IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA(I) 8

Court of Appeal / Civil Appeal from the Singapore International Commercial Court No 4 of 2023

Between

(1) BCBC Singapore Pte Ltd
(2) Binderless Coal Briquetting Company Pty Limited

… *Appellants*

And

(1) PT Bayan Resources TBK
(2) Bayan International Pte Ltd

… *Respondents*

In the matter of Suit No 1 of 2015

Between

(1) BCBC Singapore Pte Ltd
(2) Binderless Coal Briquetting Company Pty Limited

… *Plaintiffs*

And

(1) PT Bayan Resources TBK
(2) Bayan International Pte Ltd

… *Defendants*

JUDGMENT

Version No 1: 23 Oct 2023 (16:55 hrs)

[Civil Procedure — Costs]

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BCBC Singapore Pte Ltd and another
v
PT Bayan Resources TBK and another

[2023] SGCA(I) 8

Court of Appeal — Civil Appeal from the Singapore International Commercial Court No 4 of 2023
Sundaresh Menon CJ, Judith Prakash JCA and Jonathan Hugh Mance IJ
4 September 2023

23 October 2023 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This is the final instalment of a protracted set of proceedings that have spanned over a decade. After three tranches of trial, the Singapore International Commercial Court ("SICC") handed down its decision on costs in *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2022] SGHC(I) 17 (the "Costs Judgment"), awarding the sum of $4,694,633.20 in costs and disbursements in respect of SIC/S 1/2015 ("S 1") to the defendants in S 1. This comprised: (a) $90,000 in costs prior to the transfer of the suit to the SICC, (b) $2,671,787 in post-transfer costs, and (c) $1,932,846.20 in disbursements. Dissatisfied with the SICC's decision, the plaintiffs sought permission to appeal, and this was granted on 14 March 2023. The appeal is

only against the SICC's decision on post-transfer costs, which is the amount of $2,671,787.

2 We heard the appeal on 4 September 2023. Having considered the parties' arguments, we now allow the appeal for the reasons which we will set out below.

Background

3 The broad factual backdrop to this long-running dispute has been set out in our earlier judgment, *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 1 (the "Third Tranche Appeal Judgment"). We do not propose to repeat this, save to the extent it is necessary and material to the issues raised in the appeal.

4 The matter was heard over three tranches. The appellants, BCBC Singapore Pte Ltd ("BCBCS") and Binderless Coal Briquetting Company Pty Limited ("BCBC"), had succeeded on most of the issues concerning liability in S 1, which formed the focus of the first and second tranches. However, the respondents, PT Bayan Resources TBK ("BR") and Bayan International Pte Ltd ("BI"), ultimately succeeded on issues relating to damages and quantum in the third tranche that were determinative of the appellants' claim. As we held in the Third Tranche Appeal Judgment, this was chiefly because BR would have wound up the parties' joint venture company, PT Kaltim Supacoal ("KSC"), as an unpaid creditor well before sufficient revenue would have been generated for BCBCS to realise any profits or even recover any of the wasted expenditure it had incurred in connection with the project (we refer to this aspect of BR's case as the "Winding Up Defence"). In the third tranche appeal, the appellants were ultimately awarded $1,000 by way of nominal damages.

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5 The SICC considered the costs of all three tranches of S 1 at the end of the suit. It issued the Costs Judgment on 19 December 2022, ahead of the Third Tranche Appeal Judgment being released. The main question, as the SICC had framed it, was how the award of costs should reflect the fact that the appellants had "won substantial battles in [the] litigation but ultimately lost the war and obtained nothing" (Costs Judgment at [1]). The SICC considered the following three issues in its assessment. First, it considered the approach it should adopt in awarding costs in S 1. Second, applying that approach, it determined the appropriate quantum of costs that the respondents were entitled to recover. Third, it determined the quantum of disbursements that the respondents were entitled to recover. The appeal before us is concerned only with the first two issues.

6 As to the approach to awarding costs, the SICC took, as its starting point, O 110 r 46 of the Rules of Court (2014 Rev Ed) ("ROC 2014"), noting, in particular, that the costs regime in the SICC under O 110 r 46 is different from the costs regime under O 59 of the ROC 2014 which applies to proceedings in the High Court. Where costs in the SICC are concerned, the principal underlying consideration is a commercial one of ensuring that a successful litigant is not unfairly put out of pocket for sensibly prosecuting its claim or mounting its defence.

7 Given the shape of the outcome of this litigation, a key question was whether a "successful party" could be identified. This was a necessary step to applying the starting point in O 110 r 46(1) – that the "successful party" is entitled to reasonable costs. Further, if the successful party could be identified, the issue would then be whether, and to what extent, the default entitlement to costs should be departed from as a matter of the court's discretion in all the circumstances of this case.

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8 In identifying the successful party, the SICC considered that the outcome of the litigation had to be assessed in its entirety, in a realistic and commercially sensible manner, to determine which party could be said in substance and reality to have won the litigation. On this basis, the SICC ruled that the respondents were, in overall terms, the successful party in S 1. Although they had failed on significant aspects of their defence as well as in their counterclaim against the appellants, the identification of the successful party did not, in the SICC's view, turn on the outcome of the individual tranches or the discrete issues that were dealt with in those tranches. Ultimately, the respondents were the successful party because the appellants failed in their pursuit of substantial damages against the respondents, and, indeed, obtained practically nothing from the litigation.

9 The SICC then considered whether it should exercise its discretion under O 110 r 46(1) to depart from the starting point that a successful party is entitled to "reasonable costs" as against an unsuccessful party. Here, the appellants, as the unsuccessful party, bore the burden of convincing the court that this discretion should be exercised in their favour, and the extent to which this should be the case. The appellants advanced two arguments in this regard. First, they contended that an issue-based approach to costs should be adopted, and it was said that the net result would be for no costs to be awarded to either party. Second, even if the respondents were entitled to costs, the appellants contended that any costs order in favour of the respondents should be subject to a substantial reduction in quantum so as to better reflect the respective successes and failures of the parties in the course of the litigation.

10 In respect of the appellants' first argument, that an issue-based approach be taken, the SICC found that the main hurdle to applying such an approach was the fact that there was a "clear overall winner" in this case. In the context of the

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costs regime in O 59 of the ROC 2014, a successful party is generally entitled to costs even though that party has not won on every issue. This equally applied to proceedings in the SICC. Adopting the issue-based approach meant that the incidence of costs could depend on factors other than the overall outcome of the litigation, with the result that the successful party could end up paying the unsuccessful party more than what it receives in costs. This could, in a case where there was an overall winner, run counter to the reasonable expectations of the litigants.

11 The SICC also ruled that the argument that the respondents had acted unreasonably and protracted the hearing of S 1 unnecessarily did not justify applying an issue-based approach – rather, it was a factor that the court could consider in assessing what amounted to "reasonable costs".

