Raffles Town Club Pte Ltd *v* Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)
[2010] SGHC 291

Case Number : Suit No 46 of 2006

Decision Date : 30 September 2010

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Ang Cheng Hock SC and Lim Dao Kai (Allen & Gledhill LLP) for the plaintiff; Thio Shen Yi SC and Collin Seah Lee Guan (TSMP Law Corporation) for the 1st defendant; Michael Anthony Palmer, Andy Lem Jit Min and Toh Wei Yi (Harry Elias Partnership) for the 2nd & 3rd defendants and 3rd & 4th third party; Johnny Cheo (Cheo Yeoh & Associates LLC) for the 4th defendant; Fong Shu Jan Jasmine (Tan Kok Quan Partnership) for the 1st third party; Burton Chen Nan Chung and Lalitha Rajah (Tan Rajah & Cheah) for the 2nd third party.

Parties : Raffles Town Club Pte Ltd — Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)

Civil Procedure – Costs

30 September 2010 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This judgment is in relation to the costs orders to be made in Suit No 46 of 2006 ("Suit 46/2006"). In that action, the plaintiff company, Raffles Town Club Pte Ltd ("RTC") sued the defendants for breach of their fiduciary duties owed to RTC whilst they were directors of the company ("the Main Action"). That led to three third party claims and one third party counterclaim ("the Third Party Claims"). On 29 May 2010, I gave judgment in favour of the defendants in the Main Action and the Third Party Claims (see *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163 ("the *RTC* Judgment")). In other words, all the claimants in Suit 46/2006 were unsuccessful.

2 At the conclusion of the *RTC* Judgment (at [247]), I invited parties to make submissions on costs if these could not be agreed. At the hearing on 4 August 2010, this invitation was taken up by all sides. Each party had its own take on what costs orders would be fair and just in the circumstances and there was little room for agreement. Having considered all their submissions, I now render my decision with regard to costs in Suit 46/2006.

Background facts

3 All the background facts pertinent to this judgment on costs have been amply laid out in the *RTC* Judgment (particularly at [3] – [31]). As this judgment should be read as a corollary to the *RTC* Judgment, the same references to parties and documents and the same abbreviations have been employed in both judgments. The rationale for the various costs orders to be made in this judgment is best understood in the light of the main findings in the *RTC* Judgment and I turn now to those findings, setting out also parties' submissions on costs in relation to the same.

Main findings in the RTC Judgment and parties' submissions on costs

The Main Action

4 RTC alleged that the Defendants (*viz*, Peter Lim, Lawrence Ang, William Tan and Dennis Foo) had breached duties owed to the plaintiff company as its directors at the material time by conspiring on a scheme which enabled them to siphon substantial sums of money from RTC for their personal benefit through the following means:

(a) Accepting 18,992 members into the Club even though they knew or ought to have known that the maximum number of initial members for an exclusive, premier club on the site was around 7,000;

(b) Causing RTC to enter into a sham Management Agreement with EH, under which $78m was paid out by RTC as management fees;

(c) Paying themselves some $13m by way of disguised dividends, directors' remuneration and reimbursement of private expenses; and

(d) Earning interest from the loan of $33m that they had procured RTC to make to RTCI.

5 These claims were defended vigorously by the Defendants on several fronts, including on the ground that the various impugned transactions had been authorised by the shareholders acting collectively. In particular, Peter Lim sought to distance himself from any alleged impropriety on the part of the directors by denying that he was either a director or a shareholder of RTC at all material times. His denial faced considerable opposition from RTC. Even his alleged co-conspirators, Lawrence Ang and William Tan, brought a counterclaim against Peter Lim and Dennis Foo for an indemnity or contribution on the basis that Peter Lim was a director and shareholder of RTC. On this issue, Lawrence Ang and William Tan aligned themselves with the position taken by RTC in the Main Action.

6 I agreed with the Defendants in the main and dismissed RTC's claims against them. However, despite Peter Lim's strenuous disavowal of his role as a director and shareholder, I had no doubt after having considered the extensive evidence led on this issue at the trial, that he had been a *de facto* director and beneficial shareholder of RTC (see [64] – [68] of the *RTC* Judgment).

7 While RTC acknowledged in its submissions that in general costs should follow the event, it submitted that where a successful party has raised inappropriate claims or issues which caused delay and expense that general rule should not apply. Since a substantial portion of the trial and submissions was devoted to addressing Peter Lim's position that he was neither a director nor a shareholder of RTC at the material time, which position was ultimately rejected, RTC proposed that the amount of costs payable to Peter Lim should be reduced by at least 40%. Further, since the expert witnesses' evidence on the issue of the valuation of RTC was not dealt with extensively by any of the parties or relied upon in the *RTC* Judgment, RTC proposed that each party should bear its own costs occasioned by the calling of those expert witnesses.

8 Peter Lim sought costs to be awarded to him on an indemnity basis, to be borne jointly and severally by Margaret Tung and Lin Jian Wei, or, alternatively, by them and RTC. Lawrence Ang and William Tan proposed that their costs of defending the Main Action be paid by RTC. There was no dispute that RTC had to pay Dennis Foo's costs in litigating the Main Action. In addition, Peter Lim, Lawrence Ang and William Tan sought a certificate for costs of more than two solicitors under O 59

r 19 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("Rules of Court").

