IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 16

Suit No 4 of 2017

Between

Kiri Industries Ltd

… Plaintiff

And

(1) Senda International Capital Ltd
(2) DyStar Global Holdings (Singapore) Pte Ltd

… Defendants

JUDGMENT

[Civil Procedure] — [Costs] — [Principles] — [Costs in the Singapore International Commercial Court]
[Civil Procedure] — [Costs] — [Taxation]

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v
Senda International Capital Ltd and another

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Singapore International Commercial Court — Suit No 4 of 2017
Kannan Ramesh J, Roger Giles IJ and Anselmo Reyes IJ
16 July, 18 August, 12 November 2021

8 December 2021 Judgment reserved.

Kannan Ramesh J (delivering the judgment of the court):

Introduction

1 This judgment addresses the costs of proceedings that have spanned more than six years. The facts of the dispute that led to these protracted proceedings have been set out extensively in *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries and others and another suit* [2018] 5 SLR 1 (the "*Main Judgment*"), as well as in *Kiri Industries Ltd v Senda International Capital Ltd and another* [2021] 3 SLR 215 (the "*Valuation Judgment*"). We adopt all terms of reference and abbreviations used in the *Main Judgment* and the *Valuation Judgment*.

Background

2 On 3 July 2018, we delivered the *Main Judgment*. In essence, the claim was for minority oppression of Kiri by Senda in relation to the former's minority

interest in DyStar, their joint venture vehicle. In the *Main Judgment*, we found that Senda had engaged in instances of oppressive conduct against Kiri. Senda was consequently ordered to purchase Kiri's shares in DyStar at a valuation to be determined. The buy-out order was upheld on appeal: *Senda International Capital Ltd v Kiri Industries Ltd and others and another appeal* [2019] 2 SLR 1.

3 On 8 January 2019, following delivery of the *Main Judgment*, we issued an oral judgment (the "Oral Judgment"), which stated at [12(a)] as follows: "although some of Kiri's claims of oppression were not made out, it [had] substantially succeeded in its claim" and "[a]ccordingly, Kiri [was] entitled to the full costs on its claim". This order was for costs of the liability tranche of the proceedings which included the issues dealt with in the Oral Judgment (this period, *ie*, from the commencement of proceedings to the *Main Judgment*, shall be referred to as "the Liability Tranche"). In addition, the Oral Judgment stated at [12(c)] that "[a]ll such costs are to be taxed if not agreed". The Court of Appeal upheld the costs order that was made: see *Senda International Capital Ltd v Kiri Industries Ltd and others* [2020] 2 SLR 1 at [49]. To date, the parties have not been able to agree on costs based on the costs order in the Oral Judgment.

4 On 21 December 2020, the *Valuation Judgment* was issued. An interim valuation of DyStar was arrived at in the *Valuation Judgment*, subject to the experts assessing whether adjustments needed to be made to account for nine issues that were identified and discussed in the *Valuation Judgment*. The interim valuation was primarily based on the approach of Kiri's expert, Ms Roula Harfouche ("Ms Harfouche"), which we generally preferred, subject to the possible adjustments arising from the nine issues. Accordingly, it was directed that the parties' experts were to revert with their conclusion on the nine issues:

at [313]. In the *Valuation Judgment*, all issues of costs were reserved, pending the determination of a final valuation: at [314].

5 Following parties' submissions, on 3 June 2021, in *Kiri Industries Ltd v Senda International Capital Ltd and another* [2021] 5 SLR 1, we addressed the nine issues. Save for two issues concerning tax rates, we generally accepted Kiri's position on the nine issues as *per* Ms Harfouche, who expressed the view that the updated value of Kiri's shares was US$482.5m. We nevertheless required the parties' experts' assistance in calculating the final valuation of DyStar in the light of our findings: at [67]. The costs of the valuation tranche (that is, the period commencing immediately after the conclusion of the Liability Tranche up to issuance of the final valuation (as defined below, "the Valuation Tranche")) and the quantum of costs for the entire proceedings were reserved pending the determination of the final valuation: at [70].

6 Finally, in *Kiri Industries Ltd v Senda International Capital Ltd and another* [2021] 5 SLR 111, we adjudged the final valuation of Kiri's shares to be US$481.6m ("the Final Valuation").

7 It is against the backdrop of these decisions that we now deliver our judgment on costs.

Parties' positions

8 As a starting point, it is indisputable that the present case is one that falls in the second of two categories of the Singapore International Commercial Court ("SICC") cases identified by the Court of Appeal in the recent case of *CBX and another v CBZ and others* [2021] SGCA(I) 4 ("*CBX*"): at [17]. This is the category of cases that began its legal life in the General Division of the High Court ("High Court") and was later transferred to the SICC pursuant to O 110

r 12 of the Rules of Court (2014 Rev Ed) ("ROC"). In the present case, the writ of summons and statement of claim were filed in the High Court on 26 June 2015. Kiri later applied to have the case transferred to the SICC, and the application was allowed on 11 May 2017 after a contested hearing. As such, and as was explained in *CBX*, two different costs regimes may govern the case before us.

9 Parties have accordingly made submissions on costs pre- and post-transfer, in addition to disbursements, and have taken vastly differing approaches to assessing costs. Kiri has asked for costs amounting to S$7,797,718.50. Senda rejects Kiri's costs as disproportionate and counters with the figure of S$360,000.

10 On costs incurred pre-transfer ("Pre-Transfer Costs"), Kiri recognises that O 59 of the ROC applies, but argues that it ought to be entitled to costs exceeding the scale provided in Appendix G of the Supreme Court Practice Directions ("Appendix G"), leading to a sum of S$500,000. Similarly, Senda refers to Appendix G, but argues for a strict application of the rates set out therein. Its position is that Kiri is only entitled to a sum of S$102,000 for Pre-Transfer Costs.

11 On the costs post-transfer ("Post-Transfer Costs"), Kiri seeks S$7,297,718.50. This encompasses costs for two periods:

(a) First, costs for the period between the date of transfer to the SICC and the rendering of the *Main Judgment*. In this judgment, this period is referred to as the "Post-Transfer Liability Tranche". This is not to be confused with the period between the commencement of proceedings

and the rendering of the *Main Judgment*, which is referred to as the "Liability Tranche" as defined at [3] above.

(b) Secondly, costs of the Valuation Tranche (as defined at [5] above).

Senda argues that for the Post-Transfer Costs incurred during the Post-Transfer Liability Tranche, the court ought to continue to apply Appendix G strictly, and on that basis, Kiri is only entitled to S$102,000. On the Valuation Tranche, Senda's primary position is that parties ought to bear their own costs, as: (a) it has succeeded on significant issues; and (b) the final valuation is in-between the parties' respective proposed figures. Alternatively, Senda argues that if costs are awarded for the Valuation Tranche, the court ought to apply a significant discount of at least 48%, which it submits will yield a figure of S$156,000. In riposte, Kiri argues that it ought to be entitled to the full costs of the Valuation Tranche as it has substantially succeeded in the valuation proceedings.

12 On disbursements, Kiri claims S$5,944,073.44. This figure consists of travel expenses, expert witness fees and foreign lawyer's fees. Senda does not offer an alternative figure. Rather, it objects to several of the line items claimed by Kiri.

13 Senda also takes issue with the mode of assessing costs, arguing that costs and disbursements ought to be referred to the Registrar for assessment based on the procedure for taxation under O 59 r 20 of the ROC. Senda argues that this was the effect of the costs order in the Oral Judgment (see [3] above). Kiri disagrees, arguing that costs and disbursements ought to be fixed by this court.

Issues

14 From the above, several issues arise for our consideration, which we address in turn below:

(a) whether costs in this matter ought to be taxed by the Registrar under O 59 r 20 of the ROC;

(b) whether Kiri is entitled to costs of the Valuation Tranche; and

(c) what is the quantum of the costs and disbursements that ought to be awarded to Kiri?

Mode of assessment of costs in the SICC

15 The first issue is whether this court ought to order taxation of costs in the usual way, *ie*, using the procedure under O 59 r 20 of the ROC whereby a detailed Bill of Costs is produced and scrutinised by the Registrar. This issue arises out of the Oral Judgment, where we had made an order that Kiri was "entitled to the full costs on its claim" and that "[a]ll such *costs are to be taxed if not agreed*" [emphasis added]: the Oral Judgment at [12]. To date, there has been no agreement on costs. We instead have a vast divide between the parties' respective positions on the quantum of costs that ought to be allowed. The positions taken have been somewhat extreme, particularly in the case of Senda, which is unsatisfactory. The result is that costs have to be settled by the court. The parties disagree on the mode by which the court should assess the costs ordered. The dispute centres on the meaning to be attributed to "taxed".

16 Kiri argues that the word "taxed" "refers in practical terms to costs being decided by [this Court] as opposed to [it] commencing taxation proceedings by filing a bill of costs under O 59". Senda disputes this, arguing instead that the costs order in the Oral Judgment is clear, and that the only plausible reading is

that, absent agreement, Kiri had been directed to have its costs for the liability stage taxed in the usual way by a Registrar under O 59 r 20.

17 We disagree with Senda's interpretation of [12] of the Oral Judgment; that was not what was ordered, and in fact could not have been the case in the light of O 110 r 46(6) of the ROC. We elaborate.

