for the irrecoverable costs incurred in the Lew proceedings (Main Judgment at [9]); but in the light of the decision of the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 ("*Maryani*"), that endeavour was doomed to fail, and the plaintiffs "cannot seek to deny that they appreciated or otherwise ought to have appreciated the likelihood that the Suit constituted an abuse of process";
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> (b) the plaintiffs had unreasonably declined to admit the facts in a Notice to Admit Facts dated 14 June 2021, whereby the defendants were needlessly required to deal with the facts in evidence; and
>
> (c) the refusal to admit the facts was "indicative of the [generally] unreasonable manner in which the Plaintiffs' case was conducted". However, the defendants did not provide any further instances or explanation of the asserted general unreasonableness.

5 The application was opposed by the plaintiffs in a letter dated 10 March 2022. The plaintiffs first submitted that indemnity costs do not apply in Singapore International Commercial Court ("SICC") proceedings, referring to *CPIT Investments Ltd v Qilin World Capital Ltd and another* [2018] 4 SLR 38 ("*CPIT*"). As to the defendants' reasons they submitted, again in summary:

(a) the Calderbank letters were not genuine offers to compromise the plaintiffs' claim but asked the plaintiffs to capitulate, and (with reference to *Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal* [2004] 3 SLR(R) 267 ("*Man B&W*")) such an offer will not bring indemnity costs;

(b) the refusal to admit facts was of no significance, because the facts in question were not relevant and the defendants were in any event put on notice that they did not have to deal with them;

(c) their claim could not be said to be entirely without factual and/or legal basis, for reasons given, and there were not the exceptional circumstances or unreasonable conduct required for an order for indemnity costs (referring to *GTMS Construction Pte Ltd v Ser Kim Koi (Chan Sau Yan (formerly trading as ChanSau Yan Associates) and another, third parties)* [2021] SGHC 33 and *Lim Oon Kuin and others v Ocean Tankers (Pte) Ltd (interim judicial managers appointed)* [2021] SGCA 100); to which was added that the defendants had not applied to strike out the plaintiffs' claim, which "speaks volumes".

6 The defendants' letter of 2 March 2022 had not addressed indemnity costs under the SICC costs regime. By a further letter dated 29 March 2022, the defendants responded to the plaintiffs' submission that indemnity costs did not

apply. They maintained that the SICC had power to order costs on the indemnity basis, but submitted that if no order was made on the present application they should be allowed to rely on the Calderbank letters to seek a higher amount of costs "if and when the parties are before the Court to ask the Court to fix the quantum of costs to be paid by the Plaintiffs to the Defendants".

Indemnity costs in the SICC?

7 The first question is whether an order can be made that the defendants are entitled to costs on the indemnity basis. It should be noted that this is a transfer case, having been transferred from the High Court to the SICC on 2 April 2020. At the time of transfer it was ordered that O 110 r 46 of the Rules of Court (2014 Rev Ed) ("the Rules"), being the rule prescribing the costs regime in the SICC, is to apply to the assessment of costs in respect of the proceedings after their transfer. The possibility of an indemnity costs order in relation to the costs prior to 2 April 2020 may be put aside, since the order sought by the defendants is in relation to costs incurred after that date. (O 110 r 46 has since been replaced by O 22 of the Singapore International Commercial Court Rules 2021, which came into operation on 1 April 2022, but these proceedings remain subject to the Rules.)

8 The essential prescription is that in O 110 r 46(1) concerning proceedings in the SICC, with a mirror provision in r 46(2) concerning an appeal from the SICC to the Court of Appeal. It provides:

> **46.**—(1) The unsuccessful party in any application or proceedings in the Court must pay the reasonable costs of the application or proceedings to the successful party, unless the Court orders otherwise.

9 The distinction between costs on the standard basis and costs on the indemnity basis is found in O 59 of the Rules. O 59 r 27 deals with taxation of costs by the Registrar, and includes:

> (2) On a taxation of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or reasonable in amount shall be resolved in favour of the paying party; and in these Rules, the term 'the standard basis', in relation to the taxation of costs, shall be construed accordingly.
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> (3) On a taxation on the indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubt which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these Rules, the term 'the indemnity basis', in relation to the taxation of costs, shall be construed accordingly.