The Third Party Claims

9 Third party claims were brought against Margaret Tung and Lin Jian Wei, the current directors and shareholders of RTC, as well as against Lawrence Ang and William Tan. The latter pair also instituted a counterclaim against Peter Lim and Dennis Foo.

(1) Lawrence Ang and William Tan v Margaret Tung and Lin Jian Wei

10 In their third party claim against Margaret Tung and Lin Jian Wei, Lawrence Ang and William Tan alleged that:

(a) Margaret Tung and Lin Jian Wei had breached cl 7 of the RTC S&PA dated 6 June 2001, and Recital (F) and cl 4.3 of the Deed dated 18 February 2002;

(b) Margaret Tung and Lin Jian Wei had acted in bad faith, unconscionably and conspired with RTC in commencing the Main Action; and

(c) In so doing, they were using RTC to unjustly enrich themselves.

11 With regard to this third party claim, I held that:

(a) The Deed had superseded the RTC S&PA (at [212]);

(b) The Main Action did not fall within the confines of cl 4.3 of the Deed and that clause had not been breached (at [215]);

(c) Neither bad faith nor unconscionability could constitute causes of action (at [218]);

(d) It was not the predominant purpose of the Main Action to cause damage or injury to Lawrence Ang and William Tan personally, hence, the claim of conspiracy could not succeed (at [224]); and

(e) Since RTC was unsuccessful in the Main Action, the issue of unjust enrichment did not arise (at [226]).

12 As for costs, Lawrence Ang and William Tan submitted that their costs incurred in instituting this third party claim ought to be paid by RTC. Any costs ordered against them in respect of Margaret Tung and Lin Jian Wei's successful defence of this third party claim should also be recoverable from RTC.

(2) Peter Lim v Margaret Tung and Lin Jian Wei

13 Peter Lim shared Lawrence Ang and William Tan's misgivings of conspiracy amongst Margaret

Tung, Lin Jian Wei and RTC with the predominant intention of causing personal damage and injury to him. I found (at [227]) that whatever intention they had to injure him was incidental to the Main Action and dismissed this claim against them.

14 Despite the failure of his third party claim, Peter Lim submitted that there should be no order as to costs, or, alternatively, that RTC should bear his costs. In respect of the costs of their defending these two third party claims against them, Margaret Tung and Lin Jian Wei took the position that costs should follow the event and that separate costs should be awarded to them since they were represented by separate sets of counsel.

(3) Peter Lim and Dennis Foo v Lawrence Ang and William Tan

15 Peter Lim and Dennis Foo claimed that the commencement of the Main Action by RTC constituted breaches on Lawrence Ang and William Tan's part of cll 2.4(c) and 5.3 of the Deed of Settlement entered into by the four of them. I decided in favour of Lawrence Ang and William Tan because (a) cl 2.4(c) did not cover the loans impugned in the Main Action; and (b) cl 5.3 did not apply when allegations of fraud and dishonesty have been made against Peter Lim and Dennis Foo (see [231] – [232]).

16 Even though Peter Lim and Dennis Foo's third party claim here was unsuccessful, Peter Lim proposed that there should be no order as to costs, or, alternatively, that RTC should bear his costs. Dennis Foo aligned himself with that position. Lawrence Ang and William Tan submitted that the costs of their defending this third party claim should be payable by Peter Lim and Dennis Foo.

(4) Lawrence Ang and William Tan v Peter Lim and Dennis Foo (in counterclaim)

17 In their counterclaim, Lawrence Ang and William Tan claimed contribution or indemnity from Peter Lim and Dennis Foo in respect of all aspects of the Main Action on the grounds that: (a) Peter Lim was the controlling mind and driving force behind the business of EH, a beneficial shareholder of both EH and RTC and had received large sums of money from EH and RTC through Lawrence Ang; and (b) Dennis Foo was beholden to Peter Lim and was the latter's agent. I held (at [236]) that owing to the failure of RTC's claims against the Defendants the issues of indemnity and contribution, which were contingent on RTC's success in the Main Action, did not arise.

18 Lawrence Ang and William Tan submitted that the costs of their instituting this counterclaim should be payable by RTC. Peter Lim and Dennis Foo sought costs to be awarded in their favour, payable by Lawrence Ang and William Tan, or recoverable from RTC.

Issues to be decided

19 In the exercise of my discretion to arrive at costs orders that are fair and just in respect of who is entitled to costs, what costs are recoverable and who is liable to pay costs, I had to determine the following issues:

(a) In respect of the Main Action:

(i) whether Margaret Tung and Lin Jian Wei should be personally liable for Peter Lim's costs recoverable from RTC on an indemnity basis;

(ii) whether Peter Lim is entitled to his costs occasioned in defending the Main Action on the ground that he was not a director or shareholder of RTC at the material time;

(iii) whether the costs in relation to the expert witnesses on valuation should be awarded against RTC; and

(iv) whether a certificate for costs for more than two solicitors should be granted in favour of the Defendants in the Main Action.