12 The SICC did emphasise that it was fully cognisant that the appellants had succeeded on practically all issues of liability while the respondents only prevailed at the end largely due to the court's decision on "narrow points of causation of loss and quantum" (Costs Judgment at [39]). On this note, the SICC then considered whether the costs award should be reduced and concluded that it should be. The starting point was that the court's discretion under O 110 r 46(1) was sufficiently broad so as to allow it to look beyond the overall outcome of the litigation and make an order as to costs that would properly take into account the realities and circumstances of the case. Given that disputes before the SICC were international and commercial in nature, this meant that parties who appeared before the SICC were typically commercially sophisticated, and had better resources and access to quality advice. Further, as larger sums would generally be at stake in SICC cases, the parties were likely to spend more on legal representation and more liberally raise different claims or issues as compared to the average litigant appearing before the General

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Division of the High Court in non-SICC cases. This, however, did not mean that the parties were entitled to pursue any or all issues with impunity; a party that pursued claims or raised issues unreasonably would likely not be entitled to an undiminished costs award, even assuming it was successful in the litigation in overall terms. For that matter, even if the claims or issues had been reasonably pursued or raised, this did not necessarily mean that the successful party would always be entitled to recover the full quantum of costs. The discretion conferred under O 110 r 46(1) was sufficiently broad to allow the court to take into account the fact that while the respondents had prevailed in overall terms, their victory had been gained only as a consequence of their success on limited issues of causation of loss and quantum.

13 In the event, the SICC reduced the costs awarded to the respondents, first by 10%, and then by a further 40%. Using the respondents' claimed costs for the post-transfer period as a starting point, the SICC applied a 10% discount for the respondents' lack of particularisation. The respondents bore the burden of proving that their claimed costs were "reasonable costs" for the purposes of O 110 r 46(1), but failed to adduce sufficient evidence to this effect, for instance by including a breakdown in the form of a costs schedule. A further 40% discount was then applied. This accounted for the relative success of parties on issues of legal significance in the suit, including the respondents' failure to establish their counterclaim. The SICC found that the appellants, despite being unsuccessful in their litigation, had succeeded on issues that were legally significant, and that accounted for the expenditure of substantial resources. In the first and second tranches, the appellants had succeeded in establishing that the respondents were liable for breach of their contractual obligations under the joint venture by proving "crucial and critical parts of the plaintiffs' case in [S 1]" (Costs Judgment at [47]). They had also successfully resisted the respondents' counterclaim. Although the appellants ultimately failed in their wasted

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expenditure claim in the third tranche, they had succeeded in proving an important fact in that claim – that the Tabang Plant would have achieved nameplate capacity by June 2012. Weighing these points against the fact that the respondents should be awarded a significant proportion of their claimed costs to reflect their overall success, the SICC considered that a 40% reduction to the quantum of costs which the respondents were entitled to recover was appropriate. This 40% discount was only applicable to the post-transfer costs and disbursements (which were governed by O 110 r 46), and not the pre-transfer costs (which were governed by O 59 and Appendix G of the Supreme Court Practice Directions).

14 As to the *quantum* of costs, the SICC fixed pre-transfer costs at $90,000. In so far as post-transfer costs were concerned, the SICC took, as its starting point, the figure of $4,947,753.70 which the respondents had claimed. To this figure, the SICC first applied the 10% discount to account for the respondents' lack of particularisation. This figure was further discounted by 40% to reflect the relative success of parties in S 1, which yielded a sum of $2,671,787. Disbursements, which were also subject to the 40% discount, were fixed at $1,932,846.20. The appeal is only concerned with the SICC's decision on post-transfer costs, particularly its decision to apply the 40% discount. There is no appeal from either side against the SICC's decision to apply the 10% discount for the respondents' failure to particularise their costs.

Parties' cases on appeal

Appellants' case

15 The appellants seek a more favourable costs order than that handed down by the SICC. There are four main prongs to the appellants' case. First, that they ought to be awarded the costs of S 1 up to 21 January 2020, which is

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the date when the respondents first raised the narrow point of causation on which they succeeded (namely, the Winding Up Defence), and that the respondents ought to be awarded costs only for the period thereafter. This is because, while the respondents ultimately prevailed on the causation point, that was something that could have been raised from the outset of S 1.

16 Second, and in the alternative, the appellants argue that an issue-based approach to costs should have been adopted. Had this been done, the parties would each face adverse costs orders in respect of the issues on which they had been unsuccessful. Given that the appellants had succeeded on a substantial number of issues, some net costs ought to have been awarded in the appellants' favour; at the very least, no order as to costs should have been made leaving each party to bear its own costs.

17 Third, and in the further alternative, the SICC ought to have applied a greater reduction to the costs claimed by the respondents, specifically a reduction of 80%. The appellants argue that the 40% discount applied by the SICC was inadequate when one considers, among other matters, the number of issues on which the appellants had prevailed, the time spent on those issues as well as the legal significance of those issues.

18 Finally, the appellants also argue that the costs order made in respect of S 1 should only be made against BCBCS, and not BCBC. BCBC's only claim had been against BI under a guarantee, and that claim had been withdrawn on 11 November 2019, albeit after the first and second tranches of hearing. At best, BCBC ought to be liable only to BI for costs associated with its withdrawn claim, and thus, only up to the date on which it withdrew its claim against BI, but not thereafter.

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Respondents' case

19 The respondents make the following main points. First, the appellants are not permitted to contend that they are entitled to costs of S 1 up to 21 January 2020 because this was a point that they did not raise below. Even if the appellants were allowed to raise this point now, the respondents' position is that this is without merit.

20 Second, the SICC was correct in finding that the issue-based approach to costs was inapplicable. The respondents were clearly the overall winner and did not raise any issues which unnecessarily or unreasonably prolonged or added to the costs or complexity of proceedings.

21 Third, there is no basis for this court to interfere with the SICC's exercise of discretion in ordering a 40% discount.

22 Finally, the appellants' contention that costs should only be awarded as against BCBCS should not be entertained, because this was not a point which the appellants had raised before the SICC. In any case, they have not provided any basis to depart from the general rule that co-plaintiffs should be jointly and severally liable for costs.

Issues raised

23 There are, broadly speaking, two issues which arise for our consideration in this appeal:

(a) Did the SICC err in its exercise of discretion to award a 40% discount as to costs, as opposed to adopting a different approach to awarding costs or applying a larger discount?

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(b) Should any costs order to be made in respect of S 1 be made separately as against BCBCS and BCBC rather than against them both jointly and severally?

24 We turn to consider each of these issues.

Our decision

Did the SICC err in its exercise of discretion?

25 We begin with a few preliminary observations. The rules governing costs are very much underpinned by considerations of fairness and common sense. Any costs order made must not only reflect the overall justice of the case (see *Dextra Asia Co Ltd and Another v Mariwu Industrial Co (S) Pte Ltd* [2005] SGHC 85 at [19]; *Travellers' Casualty v Sun Life* [2006] EWHC 2885 (Comm) at [11]), but should also be workable and not lead the parties to indulge in expensive satellite costs litigation: *Redstone Mortgages v B Legal* [2015] 2 Costs LR 425 at [29]. It is for that reason that costs are generally left in the discretion of the trial judge, and the trial judge's determination on costs will only infrequently be amenable to appellate interference.

26 The starting point in the present case is O 110 r 46(1) of the ROC 2014 which provides that the successful party is entitled to reasonable costs from the unsuccessful party unless the court orders otherwise. This encapsulates the trite principle that while costs should generally follow the event, the court may, in its discretion, depart from this starting point. One principal reason for doing so, as noted by Lord Woolf MR in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 ("*Phonographic*") at 1523, is that strict adherence to the principle that costs "follow the event" would discourage litigants from being selective as to the points taken as part of their case. If all

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costs could be recovered so long as one won, litigants would be encouraged to leave no stone unturned in their quest for victory. In departing from the starting point that costs follow the event, O 110 r 46(3)(*b*) provides that the court *may* take into account such circumstances as the court considers relevant, including the conduct of the litigation.