18 Taxation in the O 59 sense entails the Registrar, and not the trial judge or trial *coram*, scrutinising a detailed Bill of Costs submitted by the receiving party. However, the substance of "taxation" does not pertain to *who* conducts the assessment. Rather, it refers to the level of scrutiny in assessing costs. Taxation is a more detailed, rather than summary, assessment of costs. To this effect, in the United Kingdom, "taxation" by way of a Bill of Costs has now been referred to as a "detailed assessment", in contrast to a "summary assessment": see Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) Part 47.

19 The fixing of costs by *the coram*, following more than a summary assessment, was what was meant by the costs order in the Oral Judgment. We recognised that a summary assessment of costs, and fixing costs as such, would not accurately reflect the complexity of the present dispute. Hence, the order in the Oral Judgment was that this *coram* would "tax" the costs in a manner more detailed than a summary assessment, to account for the length and complexity of the present litigation. Kiri has understood this, and has provided this court with a detailed bundle of documents and breakdown of the costs incurred.

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.

21 This position also has support in an article discussing the very first case before the SICC. It was noted that, in relation to taxation of costs, "in the SICC, the judge or judges who have heard and dealt with the case, and who are therefore familiar with the issues in dispute and the conduct of the parties in the litigation, will deal with issues relating to costs as the justice of the case requires": Teh Hwee Hwee, Justin Yeo & Colin Seow, "Commentary: the Singapore International Commercial Court in Action – Illustrations from the First Case" (2016) 28 SAcLJ 692 at p 720.

22 This conclusion is also consistent with observations made in several SICC judgments that the costs regime in the SICC was meant to be simpler than that in O 59 of the ROC: see for example *CPIT Investments Ltd v Qilin World Capital Ltd and another* [2018] 4 SLR 38 ("*CPIT*") at [15]; *B2C2 Ltd v Quoine Pte Ltd* [2019] 5 SLR 28 ("*Quoine*") at [12]. Indeed, litigation before the SICC, by design, is meant to involve an efficient, judge-led case management process, not dissimilar from the flexibility that is present in international arbitration proceedings: see Indranee Rajah *et al*, "Report of the Singapore International Commercial Court Committee" (29 November 2013): <www.sicc.gov.sg/docs/default-source/about-sicc/annex-a-sicc-committee-report.pdf>) (the "SICC Committee's Report").

23 An order requiring the costs of proceedings to be taxed by the Registrar, involving a voluminous Bill of Costs, would be antithetical to this notion. In contrast, the court fixing the costs following an assessment (whether that be a summary or more detailed assessment) that is commensurate with the

complexity of the matter at hand would comport with the efficiency and flexibility inherent in the SICC regime.

24 For these reasons, Senda's contention must be rejected. We therefore proceed to fix the costs of the present proceedings on the basis of a more detailed assessment.

Entitlement to costs for the Valuation Tranche

25 The next issue is whether Kiri is entitled to the costs of the Valuation Tranche, and if so, to what extent. Senda disputes Kiri's entitlement to costs of the Valuation Tranche, arguing that each party ought to bear its own costs. Senda makes this argument on the basis that it has succeeded on issues that consumed far greater time and incurred a great deal more expenditure, and thus it cannot be said that either party has plainly been more successful. Thus it submits that it will be equitable to make no order as to costs. Senda supports its position by pointing to the final valuation, arguing that the final figure adjudged fell in between the parties' respective figures. Alternatively, Senda argues that a significant discount of at least 48% ought to be applied if Kiri is found to be entitled to costs.

26 We find that Kiri is entitled to reasonable costs of the Valuation Tranche, pursuant to O 110 r 46 of the ROC. Kiri was successful in persuading this court that its shares should be valued at US$481.6m. It cannot therefore be said to have been unsuccessful in the Valuation Tranche. However, in assessing the reasonable costs that Kiri is entitled to for the Valuation Tranche, we agree that there ought to be a discount applied in light of how various issues were decided in that tranche. We deal with this when considering the quantum of costs below.

Quantum of recoverable costs and disbursements

27 For the reasons provided below, Kiri is awarded the following costs and disbursements: (a) for Pre-Transfer Costs, we award S$114,636.90, exclusive of disbursements; (b) for Post-Transfer Costs, we award S$4,846,178.36, exclusive of disbursements; and (c) for disbursements incurred for the entire proceedings, we award S$3,100,826.85.

Quantum of Pre-Transfer Costs

28 Two questions arise for consideration under this issue. First, whether the quantum of costs awarded to Kiri ought to be assessed with reference to Appendix G. Second, if Appendix G is used as the starting point, whether an uplift on costs is warranted in view of the complexity of this matter based on the observations of the Court of Appeal in *CBX*.

29 It would be apt to recapitulate parties' positions on the quantum of Pre-Transfer Costs. Kiri's approach, with respect, pays lip service to Appendix G, and proceeds to quantify costs with reference to time costs of *all the lawyers in the team*. In other words, Kiri computes the total time costs of each lawyer in the team by multiplying the total hours spent by the lawyer by the lawyer's hourly rate. The sum for each lawyer is totalled up to arrive at the amount claimed. The total time costs amount to S$790,325 for 1,322.5 hours of work from 26 June 2015 when the writ was filed, to 11 May 2017 when the case was transferred to the SICC, *ie*, the Pre-Transfer Tranche. This work includes work done on pleadings, discovery, pre-trial conference ("PTC") hearings and interlocutory applications. Kiri uses this figure to justify seeking "costs exceeding the scale provided for in Appendix G", and submits that an appropriate figure is S$500,000.

30 On the other hand, Senda seeks strict adherence to Appendix G as it existed in 2019 ("Appendix G 2019"). It rejects Kiri's quantum as being exorbitant and submits that S$102,000 is an appropriate amount for Pre-Transfer Costs. Senda arrives at this figure by using the tariff for complex company law disputes in Appendix G 2019, *ie*, S$20,000 *per* day. It multiplies this by the number of days of trial, subject to the proportional reduction based on the number of days of trial found in Appendix G 2019, which yields a figure of S$204,000. Senda then divides this figure in half and apportions S$102,000 each to the Pre- and Post-Transfer Costs.

31 For the reasons provided below, we find the parties' respective positions, which lie on either extreme of the spectrum, unsatisfactory. Instead, we find that while Senda's *broad* position – that Appendix G must serve as the initial reference point – is sound, there ought to be an uplift on the Appendix G scale to reflect the complexity of this matter.

The application of Appendix G

32 We begin with the issue of whether Appendix G ought to serve as the *starting point* for the assessment of Pre-Transfer Costs. In this regard, we reject Kiri's approach, as canvassed above. We are of the view that Kiri's approach is fundamentally flawed as it pays lip service to Appendix G. Kiri's approach is effectively to quantify costs on a solicitor and client basis and thereafter apply a discount. The basis for the discount and how it is arrived at has not been explained. This approach is wrong in principle and is arbitrary. It is arbitrary because the basis of the discount has not been explained, and appears to be something Kiri has offered to ameliorate the fact that it was in substance pursuing a claim for solicitor and client costs.

33 It is wrong in principle as Pre-Transfer Costs ought to be generally assessed on a standard basis, with the principal question being whether Appendix G ought to be applied or departed from. This is apparent from [28] of *CBX*:

> 28 … *In the absence of any order made by the Registrar handling the transfer PTC that Appendix G is entirely disapplied or of consent from both the parties to such disapplication, in our view Appendix G will continue to be the guide for the assessment of pre-transfer costs.* Whether it plays a role in the assessment of post-transfer costs which, on the face of it, will be assessed under Rule 46, will depend on the circumstances of the case. In relation to pre-transfer costs, however, the losing party should not have to bear the burden of providing "compelling justification" why Appendix G should be referred to; rather it should be the party who wants Appendix G to be departed from who needs to provide the justification for doing so. This discussion applies, of course, only to cases that have their inception in the High Court and to what happens while they are still there. *The policy reasons behind the adoption of Appendix G for cases filed in the High Court do not cease to apply to steps taken there simply because it is later considered appropriate to transfer the case to the SICC for adjudication.* It may be that the circumstances of the case once it has been adjudicated will, in the assessment of costs, support a lesser degree of dependence on Appendix G for the pre-transfer costs, as happens even in cases that remain in the High Court. It all depends on the particular facts before the court.
>
> [emphasis added]

Paragraph 1 of Appendix G makes it clear that it "provides guidelines for party-and-party costs in the Supreme Court" which is a reference to standard costs under O 59 r 27(2) of the ROC. The Registrar's transfer order in this matter did not disapply Appendix G to Pre-Transfer Costs. Nor was there an agreement to this effect between the parties.

34 Thus, the default position in this matter is that Appendix G ought to apply to the assessment of Pre-Transfer Costs unless Kiri is able to show "compelling justification" for departing from Appendix G: *CBX* at [28]. This

again is consistent with Appendix G; paragraph 3 of Appendix G makes it clear that it serves only as a guide and the precise amount of costs to be awarded is a matter of the court's discretion, with the court at liberty to depart from the guidance provided in Appendix G depending on the particular circumstances of each case. Kiri has side-stepped Appendix G and has provided no reasons for doing so. In other words, it has not provided "compelling justification".