(b) In relation to the Third Party Claims:

(i) whether the costs of litigating the Third Party Claims should be recoverable from RTC; and

(ii) whether Margaret Tung and Lin Jian Wei should be awarded only one set of costs in respect of their defending the third party claims against them.

Costs in the Main Action

Margaret Tung and Lin Jian Wei's personal liability for costs on indemnity basis

20 The general rule that costs follow the event is set out in O 59 r 3(2) of the Rules of Court:

When costs to follow the event (O. 59 r. 3)

3. – (1) ...

(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, *except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs*.

[emphasis added]

Under O 59 r 27(1), where an order is made that the costs of *one party to proceedings* be paid by *another party to those proceedings*, the amount of costs which the receiving party is entitled to recover is the amount allowed after taxation *on the standard basis*, unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis.

21 In seeking costs to be paid personally by Margaret Tung and Lin Jian Wei on an indemnity basis, Peter Lim is asking this Court to depart from the general rules set out at [20] above.

Personal liability of non-party to pay costs

22 It was acknowledged in *Chin Yoke Choong Bobby and another v Hong Lam Marine Pte Ltd* [1999] 3 SLR(R) 907 at [26] that an order for costs of court proceedings could be granted against a non-party where it was just to do so.

23 The main principles governing the proper exercise of the court's discretion to order costs to be paid by a non-party were summarised in the Privy Council's decision in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others (Associated Industrial Finance Pty Ltd, Third Party)* [2004] 1 WLR 2807 ("*Dymocks*") delivered by Lord Brown of Eaton-under-Heywood (at [25]):

(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", described in para 40 of Hamilton v Al Fayed (No 2) [2003] QB 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". 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*. He himself is "the real party" to the litigation ... [emphasis added]

24 The factors enumerated in the passage from *Dymocks* quoted at [23] above were adopted with approval by the Court of Appeal in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] SGCA 21 ("*DB Trustees*") at [26]. According to the Court's summary in *DB Trustees* (at [36]):

> ... 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. ... 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*. [emphasis added]

25 In *DB Trustees* itself, the Court of Appeal ordered that costs be borne personally by one Ms Florence Koh Lee Kheng ("Ms Koh") even though it was her company Consult Asia Pte Ltd ("Consult Asia") which was the party to the proceedings. In the Court of Appeal's judgment, three critical factors weighed in favour of such a costs order. First, the Court considered (at [38]) that she was "solely responsible" for all the underlying actions that Consult Asia had participated in, actions which stemmed from Consult Asia's (and her) unreasonable lack of cooperation with the receivers over Consult Asia's business and assets. The proceedings were described (at [40]) as "a delaying contrivance" and "patent abuse of process". Second, as Ms Koh was the only shareholder and director of Consult Asia, she was the "real and only beneficiary of any successful outcome of Consult Asia's litigation" (at [41]). Third, it was relevant that Consult Asia appeared to be "unable to satisfy the adverse costs orders made" (at [42]).

26 On the facts before me, I was not persuaded that it was just in all the circumstances to order that costs payable by RTC in the Main Action should be borne personally by Margaret Tung and Lin Jian Wei. First, there was an insufficiently close connection between them and the Main Action. While they were indeed the *only* shareholders and directors of RTC at the commencement of Suit 46/2006 and would therefore be the real and *only* beneficiaries of any successful outcome of the Main Action, that should not be the overriding factor in consideration. Otherwise, any court which rules against any closely-held company would have to order costs against its shareholders and directors personally. This would drive a coach and horses through the doctrine of the separate liability of the company. Fiduciary duties are owed by directors to the company, not to the shareholders directly, and it is the *company* which has to enforce those duties against the directors even though it may well be the

present shareholders and directors who are controlling the litigation. Thus, if the company has not succeeded in establishing its claim of breach of fiduciary duties against the directors who are not or no longer shareholders of the company, it is the company which has to pay the costs of the directors who have successfully resisted its claims, not the shareholders of the company. Such are the consequences of the doctrine of separate legal personality. In *DB Trustees*, it was Ms Koh's lack of cooperation with the receivers, denying them access to documents pertaining to the affairs and property of Consult Asia that precipitated the litigation instituted by DB Trustees. The Main Action in this case could not be said to have been directly precipitated by any such unreasonable conduct on Margaret Tung and Lin Jian Wei's part.

27 Second, there was no causal link between the non-parties, Margaret Tung and Lin Jian Wei, and the incurring of the costs in the Main Action. In *Dymocks*, the Privy Council awarded costs against Associated Industrial Finance Pty Ltd ("Associated") because it was Associated who had advanced moneys to the respondents on the security of an all moneys debenture over another company wholly owned by the respondents to fund the appeals to the New Zealand Court of Appeal and the Privy Council; *but for Associated's involvement*, the appellate proceedings which led to the incurring of further costs would *not* have taken place. In the instant case, there was no evidence that Margaret Tung and Lin Jian Wei were funding the Main Action instituted by RTC and thereby incurring extra costs unreasonably. It must be borne in mind that an unsuccessful claim is not necessarily an unwarranted one. The mere fact that RTC failed at first instance to establish its claims against the Defendants did not necessarily mean that the controllers of RTC had acted unreasonably and improperly or had engaged in speculative litigation without *bona fide* belief in their claim.

