IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 18

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 against non-party] — [Joint and several liability for costs]

Kiri Industries Ltd
v
Senda International Capital Ltd and another

[2021] SGHC(I) 18

Singapore International Commercial Court — Suit No 4 of 2017
Kannan Ramesh J, Roger Giles IJ and Anselmo Reyes IJ
9 December 2021

27 December 2021 Judgment reserved.

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

1 In *Kiri Industries Ltd v Senda International Capital Ltd and another* [2021] SGHC(I) 16 (the "*Costs Judgment*"), we made costs orders against Senda. Shortly before the *Costs Judgment*, Kiri applied for an order that Longsheng, a non-party to SIC/S 4/2017 ("Suit 4") be made jointly and severally liable for the costs payable by Senda. We deal with that application in this judgment. We adopt all abbreviations and terms of reference used in the *Costs Judgment*.

2 Having considered the parties' written submissions on Kiri's application, we decline to make Longsheng jointly and severally liable with Senda for Kiri's costs in Suit 4. Principally, we are not persuaded that Longsheng had such a close connection with Suit 4 or that it had caused the incurring of costs by Kiri in Suit 4, so as to justify making the order which Kiri seeks.

3 Longsheng was not a party to Suit 4. The test for whether a non-party should be made liable for costs has been set out by the Court of Appeal in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 542 ("*DB Trustees*"). Although the appeal in *DB Trustees* originated from the High Court and not the Singapore International Commercial Court ("SICC"), the parties have not contested the applicability of the principles in *DB Trustees* to these proceedings. Order 110 r 46(3)(*c*) of the Rules of Court (2014 Rev Ed) provides that the SICC may order costs to be paid by a "person who is not a party" to the proceedings. But the provision does not stipulate a test that is different from that in *DB Trustees*. We will therefore apply the principles in *DB Trustees*.

4 As *per DB Trustees* (at [27]), the question is whether the present case is "exceptional", such that in all the circumstances it will be just to order Longsheng to bear costs. "Exceptional" refers to cases falling outside the ordinary situation in which parties pursue or defend claims for their *own* benefit and at their *own* expense. In determining this question, the Court of Appeal singled out two factors which should normally be present to justify ordering a non-party to bear the costs of a given set of proceedings. The first, noted at [30], is that there must be a "close connection" between the non-party and the proceedings, and the second, noted at [35], is that the non-party must have caused the costs to be incurred.

5 Turning to the first factor, we find that this has not been established by Kiri. The Court of Appeal in *DB Trustees* clarified (at [30]) that the non-party must either have funded or controlled *the proceedings* with the intention of ultimately deriving a benefit from it. As pointed out by Senda, Kiri has not pointed to any evidence showing that Longsheng funded or controlled the proceedings in Suit 4, let alone did so for its own benefit. Instead, in its written

submissions, Kiri mainly relied on the acts of oppression which were the subject of our decision in the *Main Judgment*. These acts of oppression were acts by Longsheng that preceded Suit 4. They do not establish that Longsheng funded or controlled Suit 4.

6 Kiri referred to the fact that Senda did not call any independent witnesses and two of Senda's witnesses were affiliated with Longsheng. But this is hardly indicative of anything. It is common for company personnel and officers to be affiliated with various entities within the same group. There is nothing "exceptional" in this.

7 Longsheng may have had *control* over Senda, as its wholly owned subsidiary. However, that is insufficient to meet the threshold in *DB Trustees*. It is control or funding of proceedings that is relevant. If ownership of subsidiaries was sufficient, then in every litigation involving a group of companies, the parent company or companies would be liable for costs orders made against subsidiaries. This cannot be right. As noted in *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 ("*SIC College*") at [91], the fact that a non-party is the sole shareholder of a company does not automatically mean that the corporate veil will be lifted and that costs will be ordered against the sole shareholder. For the corporate veil to be pierced, there must be evidence of fraud or unconscionable conduct.

8 A case involving egregious conduct was *Montpelier Business Reorganisation Ltd v Armitage Jones LLP and others* [2017] EWHC 2273 (QB) ("*Montpelier*"). Kiri relied *Montpelier* for the proposition that where a non-party has funded, stood to benefit from, and controlled a claim, it should be treated as the "real party" to the litigation and be made liable for costs. However, in *Montpelier*, the claimant company, which was ordered to pay costs after its

claims had been dismissed, was insolvent well before the costs order was made. The concern in that case was that litigation had been advanced on behalf of an insolvent company by its shareholder. In other words, the controlling non-party had been using what was essentially an empty vessel to conduct "risk-free litigation". In our opinion, *Montpelier* exemplifies a paradigm example of unconscionable conduct in bringing litigation.

9 The present case is distinguishable. Unlike the claimant in *Montpelier*, Senda is not insolvent. There is thus no issue of Longsheng using an insolvent company to conduct risk-free litigation. Further, Senda was not the claimant in Suit 4. It was defending a claim brought by Kiri. This is a far cry from *Montpelier* where the controlling non-party had selected an insolvent company to *advance a claim* against several defendants. We add that while Suit 4 had been heard alongside SIC/S 3/2017 ("Suit 3"), which was initiated by Senda, Suit 3 was disposed of separately.

10 This brings us to the second factor in *DB Trustees*: causation. As was noted in *SIC College* at [103] and [106], since Senda was the defendant in this case, "different considerations may apply". One consideration is whether the defence was not *bona fide*, an example being where the company is advised that there is no realistic defence to the claim, yet its controllers choose to move forward with the trial out of spite, or for the sole purpose of causing the plaintiff to incur costs. In other words, where a non-party directs a company unreasonably to prolong proceedings, thereby causing the plaintiff to incur costs, the non-party may be made liable for such costs.

11 In our opinion, Senda's conduct of its defence did not cross this threshold. The issues in Suit 4 were complicated and multi-faceted. They involved significant controversy, as evidenced by the various judgments that

have been rendered to date. Kiri did not succeed on every issue that arose. Accordingly, it cannot be said that Senda defended the claims by Kiri in bad faith. Senda did not unreasonably cause Kiri to incur further costs in the litigation.

12 Finally, Kiri submits that, there being "serious doubts as to whether Senda will pay any costs order made against it", Longsheng should be made liable for the costs. In support, Kiri has cited *DB Trustees* at [42] and [49]. While we agree that this is a relevant factor, there is no evidence that Senda will be unable to pay the costs order. As alleged evidence of Senda's inability to pay, Kiri has highlighted a statement by Senda to the effect that it will not have the funds to comply with the buy-out order made in the *Main Judgment*. However, as pointed out by Senda in response, the quantum of the buy-out order, at almost half a billion US dollars, far eclipses the quantum of costs awarded against Senda. Accordingly, it would be speculative to infer from Senda's concession, *vis-à-vis* the buy-out order, that it will be unable to fulfil the costs order in the *Costs Judgment*.

13 For those reasons, we reject Kiri's application. We note that Kiri's application raises questions over this court's jurisdiction over Longsheng as a non-party and concerns regarding due process (for instance, the necessity of giving Longsheng an opportunity to respond to Kiri's application). However,

given our dismissal of Kiri's application, there is no need to make further observations on these matters.

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.