DB Trustees (Hong Kong) Ltd *v* Consult Asia Pte Ltd and another appeal [2010] SGCA 21

Case Number	: Civil Appeal No 19 of 2009 (Originating Summons No 1044 of 2008) and Civil Appeal No 90 of 2009 (Originating Summons No 800 of 2009)
Decision Date	: 24 May 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Sarjit Singh Gill SC and Koh Junxiang (Shook Lin & Bok LLP) for the appellant in Civil Appeal No 19 of 2009 and the respondents in Civil Appeal No 90 of 2009; Ernest Yogarajah Balasubramaniam (Arfat Selvam Alliance LLC) for the respondent in Civil Appeal No 19 of 2009; Christopher Anand Daniel and Kenneth Jerald Pereira (Clifford Law LLP) for the appellant in Civil Appeal No 90 of 2009.
Parties	: DB Trustees (Hong Kong) Ltd — Consult Asia Pte Ltd

Civil Procedure

24 May 2010 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This judgment on costs arises in connection with two related appeals, *viz*, Civil Appeal No 19 of 2009 ("CA 19/2009") and Civil Appeal No 90 of 2009 ("CA 90/2009"). CA 19/2009 was an appeal against the decision of the High Court judge in Originating Summons No 1044 of 2008 ("OS 1044/2008") and CA 90/2009 was an appeal against the decision of a second High Court judge in Originating Summons No 800 of 2009 ("OS 800/2009"). For convenience, the two High Court judges concerned will, in this Judgment, be referred to, respectively, as "the OS 1044/2008 Judge" and "the OS 800/2009 Judge". On 6 August 2009, we released our decision ("the 6 August Decision") and brief grounds for that decision (see *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2009] SGCA 39 ("the Brief Grounds")) for both CA 19/2009 and CA 90/2009. In the 6 August Decision, we decided in favour of DB Trustees (Hong Kong) Ltd ("DB Trustees"), the appellant in CA 19/2009 and the main respondent in CA 90/2009, for both CA 19/2009 and CA 90/2009, and awarded costs on an indemnity basis to DB Trustees for both appeals and both sets of proceedings below.

2 Before the order of court was extracted, counsel for DB Trustees, Mr Sarjit Singh Gill SC ("Mr Singh"), submitted, by way of a letter dated 6 August 2009, that Ms Florence Koh Lee Kheng ("Ms Koh") should be made personally liable for the costs of both appeals. This judgment contains our decision on whether Ms Koh should be made liable for the costs of the appeals and the full reasons for our decision. This judgment is, of course, to be read together with the 6 August Decision and the Brief Grounds.

The underlying proceedings

3 The Brief Grounds contains a short summary of the background facts. It is now necessary to supplement that summary as our present decision on costs is predicated on a broader foundation of

facts that include the conduct of the proceedings below as well as the relationship between Ms Koh and Consult Asia Pte Ltd ("Consult Asia"), the respondent in CA 19/2009 and the appellant in CA 90/2009.

Originating Summons No 1044 of 2008

4 In OS 1044/2008, DB Trustees applied for, *inter alia*, an order that its appointment of receivers and managers over Consult Asia on 4 July 2008 was valid. The appointment was made pursuant to the existing security arrangement between the parties. Ms Koh, who previously was a practising solicitor, owned all but one of Consult Asia's issued and paid up shares – this being 999,999 of Consult Asia's one million shares. The last remaining share was held by Ms Koh's mother. Ms Koh was also, at the time of the hearing of CA 19/2009 and CA 90/2009, the only director of Consult Asia.

5 On 28 December 2006, Consult Asia entered into an arrangement with UBS AG ("UBS") for Consult Asia to issue US$32 million worth of senior secured notes ("the Notes"). The only notable assets owned by Consult Asia were mortgaged as security for the redemption of the Notes – two pieces of real property located at Balestier Road and Changi Road (collectively referred to as "the Security" hereafter). DB Trustees acted as the trustee of the Security for the holders of the Notes ("the Note-holders").The overall effect of all the documents signed in relation to this arrangement was that a US$32 million credit facility was obtained by Consult Asia that was secured by a floating charge over all of Consult Asia's assets as well as a legal mortgage over the Security. Chesterton International Property Consultants Pte Ltd, which was the appointed valuer under the arrangement, provided a valuation report which (rather optimistically) estimated that the Security was worth S$107 million on an "as is" basis.

6 Consult Asia failed to redeem the Notes by 28 June 2008, which was the contractually stipulated redemption date. Consequently, DB Trustees, after giving notice to Consult Asia, appointed Mr Kon Yin Tong, Mr Wong Kian Kok and Mr Aw Eng Hai (collectively referred to as "the Receivers" hereafter) as receivers and managers on 4 July 2008 over the business and assets of Consult Asia. However, when the Receivers attended at Consult Asia's known address, Ms Koh was not cooperative and denied the Receivers access to documents pertaining to the affairs and property of Consult Asia. This precipitated the filing of OS 1044/2008 by DB Trustees.