28 Third, and most importantly, RTC was at all times a solvent company. There was no evidence before me that RTC could not pay the costs of litigation, resulting in injustice to the receiving parties. In *Dymocks*, their Lordships held that (at [29]) "where a non-party promotes and funds proceedings by an *insolvent company* solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails" [emphasis added]. In *DB Trustees*, the Court's determination to award costs against Ms Koh personally was "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" [emphasis added] (at [49]). Apart from the "close connection" and "causal link" elements, the inability of the unsuccessful party to pay the costs of litigation is an important factor in the determination of whether it would be just to make a non-party bear the costs.

Indemnity basis

29 Costs on an indemnity basis should only be ordered in a special case or where there are exceptional circumstances: see *Lee Kuan Yew v Vinocur John and others* [1996] 1 SLR(R) 840 at [30], citing Chao Hick Tin J's unreported decision in *Lee Hiok Ping v Lee Hiok Woon (sued as executors and trustees of the estate of Lee Wee Nam, deceased)* (Suit Nos 1401 of 1973 and 2457 of 1981, unreported). In my judgment, this was not such a special case nor were the circumstances exceptional enough to warrant the award of costs on an indemnity basis.

30 Two cases may be considered as examples of circumstances exceptional enough to warrant costs on indemnity basis. First, in *Goodwood Recoveries Ltd v Breen; Breen v Slater* [2006] 1 WLR 2723, costs were awarded against the plaintiff company's director (a non-party) personally on an indemnity basis. The facts in that case were exceptional: the trial judge found that the director had been dishonest in failing to disclose a key document, lied in giving evidence and attempted improperly to persuade a witness not to give evidence for the defence. The Court of Appeal upheld the costs order, holding that the whole of the costs had been caused by his dishonesty, impropriety

and exceptional conduct. Second, in *DB Trustees*, costs were awarded on an indemnity basis on Ms Koh personally because the Court of Appeal was of the view (at [49]) that she had "plainly abused the judicial process" and "dragged" the matter "without plausible reasons", causing prejudice to the other parties' right to realise their security and recover monies due to them.

31 In other cases, costs on an indemnity basis were sought but not awarded. In *Heng Holdings SEA (Pte) Ltd v Tomongo Shipping Co Ltd* [1997] 2 SLR(R) 813, the Court of Appeal ordered costs to be on a standard basis even though there was a material non-disclosure of facts. In *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155 ("*Ng Eng Ghee*"), despite the appellants' submissions that the respondents had suppressed information relating to an offer for collective sale, conducted the strata titles board proceedings in an unjustifiably adversarial manner, the Court of Appeal was of the view (at [32]) that the matters alleged did not compel a departure from the usual basis of costs even though different aspects of the respondents' conduct merited varying degrees of criticism.

32 In the instant case, it was argued on Peter Lim's behalf that Margaret Tung and Lin Jian Wei had been engaging in speculative litigation and had not acted *bona fide* because (a) RTC's claims against the Defendants were entirely inconsistent with positions previously taken by them; (b) RTC had relied on documents which were inadmissible in law; and (c) RTC had adopted tactics that caused embarrassment to Peter Lim such as the inclusion of criminal allegations in its Statement of Claim and the distribution of the Notes of Evidence of the entire cross-examination of Peter Lim in his matrimonial proceedings which touched on his personal affairs. While one could be critical of certain aspects of RTC's conduct, I was of the view that these matters alleged by Peter Lim did not lead inexorably to a departure from the standard basis of costs. They did not evince such a degree of dishonesty, impropriety or abuse of judicial process to warrant a departure from the usual basis of costs.

33 Therefore, RTC should bear the Defendants' costs occasioned by the Main Action litigation on the standard basis. However, there is one exception I wish to carve out from this general order. Even though RTC's claims against the Defendants had been dismissed "in its entirety" (at [247] of the *RTC* Judgment), there was one issue on which I agreed with RTC: that Peter Lim was at all material times a *de facto* director and shareholder of RTC.

Peter Lim's costs of defending the Main Action on the ground that he was not a de facto director and a shareholder of RTC

34 While costs generally should follow the event, the Court has discretion to withhold costs ordinarily payable to the successful party. Under O 59 r 6A:

> (1) In addition to and not in derogation of any other provision in this Order, *where a party has failed to establish any claim or issue which he has raised in any proceedings, and has thereby unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings*, the Court may order that the costs of that party shall not be allowed in whole or in part, or that any costs occasioned by that claim or issue to any other party shall be paid by him to that other party, *regardless of the outcome of the cause or matter*.
>
> [emphasis added]

35 In *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501, the Singapore Court of Appeal adopted the English Court of Appeal's summary of principles in *In Re Elgindata Ltd (No 2)* [1993] 1 All ER 232 governing the award of costs. At [24] of the local judgment, the following passage from the headnote

of the English judgment was cited with approval:

> ... The principles on which costs were to be awarded were: (i) that costs were in the discretion of the court, (ii) that costs should follow the event except where it appeared to the court that in the circumstances of the case some other order should be made, (iii) *that the general rule did not cease to apply simply because the successful party raised issues or made allegations that failed, but that he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings*, and (iv) that *where the successful party raised issues or made allegations improperly or unreasonably the court could not only deprive him of his costs but could also order him to pay the whole or part of the unsuccessful party's costs*. The fourth principle implied, moreover, that a successful party who neither improperly nor unreasonably raised issues or made allegations which failed ought not to be ordered to pay any part of the unsuccessful party's costs ... [emphasis added]

36 In *Denis Matthew Harte v Dr Tan Hun Hoe and Gleaneagles Hospital Ltd* [2001] SGHC 19, it was held (at [41]) that the court is entitled to take account of the conduct of parties before and during the trial for the purpose of exercising its discretion on the award of costs. Relevant considerations include whether or not (at [41]):

> (g) Plainly unsustainable, unmeritorious or unreasonable issues have been put forward and argued at length;
>
> (h) The successful party has lost or abandoned issues which have consumed a substantial amount of the trial time;
>
> ...
>
> (o) The parties or their witnesses in conspiracy with the parties concerned have lied in evidence, fabricated evidence for use or misled the court, or have been dishonest in anyway. A successful party may be deprived of his costs if he presents a false case or false evidence (See *Baylis Baxter Ltd v Sabath* [1958] 2 All ER 209); ...

In summary (at [42]):

> [A] successful party may be deprived of his costs in full or in part, if its conduct has been sufficiently blameworthy. Disallowing his entitlement to costs is one way that the court can effectively express its view of the misconduct of the successful party during the pre-litigation or litigation process and show its displeasure.

37 In order to make out a claim of breach of directors' duties against Peter Lim, RTC had to first establish that Peter Lim was a director at the material time. Unlike the other three Defendants, Peter Lim vigorously denied that he was a director and a shareholder of RTC, despite the clear evidence that he was a *de facto* director with a substantial beneficial shareholding in RTC at the material time. Even though Chan Lay Hoon, Peter Lim's "trusted lieutenant" in RTC, gave testimony in favour of Peter Lim that he was just a consultant of RTC, her evidence actually showed clearly that he was a *de facto* director. According to her, Peter Lim was present at formal and informal meetings where matters in relation to RTC and EH were discussed, whatever he recommended would be implemented, and Peter Lim's consent was required for the acceptance of 19,000 members and the payment of 15% commission to EH per membership entrance fee. Indeed, Lawrence Ang, William Tan and Dennis Foo all agreed that Peter Lim had a decisive say in the major decisions of RTC and they often deferred to his views. Owing to the weight of evidence against him, that defence was plainly unsustainable and

unmeritorious.

38 Much time and effort was spent by all the parties on the issue of his *de facto* directorship and beneficial shareholding in RTC. Five of the twelve days spent cross-examining Peter Lim were devoted to this issue; two-thirds of the time that Chan Lay Hoon was under cross-examination was spent on the same issue. Furthermore, substantial time at trial was also taken up cross-examining the other Defendants on Peter Lim's position as director and shareholder. Although I had refrained from stating in the *RTC* Judgment that Peter Lim had blatantly lied on oath when he strenuously denied that he was a director and a beneficial shareholder of RTC, I am of the view that I can take such conduct into account when ordering costs. Peter Lim's raising of the unmeritorious defence that he was not a director with a substantial beneficial shareholding in RTC had unnecessarily protracted the proceedings and added to the complexity of those proceedings because of the adroit manner in which he concealed his beneficial shareholding of some 40% in RTC and the very substantial payments of monies and distribution of other benefits from time to time arising out of that large beneficial shareholding. Therefore, in my judgment, it would be fair to deprive him of his costs incurred in litigating that defence. RTC should not be made to bear any part of his costs pertaining to the issue of whether he was a director with a substantial shareholding in RTC at the material time.

Costs occasioned by calling of expert witnesses on valuation

39 During the course of trial it occurred to me that it might be a worthwhile exercise to call evidence of expert witnesses on the valuation of RTC as it stood in 2001. One of the Defendants' grounds of defence was that the current shareholders of RTC had bought the shares in RTC in 2001 at a value that reflected their full knowledge of how the Defendants were running the company's affairs; it would therefore be unconscionable for them to claim damages against the Defendants for breach of duties which they had already ratified. Accordingly, in order to have all the relevant, even peripherally relevant, evidence before me, I invited the parties to call expert evidence on the valuation of RTC's shares to determine whether the current shareholders of RTC had in fact significantly overpaid for the RTC shares, which could then have indicated a certain amount of ignorance on the part of current shareholders of the various payments of monies to the Defendants or to EH in alleged breach of the Defendants' fiduciary duties as directors of RTC. Since it was evidence that I had invited the parties to call at trial, it cannot be said that the defendants had acted improperly in adducing such expert evidence and in incurring those costs. Accordingly, RTC as the unsuccessful party in the Main Action should bear the costs of the experts called by the successful parties.