27 The question raised in this appeal relates to ***how*** the court should set about exercising its discretion to depart from this starting point. The appellants have argued that the SICC took a wrong turn by choosing to apply a discount to the respondents' entitlement rather than adopting an issue-based approach and then netting off the respective sums based on which party had succeeded on which issues. We do not accept this. As we have explained, the court has the discretion to depart from the starting point which is that costs follow the event. Given the breadth of this discretion, it follows that the court *also* has the discretion to choose the approach it will take as to the type of costs order that it considers would best meet the justice of the case. Of course, the discretion is to be exercised in a principled way and it is incumbent on the court to explain ***how*** it exercised its discretion as to the costs order and ***why*** it made its chosen order. An appellate court would then be slow to overturn a trial court's costs order unless it can be shown that the trial court had erred in coming to its decision: see *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 2 SLR(R) 971 at [60].

28 Counsel for the appellants, Mr Francis Xavier SC ("Mr Xavier"), submitted that the SICC erred in the exercise of its discretion because it found that the issue-based approach could not apply as long as an overall winner could be identified. Mr Xavier referred us to three cases where the court had applied an issue-based approach notwithstanding the fact that an overall winner could be identified. We think that it may be an overstatement to say that the SICC had

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erred in the exercise of its discretion because it declined to apply the issue-based approach once it identified a clear winner in this case.

29 We also do not read the Costs Judgment as setting out a rule that precludes a court from applying an issue-based approach once it determines that there is an overall winner. At [33] of the Costs Judgment, the SICC observed that the issue-based approach has "*typically* been applied by courts in cases where each party has prevailed on some issues so that it is not obvious whether there is an overall winner" [emphasis added]. It does not seem to us to have regarded the issue-based costs order as one that was *exclusively* to be applied if the court was unable to identify an overall winner. Moreover, even after observing that there was a clear overall winner in S 1 and describing this as the "principal hurdle" to applying an issue-based approach (at [34]), the SICC's discussion of issue-based costs did not end there. The SICC proceeded to consider, at [36], whether other considerations might strengthen the appellants' case for seeking an issue-based costs order, such as the submission that the respondents had acted unreasonably and unnecessarily protracted the hearing of S 1. In line with this, its conclusion, at [39], was that an issue-based approach "would not be *appropriate* here" [emphasis added], and that the case was "better catered for" by discounting the respondents' costs. Hence, rather than exclude the possibility of applying issue-based costs, the SICC considered both approaches, evaluated their relative merits, and decided that the discounting approach would be more appropriate in the circumstances.

30 In so far as the appellants are dissatisfied with the SICC's adoption of the discounting approach, no cogent reason has been given to show where and how the SICC *erred* in adopting such an approach. In the context of an appeal, it does not suffice for the appellants to merely point to why an issue-based approach might, in their view, be preferable in this case, or why it could

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conceivably have been applied. The SICC was therefore, in our view, perfectly entitled to adopt a discounting approach.

31 However, although we are satisfied that the SICC was entitled to adopt the discounting approach, we do not agree with its view that in the circumstances it was sufficient to discount the costs awarded to the respondents by only 40% (on top of the 10% discount applied for their lack of particularisation). In our judgment, this does not adequately reflect the shape of the litigation, in particular the fact that the respondents had prevailed on a narrow point which had been introduced, by way of an amendment to their pleadings, at the eleventh hour, and the fact that they had failed on most of the other substantial issues. We consider that in all the circumstances of this case, the discount applied to the costs awarded to the respondents should, after taking into account the 10% discount awarded for a lack of particularisation (see above at [13]–[14]), be increased from 40% to 70%. We turn to explain how we arrive at this conclusion.

The Beoco *approach and the appropriate discount on costs*

32 We begin with the appellants' first submission, which is that they ought to be awarded the costs of S 1 up to 21 January 2020. This was the date on which the respondents first pleaded the Winding Up Defence in the sixth amendment to their Defence and Counterclaim. In support of this, the appellants urge us to follow the approach taken in *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, where Stuart-Smith LJ noted that, as a general rule, where a plaintiff makes a late amendment which substantially alters the case the defendant has to meet and without which the action will fail, the defendant is entitled to the costs of the action up to the date of the amendment (the "*Beoco* approach"). As a matter of principle, the *Beoco* approach would equally apply to a late amendment

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introduced by a defendant. This may be subject to an exception: it may not apply if the court determines that an earlier introduction of the amendment would have made no real difference to the course of the litigation in that the action would nonetheless have been vigorously resisted or pursued, as the case may be: see *Kaines (UK) Ltd v Österreichische Warrenhandelsgesellschaft Austrowaren GmbH (formerly CGL Handelsgesellschaft mbH)* [1993] 2 Lloyd's Rep 1 ("*Kaines*") at 9; *Re Jinro (HK) International Ltd* [2004] 2 HKLRD 221 at [12]; *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)* [2005] NSWSC 1111 at [22]–[23].

33 The SICC did not have the opportunity to consider whether the *Beoco* approach should be applied. Neither party had raised the point in the costs hearing before the SICC. The appellants candidly acknowledge this in their case on appeal, but argue, nonetheless, that we should apply the *Beoco* approach. Unsurprisingly, the respondents object to this, and argue that the appellants should not be allowed to raise this point on appeal given that they had not applied for permission to make this point.

34 The appellants contend that permission to raise a new point on appeal is no longer required because O 21 r 22(1)(*b*) of the Singapore International Commercial Court Rules 2021 (the "SICC Rules 2021"), which is applicable to the present appeal, only requires parties to "highlight" in their written cases any new points which were not raised before the SICC. We disagree. The purpose of requiring that parties highlight such new points is to afford the appellate court the opportunity to consider the arguments in advance and assess whether permission should be granted to the party to raise those points in the appeal. This also prevents the opposing party from being taken by surprise at the hearing of the appeal. The appellants' argument not only runs contrary to well-established practice, but would allow a party to raise any new point, which had

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not been raised in the court below, just by highlighting those points in their cases on appeal. That can hardly be consistent with the court's pursuit of the expeditious and efficient administration of justice according to law under O 1 r 3(1)(*a*) of the SICC Rules 2021.

35 In considering whether permission to appeal should be granted, the court will have regard to such factors as: (a) the nature of the parties' arguments below; (b) whether the court had considered and provided any findings and reasoning in relation to the new point; (c) whether further submissions, evidence or findings would have been necessitated had the new points been raised below; and (d) any prejudice that might result to the counterparty in the appeal if permission were to be granted: *Abhilash s/o Kunchian Krishnan v Yeo Hock Huat and another* [2019] 1 SLR 873 at [41], citing *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [38].

36 Although permission was not sought to raise this point, it is open to us to permit the point to be taken and we do so because it raises a question of principle that will not entail any further evidence being led or facts being found. In short, there is sufficient material before the court to decide the point. There is also no prejudice to the respondents who have mounted full arguments on appeal as to why the *Beoco* approach should not be applied in this case. Crucially, and in all fairness to the appellants, the applicability of the *Beoco* approach may not have been fully apparent to them during the costs hearing before the SICC, given that the SICC did not appear critical of the respondents' late amendment in its third tranche judgment (*BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2022] SGHC(I) 2). It was only in the Third Tranche *Appeal* Judgment that *we* described the pleading as "not of the highest quality" and not a "model of clarity" (see Third Tranche Appeal Judgment at [33]–[37]). Our judgment was only released on 10 February

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2023. This was after the parties had filed their reply submissions on costs in the SICC in April 2022, and after the SICC handed down its decision on costs on 19 December 2022.