35 Conversely, there is justification in this matter to adhere to the guidance provided by Appendix G. First, it is incorrect to suggest, as Kiri does, that the majority of the work for the matter was done pre-transfer. The Registrar's transfer order was made on 11 May 2017. The actual trial for the Liability Tranche took place post-transfer between 6 November 2017 and 6 March 2018. The evidential phase had yet to take place at the date of transfer. The evidential phase, without a doubt, is one of the most taxing, involved, and critical parts of the trial process. It certainly was so in this matter.

36 The trial aside, many other pre-trial hearings and matters took place post-transfer. Kiri highlights that pre-transfer, there were 17 PTCs, numerous filings, and complex issues that straddled multiple jurisdictions. But it omits to mention that post-transfer, there were two further PTCs, two case management conferences conducted by the trial court, one hearing by an Assistant Registrar, and five hearings dealing with the merits of various Summonses. Also, the "complex issues" that surfaced pre-transfer were exacerbated post-transfer by Senda's conduct during trial (*eg*, Senda's multiple non-disclosures throughout the trial).

37 Secondly, while significant work was undertaken pre-transfer (*ie*, before 11 May 2017), the scope of work done is not uncommon to large oppression suits of a similar nature that have been pursued in the High Court. This is a

relevant factor. Specifically, the complex factual issues that arose, and the numerous hearings that took place, were "a characteristic which would be common to all … proceedings [of this sort] and does not necessarily carry significant weight in assessing whether to disregard Appendix G for pre-transfer costs": *CBX* at [35]. We highlight the following passage from *CBX* which stresses the point:

> 36 … Appendix G would not be realistic in circumstances where a combination of factors would make it a wholly unrealistic measure of what parties might reasonably be expected to spend to safeguard their interests. Such circumstances could include the need to liaise with persons in different jurisdictions, the magnitude of the amount in dispute, the complexity of the arguments and the supporting material and the consequences to a party of losing. We accept that all these are relevant matters which impact the reasonableness of the costs claimed in the post-transfer period. ***But many of these matters are subjective and the court in assessing reasonable costs must have regard to the usual run of similar cases and not be misdirected by the amount a party with deep pockets and a great sense of entitlement is willing to spend.***
>
> [emphasis added in bold italics; additional emphasis in underlined bold italics]

While this observation was made in relation to post-transfer costs, it is in our view equally apposite with regard to pre-transfer costs.

38 The High Court has been hearing and continues to hear complex oppression suits prior to and after the constitution of the SICC; SIC/S 4/2017 in fact originated in the High Court, and, but for the transfer, would have run its course in the High Court. A matter does not warrant a departure from Appendix G simply by reason of being transferred to the SICC. *CBX* makes it clear that the facts must offer *compelling justification* for that conclusion. As such, to accept that there is compelling justification in this matter to warrant departure from Appendix G, notwithstanding that suits of a similar nature and

complexity are routinely heard in the High Court, would be tantamount to accepting that a matter is entitled to a different cost treatment *for Pre-Transfer Costs* simply because it has been transferred to the SICC. This is not consistent with the observations in *CBX* ([33] *supra*) at [28]. Ultimately, Kiri has the burden of showing compelling justification as to why this matter warrants departure from Appendix G with regard to Pre-Transfer Costs. This is no different from any case of a similar nature commenced in the High Court, as is evident from paragraph 3 of Appendix G. As *CBX* noted at [28], whether there is a lesser or greater degree of dependence on Appendix G depends on the particular facts. In our view, Kiri has failed to discharge the burden of demonstrating that we should not have regard to Appendix G.

39 Accordingly, Appendix G must be the starting point for assessing Pre-Transfer Costs, a position which Senda expressly endorses. That leaves a question of whether there should be an uplift on the guidance in Appendix G. As alluded to, we are in general agreement with the broad contours of Senda's approach, which adhere more closely to Appendix G 2019. That said, and as alluded to above, we disagree with Senda's strict and unwavering application of Appendix G 2019. We are of the view that the complexities patent in this matter warrant an uplift in the costs arrived at based on Appendix G. We turn to consider this next.

An uplift on the Appendix G scale

40 In *CBX*, it was observed in relation to pre-transfer costs that instead of a departure from Appendix G, there was the option of a *discretionary uplift* using Appendix G as a starting point. This observation was made in *CBX* at [34] when the court considered whether the complexity of the arbitration dispute at hand warranted departure from Appendix G, such complexity being attributable to

inter alia the presence of a "dichotomy of legal counsel" and the "time consuming" nature of the matter. The Court of Appeal considered the complexity of the matter to be "***not … a factor to justify disregarding Appendix G*** completely but rather … a factor to be taken into account when ***deciding whether to give an up-lift*** on the pre-transfer costs" [emphasis added]. In other words, the court stated that there need not be a strict and unwavering adherence to the scale set out in Appendix G. As with all costs issues, the court may, as a matter of discretion, impose an uplift to account for the particular circumstances of the case at hand. This is also stated clearly in the opening paragraphs of Appendix G. In fact, Kiri accepts this point in its written submissions where it agrees that costs in the SICC indubitably remain at the discretion of the court.

41 We are of a view that there ought to be an uplift. We explain below why this is so, with reference to specific aspects of this matter.

42 The issue in this matter is that at first blush, there is no neat method of quantifying the uplift, or, for that matter, arriving at the base amount of costs using Appendix G to which a discretionary uplift is to be applied. The principal difficulty lies in the fact that Appendix G does not differentiate between pre-trial costs matters and trial costs. It instead provides tariffs that appear to subsume both pre-trial and trial costs. This has since been addressed in the revised Appendix G issued on 31 August 2021. However, the Pre-Transfer Costs in this matter are entirely in respect of matters *prior to trial*.

43 A principled manner in which this issue may be addressed is to assess the costs of the Liability Tranche *as if this matter been conducted entirely in the High Court* (with reference to Appendix G 2019), and thereafter *apportion* the costs arrived at between the period pre- and post-transfer to determine the Pre-

Transfer Costs. In assessing such costs, we apply an uplift on the Appendix G 2019 rates to reflect the complexity of the matter. We elaborate.

The quantum of Pre-Transfer Costs to be awarded

44 First, with reference to Appendix G 2019, the appropriate daily tariff must be selected. We disagree with the tariff of S$20,000 per day that Senda proposes. Senda argues that this figure is appropriate, as under Appendix G 2019, that is the tariff for complex corporate/company law disputes, and Kiri's claim for minority oppression falls into this category.

45 Whilst Kiri's claim is a company law dispute, it would be an understatement simply to call it "complex". The dispute was more complicated than usual, with a multitude of cross-cutting allegations being levelled by both sides involving multiple entities and transactions in some cases spanning jurisdictions. The value of Kiri's claim, as reflected in the final valuation, was monumental at almost half a billion US dollars. This speaks to the size of DyStar's business and the complexity of the issues that arose in the Liability Tranche.

46 Accordingly, we find that a higher tariff is justified, taking reference from the tariff for construction, intellectual property, and equity and trusts cases found in Appendix G 2019. This tariff is up to S$30,000. Taking into account all the circumstances of the present dispute, we find that a further uplift is necessary, and that a daily tariff of S$35,000 would be appropriate.

47 Second, the question arises as to whether there ought to be a percentage reduction on the above daily tariff based on the number of days of trial as provided in Appendix G 2019. It is uncontroversial that the court will typically apply a progressive percentage reduction to the rates in Appendix G, whereby

only a percentage of the daily tariff is awarded to the winning party depending on the length of the trial. In the usual course, for the first to fifth day of trial, the full tariff will apply. From the sixth to tenth day, only 80% will be awarded. Finally, from the eleventh day onwards, only 60% of the tariff would apply. These percentage reductions are captured in the text of Appendix G 2019. Notably, this has been dropped in the 2021 iteration of Appendix G.

48 Senda has applied the aforementioned in its calculations. We disagree. Given the complexity and enormity of this matter, as explained at [45] above, it would be appropriate for the full tariff to apply for all 12 days of trial. This gives us a figure of S$420,000.

49 Third, the figure of S$420,000 ought to be apportioned to reflect the time spent pre-transfer and post-transfer for the Liability Tranche. Senda recommends splitting the costs in half for the pre-transfer and post-transfer periods. We find this apportionment to be arbitrary; indeed, Senda has not explained why a 50:50 split serves as an accurate proxy for the time spent pre- and post-transfer.

50 Instead, a better approach is to use the time spent by Kiri's lawyers during the pre-transfer period as a percentage of the overall time spent on the Liability Tranche as a proxy for the appropriate apportionment. Kiri has provided the court with the time spent in the pre-transfer period, as well as the post-transfer period. The total time spent on the Liability Tranche is 4879.8 hours. At this point, we note that 34.5 of the hours claimed by Kiri was spent on reading the *Main Judgment*. This ought to be removed from the time spent post-transfer. This is time spent deciding whether to appeal and preparing for the appeal and/or the Valuation Tranche, and not for the trial of the Liability Tranche. As such, the total time spent ought to be reduced to 4845.3 hours. Of

this, based on Kiri's schedule of time costs, the time spent pre-transfer was 1322.5 hours. As such, dividing this figure by 4845.3, the time spent pre-transfer was approximately 27.29% of the total time spent on the Liability Tranche.

51 Using 27.29% as a proxy to apportion the sum of S$420,000, we arrive at the sum of S$114,636.90. Accordingly, we award this amount to Kiri as Pre-Transfer Costs.