7 OS 1044/2008 first came before the OS 1044/2008 Judge on 26 September 2008. During that hearing, Consult Asia submitted that it was unable to obtain the requisite financing to redeem the Notes because DB Trustees did not agree to release the Security simultaneously with the payment of the redemption monies and had appointed the Receivers. The OS 1044/2008 Judge then, without adjudicating on the merits of the claim, gave directions for the receivership to be suspended for six weeks and for Consult Asia to provide concrete evidence to DB Trustees of alternative financing for US$42,080,000 (this being the redemption amount owed by Consult Asia on or about 28 June 2008) by 7 November 2008.

8 Despite this generous extension of time, Consult Asia did not take effective steps to redeem the Notes. OS 1044/2008 was eventually heard on its merits on 29 January 2009. At this point, the bare evidence Consult Asia adduced in relation to the refinancing of the Notes consisted of a letter dated 1 February 2008 from Merrill Lynch (Singapore) Pte Ltd ("Merrill Lynch") to Consult Asia. In that letter, Merrill Lynch sought to confirm the arrangements under which Merrill Lynch would act as an exclusive placement agent for Consult Asia in its issuance of "SGD [90] million principal amount of senior secured notes". [note: 1] The proposed arrangements were vaguely detailed in an attached annex entitled "Indicative Term Sheet – For Discussion Purposes Only". [note: 2] No evidence was adduced by Consult Asia to indicate what had happened to the proposed refinancing arrangements

thereafter.

9 The OS 1044/2008 Judge eventually found in favour of Consult Asia. The reasons for his decision can be found in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd* [2009] SGHC 62 ("the Enforcement Judgment"). He was, *inter alia*, of the opinion that the letter dated 1 February 2008 was both "clear" and "concrete enough" evidence of the proposed refinancing obtained by Consult Asia and was satisfied that Consult Asia had been impeded in its attempt to secure the redemption of the Notes by DB Trustees' refusal to release the Security concurrently with the proposed redemption payment (see the Enforcement Judgment at [39]). Accordingly, he discharged the appointment of the Receivers made on 4 July 2008, and allowed Consult Asia up to 29 April 2009 to redeem the Notes, failing which an "Event of Default" within the meaning of the Trust Deed entered into by Consult Asia and DB Trustees would be deemed to have occurred (see the Enforcement Judgment at [51]). Costs were fixed at $2,000 (excluding reasonable disbursements) to be paid by DB Trustees to Consult Asia.

10 DB Trustees appealed against the decision of the OS 1044/2008 Judge by way of CA 19/2009. It is noteworthy that Consult Asia failed to comply with the 29 April 2009 deadline, leading to DB Trustees re-appointing the Receivers on 30 April 2009. In response, Consult Asia filed OS 800/2009 against DB Trustees and the Receivers, seeking, *inter alia*, a rescission of the 30 April 2009 appointment of the Receivers.

Originating Summons No 800 of 2009

11 OS 800/2009 was heard by the OS 800/2009 Judge on 21 July 2009. Before the OS 800/2009 Judge, counsel for Consult Asia in OS 800/2009 (and subsequently CA 90/2009), Mr Christopher Anand Daniel ("Mr Daniel"), provided two main reasons as to why the Receivers ought to be discharged: first, the appointment was wrong on a proper construction of the agreement between the parties, and second, the Receivers had acted improperly in the discharge of their duties as they had failed to provide relevant information to Consult Asia on the sale process and had attempted to sell the Security at a severe undervalue. By this time, the Receivers had commissioned a tender exercise which was to close on 22 July 2009 in respect of the Changi Road property and 23 July 2009 in respect of the Balestier Road property.

12 The OS 800/2009 Judge declined to grant Consult Asia's application on, *inter alia*, the basis that there was insufficient evidence before him to indicate that there was any breach of duty on the part of the Receivers. Following that decision, Mr Singh applied for the costs of OS 800/2009 to be paid by Ms Koh personally. The OS 800/2009 Judge granted this application but did not explain his decision. Consult Asia then appealed against the dismissal of its application and the cost order by way of CA 90/2009.

Civil Appeal No 19 of 2009 and Civil Appeal No 90 of 2009

13 In light of the closing dates for the tender exercise commenced by the Receivers, Consult Asia applied, by way of an urgent summons, *viz*, Summons No 3867 of 2009, for, *inter alia*, DB Trustees to be restrained from dealing with any of Consult Asia's assets pending the final disposal of CA 90/2009 and for that appeal to be expedited and heard together with CA 19/2009. This urgent application was granted on 23 July 2009 by Andrew Phang Boon Leong JA, resulting in the joint hearing of both CA 19/2009 and CA 90/2009 before us.

