IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(A) 7

Civil Appeal No 19 of 2021

Between

CGG

… *Appellant*

And

CGH

… *Respondent*

In the matter of Originating Summons No 192 of 2020

Between

CGG

… *Plaintiff*

And

CGH

… *Defendant*

EX TEMPORE JUDGMENT

[Damages] — [Compensation and damages] — [Recovery of legal costs]

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CGG
v
CGH

[2021] SGHC(A) 7

Appellate Division of the High Court — Civil Appeal No 19 of 2021
Belinda Ang Saw Ean JAD, Woo Bih Li JAD, See Kee Oon J
23 August 2021

23 August 2021

Belinda Ang Saw Ean JAD (delivering the judgment of the court *ex tempore*):

Introduction

1 This is an appeal against the decision of the General Division of the High Court in *CGG v CGH* dated 20 January 2021 delivered via Registrar's Notice ("the Judgment"). The appellant's claim was for his unrecovered legal fees, disbursements and goods and services tax incurred by him in relation to a summons filed by the respondent in the Family Justice Courts ("FJC"). Having considered the parties' submissions, we are of the view that the appeal should be dismissed. We first set out the relevant background facts, before turning to the reasons for our decision.

Facts

2 Following the breakdown of the parties' marriage in or about November 2017, the parties entered into a Deed of Separation dated 6 June 2018 ("the Deed"). Pursuant to the Deed, divorce proceedings were subsequently commenced in the FJC. Interim judgment was granted by the FJC on 4 September 2018, which included a consent order in the terms of the Deed ("the Consent Order"). Final judgment in the divorce proceedings was granted on 5 December 2018.

3 Notably, paras 3(e)(25)–3(e)(28) of the Consent Order (which were based on cll 38–40 of the Deed) contained provisions relating to the maintenance of the parties' children. In sum, they provided that the appellant would be responsible for the children's maintenance, and that the appellant would reimburse the respondent for the children's living expenses incurred by the respondent using a specified credit card. The appellant would also reimburse the respondent for the children's airfare and reasonable travel expenses when travelling with the respondent. Furthermore, para 3(k)(39) of the Consent Order (which was based on cl 50 of the Deed) contained an indemnity provision, as follows:

> 39. In the event that one party seeks to revisit the ancillary matters in these proceedings in breach of the Deed of Separation and/or this Order, that party shall indemnify the other party for any and all legal fees and disbursements incurred in connection with the breach and subsequent enforcement of the Deed of Separation.

4 On 9 July 2019, the respondent filed FC/SUM 2286/2019 ("SUM 2286") in the FJC seeking to vary certain parts of the Consent Order relating to the children's maintenance. First, the respondent sought a variation to include reimbursement for purchases and expenses incurred in *cash*, in

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addition to those incurred by credit card. Second, the respondent wished for the Consent Order to provide that the appellant would also pay for the respondent's travel expenses (excluding airfare) when she visited the children.

5 SUM 2286 was dismissed on 20 November 2019. Although the appellant's counsel had initially filed written costs submissions that the District Judge ("DJ") should uphold the indemnity provision (presumably, counsel was referring to para 3(k)(39) of the Consent Order) and make an order of costs as agreed therein, his oral submission, as recorded in the DJ's Notes of Evidence ("NE"), was for "[c]osts to be agreed or taxed, and if costs agreement to be enforced separately if necessary". On that basis, the appellant's counsel sought costs amounting to between $8,000 and $12,000. On the other hand, the respondent's counsel submitted for costs of $1,200, in addition to filing fees of about $830. The DJ ordered costs of $2,000 (inclusive of disbursements) to be paid by the respondent to the appellant.

6 On 12 February 2020, the appellant filed HC/OS 192/2020 ("OS 192") seeking to recover the remainder of his legal fees, disbursements and goods and services tax amounting to $329,975.45, pursuant to cl 50 of the Deed and/or para 3(k)(39) of the Consent Order.

7 In the proceedings below, the Judge in dismissing OS 192 held that the general rule against recovery of unrecovered legal costs set out by the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 ("*Maryani*") applied to preclude the appellant's claim (see the Judgment at [59]). Furthermore, issue estoppel and *res judicata* applied against the appellant (see the Judgment at [107]–[111]).