Quantum of Post-Transfer Costs

52 Kiri has claimed a total of S$7,297,718.50 for Post-Transfer Costs. This sum includes S$2,406,947.50 for costs incurred during the Post-Transfer Liability Tranche; and S$4,890,771.00 incurred for the Valuation Tranche. Essentially, its approach is similar to that for Pre-Transfer Costs except that this time, no discount has been applied. In other words, Kiri has again compiled the hours spent by each lawyer in its team and multiplied the resultant figure by the hourly rate for that lawyer. The figures were then totalled up to arrive at the time costs that Kiri seeks. In other words, Kiri appears to have claimed its solicitor-and-client costs.

53 Senda on the other hand argues that Appendix G should be the primary basis for assessing the costs for the entire Liability Tranche *including the Post-Transfer Liability Tranche*. As noted above, Senda's argument is that S$204,000 ought to be the total costs for the Liability Tranche, and that half of this, S$102,000, ought to be awarded as costs of the Post-Transfer Liability Tranche. On costs of the Valuation Tranche, Senda agrees that O 110 r 46 ought to apply, and argues that using "reasonable costs" as the basis, an appropriate figure is S$156,000. Senda arrives at this figure through the application of Appendix G, applying an uplift to the sum of S$204,000 which, in its opinion, "accommodates any increase that would apply under [O 110 r 46]." To the

resultant sum of S$300,000, Senda applies a 52% discount, on the basis that it has succeeded on several significant issues in the Valuation Tranche.

54 To begin with, we reject Senda's position that the costs of the Post-Transfer Liability Tranche, "should be assessed with primary reference to Appendix G." Senda's submission ignores that the basis of assessment for the Post-Transfer Liability Tranche is not Appendix G but O 110 r 46, which prescribes a different regime from that which underpins Appendix G. Costs under O 110 r 46 ought not to be assessed *primarily* on the basis of Appendix G. The key issue is whether in assessing costs under O 110 r 46, the facts of this matter justify a wholesale rejection of Appendix G or speak to Appendix G being one of a number of factors which should be borne in mind: *CBX* at [39].

55 Senda argues that Kiri has not shown that the nature of the work done post-transfer was so different from other similar High Court proceedings. This argument is made in relation to the costs for both the Post-Transfer Liability Tranche and the Valuation Tranche. However, it must be remembered that for costs incurred post-transfer in the SICC, it is not for Kiri to show "compelling justification" why Appendix G ought to be departed from, *ie*, to prove that the work done was "so different". The burden is instead on Senda to show that the work that was carried out for the Post-Transfer Liability Tranche was no different from "the usual run of similar cases": *CBX* at [36].

56 Accordingly, O 110 r 46 of the ROC stipulates the basis of assessment of the Post-Transfer Costs. It stipulates that the court has a wide discretion in assessing what are "reasonable" costs: *CPIT* at [23]. Thus, as a starting point, there is *no rule* that the SICC must apply Appendix G in relation to post-transfer costs. As noted earlier, the weight given to Appendix G in assessing post-transfer costs will depend on the circumstances of the case: *CBX* at [28].

57 In our view, while the case for departure from Appendix G was not compelling for the work that was undertaken pre-transfer, the same cannot be said as regards the work for the Post-Transfer Liability Tranche. Indeed, the same may be said perhaps with even greater force as regards the Valuation Tranche.

58 We have already explained at [45] above how the present litigation, pre-transfer, was of significant complexity warranting a material uplift on Appendix G costs. This degree of complexity was only heightened post-transfer, to the extent that we are of the view it would be appropriate to depart entirely from Appendix G. The scale of the litigation post-transfer is best described as monumental. The sheer number of tranches of trial and oral submissions (for both the Liability and Valuation Tranches), and the volume of documents (deluge being an appropriate description) all point to this matter being of significant complexity and difficulty post-transfer. The issues raised were novel, challenging and required skill, expertise and specialised knowledge.

59 For context, over and above the 12 days of trial spent on liability, the Valuation Tranche alone required an additional nine days of trial and numerous rounds of written and oral closing submissions which took two days. In terms of documentation alone in the Liability Tranche, the parties' *Agreed* Bundle ran to some 79 volumes. Of these, volumes 1 to 49 were used for the very first tranche of trial in the Liability Tranche (as confirmed by the letter of 3 November 2017 from Kiri's solicitors, Allen & Gledhill LLP ("A&G"), enclosing the Proposed Markings for Trial Bundles), and these 49 volumes *alone* comprised 27,454 pages. The size of the universe of documentary material grew palpably in the Valuation Tranche. The Agreed Bundle there ran from volumes 80 to 121, and totalled some 27,282 pages. The parties' *Joint Core Bundle* for the Valuation Tranche alone amounted to 46 volumes and some

17,614 pages. This was only the tip of the iceberg as regards documentation. The bundles mentioned were the already *condensed* compilation of the *key* documents that surfaced in the course of discovery and the exchange of AEICs. Finally, the size of the claim was enormous, with Kiri's claim ranging from just under half a billion to almost a billion US dollars.

60 In particular, as regards the Valuation Tranche, there was a need to understand difficult principles on valuation, economics and statistics and to apply them to a complex set of facts that was the result of the size and scale of DyStar's business. It is important to point out that in terms of business activity, DyStar comprised a web of companies spread across the globe that were interlinked with and interconnected to each other, as well as with companies controlled or managed by its shareholders Kiri and Longsheng (through its holdings in Senda). The size of its business was significant both in absolute terms and in relation to its competitors. Its operations were complex, and the industry in which it operated complicated and global. Four illustrations, which are by no means comprehensive, of the challenging nature of the issues are apposite:

(a) First, whether DyStar's competitors were relevant comparators given that DyStar outsourced, to related companies and third parties, a large portion of the production of components that made up its dyes.

(b) Second, whether the expiry of certain critical patents DyStar held impacted on its ability to influence pricing in certain markets of its products as well as those of its competitors (in other words its ability to control pricing in the market).

(c) Third, as DyStar operated in multiple markets against, in some instances, different competitors, each with its own considerations,

whether country risk and size premia ought to be applied to DyStar's valuation as discount factors.

(d) Fourth, as DyStar was a privately held company, whether discounts for Kiri's lack of control and the lack of marketability of its shares were appropriate.

All of these required expert evidence and undoubtedly considerable time and effort to be understood and addressed, as exemplified by the total number of hours that Kiri says its team has spent. It is relevant that Senda does not challenge: (a) the hours, including the number of lawyers used to staff the litigation, that Kiri has submitted; and (b) the hourly rates that Kiri has used. This is important for reasons that will become apparent later in this judgment: see [94] below.

61 Similar observations may also be made as regards the Liability Tranche. We put aside for the moment the fact that the issues in SIC/S 4/2017 had to be tried alongside those in a separate complex commercial suit, namely SIC/S 3/2017, *ie*, DyStar's action against Kiri. The issues that arose in the Liability Tranche were voluminous, multifaceted, and complex. These include:

(a) First, discerning the legitimate expectations of the parties to a large international joint venture that operated across numerous jurisdictions.

(b) Second, examining numerous transactions that allegedly involved Longsheng and Senda acting against Kiri's interests as a minority shareholder of DyStar. Indeed, at least seven discrete arrangements or groups of transactions had to be examined in the course of the trial.

(c) Numerous other issues that required close scrutiny of the commercial dealings between Kiri, Senda, Longsheng and DyStar, in order to discern the true nature of their commercial relationship and consequently whether Kiri could meaningfully be said to have been treated unfairly.

62 Finally, putting aside the complexity of this matter, it must also be pointed out that Senda's approach to determining the costs of the Valuation Tranche is internally inconsistent. Despite "accept[ing] that the principles in relation to costs pursuant to [O 110 r 46] would apply", Senda has gone on to use Appendix G as the key factor in determining the costs for the Valuation Tranche. This is incorrect, and Senda has provided no convincing explanation for its position. As emphasised by the Court of Appeal in *CBX*, whether Appendix G plays a role in the assessment of post-transfer costs "will depend on the circumstances of the case" (at [28]), and it is open to the court to determine whether there ought to be a "wholesale rejection of Appendix G for post-transfer costs" or if Appendix G should "[remain] one of a number of factors which should [be] kept in mind" (at [39]).

63 Accordingly, in our assessment of the Post-Transfer Costs, Appendix G carries no weight. We turn thus to the issue of how "reasonable costs" under O 110 r 46 ought to be assessed, in the event Appendix G is not a relevant factor.

The definition of "reasonable costs" under O 110 r 46

64 The SICC may award successful litigants "reasonable costs", as *per* O 110 r 46. The plain text of O 110 r 46 does not stipulate what "reasonable costs" entails. There are also no decisions that discuss, with reference to any concrete guidelines, the definition of "reasonable costs" under O 110 r 46.

65 Some light is shed by the SICC Practice Directions. At paragraph 152, the Practice Directions state that reasonable costs are in the discretion of the court, which has the "full power to determine by whom and to what extent the costs are to be paid". We highlight the following:

(a) Paragraph 152(2)(a) states that regard must be had to O 110 r 46(1), which provides for "reasonable costs" to be borne by the unsuccessful party.