10 In O 59 r 1(1), it is provided that "standard basis" and "indemnity basis" have the same meaning assigned to them by rr 27(2) and 27(3), respectively.

11 Costs on the indemnity basis, therefore, does not mean that the receiving party recovers all their costs. On both bases, the receiving party recovers only their reasonable costs (reasonable in amount and in incurring): the distinction sounds in the resolution of doubt over reasonableness of amount or incurring. Costs on the standard basis and costs on the indemnity basis differ only in the burden of proof.

12 O 110 r 46(6) expressly provides that O 59 "does not apply to" proceedings in the SICC. Hence Vivian Ramsey IJ said, in *CPIT* at [15], that O 59 contained a separate regime for costs in the High Court, including the provisions for standard and indemnity costs and also the manner in which costs might be ordered, differing from O 110 r 46, and that it was "clear that the usual

High Court costs regime in O 59 was intended to be replaced with the simpler regime in O 110 r 46."

13 His Honour was not asked to order costs on the indemnity basis, but was asked to take account of an offer to settle, which under O 22A r 9 could bring an order for costs on that basis. In that connection, he said:

> 30 The provisions of O 22A r 9 of the ROC are clearly intended to operate in the context of the High Court costs regime under O 59, because of the reference therein to the 'standard' and 'indemnity' bases of costs, which, as explained earlier (at [15] above), are costs concepts that are specifically defined under O 59 r 1(1) read with O 59 rr 27(2) and 27(3). I therefore consider that r 9 cannot apply to proceedings in the SICC where the standard or indemnity basis is not applicable. The Plaintiff places reliance on the decision in *Telemedia Pacific Group Ltd v Yuanta Asset Management International Ltd* [2017] 3 SLR 47 at [67]–[76], where payment of costs on an indemnity costs [sic] was considered, leading to an order 'that the defendants pay 10% of the plaintiffs' cost of the proceedings on an indemnity basis' (at [76]). In that case, both parties argued in favour of indemnity costs and no reference appears to have been made to the provisions of O 59 or O 110 in that context. I do not therefore consider that this decision provides grounds for contending that costs can be awarded on a standard or indemnity basis under O 110.

14 His Honour did take account of the offer to settle, however, as part of determining "reasonable costs" as the measure of costs under O 110 r 46(1). The plaintiff had failed in its claim against the first defendant, and in one of its claims against the second defendant. The offer to settle was taken into account by allowing the plaintiff its reasonable costs from the date of the offer without an allowance for the costs incurred in respect of those failed claims: at [37].

15 On appeal, in *Qilin World Capital Ltd v CPIT Investments Ltd and another appeal* [2019] 1 SLR 1 the Court of Appeal came to a different

disposition of costs, but did not cast doubt on this aspect of His Honour's reasoning. On the contrary, it was said:

> 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.

16 Although the parties did not refer to it, that indemnity costs are inapplicable in the SICC is supported by *Kiri Industries Ltd v Senda International Corporation Ltd and another* [2022] 3 SLR 174 ("*Kiri*"). A question was whether an earlier order that costs were "to be taxed if not agreed" meant taxation in the manner in O 59 r 20, where a detailed Bill of Costs is produced and scrutinised by the Registrar. It was held that it did not, but meant the fixing of costs by the *coram* by more than a summary assessment, and it was said (at [20]):

> 20 This is entirely consistent with O 110 r 46 of the ROC, the relevant rule on costs in the SICC. A brief examination of the rule makes this amply clear. Order 110 r 46(6) states that O 59 does not apply to proceedings in the SICC. Therefore, the costs order in the Oral Judgment simply cannot be interpreted as ordering a taxation *by the Registrar* in accordance with the procedure in O 59 r 20 of the ROC.

17 The distinction between costs on the standard basis and costs on the indemnity basis in O 59 rr 27(2) and 27(3) is a distinction arising under the Rules in a taxation of costs by the Registrar as provided in O 59 r 20. Order 59 being inapplicable to proceedings in the SICC, there is no taxation by the Registrar as so provided, and so the different bases of taxation which by O 59 r 27 the Registrar follows on a taxation are inapplicable.