14 Relevant to our present decision is also the fact that the Receivers, by way of Originating Summons No 760 of 2009 ("OS 760/2009"), had applied, on 3 July 2009, for Ms Koh to be made to personally provide security for DB Trustees' costs in CA 19/2009. The High Court judge who heard the

application dismissed it without giving written grounds. We might also add that counsel for Consult Asia in CA 19/2009, Mr Ernest Yogarajah Balasubramaniam ("Mr Balasubramaniam"), then rather audaciously submitted that the Receivers should be made to personally pay the costs of that hearing. The court rightly declined to do so.

15 Before us, most of the arguments that were canvassed below were once again rehearsed. After hearing oral submission, we made known our concerns about worrying gaps in the affidavit evidence. In particular, we queried DB Trustees as to why it had not provided any updated valuation report for the Security, given that the only valuation report produced was dated July 2008. In relation to Consult Asia, we queried why it could not have redeemed the Notes even without the release of the Security, and why, even until the dates of the hearings of CA 19/2009 and CA 90/2009 (30 July 2009 and 31 July 2009), it was still unable to redeem the Notes, despite having obtained two extensions of time to do so. The parties then requested for leave to adduce new evidence in relation to the above questions and we acceded to their requests.

16 Pursuant to our directions, DB Trustees filed an affidavit on 31 July 2009, in which valuation reports dated 6 July 2009 and 14 July 2009, which indicated that the Security was worth a total of S$33 million as at July 2009, were exhibited. On the part of Consult Asia, it filed an affidavit by Ms Koh dated 3 August 2009 ("the August Affidavit"), in which several letters and emails were exhibited. After considering the new evidence, in the 6 August Decision, as earlier mentioned (see [1] above), we held in favour of DB Trustees for both CA 19/2009 and CA 90/2009. The reasons for our decision are set out in the Brief Grounds. In addition, the costs of both appeals and the proceedings below were awarded to DB Trustees on an indemnity basis. Thereafter, Mr Singh, through a letter dated 6 August 2009, submitted that "[Ms Koh] should be ordered to pay the costs of both appeals instead of [Consult Asia]". It appears that this submission was made because Consult Asia's assets were insufficient to meet the outstanding sum due to DB Trustees. On this issue, we directed parties to make full submissions.

Submissions by the parties

17 Mr Balasubramaniam and Mr Daniel responded in letters dated 11 August 2009. The thrusts of their arguments were similar. They both accepted that the court had the power to make an order for costs against a non-party but took the position that such an order should not be made in the present matter for two main reasons. First, DB Trustees did not, at any time prior to the release of the 6 August Decision (and the Brief Grounds), provide any indication that Ms Koh ought to be made to personally bear the costs of both appeals. It would, accordingly, be unfair to make her do so now at this late stage. Second, Ms Koh owed fiduciary and contractual duties, as the sole director, to act in the best interest of Consult Asia, and the present proceedings were brought and conducted *bona fide* in the course of discharging those duties. It would be unjust, in such circumstances, for her to be rendered liable for costs simply because she had caused Consult Asia to participate in proceedings that turned out to be unfavourable to the latter.

18 In his letter in reply to the arguments of Mr Balasubramaniam and Mr Daniel dated 14 August 2009, Mr Singh put forward a number of reasons in support of his submission that Ms Koh ought to be made to pay the costs of the appeals, including:

(a) DB Trustees would be unfairly prejudiced as Consult Asia would be unable to pay costs due to its state of insolvency;

(b) while costs orders against a non-party should be exceptional, such an order is appropriate when the non-party promotes legal proceedings by an insolvent company solely or substantially

for his or her own benefit as Ms Koh, the major shareholder of Consult Asia, did;

(c) it was Ms Koh's unreasonable behaviour in refusing to cooperate with the Receivers, who were lawfully appointed, which caused the incurring of unnecessary legal costs; and

(d) it is not an essential prerequisite for a non-party to be given notice of an intention to seek costs against him or her before such an order may be made.

Decision of this court

19 After considering the submission of all of the parties, we have determined that it is appropriate, in the present case, for Ms Koh to bear the costs of both appeals, which were awarded on an indemnity basis, jointly and severally with Consult Asia.