(b) Subparagraph (2)(b)(ii) states that the court may consider relevant circumstances such as the "conduct of the case and the existence, scope, extent and terms of any third-party funding contract".

(c) This is further elaborated upon in subparagraph (3), which provides for a list of circumstances that the court may consider. These include the conduct of the parties, the amount or value of the claim, the complexity or difficulty of the subject matter involved, the skill, expertise and specialised knowledge involved, the novelty of any questions raised, and the time and effort expended on the application or proceeding. Subparagraph (3) makes it clear that this is a non-exhaustive list.

66 In short, "reasonable costs" allows the court to look at all the facts and circumstances in a given case to determine the appropriate quantum of costs to be awarded. Skill, expertise and specialised knowledge coupled with the novelty of the issues raised are important considerations. It is, by design, a more generous and flexible regime, that may in appropriate circumstances mirror the approach to costs in international arbitration: see *CPIT* at [15]; *Quoine* at [12]; the SICC Committee's Report. The broad nature of this inquiry was observed by the court in *CBX* at [9]:

> Thus, the question of amount of costs that a successful party should recover is at large and the judge is tasked to determine what is "reasonable", a determination which can be guided by many factors moving far beyond the type of proceeding, the number of hearing hours and the kind of transcription service employed (though these factors will also be relevant, of course).
>
> …

67 A difficulty patent in any SICC matter on costs, however, is the absence of any yardstick against which the quantum of costs may be measured, which guidelines such as Appendix G provide. For this reason, scrutiny of the costs positions taken by the parties assumes importance. The parties' submissions in the present case, however, offer limited assistance; Senda's reference to Appendix G is overly conservative for the reasons provided above. Kiri's position is, in essence, a claim for solicitor-and-client costs, and it is trite that the court will not reimburse successful litigants for the full extent of their solicitor-and-client costs (see [75] below).

68 With these difficulties in view, and in the light of the flexible "reasonable costs" regime as set out above, we adopt what is, in our view, a principled compromise between the parties' positions that will reflect a reasonable quantum of costs. Specifically, the quantum of Post-Transfer Costs awarded to Kiri should be higher than indemnity costs in the High Court, yet should still not amount to solicitor-and-client costs. We explain further.

69 It is relevant to consider the conceptual underpinnings of the well-established costs regime under O 59 of the ROC, applicable to proceedings in the High Court, as a point of contrast to costs awarded under O 110 r 46. An appropriate starting point would be to ascertain the possible interpretations of these provisions, having regard not just to the text of the provisions but also to the context of the provisions within the statute (in this case, subsidiary

legislation, *ie*, the ROC) as a whole: see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37]–[38].

70 Under O 59 r 27, there are two methods to assess costs: the "standard" and "indemnity" bases. The "standard" method of assessing costs is to award a "reasonable amount" of the costs that are "reasonably incurred". As noted earlier, Appendix G provides guidance on the quantum of standard costs under O 59 r 27(2). The "indemnity" method of assessing costs is to award costs as long as they are not of an "unreasonable amount" and have not been "unreasonably incurred".

71 The difference between standard and indemnity costs lies in the burden of proof. When assessing costs on the "indemnity basis", any doubts as to *reasonableness* are resolved in favour of the receiving party. On the other hand, in assessing costs on a "standard basis", any doubts as to *reasonableness* are resolved in favour of the paying party: see O 59 r 27(2), (3). The basis of assessment is the same but the burden of proof is shifted. In practice, this difference in the burden of proof has led to indemnity costs being typically materially higher. However, conceptually, "reasonableness" remains the common thread in O 59 r 27, and the only distinction between standard and indemnity costs is in whose favour any doubts over reasonableness are resolved.

72 Importantly, there are two ways in which the concept of "reasonableness" appears in O 59. First, the costs incurred by a party must be "reasonably incurred". Second, the *amount* of the "reasonably incurred costs" that are to be awarded to the receiving party must be "reasonable". To illustrate, consider a situation where a party has incurred five items of costs. The first question is: of those five items, how many were "reasonably incurred". Assuming that only three of the items were "reasonably incurred", the total

amount of these three items is calculated. If the total amount is "X" dollars, only a "reasonable amount" of "X" will be awarded to the receiving party. That is, based on the circumstances of the case, the court may award any percentage of "X" to the receiving party. In short, there is a *double* attenuation of costs based on the consideration of "reasonableness" in an assessment under O 59.

73 On the other hand, this does not appear to be the case in O 110 r 46 of the ROC, where there is only one mention of the concept of "reasonableness", *ie*, "reasonable costs". The plain words of the provision therefore suggests that, in contrast to O 59, there is only a *single* attenuation under *one broad inquiry as to reasonableness.* This may reasonably lead to the conclusion that the costs awarded in the SICC will generally be higher, depending of course on the circumstances of the case. On the other hand, we recognise that it may be possible that the double attenuation found in O 59 is encompassed by this single reference to "reasonable costs" in O 110 r 46. There is some ambiguity on a plain reading of the provision. Accordingly, we are left with two choices: a broader inquiry that only requires costs to be "reasonable"; or a narrower one that requires the costs to be reasonably incurred, and a reasonable amount of those reasonably incurred costs. We prefer the former approach for reasons we shall explain.

74 The difference in rationale between the SICC and the High Court supports the position that there is only a "single attenuation", and as a consequence, the costs orders in the SICC will generally be higher than in the High Court. That the rationale and purpose behind statutory provisions is of paramount importance in their interpretation is trite and uncontroversial: see *Tan Cheng Bock* at [37]–[38].

75 In the High Court, one of the key considerations is access to justice for all litigants, regardless of the depth of their pockets. This consideration pervades an inquiry into the costs of proceedings in the High Court. This is reflected in the guidance laid out in Appendix G, which is meant to keep costs affordable in order not to impede access to justice. Also pertinent in this regard is the fact that case law on O 59 has recognised that a party will not recover *all* the costs of their litigation: *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 at [34]. Instead, in the context of O 59, the "purpose of the exercise of assessing costs is to ensure that the receiving party is given a *fair* amount of money towards compensating the costs he expended in pursuit of his case. It is not to compensate him for every cent he expended even if they were reasonably expensed. It is *in the public interest* to keep costs within reasonable limits" [emphasis added]: *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2012] 2 SLR 616 at [5]. These considerations are reflected in the aforementioned double attenuation in O 59 r 27.

76 On the other hand, it has been observed that, in the SICC, "[a] successful commercial litigant *should not be out of pocket if it has prosecuted its claim or defence sensibly* and, more specifically, *without enhancing the cost of the litigation as a means of seeking to oppress the losing party*": see *Quoine* at [10]–[13]. This accords with the very nature of the SICC, and the disputes that are generally brought before it, namely international commercial disputes. The parties will often be large commercial entities with the financial resources to prosecute and defend claims, much more so than the average litigant in the High Court. Thus, concerns of access to justice are not at the forefront, and accordingly, in the SICC, there is less of a need to attenuate the amount of costs awarded.

77 In short, while costs must still be "reasonable", the policy concern of "access to justice" is replaced by the *commercial consideration* of ensuring that a successful litigant is not generally out of pocket for prosecuting their claim in a sensible manner. Thus, as long as the costs are sensibly and reasonably incurred, a party in the SICC ought to be able to claim them – in other words, there is only a single attenuation, as earlier described.

78 It becomes apparent from the preceding discussion that reasonable costs awarded in the SICC may well exceed indemnity costs awarded in the High Court. As alluded to above, this in and of itself is not objectionable, given that indemnity costs are in essence costs that have been subject to the double attenuation under O 59, and conceptually are akin to costs on a standard basis save for the burden of proof.

79 However, the approach above to costs in the SICC does not pave the way for an award of solicitor-and-client costs. There are two points of note. First, that is not what O 110 r 46 provides. If that was the intention, we would have expected this to be clearly stated in the rule and expressed in the various publications that concerned the formation of the SICC. Indeed, if this was intended, O 110 r 46 could have been crafted in the same manner as O 59 r 28 which deals with taxation of solicitor-and-client costs. Second, the touchstone of reasonableness is present in O 110 r 46 to act as a critical safeguard to prevent parties from indiscriminately incurring costs and thereby oppressing the other side. It is important to note that only those costs that are *properly and sensibly incurred* will be recoverable. In *Quoine*, Simon Thorley IJ stated thus (at [14]):

> … What O 110 r 46 of the ROC and para 142 of the SICC Practice Directions are clearly indicating is that successful litigants before the SICC can expect to receive reasonable compensation for the expenditure that they have *properly incurred*. Just as any *unreasonable* escalation of costs in arbitration proceedings can be excluded from an award of

> 'reasonable' costs so also can any *unjustifiable expenditure* in proceedings before the SICC …"
>
> [emphasis added]

It is always open to the unsuccessful party to challenge the hours claimed, the rate that is applied and the number of lawyers that have been used to staff the brief when "reasonable costs" are being assessed. This is important as noted above.