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Our decision

8 Having set out the relevant facts, we now set out the reasons for our decision.

The basis of the appellant's claim

9 A preliminary issue is whether the appellant's claim in OS 192 is based on the Deed or the Consent Order. We note that in the proceedings below, the Judge had assumed, without deciding, that the appellant's claim was a contractual claim under the Deed, rather than a claim to enforce the Consent Order. In the Judge's view, this was the appellant's primary argument and if the contractual claim under the Deed were rejected, so would the claim to enforce the Consent Order (see the Judgment at [16]).

10 While that may be so, it is useful in our view to clarify the precise basis of the appellant's claim, so as to frame the parties' dispute in its proper context. We disagree with the respondent that the Consent Order superseded the Deed, such that the Deed is no longer in effect. This is not borne out by the terms of the Consent Order, or by any other evidence before the court. On a true construction of the Consent Order, we find that para 3(k)(39) of the Consent Order (*ie*, the indemnity provision, a terminology that was accepted by the parties) was intended to reserve a party's right to make a contractual claim for costs under the Deed in the event that the other party sought to revisit the ancillary matters in the divorce proceedings in breach of the Deed and/or the Consent Order. This is evident from the phrase "in connection with the breach and *subsequent enforcement of the Deed of Separation*" [emphasis added], which shows that any breach within the meaning of para 3(k)(39) was intended to be enforced via the Deed, rather than by the usual modes of enforcement of a judgment. This interpretation is reinforced by the fact that none of the usual

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modes of enforcement of a judgment (*eg*, writ of seizure and sale, garnishee order, appointment of a receiver) would have been applicable given that para 3(k)(39) pertains to an unquantified sum. Therefore, the effect of para 3(k)(39) is that should one party seek to revisit the ancillary matters in breach of the Deed and/or the Consent Order, a substantive right arises in favour of the other party to bring a contractual claim for costs under cl 50 of the Deed. We would add that equally, as a matter of construction, the same phrase "in connection with the breach and *subsequent enforcement of the Deed of Separation"* [emphasis added], read with the rest of para 3(k)(39) in its entirety serves to describe the ambit and scope of the indemnity provision. Suffice to say for now that the form of promise in the indemnity arises as long as both the specified events and nature of the loss fall within the scope of the indemnity.

11 There is another preliminary point. The appellant's case as argued before the Judge was framed in terms of damages. However, in this appeal, the appellant characterised his case as an enforcement of a contractual promise which is a claim for specific enforcement of the respondent's primary payment obligation and such a claim is unlike a claim for damages. The appellant submits that at common law, an action to enforce a contractual promise is equivalent to an action for a fixed sum or a debt. The aforesaid position is a new point that should not ordinarily have been raised on appeal without leave of court (see O 56A r 5(*b*) of the Rules of Court (2014 Rev Ed)). We permitted the appellant to raise the new point without a formal leave application in the circumstances of this appeal but the appellant would have to bear some costs occasioned by raising this new point. The new point is a legal point and there is no discernible prejudice to the respondent who had ample opportunity to, and did address this point in the Respondent's Case. Whilst the respondent points out that the appellant's position in the appeal is a belated contention, the need for leave was

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not even identified as a potential procedural roadblock until this court directed attention towards the issue at the hearing before us.

The scope of the indemnity provision and whether it is operative

12 We turn now to the scope of the indemnity provision and whether the indemnity is operative on the facts of this case. The appellant's position is that the indemnity provision entitles him to a *full indemnity*, *ie*, he is entitled to be reimbursed for the entirety of the legal fees and disbursements that he would have to pay his solicitors. Notably, this is more than what he would obtain if he was simply awarded costs *taxed on an indemnity basis* (see *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 ("*Then Khek Koon*") at [172]). The courts will interpret each indemnity provision on its merits. In our view, although the indemnity provision is phrased in broad terms, the scope of the indemnity in question does not necessarily create a full "debt" indemnity or a "fixed sum" indemnity. It is difficult to construe from the language used a full "debt" obligation where the payment obligation is for an indeterminable amount and not for a "fixed sum" obligation. The appellant did not cite any authority that imposed a full "debt" obligation from a simple construction of words similar to those used in para 3(k)(39) of the Consent Order. At most, the authorities cited by the appellant show that clauses phrased in similarly broad terms as para 3(k)(39) of the Consent Order have been construed to confer only a right to costs taxed on an indemnity basis. As for the timing of enforcing this contractual right as an independent cause of action, we discuss this further below.