Certificate for costs for more than two solicitors

40 Costs for getting up the case by and for attendance in Court of more than two solicitors for any one party are only allowed if the Court so certifies: O 59 r 19(1). Nevertheless, the use of more than two solicitors must be reasonable, having regard to para 1 of Appendix 1 to O 59: O 59 r 19(3). Such a certificate will be granted where the services of more than two solicitors are *reasonably necessary* for the adequate presentation of the case: see *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR(R) 230, at [125] – [126]. In *New Civibuild Pte Ltd v Guobena Sendirian Berhad and another* [2000] SGHC 47, Lai Siu Chiu J was of the view (at [6]) that such a certificate should only be granted in exceptional circumstances, which would include cases "which involve a high degree of complexity of facts and/or law or, where there are many issues of both fact and law and, trial is lengthy".

41 The 82-day hearing of Suit 46/2006 was the longest ever civil trial in Singapore's history. A wide range of issues was canvassed at trial. There were 22 factual and expert witnesses. The

documents were voluminous, totalling over 300 volumes of bundles of documents which required the Supreme Court auditorium to be specially set up as a "mega court". In the circumstances, I am of the view that the use of more than two solicitors was reasonably necessary for the adequate preparation and presentation of the case. Therefore, I certify costs for three solicitors for the Main Action with respect to the parties who had sought this certificate, *viz*, Peter Lim, as well as Lawrence Ang and William Tan.

Costs in the Third Party Claims

Costs recoverable from RTC

42 This Court's discretion to make any order as to costs includes "full and ample power to make such orders as to costs as between plaintiffs, defendants and third and subsequent parties as the justice of the case may require" (*Edginton v Clark and Another, Macassey and Others (Third Parties)* [1964] 1 QB 367 ("*Edginton v Clark*"), per Upjohn LJ at 384). Counsel for Lawrence Ang and William Tan submitted that this Court should exercise its discretion to order RTC to pay the costs occasioned by the third party proceedings since RTC's claim was dismissed and it was proper and reasonable for the Defendants to have issued third party proceedings. When is it proper and reasonable for the defendants to institute third party proceedings such that the costs of those proceedings should be borne fully by the plaintiff who is a non-party to the same proceedings?

43 In *Edginton v Clark*, the plaintiff, a squatter of a vacant bombed site, brought an action in trespass against the defendants who had entered on the site as weekly tenants of the freeholders and dispossessed him, claiming that he had acquired title by adverse possession for over 12 years. At one point during the 12-year period, he had written letters to the agent of the freeholders offering to purchase the site. The defendants joined the freeholders as third parties as those letters amounted to the plaintiff's acknowledgement of the freeholders' title. The plaintiff's claim was dismissed. The Court of Appeal upheld that dismissal and granted the defendants' application to add the costs which they had been ordered to pay to the third parties to the costs which the unsuccessful plaintiff should pay to them. Upjohn LJ observed that (at 384):

> In the circumstances of this case it is abundantly clear that the *real and only fight was between the plaintiff as the alleged owner by adverse possession and the true owners, the third parties*, and, accordingly, we should have been prepared to order that the plaintiff should pay their costs directly. [emphasis added]

44 *Edginton v Clark* was applied in *Thomas v Times Book Company Limited; Cox (Third Party) and Cleverdon (Fourth Party)* [1966] 1 WLR 911 ("*Thomas v Times*") and the plaintiff was ordered to bear the costs of the third and fourth parties since the plaintiff's claim had made the third and fourth party proceedings *inevitable*. Cleverdon (the fourth party) found an original manuscript of a play by Dylan Thomas, who had told the former to keep it if he could find it. Cleverdon sold it to Cox who in turn sold it to the defendant. Thomas's wife, as administratrix of his estate sued the defendant for possession of the manuscript. The defendant joined Cox as third party and Cox joined Cleverdon. Plowman J dismissed the plaintiff's claim, holding that there was sufficient delivery of the manuscript to perfect the gift by Thomas to Cleverdon. The learned judge reasoned as follows (at 919 - 920):

> It is quite clear from the judgment of the Court of Appeal in *Edginton v Clark* that I have a complete discretion in regard to the costs of the third and fourth parties. The action was brought against the defendants as the persons who were in possession of the manuscript of "Under Milk Wood," but it became clear at the early stage of the proceedings, and certainly before the third and fourth party proceedings were started, that *the real issue in the action was going to be*

whether Dylan Thomas had made a gift of this manuscript to the fourth party, Cleverdon; and it was also clear that an attack was likely to be made—as in fact it was made—on the character of Cleverdon. ...

In all those circumstances, it seems to me that not only did the plaintiff's claim render the third and fourth party proceedings *inevitable*, but that the fourth party was amply justified in being represented before me by counsel. After reflecting on the matter, I have come to the conclusion that the right order for me to make is that the plaintiff should pay the costs of the third and fourth parties. That I think now disposes of all questions of costs.