80 As such, if a party, no matter how successful, incurs costs in arguing issues that were doomed to fail, or has incurred costs vexatiously to oppress the other party, such costs would not have been reasonably incurred and therefore ought not to be awarded as "reasonable costs". In as much as successful parties in the SICC are entitled to receive reasonable compensation for costs properly incurred, it does not follow that they are entitled to their full costs and expenses if aspects of the litigation, or the litigation as a whole, were not sensibly prosecuted, or if costs were incurred for the purpose of oppressing the losing party, resulting in enhancement of the costs: see *Quione* at [12]. That would not lend to the efficient resolution of complex commercial disputes of an international character which is the central tenet of the SICC. Indeed, it would be the antithesis of efficiency to allow a party to conduct a campaign of litigation by attrition and still recover what were essentially wasted costs. As observed by the Court of Appeal in *CBX*, the assessing court should "not be misdirected by the amount a party with deep pockets and a great sense of entitlement is willing to spend": at [36]. We should add that even where an issue is reasonably pursued, it does not follow that time and efforts expended in terms of hours would necessarily be allowed. This would be so if the quantum claimed in terms of the hours expended, the size of the team involved and the hourly rates that were used were not reasonable in terms of the nature of the issue.

81 Accordingly, in our view, as a general rule, a principled approach is to assess costs based on: (a) the time spent on the matter; multiplied by (b) an appropriate hourly tariff. The reasonableness of both figures can be assessed with reference to the factors set out in paragraph 152(3)(a) of the SICC Practice Directions. In this regard, in determining whether the litigation or aspects of the litigation have been reasonably pursued, it will be useful to assess whether the issues canvassed were sensibly or reasonably pursued, bearing in mind the overall conduct of the parties. It would be helpful in this regard if the costs are presented, as far as practicable, in terms of the issues pursued in the various stages of the litigation. Whether it was reasonable for a party to pursue an issue, and the manner in which an issue is pursued by a party, are two factors identified in paragraphs 152(3)(a)(ii) and (iii) of the SICC Practice Directions. Where an issue has not been pursued sensibly or reasonably, it ought to be disallowed, with the hours attributed to that issue being deducted from the overall costs claimed. Where such hours have not been provided, a suitable proxy has to be ascertained; indeed, as will be explained, this is precisely the case in this matter.

82 Finally, the costs arrived at ought to be weighed against the overarching consideration of proportionality. As observed by Thorley IJ, "the costs incurred *should not be disproportionate with the value of the claim*": *Quoine* at [14]. This is also reflected in paragraph 152(3)(b) of the SICC Practice Directions. In other words, the value of the winning party's claim may be a relevant factor in calibrating the final amount of costs awarded. To be clear, this is suitable where the immediate prior question as to whether Appendix G ought to be departed from has been answered in the affirmative.

83 It is with the aforementioned principles in mind that we turn to consider the Post-Transfer Costs claimed by Kiri.

Assessing "reasonable costs" in this matter

84 In Kiri's first set of submissions, they dealt with Post-Transfer Costs as one homogeneous parcel of costs, *ie*, both the costs incurred for the Post-Transfer Liability Tranche and the Valuation Tranche. We agree with this approach.

85 In our opinion, it is reasonable in this case to regard both sets of costs as incurred in the overall objective of obtaining relief from oppression by a buy-out at a determined value. The matters in both tranches substantially overlap, and the tranches are inextricably tied. For example, in considering whether adjustments needed to be made to DyStar's valuation by reason of the nine issues, we considered several acts of oppression by Senda that constituted the subject matter of the *Main Judgment*. These include the Special Incentive Payment to Ruan, the Longsheng Fees, Longsheng's exploitation of the Patent, and various other oppressive financing transactions: see *Main Judgment* at [281(b)]. In this light, the choice to bifurcate the two tranches as a "mode of trial [was] pre-eminently a matter of case management": *Scintronix Corp Ltd v Ho Kang Peng and another* [2011] SGHC 28 at [25]; *Singapore Airlines Ltd v CSDS Aircraft Sales & Leasing Inc* [2020] 5 SLR 221 at [19]. Bifurcation in this case did not *substantively* change the nature of the dispute before the court. Liability still remained the precursor to valuation; and absent the proving of such liability, the question of valuation would never have arisen.

86 The converse is equally true; any victory in the Liability Tranche would have been a pyrrhic one for Kiri if it did not succeed at the valuation stage. That is, if it transpired during the Valuation Tranche that Longsheng's oppressive acts did *not* in fact cause DyStar significant loss, then DyStar's valuation would *not* have been correspondingly adjusted in Kiri's favour. We in fact witnessed

such a state of affairs as regards the issue of how Longsheng's exploitation of the Patent ought to be quantified, and how the impact of this oppressive act was to affect DyStar's valuation. We elaborate at [90] below in this respect. Finally, reflective of the coterminous importance of both stages is the fact that, in this particular case, the trial for the Valuation Tranche required almost the same amount of time as the trial for the Liability Tranche.

87 We have said that Kiri is entitled to "the full costs of its claim" in relation to the Liability Tranche, which includes the Post-Transfer Liability Tranche: Oral Judgment at [12(a)]. However, when arriving at the amount of such full costs, it remains necessary to assess Kiri's "reasonable costs" in accordance with the parameters we have set out above at [81]. Also, this approach will allow this court to better account for the principle of proportionality noted above at [82]. The value of Kiri's claim in the present case, and the extent of its success in obtaining this value, provide the court with a useful yardstick in determining what costs were properly and sensibly incurred, and what are "reasonable" Post-Transfer Costs (for both the Post-Transfer Liability Tranche and Valuation Tranche).

88 Naturally, this raises the question: how should the *extent* of Kiri's success be assessed or quantified? We expressed the view above that it would be useful to examine this through the lens of whether it was reasonable for Kiri to have pursued an issue. There were various issues that affected the overall value of Kiri's claim. For the most part, Kiri succeeded. However, it was not successful on several issues. Significantly, it did not prevail on the issue of discount for lack of marketability ("DLOM"), and importantly, its claim for an account of profits as the measure of the benefit that Longsheng had derived from exploitation of the Patent (the "Account of Profits" issue).

89 Keeping in mind the principles enunciated above, the costs expended in pursuing issues that were *not sensibly pursued* should be factored out. But just because Kiri failed to prevail on an issue does not necessarily mean that the issue was not sensibly pursued and the costs not reasonably incurred. To this end, we find that the DLOM arguments put forward by Kiri were made towards a keenly-contested issue, towards which some 22 paragraphs of the *Valuation Judgment* were dedicated (see the *Valuation Judgment* at [225]–[246]). Kiri's failure to prevail was after the court's close consideration of the merits of both sides' arguments. We are unable to say that the costs thereby incurred by Kiri were not reasonable.

90 The only issue which was in our view not properly pursued was the Account of Profits issue. The result of Kiri failing to persuade us on this argument was that they were only awarded a notional license fee. This was not a claim that was sensibly pursued by Kiri as it arose out of its misapprehension of the order made in [191] and [281(b)] of the *Main Judgment*. A careful reading of the *Main Judgment* would have made it clear that an Account of Profits was not ordered to be written back into the valuation of DyStar. Indeed, a cursory examination of the local and foreign jurisprudence on what is now known as the "user principle" would have revealed that the appropriate relief for Longsheng's exploitation of the Patent would have been a notional licence fee: see the *Valuation Judgment* at [180]–[182]. We also explained in the *Valuation Judgment* at [185]–[186] that Kiri's argument on the Account of Profits was quite clearly unmeritorious. It would in fact have resulted in a windfall for Kiri, as "DyStar was not in a position fully to exploit the Patent *itself*, and mainly sought to profit from the Patent by using it for strategic and competitive purposes": the *Valuation Judgment* at [186].

91 Finally, we consider how to: (a) account for the costs expended in pursuing the Account of Profits issue; and (b) make a corresponding deduction to Kiri's claim for costs in this respect. We suggested earlier that the appropriate approach would be to look at the time spent by Kiri's lawyers on the Account of Profits issue and reduce the hours claimable accordingly. However, this is not possible as Kiri has not presented its time costs based on the issues argued. We therefore have to identify a suitable proxy.

92 In our view, Kiri's success on the value of DyStar's shares is a useful proxy for the hours that ought to be deducted from the total time that is to be allowed. Although we accept that this is not an entirely accurate proxy, it is the next best available option based on the information that has been placed before the court.

93 Kiri has relied on two figures provided by Ms Harfouche (based on her updated calculations) for the value of its shareholding in DyStar. One was US$618m, and the other, US$888m. The difference of US$270m was to account for the situation where Kiri did not succeed on its claim on the Account of Profits issue, *ie*, the figure of US$270m represented the value of the Account of Profits claim. As we have found this to be the only issue that Kiri had not sensibly pursued, the figure of US$270m claimed should be divided by the figure of US$888m as that would approximate the extent to which Kiri has been unsuccessful on this issue and which ought to be deducted as costs not reasonably incurred. This yields a percentage of 30.41%, which represents the percentage reduction that is to be applied to the costs claimed by Kiri. Thus, Kiri ought to be awarded 69.59% of the Post-Transfer Costs claimed, as costs *reasonably incurred*.

94 We reiterate the observation made earlier that Senda has not raised any dispute on the hours and rates that Kiri has used in quantifying its costs, as well as the number of lawyers that have staffed its team. Neither does it take issue with the manner in which Kiri has conducted the litigation; there has been no suggestion that it was pursued in a manner to run up an excessive amount of costs or conducted in an oppressive manner. Its objections are purely a matter of principle. As Senda has failed to raise these issues, we do not consider them. We assume that it accepts that these are not issues that we need to consider. Ultimately the onus is on Senda to raise these issues. We therefore do not do so. We accordingly accept the hours and rates, and the number of lawyers that Kiri says ought to be used in quantifying its costs, subject to the adjustments stated above.