13 We agree with the Judge's interpretation that the indemnity provision requires two conditions for the right to an indemnity to arise: (a) there must be a revisiting of ancillary matters; and (b) this revisiting must be in breach of the

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Deed and/or the Consent Order (see the Judgment at [116]). In this case, the Judge held that these two conditions were satisfied; SUM 2286 constituted a revisiting of the ancillary matters, and this was in breach of the Deed and/or the Consent Order because it was ultimately unsuccessful (see the Judgment at [117]–[119]). We are not persuaded by the arguments raised by the respondent against such findings and we see no reason to disturb them. On this view, the relevant breach occurred when the respondent filed SUM 2286 on 9 July 2019, and the DJ's decision to dismiss SUM 2286 simply confirmed the date of breach.

The rule in **Maryani**

14 We now turn to the critical question on appeal, which is whether the appellant's claim for costs is precluded by the fact that he had already obtained an order of costs from the DJ in respect of SUM 2286. We agree with the Judge that it is.

15 First, it is precluded by the rule against recovery of unrecovered legal costs. As the Court of Appeal explained in *Maryani*, Singapore's "legal regime on costs recovery is calibrated in a manner such that full recovery of legal costs by the successful party is the exception rather than the norm" (see *Maryani* at [34]). This is due to (a) the need to enhance access to justice; (b) the need to achieve finality in litigation; and (c) the need to suppress parasitic litigation (see *Maryani* at [32]). When a claim is brought to recover compensation for costs incurred in previous proceedings, there is an apparent tension between the policy of the procedural law on costs (which limits liability to pay costs) and the policy of the substantive law in awarding compensation for a civil wrong (which seeks to make whole the victim of the wrong) (see *Then Khek Koon* at [177]). However, this is not to say that one doctrine must be preferred over the

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other. Instead, the policy considerations underlying the law on costs *inform* the substantive law by limiting the *measure* of the plaintiff's costs recovery (see *Maryani* at [53], [59]).

16 The question in this case is how, if at all, the rule in *Maryani* applies in the context of a contractual indemnity. The starting point is that, as a matter of substantive law, there is nothing inherently objectionable about a contractual indemnity. It is entirely permissible for a party to promise to indemnify or compensate another person for loss that arises in a specified event. Such an indemnity would give a better means of recovery than what would otherwise be available under the general law of damages, and can form the basis of a standalone claim. However, when the indemnity relates to *legal costs*, the policy considerations articulated in *Maryani* require that the claim for an indemnity be enforced *before* the court makes a ruling on such costs. This is because our procedural law on costs informed by policy considerations is against parasitic litigation brought to claim for what in substance is unrecovered legal costs of previous proceedings. To this extent, our procedural law on costs (underlined by policy considerations) informs the measure of a substantive claim for legal costs. Although the appellant has argued that an indemnity claim can be distinguished on the basis that it is a claim to enforce a primary payment obligation, rather than a damages claim which enforces a secondary obligation, this is a distinction without a difference here. While the discussion in *Maryani* focused on the recovery of costs as damages, the law on costs makes no distinction of principle between a claim for costs as damages and a claim for costs based on a primary payment obligation. That simply goes towards the framing of a particular claim. Ultimately, the appellant's claim is in substance one for unrecovered legal costs. In these circumstances, the policy considerations underlying our law on costs apply with full force (see the

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Judgment at [101]–[103]), and the rule in *Maryani* requires that the measure of the appellant's claim be subject to these policy considerations.

17 We are also of the view that the authorities cited by the appellant do not assist his case. In *John and others v Price Waterhouse (a firm) and another (Frere Cholmeley (a firm) and another, Part 20 defendants)* [2002] 1 WLR 953 ("*Price Waterhouse*"), the successful defendant initially obtained costs assessed on the standard basis but subsequently sought indemnity costs against the plaintiff at a further hearing of the same proceeding. One of the grounds relied upon by the defendant for seeking indemnity costs was that certain articles of association incorporated into its contract with the plaintiff conferred onto it the right to an indemnity. Ferris J held that it would not be appropriate to give effect to this contractual right *in those proceedings* as this purported contractual right was not in issue and there were certain disputed factual issues surrounding its incorporation into the contract. Thus, the defendant had to commence a fresh action if it wished to seek indemnity costs on this basis (see *Price Waterhouse* at [23], [33]–[34]). It is apparent from the above that, as the Judge observed, Ferris J was concerned with the *procedural* issue of whether the contractual claim under the indemnity should be dealt with in the same proceeding or whether the defendant was required to bring a fresh action (see the Judgment at [78]). Ferris J did not make any finding as regards the defendant's right to indemnity costs under the purported contractual indemnity. In our view, *Price Waterhouse* does not assist the appellant given our conclusion on the rule in *Maryani*.