[emphasis added]

45 A similar issue arose in the local case of *SAL Industrial Leasing Ltd v Teck Koon (Motor) Trading (a firm)* [1998] 1 SLR(R) 501 ("*SAL*"). The plaintiff finance company entered into a hire-purchase agreement with Greenbay Marine Pte Ltd for the purchase of a second-hand car from the defendant. When the hire was unpaid, the plaintiff sued the defendant, who denied having sold the car to the plaintiff. The defendant initiated third party proceedings for indemnity or contribution from, *inter alios*, one Tan Kang Hoe ("Tan"). The Court of Appeal found that there was insufficient evidence to prove that the plaintiff was the purchaser and not just the financier of the hire-purchase car and that the defendant never intended to contract with the plaintiff; in other words, *the plaintiff had sued the wrong party*. The Court of Appeal accepted that the defendant had properly issued third party proceedings but since the plaintiff's claim against the defendant was unsustainable, the question of indemnity or contribution did not arise. Therefore, Lai Kew Chai J's order that the plaintiff should pay the defendant's costs for issuing third party proceedings was upheld.

46 It can be surmised from the above cases that in order to justify visiting the costs of the third party proceedings on the plaintiff, he must have instituted the claim against the defendant under such circumstances that it became *inevitable* that the costs of the third party proceedings had to be incurred *as a direct result* of the plaintiff's claim. In *Edginton v Clark* and *Thomas v Times*, it was held that the *real issue* was not litigated between the plaintiff and the defendant, but between the plaintiff and the third (or fourth) party. Since the third parties *should* have been the proper parties in the suit, the plaintiff who was unsuccessful in his claim against the defendant should bear the costs of those third party proceedings, not the defendant. In similar vein, the defendant in *SAL*'s case should not have been sued at all since the contract on which the plaintiff was relying was not at all entered into with the defendant; again, the real issue in that case did not concern the defendant. In such circumstances, as between the defendant and the plaintiff, the fairer and more just result as regards the costs of the third party proceedings would be to impose those costs on the plaintiff. After all, it was the plaintiff who had acted improperly, not the defendant. The real question, therefore, is not whether the *defendant* had acted properly and reasonably in instituting the third party proceedings, but whether the *plaintiff* had acted properly and reasonably in instituting its claim against the defendant instead of the third parties in the first place.

47 In the present case, RTC's claims against the Defendants were not dismissed on the ground that the Defendants were the wrong persons to sue. The real question in this case was whether the Defendants had breached their duties to RTC while they were its directors. Even though it was held that the answer was "No, they had not", it can hardly be gainsaid that the real and only fight in the Main Action was between RTC and the Defendants. RTC had not acted improperly in instituting the Main Action under such circumstances that the Third Party Claims could be said to have been "inevitable" in order to join the proper parties to the proceedings.

48 Lawrence Ang and William Tan's third party claim against Margaret Tung and Lin Jian Wei was

dismissed on grounds of the construction of the Deed and the RTC S&PA as well as the inefficacy of causes of action founded upon unconscionability, bad faith, conspiracy and unjust enrichment (see [11] above). Peter Lim's unsuccessful third party claim against Margaret Tung and Lin Jian Wei was also founded upon conspiracy (see [13] above). The dismissal of Peter Lim and Dennis Foo's third party claim against Lawrence Ang and William Tan was based on construction of the Deed of Settlement amongst the four of them (see [15] above). To my mind, these third party claims were not the inevitable result of RTC's claims against the Defendants, which in any event were not brought against the wrong parties. It would not be fair or just to visit the costs of these third party claims upon RTC. Therefore, for these third party claims, costs should follow the event.

49 With regard to Lawrence Ang and William Tan's counterclaim against Peter Lim and Dennis Foo, I made no order either dismissing or allowing the counterclaim as the issues of indemnity and contribution from Peter Lim and Dennis Foo did not arise, owing to RTC's failure to make out its claim in the Main Action. Clearly, there was no good reason why the costs of Peter Lim and Dennis Foo in defending the counterclaim should be borne by RTC especially after I had found against them on the important issue in the counterclaim that Peter Lim was indeed a beneficial shareholder and a *de facto* director of RTC, which was in fact the position taken by RTC in the Main Action and similarly by Lawrence Ang and William Tan in their counterclaim. The next question is whether Lawrence Ang and William Tan's costs of instituting the counterclaim should be borne by RTC. While it cannot be gainsaid that the work done by Lawrence Ang and William Tan's counsel in cross-examining Peter Lim and Dennis Foo on the issue of Peter Lim's beneficial shareholding and directorship assisted RTC in establishing that Peter Lim was a *de facto* director of RTC with a substantial shareholding of some 40% in RTC, this was already part of RTC's case against Peter Lim and this incidental assistance given to RTC would not be a sufficient basis for me to order RTC to bear the costs of Lawrence Ang and William Tan in bringing the counterclaim. Lawrence Ang and William Tan's counterclaim against Peter Lim and Dennis Foo was not intended to join all the proper parties to the proceedings. The purpose behind the counterclaim was simply to make Peter Lim and Dennis Foo indemnify Lawrence Ang and William Tan for any loss and damage which the latter duo might suffer in respect of all aspects of RTC's claim, or to make the former two contribute towards the same. While I agreed with Lawrence Ang and William Tan's contention that Peter Lim was a beneficial shareholder and *de facto* director, it did not mean that they were therefore entitled to contribution from or indemnity by Peter Lim as of right. In any event, the issues of contribution and indemnity did not arise. I also made no finding on their allegation that Dennis Foo was an agent for Peter Lim. Under these circumstances, it would not be just to make RTC bear the costs of Lawrence Ang and William Tan in bringing the counterclaim. As between the parties involved in the counterclaim, I think they should each bear their own costs since I had made no order on the counterclaim owing to RTC's failure to make out its claim in the Main Action. Accordingly, I make no order as to costs with respect to the counterclaim.