20 Before we set out our reasons for our decision, we ought to clarify a factual crease in the Brief Grounds. Following the release of the 6 August Decision and the Brief Grounds, Mr Daniel, in his letter dated 11 August 2009, pointed out that a particular finding set out in the Brief Grounds was not entirely accurate. In the Brief Grounds, we had stated (at [10]):

> [I]t is our view that [the Receivers] had not breached any of the duties allegedly owed to Consult Asia as receivers and managers. The manner in which they had attempted to solicit offers for the Security was proper in the prevailing circumstances. They had obtained an independent valuation report of the Security before the tender exercise was carried out and had taken adequate steps to advertise the sale. [underlining added]

Rightly, it was brought to our attention that the tender exercise was first advertised on 17 June 2009 while the valuation reports tendered by DB Trustees to us were dated 6 July 2009 and 14 July 2009 (see [16] above). Hence, the underlined portion of the passage above should have, instead, read as follows: "They did not sell the Security before obtaining independent valuation reports and had taken adequate steps to advertise the sale." Needless to say, this factual correction does not, in any way, affect the outcome of the matter. The Receivers had not breached any of their duties.

21 That said, we turn to the reasons for our decision.

The applicable principles

22 It cannot be gainsaid that the following two principles are trite in relation to an award of costs. First, costs are entirely at the discretion of the court. We need look no further than O 59 r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") for authority. The said provision reads:

> Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Supreme Court or the Subordinate Courts, including the administration of estates and trusts, *shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid*. [emphasis added]

In *Karting Club of Singapore v Mak David and others (Wee Soon Kim Anthony, intervener)* [1992] 1 SLR(R) 786 ("*Karting Club*"), Chan Sek Keong J declared (at [6]) that "[t]he power so conferred [is] completely unfettered … [although] … it must be exercised judicially." Second, the general rule is that costs are to follow the event (see O 59 r 3(2) of the Rules).

23 There is no rule that states that the court's power to award costs does not extend to awarding costs in favour of or against a non-party, and, in our view, there is no reason why the court should be precluded from awarding costs in favour of or against a non-party. A similar position was taken by the Federal Court of Australia in *O'Keefe v Hayes Knight GTO Pty Ltd* [2005] FCA 1559 ("*O'Keefe*") and the High Court of Australia ("the HCA") in *Knight and another v FP Special Assets Limited and others* (1992) 174 CLR 178 ("*Knight*"). In *O'Keefe*, Nicholson J held that the jurisdiction of the court to award costs, pursuant to s 43 of the Federal Court of Australia Act 1976 (Cth), was sufficiently wide to enable the court to make an order for costs in favour of a non-party without the non-party being formally made a party to the proceedings. The HCA in *Knight*, by a majority, decided that the Supreme Court of Queensland, by virtue of O 91 r 1 of the Rules of the Supreme Court (Qld), could award costs against a non-party. Mason CJ and Deane J reasoned (at 185):

> According to their natural and ordinary meaning, *the words of the rule are sufficiently expansive to enable the Court to make an order for costs against a person, whether that person is formally a party to the proceedings or not*. The jurisdiction and the discretion thereby conferred are not limited. Because they are not limited it is easy to postulate a variety of circumstances where an exercise of the jurisdiction against a non-party would be extravagant and unjust. However, the existence of that possibility provides no justification for the imposition by the courts, by way of implication, of an arbitrary limitation upon the general jurisdiction conferred by the rule. To do so would, as will appear, deny power to the Court to order costs against a non-party in cases in which, in the interests of justice, such orders should be made. *The inevitable answer to arguments directed to limiting curial jurisdiction based on the supposition that the jurisdiction might lend itself to abuse is that the court will and should develop principles governing the exercise of the discretion which will ensure that the jurisdiction is not exercised in such a way as to give rise to abuse*. [emphasis added]

24 In our view, the wording of O 59 r 2(2) of the Rules is similarly sufficiently expansive to enable us to make an order for costs against a non-party, whether or not that party is formally a party to the proceedings or not. Parenthetically, it may be noted that Rule 48.2 of the Civil Procedure Rules (SI 1998 No 3132) (UK) expressly stipulates that a non-party must be added as a party to the proceedings for the purposes of costs only before an English court can order costs against or in the non-party's favour. There is no local equivalent of that rule. That said, to date, no local case has established the general principles or guidelines as to when costs should be awarded in favour of or against a non-party, although such awards are not non-existent (see, *eg*, *Ng Eng Chee and others v Mamata Kapildev Dave and others (Horizon Partner Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155). With respect to costs against a non-party, two influential appellate decisions – one from the English Court of Appeal and the other from the Privy Council – are instructive.

25 In the English Court of Appeal case of *Symphony Group PLC v Hodgson* [1994] 1 QB 179 ("*Symphony*"), Balcombe LJ stated (at 192–193):

> … In my judgment the following are material considerations to be taken into account, although I do not suggest that there may not be others which are relevant.
>
> (1) An order for the payment of costs by a non-party will always be exceptional …. The judge should treat any application for such an order with considerable caution.
>
> (2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. Joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules ….