18 Next, we address the decision of the New South Wales Court of Appeal in *Abigroup Ltd v Sandtara Pty Ltd* [2002] NSWCA 45 ("*Abigroup*"). In that case, the claimant successfully commenced separate proceedings and recovered under an indemnity provision its costs and expenses incurred in a previous set

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of proceedings with the same party. Critically, the court in *Abigroup* found that the claimant's right to enforce its contractual indemnity had not crystallised until the previous set of court proceedings had concluded (see *Abigroup* at [10]–[11]). It therefore followed that no issue as to *res judicata*, estoppel or abuse of process arose. In our view, *Abigroup* is distinguishable from the present case. As we observed at [13] above, the appellant's right to rely on the indemnity provision had crystallised by the time the appellant was asked to make submissions on costs for SUM 2286. The reasoning in *Abigroup* is therefore inapplicable. This aligns with the Judge's observation at [80] of the Judgment that the "English authorities showing subsequent claims on a separate cause of action were restricted to cases where the costs could not be recovered on the indemnity principle in the prior proceedings". We note that the High Court made much the same observation in *Then Khek Koon* at [228], opining that "a different rule might apply because the plaintiff who seeks to recover costs as damages could not have asserted a cause of action against the defendant in the earlier proceedings". Furthermore, although we have distinguished *Abigroup*, there is room for us to depart from the court's view that the claimant's right to enforce its contractual indemnity had not crystallised. In this regard, we note that there are several local cases where indemnity costs pursuant to costs agreements were ordered in the same proceedings in relation to which costs were sought (see *eg*, the recent decision in *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd and other suits* [2020] SGHC 204).

19 Applying the above principles to the present case, it is clear that the rule in *Maryani* applies to preclude the appellant's claim. As we have mentioned, the appellant's entitlement to rely on the indemnity provision had already arisen at the time the DJ was dealing with the costs of SUM 2286 (see the Judgment at [104(b)]). Indeed, the fact that the appellant's written costs submissions

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sought to rely on the indemnity provision suggests that the appellant was aware of his entitlement to do so. However, it bears emphasis that during the oral costs submissions before the DJ, the appellant decided *not* to rely on the indemnity provision and sought costs ostensibly on the ordinary principles relating to costs. In our view, this was the critical weakness of the appellant's case. Due to the rule in *Maryani* and the policy considerations underlying our law on costs, once the DJ made the costs order, that was the end of the matter as far as the appellant's entitlement to costs was concerned. If the appellant wished to enforce his indemnity, he had to do so before the DJ made a ruling on costs. In other words, the appellant ought to have argued his entitlement to costs based on the terms of the indemnity before the DJ, who would then determine the scope of the indemnity provision and the appropriate costs order. It is the DJ who has to decide whether to exercise his discretion to uphold the agreement on costs. As the Singapore International Commercial Court observed in *BNP Paribas SA v Jacob Agam and another* [2018] 3 SLR 1 at [127], as costs are at the discretion of the court, and in exercise of this discretion, a contractual agreement on legal costs may be overridden in order to avoid manifest injustice.

20 If the appellant was dissatisfied with the DJ's costs order, he would have to avail himself of the appropriate recourse, if any, pursuant to the rules of the FJC. However, the appellant chose *not* to rely on the indemnity provision in seeking costs for SUM 2286 and the DJ rendered a costs decision accordingly. In these circumstances, the rule in *Maryani* precludes the appellant from recovering the difference between the amount of costs ordered in his favour and the amount of costs recoverable under the indemnity provision.

21 We note the appellant's argument that he had reserved his rights as regards the indemnity provision at the hearing of SUM 2286, and that the respondent did not object to this alleged reservation of rights. Specifically, the

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appellant's counsel submitted for "[c]osts to be agreed or taxed, and if costs agreement to be enforced separately if necessary", as recorded in the DJ's NE. However, as the Judge rightly pointed out at [99] of the Judgment, the DJ did not make reference to this purported reservation and eventually rendered a costs decision in respect of SUM 2286. In these circumstances, the appellant's purported reservation cannot oust the rule in *Maryani*, which is based on policy considerations. Therefore, regardless of any purported attempt by the appellant to reserve his rights, the legal effect of the DJ's costs order is that the policy considerations underlying the law on costs are fully engaged and preclude any subsequent claim for unrecovered costs. Furthermore, the absence of any objection by the respondent does not assist the appellant because it does not create a right to subsequently claim the difference where no such right exists.