One set of costs for Margaret Tung and Lin Jian Wei

50 The right to be represented by separate counsel does not invariably carry with it an entitlement to recover all the attendant legal costs incurred since that right should be judiciously balanced against the desirability of not unduly penalising the losing party by visiting upon it unreasonably incurred costs: *Ng Eng Ghee*, at [22]. In particular, the Court of Appeal in *Ng Eng Ghee* observed that (at [24]):

> It is axiomatic that counsel, as officers of the court, ought not to unnecessarily consume judicial time (or, for that matter, the time of quasi-judicial or administrative tribunals) by repetitively covering the same ground. Each determination of whether to award more than one set of costs will necessarily have to turn on the facts of the case. The court ought to take into consideration all relevant factors, including: (a) the degree of the community of interests existing among the

parties; (b) the size of the sum or the importance of the interest that is the subject matter of the dispute; and (c) the degree of overlap in the pre-hearing preparations and conduct of proceedings. *In general*, the greater the community of interests, the less inclined the court will be to grant separate costs for separate representation. *On the other hand*, the more important and distinct the interests which are the subject of the dispute, the more likely would an order for more than one set of costs be given. An order for more than one set of costs is also more likely where counsel have taken efforts to avoid the duplication of effort. Plainly, where there is an obvious community of interests between multiple parties on the same side, their counsel should try and agree, as far as possible, on the best approach towards advancing a unified case for their clients. That said, the court will also bear in mind the need to not unduly deter persons from making reasonable efforts to protect or vindicate their rights ... . Finally, for completeness, it should be noted that as this court recently indicated in *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814 (at [201]-[202]), the usual order where different parties with broadly similar interests are represented by different counsel is just one set of costs. [emphasis in original]

51 Counsel for Lin Jian Wei submitted that it was not unreasonable for Margaret Tung and their client to engage separate sets of counsel given the magnitude of the claim and the consideration that Margaret Tung and Lin Jian Wei did not have the same involvement and knowledge with regard to the various allegations made against them by the Defendants. Moreover, counsel for Margaret Tung and Lin Jian Wei had divided areas of cross-examination between them and also covered different witnesses.

52 However, counsel for Lin Jian Wei conceded that they had prepared a joint written submission to avoid duplication of labour. I note that the Defendants never referred to Margaret Tung and Lin Jian Wei separately in any of their submissions. To my mind, for all intents and purposes, Margaret Tung and Lin Jian Wei represented the same interests in the outcome of the suit and adopted the same strategy. There was no real necessity for them to have been represented by separate sets of counsel given the large degree of community of interests that they had and the unified stand that they had taken on all issues in relation to the Third Party Claims against them. Therefore, it was not reasonable to award more than one set of costs in favour of Margaret Tung and Lin Jian Wei.

Conclusion

53 Drawing all the threads of the above analysis together, I make the following orders as to costs:

(a) As regards costs in the Main Action:

(i) RTC is to bear Peter Lim's costs, certified for three solicitors, on the standard basis, excluding any costs incurred by him in defending the Main Action on the ground that he was not a beneficial shareholder or director of RTC;

(ii) RTC is to bear Lawrence Ang and William Tan's costs, certified for three solicitors, on the standard basis; and

(iii) RTC is to bear Dennis Foo's costs on the standard basis.

For the avoidance of doubt, any costs incurred by the Defendants in instituting or defending the Third Party Claims are not to be part of the costs of the Main Action. For instance, the costs incurred by Lawrence Ang and William Tan in dealing with the issue that Peter Lim was a beneficial shareholder and director of RTC will not form part of their costs in the Main

Action as this issue is relevant only to the counterclaim brought by them against Peter Lim and Dennis Foo for contribution or indemnity.

(b) As regards costs in the Third Party Claims:

(i) For the issue of conspiracy, Peter Lim is to bear half, and Lawrence Ang and William Tan are to bear the other half, of Margaret Tung and Lin Jian Wei's costs;

(ii) For the other issues in Peter Lim's third party claim against Margaret Tung and Lin Jian Wei, Peter Lim is to bear their costs;

(iii) For the other issues in Lawrence Ang and William Tan's third party claim against Margaret Tung and Lin Jian Wei, the former two are to bear the latter two's costs;

(iv) Margaret Tung and Lin Jian Wei are only entitled to one set of costs, assessed on the standard basis for two solicitors;

(v) Peter Lim and Dennis Foo are to each bear half of Lawrence Ang and William Tan's costs in the third party claim against the latter two, on the standard basis for two solicitors; and

(vi) There will be no order as to costs in respect of Lawrence Ang and William Tan's third party counterclaim against Peter Lim and Dennis Foo.

(c) There shall be no order as to costs for this supplementary hearing on costs.

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