(3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action ….

26 Ten years later, the Privy Council, in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others (Associated Industrial Finance Pty Ltd, Third Party)* [2004] 1 WLR 2807 ("*Dymocks*"), framed the relevant considerations as follows (at 2815):

A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows. (1) *Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order*. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against "pure funders" …. In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) *Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs*. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. [emphasis added]

27 On our part, we are of view that the above passage from *Dymock* is particularly helpful. The ultimate question in any such "exceptional" case, as the Privy Council observed, must be whether, in all the circumstances, it is just to make the order. The following observation in *Globe Equities Limited v Globe Legal Services Limited and ors* [1999] BLR 232 ("*Globe Equities*") is also apposite (at 240):

Ultimately the test is whether in all the circumstances it is just to exercise the power conferred by subsections (1) and (3) of section 51 Supreme Court Act 1981 to make a non-party pay the costs of the proceedings. Plainly in the ordinary run of cases where the party is pursuing or defending the claim for his own benefit through solicitors acting as such there is not usually any justification for making someone else pay the costs. But there will be cases where either or both these two features are absent. In such cases it will be a matter for judgment and the exercise by the judge of his discretion to decide whether the circumstances relied on are such as to make it just to order some non-party to pay the costs. Thus, as it seems to me, the exceptional case is one to be recognised by comparison with the ordinary run of cases not defined in advance by reference to any further characteristic.

28 For completeness we ought to point out that, in *Chin Yoke Choong Bobby and another v Hong Lam Marine Pte Ltd* [1999] 3 SLR(R) 907 ("*Bobby Chin*"), this court decided that the courts have no power, upon a proper interpretation of O 59 r 2(2) of the Rules, to order a non-party to pay the costs of arbitration proceedings. Nevertheless, it was acknowledged that an order for costs of *court proceedings* could be granted against a non-party where just to do so. The following was stated (at [26]):

> While we were prepared to recognise that under O 59 r 2(2) the court had the jurisdiction and discretion to order, *in circumstances where it was just to do so*, a non-party such as a receiver to be personally liable for costs of court proceedings, we did not think that such a jurisdiction existed in the instant case. [emphasis added]

29 From *Dymocks* and *Globe Equities*, as well as *Bobby Chin*, it is clear that the overarching rule with regard to ordering costs against a non-party in court proceedings is that it must, in the circumstances of the case, be *just* to do so. That said, it appears to us that two particular factors, among the myriad of possibly relevant considerations, ought to almost always be present to make it just to award costs against a non-party. This does not, however, mean that they are indispensable prerequisites that have to be met before a costs order against a non-party can be made.

30 The first of the two factors is that there must be a *close connection* between the non-party and the proceedings. The following sentence from the passage in *Dymocks* that was quoted at [26] above would indicate one way in which a close connection may be demonstrated:

> Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs.

One clarification that we should make is that funding and control need not be conjunctive, as seems to be suggested in the above sentence. It is sufficient that the non-party either funds or controls legal proceedings with the intention of ultimately deriving a benefit from them.

31 One example of funding that would allow for a finding of a close connection can be found in the case of *Dymocks* itself. In that case, the underlying proceedings involved Dymocks Franchise Systems (NSW) Pty Ltd ("Dymocks"), on the one hand, and four parties collectively referred to as "the Todds", on the other. The litigation between the parties consisted of three rounds, so to speak: (a) before the New Zealand High Court; (b) before the New Zealand Court of Appeal ("the NZCA"); and (c) before the Privy Council. At each stage, the relevant non-party, Associated Industrial Finance Pty Ltd ("Associated"), funded the litigation of the Todds by providing them with loans. Apart from funding, there was little evidence that Associated was otherwise involved in the litigation. However, it was principally Associated which stood to benefit from the success of the Todds in the appeals before the NZCA and the Privy Council, and this was taken into account by the Privy Council in its decision to order costs against Associated.

32 Another way of evidencing a close connection may be drawn from *Karting Club*. In that case, the plaintiff, an unincorporated club, applied, by way of an originating summons, for a declaration that the four defendants were deemed to have retired as officers and/or committee members of the club as they had failed to attend three consecutive club meetings. F A Chua J dismissed the originating summons and ordered costs against the chairman of the club, Anthony Wee Soon Kim ("Wee"), who was a non-party to the proceedings. Thereafter, Wee applied to intervene in the proceedings to be added as a defendant with the further intention of applying to set aside the costs order. Chan Sek Keong J, in dismissing the application, held as follows (at [9]):

> The second reason why the application [to intervene] was misconceived was even more obvious. The plaintiffs were an unincorporated association and the applicant [*ie*, Wee] was its chairman. He and his fellow members were the plaintiffs. The applicant was found by F A Chua J to have been responsible for initiating an unwarranted action in the name of the club against the defendants. Accordingly, if costs had been ordered against the plaintiffs, it would have meant that the successful defendants and the other members had to finance the unwarranted action

brought at the instigation of the applicant.