37 Turning to the merits of the appellants' argument, we agree with the appellants that the Winding Up Defence could and should have been pleaded earlier. In the Third Tranche Appeal Judgment at [33], we noted, in relation to the respondents' Winding Up Defence, that:

> 33 The respondents' pleaded position on this issue is not of the highest quality. *Despite the long procedural history of the parties' dispute, it was only on 21 January 2020, in the sixth amendment to the Defence and Counterclaim, that the following pleading at paragraph 197D* was added to respond to the appellants' allegation that they 'suffered substantial loss and damage' as a consequence of BR's breaches of the JV Deed … [emphasis added]

38 It may be noted that this amendment, by the respondents to their Defence and Counterclaim ("D&CC"), appears to have been triggered by the appellants' amendments to their Statement of Claim ("SOC") pursuant to SIC/SUM 63/2019 ("SUM 63"). SUM 63 was filed on 13 September 2019, after the second tranche of S 1 was completed, and before the third tranche was due to commence in 2020.

39 We describe the D&CC amendment as appearing to have been "triggered" by the appellants' amendments, because the appellants intimated their intention to pursue damages primarily on a reliance basis for the first time in SOC (Amendment No 6) dated 11 November 2019. Their claim was initially for loss of profits, and, *in the alternative*, wasted expenditure. In SOC (Amendment No 6), the claim for loss of profits was dropped. Instead, the claim became one for wasted expenditure (or what is also commonly labelled as reliance damages) and loss of chance.

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40 On one view, the point is potentially significant because in a claim for expectation damages, it is the plaintiff who bears the burden of proving that the venture would have resulted in the expected gain, whereas in a claim for wasted expenditure, once the plaintiff proves that it has incurred certain expenditure which it claims it cannot recover because of the breach, the burden is on the defendant to show that the plaintiff would not, in any event, have been able to recover the sum in question: *Liu Shu Ming and another v Koh Chew Chee and another matter* [2023] 1 SLR 1477 at [131] and [164]–[167]. On this basis, it might be said that a defendant faced with a shift in burden should be allowed to expand on and particularise its defence to meet its new burden. Furthermore, at the hearing of SUM 63, counsel for the appellants had acknowledged that inasmuch as they were to be allowed to modify their position as to the reliefs sought, then so too should the respondents be allowed to do the same:

> Even if we had not framed loss of profits in issue 10 expressly when the list of issues had settled, surely, well ahead of the third tranche, we can come to court and make an election since we are duty bound to make an election between loss of profits and wasted expenditure. *In circumstances where we say that there would be no prejudice, as hearing is to be fixed for September next year, My Learned Friend would have ample opportunity to deal with the case as we wish to plead now. There would be no good reason to deprive us of proceeding in this way.* [emphasis added]

41 We take a different view. The respondents could and should have provided fuller pleadings on wasted expenditure at the outset, including the Winding Up Defence. After all, they knew from the appellants' pleadings that the appellants were claiming for lost profits, *and in the alternative*, wasted expenditure. It was therefore abundantly clear from the outset that they would have to shoulder the burden of proof in so far as the appellants' claim for wasted expenditure was concerned. There was, as far as we could see, no reason why they could not have pleaded the Winding Up Defence earlier. Indeed, we note that the Winding Up Defence would also have been an answer to the loss of

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profits claim. One could even go so far as to say that the respondents *should* have pleaded the Winding Up Defence at the outset – this could have better informed the appellants' choices on the conduct of the litigation. Pleadings are meant to give the opposing party notice of one's case (see *Writers Studio Pte Ltd v Chin Kwok Yung* [2022] SGHC 205 at [135]), and this becomes especially important in large, complex cases such as this one, because advance notice of each party's case aids in case management. For instance, issues such as how the hearing is to be split across the different tranches, whether a trial of a preliminary issue is necessary, and even whether expert evidence will be allowed, will necessarily have to be determined with reference to the pleadings.

42 We also do not think the case comes within the exception in *Kaines* (see [32] above). Had the Winding Up Defence been pleaded earlier, it is not at all clear that the appellants would have run their case in the same way. It is unconvincing for the respondents to point to what the appellants *did* in fact do in this case, after the late amendment was introduced, to demonstrate what the appellants *would have done* if the defence had been pleaded earlier. After all, up to the threshold of the third tranche, the appellants had achieved substantial successes on many key issues of legal significance. By that late stage of the litigation, and having expended considerable resources on the earlier tranches over the preceding years, it would have been a difficult and unlikely decision for the appellants to surrender on the basis of an amended pleading.

43 The Winding Up Defence had a decisive impact on the outcome of the case. It was on the basis of this defence that we upheld the SICC's decision in the Third Tranche Appeal Judgment. The respondents submit that the defence was not singularly determinative, because they had a second string to their bow: even if it were found that KSC would not have been wound up, BCBCS would still not have recouped its wasted expenditure. In essence, BR's coal supply

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obligations would have come to an end before KSC's cash flow became sufficient for the wasted expenditure to be recouped. There are two difficulties with this submission. First, the issue was ultimately not decided in the *Third Tranche Appeal Judgment*. It cannot be assumed that, had the issue been decided, it would have been decided in the respondents' favour. Second, this alternative submission is not free from pleading difficulties either, and may be subject to the same criticisms as the Winding Up Defence. Indeed, on our reading of the D&CC, this does not even appear to have been pleaded as a discrete point.

44 Given the respondents' late amendment to their pleadings, which substantially altered the case to be met and decisively impacted the outcome of S 1, we are inclined to agree that S 1 may be an appropriate case for the *Beoco* approach to be applied.

45 That being said, it would be incorrect to treat the *Beoco* approach as a mandatory rule because that would be incompatible, in principle, with the wide discretion of the court on matters of costs. Further, there may be difficulties with the practical application of the *Beoco* approach in a given case. For example, as each party would typically be required to pay a portion of the other's costs under this approach, the net effect of the costs orders – and their overall fairness – may have to be considered having regard to the amount of reasonable costs incurred by each party. Without access to these figures, the court would not be in a position to assess the overall fairness of the outcome. There would also arise concerns of practical workability, as the parties would have to attribute their costs to one period of time or the other. In complex litigation like the present, where work may be done and costs may be incurred in relation to matters that prove relevant to more than one tranche, this process of attribution is unlikely to be straightforward and may give rise to further disputes.

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46 At its core, we consider the *Beoco* approach to be a reminder that costs orders ought to appropriately reflect the fact that a party made a late amendment which substantially altered the case to be met and had a decisive impact on the outcome of the case. How this is best given effect to is a matter for the court.

47 In the present case, we are mindful that the SICC exercised its discretion in favour of a discounting approach. This has not been shown to be in error. In contrast to the limitations of a time-based order (as described at [45] above), we think the discounting approach has much to commend it in this case. We therefore give effect to the spirit of the *Beoco* approach by adjusting the discount upwards to 70%. The larger discount of costs which the respondents are entitled to adequately reflects the fact that they only prevailed because of a late amendment to their D&CC, which introduced a narrow and ultimately successful defence that could, and should, have been introduced earlier, as well as the other considerations that the SICC had taken into consideration.