18 From *CPIT* and *Kiri*, the distinction between costs on the standard basis and costs on the indemnity basis does not arise under the SICC costs regime. On what, then, did the defendants rely in maintaining that the SICC had power to award costs on the indemnity basis?

19 First, the defendants referred to the judgment of the Court of Appeal in *BNP Paribas SA v Jacob Agam and another* [2019] 1 SLR 83 ("*BNP*"), an appeal from the SICC, where the Court ordered (at [110]) that "costs of the Application be paid by the Agams, on a joint and several basis, to the Bank, on an indemnity basis, to be taxed if the parties are unable to reach agreement within 14 days from the date of this judgment".

20 The defendants properly pointed out that this was despite the Court observing (at [108]) that "[s]trictly speaking, the concept of costs on an 'indemnity basis' (as opposed to costs on a 'standard basis' is irrelevant to proceedings in the SICC…". However, the defendants did not go far enough; the Court's observations amounted to endorsement of the reasoning of Vivian Ramsay IJ in *CPIT.* Their Honours noted the Bank's submission that it should have costs on an indemnity basis pursuant to a clause in the relevant guarantees providing for payment of costs "on the basis of a full indemnity", and said:

> 108 Strictly speaking, the concept of costs on an 'indemnity basis' (as opposed to costs on a 'standard basis') is irrelevant to proceedings in the SICC, even though these may be familiar terms in litigation before the Singapore courts. In the recent decision of *CPIT Investments Ltd v Qilin World Capital Ltd* [2018] 4 SLR 38, Ramsey IJ made it clear that the costs regimes for proceedings in the SICC and Singapore High Court rest on different bases. This is evidenced by O 110 r 46(6), which provides that the familiar O 59 of the ROC on costs in the Singapore courts does not apply to SICC proceedings, including to appeals from the SICC to the Court of Appeal.

> 109 Instead, the applicable general principle for costs in proceedings related to the SICC is enshrined in O 110 r 46 of the ROC. In particular, in so far as the present Application is concerned, O 110 r 46(2) confers upon the court a wide discretion as to any award of costs, while providing that the starting position is that the 'reasonable costs' of the successful party in any appeal or application to the Court of Appeal must be paid by the unsuccessful party.

21 As appears from [110] of the judgment, the Court's order for costs on an indemnity basis was made in the exercise of the discretion because of the clause in the guarantees:

> 110 In the present case, having regard to the agreement between the parties as to costs, which is contained in the Guarantees that have been upheld as valid in the Judgment,… and in the absence of any reason as to why the agreement as to costs ought not be given effect, we consider it appropriate to order, pursuant to our discretion in O 110 r 46(2) of the ROC, that costs of the Application be paid by the Agams, on a joint and several basis, to the Bank, on an indemnity basis, to be taxed if the parties are unable to reach agreement within 14 days from the date of this judgment.

22 Secondly, the defendants referred to the *Singapore Court Practice* (LexisNexis Singapore, 2021), para 110/46/2, for the commentary by Professor Jeffrey Pinsler SC:

> Rule 46 provides a much simpler process based on compensation of reasonable costs. There is no provision for other bases of costs such as the indemnity basis. However, the SICC has a general discretion to make a contrary order under r 46(1) or (2) which includes awarding costs or partial costs to the unsuccessful party … and awarding indemnity costs where such an order is justified. For this purpose, the case law under O 59 concerning the High Court's discretion to award full or partial costs to the unsuccessful party and whether cost should be awarded on a standard basis or indemnity basis would continue to be useful to the SICC.

23 Through these citations, the defendants rested the power to award costs on the indemnity basis on the power to order otherwise in O 110 r 46(1): for convenience, I repeat the Rule:

> The unsuccessful party in any application or proceedings in the Court must pay the reasonable costs of the application or proceedings to the successful party, unless the Court orders otherwise.