Plainly, Wee could be said to have had a close connection with the unwarranted action due to his role in initiating it.

33 This court in *Godfrey Gerald QC v UBS AG and others* [2003] 2 SLR(R) 306 adopted a similar tack. The backdrop to the appellate proceedings before this court was that Wee (the non-party involved in *Karting Club*), had filed a suit in which he alleged that UBS had made several misrepresentations in inducing him to adopt a certain financial course of action. Subsequently, a Queen's Counsel, Godfrey Gerald QC, applied, at the behest of Wee, for admission on an *ad hoc* basis to the Singapore Bar for the purpose of representing Wee in his suit. The High Court judge who heard the application declined to grant it and ordered Wee, who was a non-party to the application, to pay $5,000 in costs to UBS. This decision was affirmed by this court. In so doing, this court held (at [45]):

> We found that there were ample grounds for the judge to order that [Wee] be personally liable for costs. … [Wee] was responsible for initiating an unwarranted application. As the judge below expressly found, it was [Wee's] own unjustifiable stance that no local counsel would be fit for the job that was responsible for the predicament that he was in.

34 These cases serve to illustrate the point that there will be many ways to demonstrate a close connection between the non-party and the legal proceedings in question. At the end of the day, whether this factor is adequately shown depends on the facts of the case.

35 The other factor, which is related to but distinct from the first, is that the non-party must have caused the incurring of costs. This is a matter of causation which has often been glossed over in case law. Ordinarily, it would not be just to order a non-party, as opposed to a litigant, to pay costs if the litigant would have incurred the legal costs regardless of the non-party's role. It suffices to cite the Privy Council's observation on this point in *Dymocks* (at 2814):

> Although the position may well be different when a number of non-parties act in concert, their Lordships are content to assume for the purposes of this application that a non-party could not ordinarily be made liable for costs if those costs would in any event have been incurred even without such non-party's involvement in the proceedings.

Of course, this factor may be established by the very same facts which go toward the establishment of the first factor, *ie*, a close connection between the non-party and the proceedings. In *Dymocks*, the Privy Council decided that but for Associated's involvement, the appellate proceedings, which led to the incurring of further costs, would not have taken place.

36 We summarise. The core consideration in relation to the court's exercise of discretion in ordering costs against a non-party is that it must be *just*, in all the circumstances of the case, to do so. In assessing whether it would be just to do so, a variety of factors, including those enumerated in *Symphony* and *Dymocks* may be relevant. Ordinarily, considerable weight would be placed on the presence of two factors, *viz*, a close connection between the non-party and the proceedings and a causal link between the non-party and the incurring of costs.

The present case

37 In our view, three critical factors weighed in favour of an order for Ms Koh to pay the costs of the appeals and the proceedings below.

38 First, Ms Koh, being at all material times the only director, was solely responsible for Consult Asia's participation in CA 19/2009 and CA 90/2009, as well as the underlying actions. These proceedings, at their roots, stemmed from Consult Asia's (and Ms Koh's) unreasonable stance in not cooperating with the Receivers, who had been lawfully appointed by DB Trustees. As we have explained in the Brief Grounds, it was axiomatic that Consult Asia was not in a realistic position to obtain fresh financing during the material period to redeem the Notes. The documentary evidence adduced, pursuant to our directions, showed that Consult Asia had been unable, even as late as mid-June 2008, to resolve the terms of the refinancing arrangements with Merrill Lynch. In this regard, we reject Ms Koh's explanation in the August Affidavit that the reason why the Merrill Lynch refinancing plan fell through was because DB Trustees refused to release the Security concurrently with the payment of the redemption monies. This was an absurd excuse. In several emails to Ms Koh from end-May 2008 to early-June 2008, the solicitors acting for Consult Asia in the Merrill Lynch refinancing, Lee & Lee, referred to "outstanding commercial issues", "outstanding points" and "pending discussions" to be resolved between Merrill Lynch and Consult Asia. [note: 3] Yet, there is nothing to suggest that DB Trustees' insistence on releasing the Security after the redemption monies had been paid had any impact on the refinancing proposal. Ms Koh failed to give any credible explanation as to why the refinancing proposal was called off by Merrill Lynch. In fact, it seems to us that any email that would have explained what the outstanding issues were between Consult Asia and Merrill Lynch was deliberately not exhibited in the August Affidavit, [note: 4] and it would appear that the real reason for the proposal being called off was Merrill Lynch's concern about the value of the Security. There is good reason to believe that Ms Koh had been less than candid in the proceedings before us and below.