48 This suffices to dispose of the first issue. However, we will briefly consider the applicability of issue-based costs in the context of the SICC costs regime given the extensive arguments which were made on this point in the appeal.

The issue-based approach

49 The appellants sought to convince us that this was an appropriate case to apply an issue-based approach to costs and to conclude on this basis that the appropriate order should be some net costs in the appellants' favour, or at the very least, that no order as to costs should be made.

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50 The issue-based approach to costs refers to what was described in *Summit Property Limited v Pitmans (A Firm)* [2001] All ER (D) 270 (Nov) ("*Summit*") as follows, at [27]:

> … An issue based approach requires a judge to consider, issue by issue in relation to those issues to which that approach is to be applied, where the costs on each distinct or discrete issue should fall. If, in relation to any issue in the case before it the court considers that it should adopt an issue based approach to costs, the court must ask itself which party has been successful on that issue. Then, if the costs are to follow the event on that issue, the party who has been unsuccessful on that issue must expect to pay the costs of that issue to the party who has succeeded on that issue. That is the effect of applying the general principle on an issue by issue based approach to costs …

51 As we held at [30]–[31] above, the SICC did not err in preferring the discounting approach over the issue-based approach, and the appellants' submission fails on this footing. Nevertheless, this case provides a useful occasion to examine the applicability of issue-based costs to the SICC. We briefly survey some of the key developments surrounding the issue-based approach in the UK and Singapore, before outlining two main reservations that we have with adopting the approach too readily.

(1) The development of the issue-based approach

52 The growing prominence of issue-based costs orders may be traced to the introduction of the UK's Civil Procedure Rules in 1999 ("CPR 1999"), following the recommendations of Lord Woolf in his report, UK, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July 1996) (Chairman: Rt Hon Lord Woolf) (the "Woolf report"). These changes arose out of the concern that the indemnity principle encapsulated in the default "costs follow the event" rule did not always encourage good conduct in litigation. In particular, litigants were encouraged to

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"leave no stone unturned" instead of being selective as to the points they took, since they would expect to recover all their costs so long as they won: see *Element Six Technologies Ltd v IIa Technologies Pte Ltd* [2020] SGHC 140 ("*Element Six*") at [29]; *Phonographic* at 1522–1523.

53 The CPR 1999 introduced r 44.3, which ushered in a sea-change in attitudes towards costs. In particular, as Lord Woolf MR emphasised in *Phonographic* (at 1522–1523), courts were required to be more ready to make separate costs orders reflecting the outcomes of different issues.

54 In *Johnsey Estates (1990) Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] All ER (D) 135 (Apr), Chadwick LJ summarised a number of key principles relevant to the operation of r 44.3 (see also UK, *Review of Civil Litigation Costs: Preliminary Report* (Vol 1, May 2009), in Part 1: Chapter 3 at para 4.9 (Chairman: Lord Justice Jackson)):

> The principles applicable in the present case may, I think, be summarised as follows:
>
> > (i) costs cannot be recovered except under an order of the court;
> >
> > (ii) the question whether to make any order as to costs—and, if so, what order—is a matter entrusted to the discretion of the trial judge;
> >
> > (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless,
> >
> > (iv) *the judge may make different orders for costs in relation to discrete issues—and,* ***in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation***; and
> >
> > (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue;

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> (vi) an appellate court should not interfere with the judge's exercise of discretion merely because it takes the view that it would have exercised that discretion differently.
>
> [emphasis added in italics and bold italics]

55 The availability of issue-based orders was considered locally in *Khng Thian Huat and another v Riduan bin Yusof and another* [2005] 1 SLR(R) 130 ("*Khng Thian Huat*") at [19]–[21]. VK Rajah JC (as he then was) expressed reservations over such orders, and considered that they should be confined to unusual cases or cases where the raising of particular issues had, borrowing the phrasing of O 59 r 6A of the Rules of Court (2004 Rev Ed), "unnecessarily or unreasonably protracted, or added to the costs or complexity of … proceedings".

56 On the facts, Rajah JC refused to award issue-based costs. He reasoned that fairness in that case required the court not to adopt an issue-based approach, because "[t]he financial consequences of such an approach would have been distinctly more favourable to the defendants", when the defendants' conduct had left much to be desired and "regrettably and unnecessarily added to the length of the hearing": *Khng Thian Huat* at [23]–[24]. This was aligned with his broader criticism of such orders (at [21]):

> … A sterile issue-based approach or a pure time-based approach might create mathematical partisanship that will not embrace the entire spectrum of discretionary factors inherent in trial proceedings. The assessment of costs ought not to be a clinical scientific exercise divorced from considerations of intuitive fairness …

57 Issue-based costs were also considered in the context of a patent suit in *Element Six*. The court identified two conceptions of the issue-based approach from the case law. On the one hand, there is the approach set out by Chadwick LJ in *Summit*, which appears to be the form of issue-based costs with which most cases are concerned. Under the *Summit* approach, the court

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considers each issue independently and determines which party has been successful on that particular issue, with costs implications flowing from each issue separately. On the other hand, there is the approach taken by the English Patents Court in *Monsanto Technology LLC v Cargill International SA (No 2)* [2008] FSR 16 ("*Monsanto*") at [7]–[8], where the court begins by looking at who the successful party is in overall terms, and any issues on which that party has failed are assessed in that context: *Element Six* at [18]–[20]. The court observed that while the issue-based approach might serve to instill greater discipline in litigation, both Singapore and England recognised the importance of allowing a party to ventilate all reasonable arguments without fear of adverse consequences: *Element Six* at [29]–[30]. In the final analysis, both traditional and issue-based approaches are capable of encouraging good conduct in litigation, through the reduction and reversal of costs orders respectively: *Element Six* at [31]. The way that the issue-based approach does so is by pursuing greater granularity when considering the issues in the litigation: *Element Six* at [31].

58 A similar distinction was also drawn in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd and another* [2022] 5 SLR 525 ("*Comfort Management*"). The court observed that where a successful party has failed on certain claims or issues, a court may make a "Type I" order, which deprives the successful party of the right to recover all or part of his costs from the unsuccessful party. Alternatively, the court may make a "Type II" order, which requires a successful party to pay all or part of the unsuccessful party's costs. However, on the judge's view, stricter justification is needed for a court to prefer making a Type II order over a Type I order: *Comfort Management* at [46] and [52]–[80].

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(2) Limitations of the issue-based approach

59 While courts have acknowledged that the issue-based approach to costs may mitigate the harshness of the default winner-takes-all rule, such awards also present some significant challenges. This has been a common thread across *Khng Thian Huat*, *Element Six* and *Comfort Management* (although we acknowledge that the criticisms have tended to be less forceful in the context of intellectual property litigation, as *Element Six* illustrates at [32]–[36]). We can broadly categorise these problems along the lines of principle and practice.