24 In *BNP* at [109] the Court referred to this as conferring a wide discretion as to the award of costs, and from the following of the clause in the guarantees considered that the discretion extended to awarding costs on a basis other than the starting position of reasonable costs. If, however, it extended to awarding costs on the indemnity basis, the particular basis found in Order 59, it would be expected to have been taken up in *CPIT* rather than the offer to settle being accounted for as part of arriving at reasonable costs; nor would the Court in *BNP* have referred to the concept of costs on an indemnity basis as irrelevant to proceedings in the SICC. When regard is had to the meaning of costs on the indemnity basis, it is difficult to see an order for costs on that basis as an order otherwise pursuant to the discretion. The costs are still the reasonable costs of the application or proceedings. The difference is in the burden of proof, that doubt over reasonableness is resolved in favour of the receiving party rather than in favour of the paying party. Directing how doubt is to be resolved is scarcely "otherwise" from payment of reasonable costs, and importation of the concept of indemnity costs would be expected to be made clear; on the contrary, it is excluded by the dis-application of Order 59.

25 It must be recognised that in *BNP* the order was made in the terms of costs on an indemnity basis. However, it is evident that the Court was really concerned to exercise the discretion in line with the contractual entitlement of

the Bank to costs "on the basis of a full indemnity", as is commonly done (see for example *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171; *Abani Trading Pte Ltd v BNP Paribas* [2014] 3 SLR 909; *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd and other suits* [2020] SGHC 204) (which the terms of the order may not fully have done). The Agams were not present and does not appear that there was debate over the terms of the order, and when the terms of the order do not easily lie with the Court's acceptance that the concept of costs on an indemnity basis is irrelevant to proceedings in the SICC, I consider that it should be seen as an expedient in departing from the starting position of reasonable costs, rather than a holding that costs can be awarded on the indemnity basis.

26 I respectfully agree with the conclusion in *CPIT* that indemnity costs as distinct from standard costs does not arise in the SICC costs regime as applicable to these proceedings. It follows, in my view, that it is not open to make the order sought by the defendants, and I am unable to agree with Professor Pinsler so far as he suggests that such an order, meaning an order with the particular meaning given to it in the Rules, can be made.

27 That does not mean that matters which in proceedings in the High Court might have brought an order resulting in a taxation under O 59 on the indemnity basis are cast aside, and have no effect on the amount of costs in proceedings in the SICC subject to the Rules. If appropriate, account might be taken of them not by an order for costs on the indemnity basis, but through arriving at the amount of reasonable costs, as in *CPIT,* or perhaps by departure from the measure of reasonable costs as an order otherwise. Reasonable costs is a broad and flexible concept, allowing arrival at proper compensation to a successful party taking account of all the circumstances.

Ordering indemnity costs?

28 In case I am wrong in my conclusion on the first question, I go on to consider whether, if it be open to make the order sought by the defendants, the order should be made.

29 I go first to the Calderbank letters. The proceedings were commenced on 7 October 2019, and the pleadings closed with the filing of the Reply on 20 November 2019. Judgment in the Lew proceedings at first instance was given on 5 February 2020. The letter of 6 July 2020 proposed that the proceedings be discontinued with no order as to costs. Judgment in the Lew proceedings on appeal was given on 10 February 2021. The letter of 29 March 2021 invited discontinuance "at this relatively early stage, before more costs are incurred by both sides", and offered that the defendants would not claim costs if the plaintiffs agreed to "withdraw all the allegations raised in the Suit" and discontinue the proceedings; the offer was open for acceptance until 9 April 2021.

30 It is sufficient to consider the letter of 29 March 2021. From *CPIT*, the offer to settle in the letter did not take effect as an offer to settle under O 22A of the Rules, and the defendants did not suggest that it did; they accepted that, as stated in *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 ("*Ong*") at [34], if the outcome of the litigation was less favourable than the offer, the letter would be taken into consideration on the question of costs. The discussion in *Ong* includes that a Calderbank offer "does not bind the court to award costs in any particular manner but is one factor that the court will take into consideration in the exercise of its discretion to award costs" (at [35]), and that the court has a broad discretion as to costs in assessing Calderbank offers and generally the court's consideration "will bear on reasonableness or

otherwise of an offeree's refusal to accept the Calderbank offer" (at [37]). These are well established principles, which need not be elaborated.