22 Therefore, given the DJ's costs order in favour of the appellant, and the fact that the appellant's right to rely on the indemnity provision had already arisen by the time of such an order, the rule in *Maryani* applies to preclude the appellant from bringing any subsequent proceedings to claim his unrecovered legal costs.

Issue estoppel

23 The appellant's claim for costs is also precluded by issue estoppel. The elements of issue estoppel are well-established: (a) there must be a final and conclusive judgment on the merits; (b) the judgment must be by a court of competent jurisdiction; (c) the two proceedings must involve the same parties; and (d) there must be identity of subject matter in the two proceedings (see *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12 ("*Turf Club Auto Emporium*") at [87], cited in the Judgment at [107]).

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24 In this case, only the first and fourth elements are disputed. We agree with the Judge that a broader view ought to be taken of the subject matter of the proceedings, as well as the question of whether final and conclusive judgment has been given. On this view, there is identity of subject matter because, as the Judge observed, "the same question is being determined, *ie*, how much of his legal fees and expenses should the [appellant] be entitled to claim from the [respondent]" (see the Judgment at [108]). Although the precise *argument* employed by the appellant to seek costs in each case is different (*ie*, whether he is relying on the indemnity provision or the usual principles relating to costs), the underlying issue is the same. Furthermore, the issue of the amount of costs the appellant can rightfully claim from the respondent was finally and conclusively determined by the DJ, who ordered costs of $2,000 in favour of the appellant. That being the case, the appellant is estopped from raising the same issue again in OS 192 (see the Judgment at [109]–[110]).

Abuse of process

25 We also agree with the Judge that the appellant's claim in OS 192 is precluded by the extended doctrine of *res judicata*, *ie*, abuse of process (see the Judgment at [111]). Although the Judge did not make this explicit, it is clear that he was essentially articulating the doctrine set out in the English decision in *Henderson v Henderson* (1843) 67 ER 313, which precludes a party "from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier proceedings" (see *Turf Club Auto Emporium* at [82] and [85]). In this case, the appellant had the opportunity to raise the indemnity provision in his costs submissions before the DJ but failed to do so. Moreover, the reasons that he has given for such failure are not compelling.

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(a) First, the appellant's claim that he wanted to de-escalate matters between himself and the respondent goes to his subjective motives and is irrelevant. Furthermore, he could have asked the DJ to reserve the question of costs for a while to de-escalate matters, but he did not.

(b) Second, as we have explained, it is untenable for the appellant to argue that his right to invoke the indemnity provision had not arisen at the time the DJ was deciding the costs order for SUM 2286.

(c) Third, the Judge rightly rejected the appellant's argument that the FJC did not have jurisdiction to determine disputes relating to the indemnity provision. In so far as any such disputes would have arisen in the context of determining the appropriate costs order in SUM 2268, there is no reason why the FJC could not have heard and determined such disputes (see the Judgment at [92]–[94]).

(d) Finally, the appellant's argument regarding the asymmetry of the parties' rights of appeal in SUM 2286 is wholly without merit. The same rules apply to both parties. It may be that a successful party has no avenue of appeal on costs under the Women's Charter (Cap 353, 2009 Rev Ed) but that is a different matter.

Conclusion

26 For these reasons, we affirm the Judge's decision and dismiss the appeal. We heard parties on costs of the appeal and having regard to the appellant's new point raised in this appeal, we order the appellant to pay the respondent costs of

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the appeal fixed at $40,000 (all-in) on a standard basis for two solicitors. The usual consequential orders are to apply.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

See Kee Oon
Judge of the High Court

Tham Lijing (Tham Lijing LLC) (instructed), Quahe Cheng Ann Lawrence, Ho Shiao Hong (He Xiaohong) and Joel Raj Moosa (Quahe Woo & Palmer LLC) for the appellant;
Tan Chau Yee, Kok Yee Keong (Guo Yiqiang) and Marcus Ho Shing Kwan (Harry Elias Partnership LLP) for the respondent.

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