(A) CRITICISMS FROM PRINCIPLE

60 The default "costs follow the event" rule rests on the indemnity principle, which holds that "a party who succeeds in litigation is accorded complete justice if and only if he recovers compensation for the costs of the litigation in addition to the compensation he is entitled to under the substantive law": *Comfort Management* at [54], citing *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155 at [6]–[7]. The indemnity principle ensures that a litigant with a meritorious case is not unduly deterred from participating in litigation, for fear that it would be put out of pocket even if it emerges as the successful party in the litigation: *Element Six* at [28]. The issue-based approach, however, runs counter to the indemnity principle because it may require the victorious party in litigation to compensate its opponent for some part of the costs of that litigation: *Comfort Management* at [57] and [70]–[76]. Indeed, depending on the particular facts, the successful party may well end up paying more costs to the unsuccessful party than it receives. Where a successful party succeeds on one issue but loses nine others, for example, it may well be liable to pay the unsuccessful party costs despite having prevailed in the litigation. As

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the court observed in *Comfort Management* at [76], this risks undermining the compensatory objective of the indemnity principle.

61 It has also been suggested that the issue-based approach runs counter to one other aspect of the indemnity principle, namely that of incentivising discipline in litigation by forcing the litigants to carefully assess the strength of their case. The court in *Comfort Management* reasoned (at [59]) that a party would have little incentive to exercise discipline in litigation by making reasonable concessions or reaching compromises at any stage if there is a prospect of obtaining costs on an issue-based approach. With the benefit of hindsight, the present case might be seen as an illustration of how the expectation that an issue-based approach to costs would apply might have encouraged a party in the position of BCBCS to pursue its case to the bitter end, even if it might not ultimately be able to prove its damages. Conversely, a party with a strong case may, out of a desire to avert the risk of adverse costs orders that might be imposed under an issue-based approach to costs, opt instead to make undue concessions or compromises.

62 While these objections from principle merit consideration, they do not seem to us to be wholly insurmountable. O 110 r 46(1) of the ROC 2014 envisages that the court may depart from the general rule that costs should follow the event. Where the court exercises its discretion in this manner, this is typically done precisely to make the point that the indemnity principle should not be applied if the victory has come with inappropriate conduct in the management of the litigation.

63 As for the second concern raised in *Comfort Management*, that the issue-based approach could discourage discipline in litigation and risk-averse litigants from fully pressing their case, we think that these concerns are more apparent

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than real. The concern that discipline in litigation might be discouraged under an issue-based approach applies equally where costs follow the event. As we have noted (at [26] above), that is why the court has the discretion to depart from the general rule and this empowers the court to deal with ill-disciplined or ill-conceived litigation strategies by crafting the appropriate costs orders. As for the concern that risk-averse parties might be deterred from litigating, each party will have its own motivation and risk threshold for litigating, but it seems unreal to think that a party will necessarily throw in the towel solely by reason of costs if the stakes are high enough to warrant pressing or defending against the claim. Indeed, a risk-averse party may be deterred regardless of the type of costs order that might be expected to be made.

(B) PRACTICAL CONSIDERATIONS

64 On the other hand, we think the practical difficulties associated with the issue-based approach present a more formidable obstacle standing in the way of its widespread or ready adoption.

65 The first difficulty is one of separation. Given that issues regularly overlap, it may be difficult, if not impossible, to clinically delineate the issues in any given case, which is a necessary antecedent to identifying the winning party for each issue: see *Smithkline Beecham plc and others v Apotex Europe Limited and others* [2004] All ER (D) 246 (Dec) ("*Smithkline*") at [4]–[5]; *Fortune Link Engineering Co Ltd v Sui Chong Construction & Engineering Co Ltd* [2016] HKCU 1611 at [13]; *Cyberworks Audio Video Technology Ltd v Mei Ah (HK) Co Ltd* [2020] HKCU 3816 at [17]. As Beldam LJ had noted, in a related context, in *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232 ("*Elgindata*") at 241D:

> … by concluding on a purely numerical basis that costs should be borne in the proportion three-quarters to one-quarter the

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> judge apparently assumed, firstly, that the costs of the groups of issues would all be equal, and, secondly, *he made no allowance for the fact that proof of some of the facts in the groups of issues on which he had deprived the petitioners of all costs was essential to establish the petitioners' right to an order that the respondent buy their shares. In my view it is only if it is possible so to isolate an issue in the case that it can properly be said that it is unnecessarily pursued as having no bearing on the real questions in the suit that it would be proper to deprive the successful party of all costs of that issue.* Otherwise a more general assessment should be made. [emphasis added]

66 Second, there is the related difficulty of abstraction. Legal and factual issues may be framed at varying levels of generality. Parties may disagree over the level of generality or granularity that paints the most accurate picture of each party's relative success in the case. This arose in *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd and others* [2022] SGHC 26 ("*EFG*") at [17]–[22]. The plaintiff had succeeded on all three broad issues. However, the second defendant submitted that those broad issues could be split up into a number of subsidiary issues, and that the plaintiff's success did not extend to all subsidiary issues. On this basis, the second defendant argued that the plaintiff should be deprived of 50% of its costs. This argument was roundly rejected by the judge. While it was clear in this case that further sub-division was unwarranted, disagreements over the appropriate level of abstraction may well be intractable in others. After all, such matters of characterisation often do not lend themselves to being shown to be "wrong" or indefensible.

67 Third, there is the cost of granularity. Identifying, defining and delineating issues necessarily import a greater degree of granularity into the assessment of costs. This has the effect of inflating the costs incurred in the costs assessment: see *Burchell v Bullard and others* [2005] 3 Costs LR 507 at [18] and [29].

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68 Fourth, there is the difficulty of attribution. Having identified, defined and delineated the issues relevant to costs, parties would need to attribute specific sums of costs to the individual issues. This mapping exercise may be fraught with difficulty. For example, there would likely be a pool of common costs of the litigation, which are costs that the successful party would have had to incur even if it had not raised the issues on which it failed. These common costs would have to be isolated from the costs of litigating the other issues in the litigation. The difficulty of this exercise is compounded by the court having to scrutinise all of this in retrospect, at the time of assessment: *Comfort Management* at [62]; *Elgindata* at 241D; *Smithkline* at [5].

69 Finally, there is the problem of duplication. Inevitably, the court would need to assess parts of *both sides'* costs, and not only those of one side to the dispute.

70 In sum, an issue-based approach to costs is not only potentially unwieldy, but may generate more problems without necessarily increasing the precision by which costs are awarded, or improving the quality or completeness of the justice rendered to both parties in the litigation: *Comfort Management* at [64].

71 It is perhaps for these practical reasons that the CPR 1999 indicates that issue-based costs should be deployed a tool of last resort. That finds expression in r 44.3(7) of the CPR 1999, which requires a court that would otherwise consider making an issue-based order to instead make a percentage order or time-based order, if practicable:

> (6) The orders which the court may make under this rule include an order that a party must pay —
>
> (a) a proportion of another party's costs;

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> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date only;
>
> (d) costs incurred before proceedings have begun;
>
> (e) costs relating to particular steps taken in the proceedings;
>
> (f) *costs relating only to a distinct part of the proceedings*; and
>
> (g) interest on costs from or until a certain date, including a date before judgment.
>
> (7) *Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).*
>
> [emphasis added]

72 The rationale behind r 44.3(7) was explained in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at [115] and [116] (see also *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 at [27]; *McGlinn v Waltham Contractors Ltd and others (No 4)* [2007] EWHC 698 at [83]; and *National Westminster Bank plc v Kotonou* [2007] EWCA Civ 223 at [22]):