31 It is also well established, and is discussed in *Man B&W* in the context of an offer to settle under Order 22A, that an offer to settle should generally contain an element of compromise, an element which will induce or facilitate settlement; it should be a serious and genuine offer, not just made in order to set up payment of costs on the indemnity basis. If it effectively asks the offeree to capitulate, it is unlikely to do this. Each case is fact-specific, however, and when the offer to settle is by a Calderbank letter the element of compromise or lack thereof is part of the consideration of the offeree's reasonableness in refusal to accept it.

32 The reasonableness of the plaintiffs' failure to accept the offer in the letter takes one to the justification for and strength of their claims.

33 I accept that the plaintiffs should have seen the decision of the Court of Appeal in *Maryani* as a formidable difficulty in obtaining indemnity for the irrecoverable costs incurred in the Lew proceedings; the attempt to distinguish that decision noted at [215] of the Main Judgment in these proceedings was faint and without merit. However, I do not accept that the recovery of the costs should be seen as the real reason for the proceedings. A person can justifiably seek to undo a transaction into which the person was misled by fraud, even if the asset acquired was acquired at proper value, in order to vindicate the wrong done and to be restored to the person's previous position. Mr Larpin sought to do so, and I am not prepared to discount this and the desired recovery of the US$7,900,000 as a genuine part of his reasons for bringing the proceedings.

34 Although the case for undoing the purchase of the Villa by Quo Vadis failed at the hurdle of misrepresentation (Main Judgment at [189]), and faced also a difficulty in inducement (Main Judgment at [195]), that was after a careful and detailed consideration of the evidence and factual findings made. Had I come to a different view on, for example, when Mr Nargolwala read Mr Zeman's email of 14 November 2017 (Main Judgment at [137]) or falsity of the belief representation (Main Judgment at [188]), and on inducement, there may have been a different outcome. It is true that the facts had been extensively canvassed in the Lew proceedings, and the plaintiffs were thereby informed, but the direction and scope of those proceedings was different. I do not regard the proceedings as unreasonably brought, or brought when the plaintiffs should have foreseen that they were likely to fail, and certainly not as brought as an abuse of process.

35 Having regard to this, I do not think it unreasonable for the plaintiffs to have declined to accept the offer in the letter of 29 March 2021. I have no clear indication of the amount of costs which the defendants would have forgone, but it is unlikely to have been much: I infer that following the pleadings, little had occurred in the proceedings pending the decision of the appeal in the Lew proceedings. The element of compromise was small: the defendants would have given little away. Correspondingly, the plaintiffs would have gained little, but would have given away a claim reasonably brought to undo the purchase of the Villa, and recover the US$7,900,000 and have the money rather than the asset. The plaintiffs were also required to "withdraw all the allegations made in the Suit", which was not further explained but was an added impost when it was evident that Mr Larpin believed that he had been hardly done by, and the occasion for which in the dispute is not easy to see.

36 That leaves the suggested unreasonableness in the conduct of the proceedings. I do not regard the non-admission of the facts in the Notice to Admit Facts as of any real significance in the conduct of the proceedings. The defendants having failed to elaborate on the asserted "generally unreasonable manner in which the Plaintiffs' case was conducted", it is not an assertion to which substance can be given. I do not for my part see unreasonableness to an extent calling for sanction in indemnity costs.

37 Had it been open to make the order sought by the defendants, I would have declined to make it.

The result

38 The defendants' application is refused, and they must pay the plaintiffs' costs which may be set off against the costs payable by the plaintiffs to the defendants. If the parties are unable to agree on the amount, no doubt there will be the wider determination of the costs of the proceedings of which that can become part. If there is not agreement beforehand on all costs, the directions for their determination referred to in the judgment should be proposed no later than 28 days from the date of this judgment.

Roger Giles IJ
International Judge

Christopher Anand Daniel, Harjean Kaur, Keith Valentine Lee Jia Jin (Advocatus Law LLP) for the first and second plaintiffs;
Ramesh Kumar s/o Ramasamy, Natalie Ng and Edmond Lim Tian Zhong (Allen & Gledhill LLP) for the first and second defendants.