39 It was suggested by Mr Daniel that Ms Koh was acting *bona fide* in her discharge of her duties as a director of Consult Asia in causing Consult Asia to defend in OS 1044/2008. We do not agree. Ms Koh, as a former lawyer and, now, a savvy businesswoman should have been well aware that if Consult Asia failed to redeem the Notes by the contractually stipulated redemption date, DB Trustees would be entitled to appoint receivers and managers over the business and assets of Consult Asia. That being the case, it can hardly be said that she was, when Consult Asia failed to redeem the Notes by 28 June 2008, acting reasonably or *bona fide* in the best interest of Consult Asia in refusing to cooperate with the Receivers and in subsequently causing Consult Asia to defend in OS 1044/2008 and respond in CA 19/2009.

40 The commencement of OS 800/2009 and the filing of CA 90/2009 would be even more troubling. (It must be remembered that OS 800/2009 was filed after the OS 1044/2008 Judge had given Consult Asia *two* extensions of time to obtain refinancing.) The bases on which Consult Asia's case was put in OS 800/2009 and CA 90/2009, as we explained in the Brief Grounds, were entirely devoid of merit. In fact, they were so dubious that we have to conclude that OS 800/2009 and CA 90/2009 were not brought *bona fide*. It would appear that these proceedings were employed by Consult Asia as a delaying contrivance to impede the sale of the Security – a right that DB Trustees possessed as far back as 29 June 2008. That such a tactic was persisted with even after the OS 1044/2008 Judge had, on no less than two separate occasions, given Consult Asia grace periods to redeem the Notes was a patent abuse of process.

41 Second, it cannot be gainsaid the Ms Koh was the *alter ego* of Consult Asia. She was, to all intents and purposes, the only shareholder and director of Consult Asia. In this regard, we note that all affidavits filed on behalf of Consult Asia were sworn by her. Admittedly, that fact in itself cannot be held against her. However, we also note that as Ms Koh was, in essence, the only shareholder, the real and only beneficiary of any successful outcome of Consult Asia's litigation would be her. She, alone, stood to gain from the survival of Consult Asia and the preservation of its assets. In the

prevailing circumstances, the relationship between Ms Koh and all of the proceedings in question was so close that it would not be unjust to make her liable for costs. As the Privy Council in *Dymocks* aptly put it in the following sentence from the passage that was quoted at [26] above:

> Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs.

Here, Ms Koh directed Consult Asia's unreasonable conduct in the proceedings and stood to gain from any success that Consult Asia may have enjoyed – this apparently without incurring a corresponding risk from any failure.

42 Finally, it is also relevant that Consult Asia appears to be unable to satisfy the adverse costs orders made. As mentioned earlier (see [5] above), Consult Asia's only major assets were its Balestier Road and Changi Road properties (*ie*, the Security). Pursuant to the tender exercise commissioned by the Receivers, the highest offers for the Balestier Road and Changi Road properties were, respectively, below S$10 million and slightly above S$30 million. Furthermore, the valuation reports dated 6 July 2009 and 14 July 2009 indicated that the combined value of the Security was just S$33 million. Mr Singh, in his letter dated 14 August 2009, drew our attention to the fact that Consult Asia's liabilities under the Notes would now be in excess of S$60 million. Clearly, DB Trustees would be hard pressed to help the Notes-holders recover from Consult Asia all that was owed to them under the Notes, let alone the costs of the proceedings.

43 For these reasons, we have arrived at the view that it is just, in the circumstances of the case, to accede to DB Trustees' request that Ms Koh should be made liable for the costs of the appeals. Not only was there a close connection between Ms Koh and the proceedings, Ms Koh had in fact caused the incurring of unnecessary legal costs which Consult Asia was unable to pay.

The requirement of prior warning

44 For completeness, we now turn to address the other plank of the arguments of Mr Balasubramaniam and Mr Daniel, which was that a non-party must be informed or warned, prior to the conclusion of the proceedings, of any intention to seek an order for costs against him or her before such an order can be made.