> 115 … In our view there are good reasons for this rule. An order which allows or disallows costs of certain issues creates difficulties at the stage of the assessment of costs because the costs judge will have to master the issue in detail to understand what costs were properly incurred in dealing with it and then analyse the work done by the receiving party's legal advisers to determine whether or not it was attributable to the issue the costs of which had been disallowed. All this adds to the costs of assessment and to the amount of time absorbed in dealing with costs on this basis. The costs incurred on assessment may thus be disproportionate to the benefit gained. In all the circumstances, contrary to what might be thought to be the case, a 'percentage' order, under rule 44.3(6)(a), made by the judge who heard the application will often produce a fairer result than an 'issues based' order under rule 44.3(6)(f). Moreover such an order is consistent with the overriding objective of the [CPR 1999].
>
> 116 … [T]he considerations mentioned in the preceding paragraphs are ones which a judge should bear in mind when

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> considering what form of order ought to be made in order properly to apply rule 44.3(7). These considerations will in most cases lead to the conclusion that an 'issues based' order ought not to be made …

(3) Conclusion

73 In short, the issue-based approach to costs suffers from various shortcomings, especially in its practical application. In the context of this case, these shortcomings reinforce our view that the SICC was justified in declining to adopt the issue-based approach. We do accept that there may well be cases where an issue-based approach would be appropriate. For instance, it has been suggested that the unique nature of intellectual property litigation may be such as to commend itself to an issue-based approach: see *Comfort Management* at [84]; *Element Six* at [17]–[36]; Luke McDonagh and Christian Helmers, "Patent litigation in England and Wales and the issue-based approach to costs" (2013) 32(3) Civil Justice Quarterly 369. And so, while we do not shut the door on the adoption of an issue-based approach under the SICC costs regime, a judge contemplating such an order would undoubtedly benefit from seriously addressing his or her mind to the challenges that may come in the wake of making such an award, and where possible, to consider means of mitigating those challenges.

Should the costs order only be made against BCBCS and not BCBC?

74 We turn now to consider whether BCBCS and BCBC should be jointly and severally liable for the costs of S 1.

75 In the Costs Judgment, the SICC held that the respondents could recover costs of S 1 from "the plaintiffs", meaning both BCBCS and BCBC (at [74]). The appellants now take the position that BCBC should only be liable for costs associated with its withdrawn claim, and thus, only up to the date on which it

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withdrew its claim against BI, but not thereafter. Their position is that BCBC was only named as the second plaintiff in S 1 for the sole reason of bringing a claim against BI. The claim was for specific performance of a guarantee, alternatively damages thereunder, or in the further alternative, an indemnity from BI against losses suffered by BCBCS. That claim was eventually withdrawn in SOC (Amendment No 6) and was never dealt with by the SICC. Given BCBC's limited involvement in the proceedings, the appellants argue that any costs order against BCBC should be limited accordingly.

76 In response, the respondents argue that the appellants, having failed to raise this point before the SICC, should not now be allowed to raise this point on appeal. In any event, the respondents take the position that there is no merit to the point. They contend that there is no reason to depart from the general rule that co-plaintiffs should be jointly and severally liable for costs. The respondents further characterise S 1 as a "single group of claims" brought "by the [a]ppellants against the [r]espondents". BCBCS and BCBC were connected parties in the same group of companies. BCBC's claim was "inextricably connected" to BCBCS', being an indemnity for losses which *BCBCS* suffered, and was based on the same facts, evidence and arguments. Both parties were commonly represented. BCBC sought to benefit from the appellants' success in the action. There has also been no prior suggestion that, when the respondents were liable to pay the appellants costs for the appeals in earlier tranches, only BCBCS ought to be entitled to costs. The reason that BCBC is now being removed is because BCBCS is a shell company with a paid up capital of $1.

Principles relating to costs orders made where there are two or more unsuccessful claimants

77 We start with the general position, which is that where an unsuccessful suit was brought by two or more claimants, they will be jointly and severally

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liable for costs. In *Meady v Greyhound Canada Transportation Corp* [2013] OJ No 4634 ("*Meady*"), the Ontario Superior Court of Justice noted (at [86]) that the general rule is that unsuccessful claimants are jointly and severally liable unless the court orders otherwise in its discretion. Cases where the court has departed from this rule tend to bear one or more of these features:

(a) the factors (established by case law) that determine whether the claimants acted jointly are markedly absent;

(b) one claimant had minimal involvement in the litigation and there is an underlying public policy to avoid joint and several liability; or

(c) an order of joint and several liability would result in gross unfairness to a particular claimant given the circumstances of the case.

78 In *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd and another and another appeal* [2009] 2 SLR(R) 814 ("*Wing Joo Loong*"), this court noted (at [201]) that "[o]ne trite principle that guides the exercise of the court's discretion as to costs is that where there are two (or more) co-defendants, only one set of costs will normally be payable to them if both (or all) of them succeed, even if they were separately represented" [emphasis in original omitted].

79 The Supreme Court of New South Wales, in its unreported decision in *Mike Gaffikin Marine Pty Ltd v Princes Street Marina Pty Ltd* BC9603588 (July 1996) ("*Mike Gaffikin*"), expressed a similar view. The court observed (at p 3) that, ordinarily, orders for costs against two or more defendants are joint and several, unless "some special circumstances" are shown: see also *Rushcutters Bay Smash Repairs v H McKenna Netmakers & Ors* [2003] NSWSC 670 ("*Rushcutters*") at [2].

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80 Although *Wing Joo Loong* and *Mike Gaffikin* both discussed the rule in relation to a case where there were two or more defendants, we do not see why, in principle, this general rule should differ in a situation where there are two or more claimants. In a case where the joint claimants, or joint defendants, as the case may be, have lost, the general rule is that they will be jointly and severally liable for costs.

81 In our view, the best explanation for the general rule seems to be the fair allocation of risk. For the successful party, it is fairer that any risk of non-collection (for example, from one defendant's insolvency) falls on the other unsuccessful party than the successful party: see *Mike Gaffikin* at 3–4; *Rushcutters* at [2]. As for the unsuccessful parties, they would have had the opportunity to address the risk of liability for costs and prepare for the worst-case scenario in which they lose. This is especially so if they had been represented by the same counsel. As the court in *Meady* put it (at [88] and [90], citing *King v On-Stream Natural Gas Management Inc* (1993) 21 CPC (3d) 16 (Supreme Court, British Columbia)):

> 88 In coming to this conclusion, at para 23, Shaw J expresses some of the same concerns the OPP and Greyhound share in this case:
>
> > I do not think that the Bank, having won the action, should be obliged to undertake proceedings against 92 separate parties, each for a minor portion of the costs. The trouble and the risk, should, in my view, rest with the plaintiffs who acted jointly and lost the action. They had to organize themselves when they commenced the action. In doing so, they will have had the opportunity to address the risk of what lay ahead and to provide for the contingency of losing. As between themselves they have at law rights of contribution from each other which can, if exercised, reduce the financial outlay of any plaintiff who may be called upon by the Bank to pay some or all of its costs. When I consider whether the burden of enforcing contribution by each individual plaintiff should rest upon the Bank or upon the plaintiffs, I

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> conclude that the plaintiffs as the losing parties should bear the burden.
>
> …
>
> 90 … The plaintiffs acted together when it was to their benefit and should also be considered as one when it is to their detriment. To do otherwise would be unfair to the defendants who were left to defend against this joint effort and may now be required to pursue their costs individually.