Preventing double recovery of certain costs

95 However, before applying the 69.59% multiplier, we consider that, on the schedule tendered by Kiri, there are parcels of costs that ought not to be awarded. This is not due to Kiri's lack of success. It also is not due to issues being improperly pursued. Rather, it is because these parcels of costs may rightly be claimed in other proceedings or have already been claimed. Hence, the concern is that there may be double recovery.

(a) As noted above, Kiri has claimed 34.5 hours on "Consideration of the Judgment", referring to the *Main Judgment*. This should be removed from the equation given that it would have been for the purpose of deciding whether to appeal and to prepare for the Valuation Tranche. Kiri has already claimed for the hours spent in preparing for the Valuation Tranche as a separate parcel of costs. As such, awarding costs for the time spent by Kiri's lawyers in reading the *Main Judgment*

would be double recovery. Therefore, we reject the S$25,725 claimed for this line item.

(b) Kiri has also claimed S$559,863.00 for "Affidavits of Evidence-in-Chief and Expert Reports" which includes the costs incurred by Kiri's solicitors to both prepare their own experts' AEICs as well as review Senda's experts' AEICs. The difficulty with this is that the bulk of Kiri's AEICs comprised the expert reports of Ms Harfouche. Save for investing time to understand the expert reports of Ms Harfouche, it is difficult to see what other costs *Kiri's lawyers* would have incurred in relation to *her reports*. The expert report is purely a matter for Ms Harfouche. In this regard, we note that Kiri is separately also claiming more than S$3m in disbursements for her fees. In our opinion, there is a significant overlap between these two sums, namely the S$559,863.00 sum for AEICs and expert reports, and the S$3m sum as disbursements for expert fees. We accept that time would have been spent in reviewing the AEICs of Senda's experts and taking instructions from Ms Harfouche on them. Thus, some time would have been spent independent of Ms Harfouche's work on her reports. As such, we do not find it correct to award the full amount, and we reduce the sum claimed by 50%, to S$279,931.50.

(c) Finally, Kiri has claimed S$28,161.50 for the preparation of the "Joint Statement of Experts pursuant to [the court's] direction in the judgment dated 3 June 2021". This was a two-page document with only one page of text, consisting of Ms Harfouche's final calculation. There has been no explanation as to why 38.4 hours had to be incurred. Most of the work would have been done by Ms Harfouche, the fees for which

> Kiri have already claimed for under disbursements. As such, the amount of S$28,161.50 should not be included in the amount of costs claimable.

Accordingly, the total amount claimable for Post-Transfer Costs ought rightly to be S$6,963,900.50.

Final quantum

96 Applying the multiplier of 69.59% to the figure of S$6,963,900.50, we arrive at the sum of S$4,846,178.36 for Post-Transfer Costs. Whilst at first blush this figure may seem high, it is important to recall the complex nature of the dispute. As we have already recounted in some length, this was a litigation of significant scale and complexity, spanning over six years. The value of the claim was almost half a billion US dollars. Costs of the amount assessed can rightly be said to be proportionate to an action of such scale, in line with Thorley IJ's observations as reproduced at [82] above. We accordingly award this amount to Kiri as Post-Transfer Costs, excluding disbursements which we now turn to.

Recoverable disbursements

97 Kiri seeks disbursements of S$5,654,975.63, consisting of the usual disbursements, expert witness fees and foreign lawyer fees; and S$289,097.81 for travel expenses such as airfare and hotel accommodation. This totals to S$5,944,073.44. Senda does not propose an alternative figure, but takes issue with several items, including some of the travel expenses, the fees paid to Kiri's experts, the sums paid to Dr Girishbhai Tandel ("Dr Tandel"), and the sum paid to foreign counsel. We will consider the recoverability of each of these items.

Foreign lawyer fees

98 Kiri claims disbursements being fees of its foreign counsel as S$1,355,097.86. Most of this involves its Indian counsel, DSK Legal ("DSK"). Kiri has provided a breakdown of all the work carried out by DSK, but has only highlighted certain disbursements it seeks to recover. The majority of these are "Meetings" or "Conference Calls", that are "discussions" relating to affidavits, pleadings and other papers that were filed in this matter.

99 There is no local decision that has expressed any views on the recoverability of foreign lawyer fees. At this stage we do not express any views on whether foreign lawyer fees should or should not be recoverable as a general rule. It seems incorrect to say that they should never be awarded, given the international nature of disputes before the SICC. Much will depend on the circumstances. However, even if such fees are claimable, it seems to us that a cogent explanation has to be provided as to why it was necessary to engage foreign counsel when representation was retained for the proceedings in the SICC.

100 The key issue therefore is whether Kiri has offered a good reason why it needed foreign counsel's involvement when it had separate representation in the form of A&G. Kiri has not provided a cogent explanation. Kiri chose to bring this matter in the High Court. It was thereafter transferred to the SICC pursuant to the Registrar's transfer order made on its application. Thus, right from the outset, it had retained counsel in Singapore, A&G, to prosecute its claim. Following transfer to the SICC, A&G continued to represent Kiri. Therefore, Kiri chose to bring the claim in the Singapore courts and thereafter pursue it in the SICC, retaining the service of Singapore lawyers. This is no different from a foreign party bringing an action in the High Court pursuant to

a jurisdiction clause; the need for the involvement of foreign counsel is not a matter of necessity. Thus, there is no ostensible need to engage foreign counsel, and then to instruct A&G *through* them. Kiri ought not to be allowed to recover those expenses as disbursements if they were incurred as a matter of convenience, or simply because of deep pockets and a willingness to spend. As such, on this basis alone, we find that Kiri should not be allowed to recover DSK's fees as disbursements.

101 Aside from this, of concern is the fact that the work done by DSK would appear to be preparation work for *the trial* in Singapore, the costs of which we have already awarded. It is unclear what value-add DSK provided to the Singapore proceedings. There is a serious concern of Kiri being compensated twice over, *ie*, once via reasonable costs for the work done by Kiri's Singapore lawyers, A&G, and again for disbursements in the form of "foreign lawyers" fees, for essentially the same work as that undertaken by Kiri's Singapore lawyers. Thus, this parcel of disbursements, amounting to S$1,355,097.86, is not awarded to Kiri.

Expert witness fees

102 Expert witness fees are generally recoverable as long as they are *reasonably* incurred: see *Yeo Boong Hua and others v Turf Club Auto Emporium Pte Ltd and others* [2019] SGHC 73 at [53]–[57] ("*Turf Club Auto*"). However, a distinction ought to be drawn between the situation where the costs associated with expert evidence are unreasonably incurred, and a situation where the expert evidence was reasonably sought (and the associated fees were reasonably incurred) but was eventually not accepted by the court. In the latter case, the party would still be entitled to disbursements: *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and*

another appeal [2018] 1 SLR 180 at [95]–[96]. Kiri has claimed for three separate expert fees: those paid to Accuracy Singapore Corporate Advisory Pte Ltd ("Accuracy") in relation to Ms Harfouche, CDIC Consultants, and Dr Tandel.

(1) Accuracy's fees

103 Kiri lists the payments to Accuracy, its valuation expert, as amounting to S$3,336,800.42. We find that Kiri ought to be allowed to recover this expense subject to some adjustments.

104 The specific breakdown in Kiri's Bundle of Documents includes fees, "direct expenses", and "indirect expenses". The "direct expenses" include trips for the expert's employees to Singapore. Kiri has not elaborated on why these trips were necessary. Further, the "indirect expenses" are vague and not itemised clearly. We do not allow the direct and indirect expenses and only allow the fees. After the deductions we have stated, the total amount would be S$3,036,504.00. This sum of S$3,036,504.00, while significant, is not surprising considering the numerous rounds of reports that Ms Harfouche had to provide, in the light of the various late disclosures made by Senda and DyStar in the course of the proceedings. It also accounts for the work done by Ms Harfouche after the *Valuation Judgment*, namely the joint expert report and the final calculations. Kiri has also provided invoices supporting the fees.

105 However, we are of the view that not all of Ms Harfouche's fees should be recoverable as disbursements, as her valuation encapsulates the Account of Profits issue. As noted above, Kiri's pursuit of the Account of Profits issue was not reasonable. It follows that Ms Harfouche's fees in determining the quantum that is attributable to this issue would not be sensibly incurred either. As we have already explained, the Account of Profits issue represents 30.41% of

Ms Harfouche's higher valuation of US$888m. Accordingly, only 69.59% of the sum of S$3,036,504.00 ought to be recoverable by Kiri. This would amount to S$2,113,103.15, representing a reduction of S$1,223,697.27 from Kiri's originally claimed figure of S$3,336,800.42.