45 At first blush, it appears that there is some basis for this view. We have already mentioned *Symphony*, which classified the requirement of prior warning as one of a number of "material considerations" (see [25] above). Having regard to *Symphony*, the English High Court in *Shah and another v Karanjia and another* [1993] 4 All ER 792, took into consideration, *inter alia*, the lack of prior warning to dismiss an application for a non-party to pay costs. In that case, the plaintiffs entered into various agreements with the defendants pursuant to which the plaintiffs transferred their shares in a property company to the defendants. The main asset of the property company was a piece of land which, shortly after the transfer, the defendants managed to sell for substantial profit. The plaintiffs brought an action against the defendants claiming that they had been tricked into transferring the shares in the belief that the shares would be further transferred to a non-party, known as Ashok Shah ("Ashok"). The judge, Vinelott J, found that the suit was a malicious fabrication initiated in the misconceived hope that the defendants would disgorge some of the profits that they had rightfully earned. When it became apparent that the plaintiffs would be unable to pay costs, the defendants sought an order that Ashok be made to pay costs on the basis that Ashok had conspired with and induced the plaintiffs to institute the malicious proceedings and had funded such litigation. Vinelott J declined to make the order, with one of the main reasons given being that Ashok had no

warning that he might be made to pay the costs of the action.

46 A Singapore case would appear to provide some penumbral support for the view that prior warning is necessary before costs can be ordered against a non-party. In *Har Chee Choey v Lee Khai Seng and another* [2003] SGDC 237, the District Court held (at [21]) that it could not grant the application to make a non-party pay costs because it was "oppressive to the repairers, a non-party to the action, to be sprung with a surprise attack, at the conclusion of the trial, to pay the costs to the defendants". *Dymocks*, however, would suggest the contrary. In that case, one argument raised by counsel for Associated was that Associated had no warning of an intention to ask for costs against it. The Privy Council, in dismissing this argument, stressed that the presence of prior warning "is no more than a material consideration" and that "their Lordships are unable to see how an earlier warning could have made any difference to the course of the proceedings" (at 2818). It was elaborated that there was no suggestion that Associated would have acted differently if it had been given prior warning or that Associated could have "sensibly" been made a party to the proceedings at an earlier stage (at 2818).

47 In our view, there cannot be an unbending proposition that a non-party must be given prior warning before an order for costs can be made against the non-party. This would be contrary to the rule that costs are ordered according to the unfettered discretion of the court, save that such discretion must be exercised judiciously (see [22] above). This rule means that the court may make any order as to costs as long as it is just in the circumstances to do so. To imply a requirement that a non-party must be given prior warning before an order for costs can be made against the non-party would be to unnecessarily fetter the very broad discretion provided in O 59 r 2(2) of the Rules. Of course, we recognise that, in certain instances, the non-party may be prejudiced by not having been warned. Even so, the lack of a warning ought to be properly assessed and balanced against other factors in the exercise of the court's discretion to order costs. Furthermore, this disadvantage can be ameliorated, if not eliminated, by ensuring that there is due process accorded to the non-party before any order is made. In short, there is no indispensable rule of practice that a non-party must be given prior warning before an adverse order for costs is made. What is *essential* is that the non-party must be *accorded due process* and his or her *views adequately considered* before such an order is made.

48 In the present case, Ms Koh has been allowed, through Mr Balasubramaniam and Mr Daniel, to make submissions on costs to us. Moreover, we are satisfied that Ms Koh would have known that a submission that she should pay costs was always on the cards. OS 760/2009, which was filed by the Receivers, was an application for Ms Koh to personally provide security for DB Trustees' costs in relation to CA 19/2009. In addition, DB Trustees applied to the OS 800/2009 Judge for Ms Koh to be made to pay the costs of OS 800/2009. Therefore, it would not be unreasonable to presume that Mr Singh's submission that Ms Koh should pay the costs of the appeals would have been of little or no surprise to her.

Conclusion

49 We are of the view that Ms Koh has plainly abused the judicial process. She has dragged the matter on for more than a year without any plausible reasons for believing that Consult Asia could repay the Note-holders. This delay prejudiced the Note-holders' right to realise the Security and recover monies due to them. This is a case where the *alter ego* of a single-director entity had adopted delaying tactics vexatiously. Our determination is also influenced by the fact that Consult Asia does not appear to be able to pay the costs orders made against it and that Ms Koh had, in fact, caused the incurring of unnecessary costs. She must have known that Consult Asia, a corporate fig leaf for her, would not or could not settle any adverse costs orders.

50 In the circumstances, it is right and just to order that Ms Koh bear the costs of CA 19/2009 and CA 90/2009, which were awarded on an indemnity basis, jointly and severally with Consult Asia. We would add for avoidance of doubt that the cost order of the OS 800/2009 Judge against Ms Koh remains as we dismissed the appeal against his decision.

[note: 1] CA 19/2009 Core Bundle, vol 2 at p 270.

[note: 2] CA 19/2009 Core Bundle, vol 2 at p 277.

[note: 3] See the August Affidavit at pp 182 and 222.

[note: 4] See the August Affidavit at pp 182–183.