(2) CDIC Consultants' fees

106 Kiri has claimed disbursements of S$179,200 paid to CDIC Consultants. However, CDIC Consultants' evidence was not even introduced, let alone considered. We reproduce below the order made by us in SIC/SUM 3/2020, as recorded in the minute sheet dated 17 February 2020:

> CT The Court delivers judgment in SUM 3:
>
> We allow prayer 1 in part as regards that portion of the draft RAEIC of Manish Kiri at ***Annex B of the Plaintiff's submissions*** filed on 29 January 2020 that relates to the integrity of the Longsheng samples that Kiri had secured, which would include the audio recording and its transcript referred to in [18] of the said draft, subject to Senda being granted leave to file further RAEICs within 4 weeks.
>
> [emphasis added in bold italics]

107 As is apparent from the minute sheet, the Summons was only allowed in part, in respect of Annex B of Kiri's submissions (Manish Kiri's RAEIC). The RAEIC of Mr Tan Kok Boon, Managing Partner of CDIC Consultants, was attached as Annex C; we did not grant leave for Annex C to be filed.

108 CDIC Consultants' fees therefore cannot be considered an expense that was sensibly incurred. Accordingly, the sum of S$179,200 should be deducted from the final disbursements awarded.

(3) Dr Tandel's fees

109 On the point of Dr Tandel's fees, Kiri cites "the *Nossen* principle" which states that a corporate party might be able to recover for the direct costs of its own specialist employees if they were the most suitable or convenient experts to employ in a matter requiring expert evidence: cited recently in *In re Ralls Builders Ltd (in liquidation) (No 2)* [2016] 1 WLR 5190 at [25]. These cases have not been considered in Singapore as of yet. However, even if it is assumed that this principle applies, Kiri ought not to be entitled to this disbursement. Dr Tandel's evidence was given in support of Kiri's pursuit of the Account of Profits issue. As we have held at [90] above, this is not an issue properly pursued by Kiri. Accordingly, we disallow the fees of Dr Tandel, amounting to S$48,878.69, as a disbursement item.

Travel expenses

110 Kiri has claimed for travel expenses amounting to S$289,097.81. This is divided into two sections. The first section is titled "Travel Expenses for Witnesses", which amounts to S$26,733.16. Travel expenses necessarily incurred for the purposes of attending court as a *witness* are recoverable: *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang* [2013] 2 SLR 524 ("*Lam Hwa Engineering*") at [47]. Accordingly, this amount ought to be allowed.

111 The other sections of the travel expenses raise separate issues. There is a separate section entitled "Other Travel Expenses". This has two sub-sections which are made up of expenses for travelling to Singapore to attend meetings with counsel, and travel within India to meet at the office of DSK. There is also a third sub-section entitled "Travel expenses for DSK Legal". The position in Singapore as to the recoverability of travel expenses for persons other than witnesses is unclear.

112 In *Lam Hwa Engineering*, the court undertook an examination of the position in three Commonwealth jurisdictions: England, Canada and Australia. It noted that in England, it appears that not all travel expenses are claimable, although travel expenses incurred for the purposes of attending court as a witness are recoverable. Similarly, it noted that in Canada, it had been held that travel expenses for instructing counsel and attending the hearing should not be allowed, whilst the travel expenses of witnesses should. Importantly, the court noted that the Australian position might be broader, as some cases had held that travel expenses were recoverable as long as they were incurred for attending court or prosecuting the action.

113 Thus, the court in *Lam Hwa Engineering* had only accepted that travel expenses for a witness to attend court were recoverable. However, it *did not* rule out the recoverability of other forms of travel expenses. Furthermore, *Lam Hwa Engineering* was a decision of the High Court, not the SICC. Accordingly, there are different considerations at play, as we have discussed above at [76]–[77] and [99].

114 Without expressing any views as to the position in the High Court, we are of the opinion that a broader approach ought to be taken in the SICC. It is part and parcel of international litigation in the SICC that litigants would be required to travel for the purposes of prosecuting their claim. Accordingly, the disbursements in relation to travelling to Singapore to attend meetings and of course the trial ought to be allowed.

115 However, as we have already found that the fees for DSK are not recoverable, it follows that the two parcels of travel expenses related to them should not be recoverable. Similarly, the travel expenses for Dr Tandel should

also not be recoverable as his evidence was used to support an issue that was not sensibly pursued by Kiri.

116 Thus, the following deductions ought to be made from Kiri's claimed disbursements for travel expenses amounting to S$289,097.81: (a) a deduction of S$3,786.72 for Dr Tandel's travel to Singapore; (b) a deduction of S$1,688.51 for domestic travel within India to attend meetings with DSK; and (c) a deduction of S$30,897.54 for travel to Singapore for DSK to attend meetings with A&G. This would leave S$252,724.30 as claimable disbursements for travel expenses.

Conclusion on disbursements

117 Taking into account the various deductions noted above, the figure claimed by Kiri of S$5,944,073.44 for disbursements should be reduced to S$3,100,826.85.

Interest on costs

118 Kiri wrote to the court on 3 November 2021 seeking post-judgment interest of 5.33% *per* annum to accrue from the date of the "costs order". Parties were directed to file written submissions on the issue by 12 November 2021, which they did. Senda submitted that the court should apply its discretion not to make any order as to interest on costs, whilst Kiri argued that such an order should be made as it had incurred significant costs "to pursue justice as an oppressed minority shareholder". Senda proposed that, if interest was to be ordered, it only should run from the date that costs were fully quantified. Kiri instead argued that interest should run from the "date of the costs order". Kiri's position was unclear as it could mean either: (a) the date of the costs order made

in the Oral Judgment dated 8 January 2019; or (b) the date of this judgment, which would be consistent with Senda's alternative position.

119 In our opinion, post-judgment interest should be awarded in this case, and it should be calculated from the date of this judgment to the date of payment, at the rate of 5.33% *per* annum. First, the SICC has the discretion to order interest on costs under O 110 r 46(3)(*d*). Kiri has cited several cases where such an order has been made by the SICC (*BXS v BXT* [2019] 5 SLR 48; *BYL and another v BYN* [2020] 4 SLR 204; *POSH Semco Pte Ltd v Makamin Petroleum Services Co and another* [2021] 3 SLR 203) and we exercise our discretion accordingly. Second, we agree with Senda that interest should run from the date that costs are assessed or fixed, *ie*, the date of this judgment. Notably, in the cases that Kiri has cited (referenced earlier), interest has been ordered to run from the date when costs were assessed. This is logical given that interest is simply to compensate the party entitled to costs for the time value of the costs that have been ordered until payment is made. It is a matter of logic that there is no time value to the costs until they have been assessed, fixed or agreed. Senda has pointed us to the instructive observation in *Involnert Management Inc v Aprilgrange Ltd and others* [2015] EWHC 2834, where it was stated that it is not "reasonable to expect the party liable for costs to pay the balance of the debt until it knows exactly what sums are being claimed by the party awarded costs and has had a fair opportunity to decide what sums it accepts are properly payable.": at [23]. We agree.

120 Both parties have relied on O 59 r 37 in support of their argument on the date of interest. This provision stipulates the date from which interest on costs in the High Court shall run. However, O 59 r 37 does not apply to the SICC. In the SICC, interest on costs, as stated above, is awarded pursuant to O 110 r 46(3)(*d*) which, unlike O 59 r 37, leaves the matter in the discretion of the

court. Having said that, it is helpful to note that the position articulated in the paragraph above is encapsulated in O 59 r 37. It is clear that the common thread running through the constituents of O 59 r 37(1) is that interest is to run from the date that costs are assessed, fixed or agreed. We see no reason to take a different approach to interest on costs in the SICC. Finally, on the rate of interest, both parties have agreed that simple interest at a rate of 5.33% *per* annum is appropriate.

Further request from Kiri

121 On 22 November 2021, shortly before this judgment was to be released, Kiri wrote to court to raise yet again another issue for our consideration. This time, Kiri sought leave of the court to make submissions on whether Longsheng ought to be jointly and severally liable with Senda for costs pursuant to O 110 r 46(3)(*c*). We found Kiri's approach of drip-feeding issues in this manner not satisfactory. Having said that, in order not to delay this judgment, we have reserved the issue to be dealt with subsequently. Accordingly, we wish to make it clear that the issue remains open for our consideration and determination notwithstanding this judgment.

Conclusion

122 Based on the foregoing, we award to Kiri costs of S$4,960,815.26, and disbursements of S$3,100,826.85. Kiri has also sought costs and disbursements of S$89,512.50 for preparing submissions for the issue of costs. Having found

that Kiri is entitled to approximately 50–60% of its claimed costs and disbursements, we award Kiri S$50,000 of this sum. Represented as a table:

Item	**Amount awarded**
Pre-Transfer Costs	S$114,636.90
Post-Transfer Costs	S$4,846,178.36
Disbursements	S$3,100,826.85
Costs and disbursements for submissions on costs	S$50,000.00
Total	*S$8,111,642.11*

123 Senda is also to pay simple interest on the aforementioned sums at a rate of 5.33% *per* annum, calculated from the date of this judgment until the date of payment to Kiri.

Kannan Ramesh
Judge of the High Court

Roger Giles
International Judge

Anselmo Reyes
International Judge

Dinesh Dhillon, Lim Dao Kai, Margaret Joan Ling, Dhivya Naidu and Serene Chee Yi Wen (Allen & Gledhill LLP) for the plaintiff;
Toh Kian Sing *SC*, Cheng Wai Yuen, Mark, Soh Yu Xian, Priscilla and Lim Wee Teck Darren (Rajah & Tann Singapore LLP) for the first defendant;
Teng Po Yew (Drew & Napier LLC) for the second defendant.