82 While this is the general rule, this does not mean that the court is necessarily bound to follow it. As Nugee J noted in *Rowe and others v Ingenious Media Holdings plc and others* [2020] EWHC 235 (Ch) ("*Rowe*") at [10], in response to a submission that the default position or starting point is joint and several liability, the starting point could not be "as starkly straightforward as that", as costs are always in the discretion of the court and cases vary infinitely.

83 We turn to consider when the court may depart from this general rule. It appears that courts rarely depart from the rule where there is a certain degree of commonality between: (a) the parties on the same side of the litigation; (b) the approach taken by the parties in the conduct of proceedings; and (c) the claims or issues and the facts and evidence that underlie them. We mention a number of cases which are illustrative of this.

84 In *Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 3)* [2023] FCA 723, the court declined (at [309]–[310]) to depart from the general rule, noting that there was not only a common substratum of facts, but also a commonality of parties, as the fourth defendant was the controlling mind of the other three corporate defendants. It was also the case that the corporate defendants took a common approach to the conduct of proceedings.

85 In *Filipovic v Upshall* [1998] OJ No 4498, Chapnik J held that the unsuccessful plaintiffs were jointly and severally liable for costs as they had

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sought similar remedies arising from the same alleged cause of action. Furthermore, the fact that all the plaintiffs were represented by the same counsel meant that they must have addressed the risk of an unsuccessful result when organising their action.

86 In *Floyd and others v John Fairhurst & Co* [2004] All ER (D) 312 (May), one of the claimants, Mrs Floyd, appealed against the decision of the trial judge to make her jointly and severally liable for costs. She was one of three claimants; the other claimants were her husband, Mr Floyd, and a company of which they were equal shareholders. The English Court of Appeal found that Mrs Floyd's claims did not overlap with Mr Floyd's case save in a minor respect, namely in the loss of £1,000 occasioned by the defendant's alleged failure to cause the company to pay a dividend (at [41], [82] and [84]). Notwithstanding this, Mrs Floyd's appeal failed as she "stood to benefit from success on all the issues in the action". She did not finance the litigation as a disinterested observer, but as a person who stood to benefit substantially therefrom. On Mr Floyd's own evidence, Mrs Floyd stood to benefit from 50% of any damages awarded in the action. She would also benefit as a 50% shareholder in the co-claimant company (at [84] and [85]).

87 *Rowe* also serves as a useful reminder that the general rule applies not only to cases where parties have "true joint claim[s]", but also where they bring what is *in effect* a single claim or a single group of claims (at [11]):

> Of course in a simple case where A and B have a true joint claim (for example where they claim as the joint owners of property, or joint parties to a contract), one would expect them to be jointly liable for the defendants' costs. And I also have no difficulty with the proposition that the same applies as a general rule to many cases where the claimants technically have several claims, but, as very commonly happens – probably in the majority of claims in this Division – a number of claimants join forces to bring what is in effect a single claim, or to be more

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> precise a single group of claims. Very often in such cases the claimants will be connected parties (for example companies in the same group; members of the same family; individuals, their trustees and their corporate vehicles; and the like), and there will in effect be only one case being made, even if, due to the complexity of the facts, technically different claimants have different causes of action and claim different relief …

88 In *Dansk Rekylriffel Syndikat Aktieselskab v Snell* [1908] 2 Ch 127 ("*Dansk*"), the court departed from the general rule. In that case, one defendant did not put on a defence and judgment was entered. The other went to trial and lost. Neville J, who delivered the judgment, described it as "an injustice" that a defendant who has not entered an appearance or put in a defence may be rendered liable for the co-defendant's costs (at 138). Neville J ordered taxation to determine how much of the costs was attributable to both defendants jointly, and how much to each of them separately.

89 In *Stumm v Dixon & Co and Knight* (1889) 22 QBD 529 ("*Stumm*"), there was no connection between the unsuccessful parties, and they were not running a single case. Lord Esher MR, in deciding to depart from the general rule, commented (at 533–534) that where defendants have put in separate defences with different issues being tried and different amounts of time being taken in respect of the various issues, it may be appropriate to depart from the general rule. This emphasis was clear from Lord Esher's framing of the issue (at 530–531):

> The question is whether, when an action in respect of a wrongful act is brought against two defendants, and they both defend the action, but one of them (*the other not being able to interfere with him in any way*), puts a defence on the record *wholly and solely on his own account* – a defence which can have *no effect whatever either in favour of or against the other defendant* – and by doing so occasions costs to the plaintiff, – whether the plaintiff, under a judgment against both the defendants, can recover against the other defendant the costs thus occasioned by the act of the one defendant *without the authority of the other*. [emphasis added]

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90 In other words, it can be gathered from *Dansk* and *Stumm* that, where one of the defendants breaks ranks with the rest of the defendants, and chooses to run his own separate defence, he should expect to bear costs for that defence (if unsuccessful), and the successful claimant may not be entitled to look to any other defendant for such costs: see also *Hobson and another v Sir W C Leng & Co* [1914] 3 KB 1245. Lord Esher's observations are, in our view, equally applicable in a situation involving a claim brought by two or more claimants.

Whether BCBCS and BCBC should be jointly and severally liable for costs

91 Having considered the applicable principles, we agree with the appellants that BCBC should not be jointly and severally liable for costs. While this point was only raised on appeal, and not before the SICC, we consider that there is no prejudice to the respondents, who made detailed submissions on this point in the appeal.

92 In the present case, BCBC had pursued what was essentially a *separate* claim as against the respondents, and not a common claim with BCBCS. There was undoubtedly *some* overlap with BCBCS' claims, which formed the thrust of S 1, in that the guarantee was factually connected with the operation of the joint venture and its terms made reference to losses suffered by BCBCS. Notwithstanding this factual overlap, BCBC's claim was based on the guarantee, for which it sought, amongst other things, specific performance of that guarantee, as well as damages pursuant to clauses 2.2 and/or 2.3 of the guarantee in the alternative, but that did not involve BCBC positively promoting any such claim which fell to be decided in the proceedings brought by BCBCS against BR. In contrast, the claim mounted by BCBCS centered on the alleged breach of the JV Deed.

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93 More importantly, a critical distinguishing feature of this case is that BCBC had at an earlier stage *withdrawn its claim*. While BCBC remained as a named party to S 1, it did not, after it withdrew its claim, continue to participate in the suit. The SICC was only concerned with adjudicating a single claimant's (that is, BCBCS') claim. There was therefore good reason to depart from the general rule, given that BCBC, in essence, left BCBCS to proceed with its claim alone. In these circumstances, in our judgment, BCBC should only be liable for the costs of its own claim against BI.

94 At the hearing of the appeal, counsel for the respondents stressed that BCBCS was a shell company. If BCBC were not jointly and severally liable for costs, the risk of non-payment would fall on the respondents' shoulders. However, as we pointed out during the hearing, this was an argument of expediency or convenience and not one of principle. To be sure, considerations of fair risk allocation inform the default position of joint and several liability, as we noted at [81] above. However, the reason for a rule should not be confused for the rule. It cannot, in itself, supply a principled basis for awarding costs against BCBC, especially as BCBC's claim was separate from BCBCS' and, more importantly, had been withdrawn. The respondents' recourse, if any, was and is to the array of procedural mechanisms that the law provides to deal with potentially impecunious litigants.

Conclusion

95 We therefore allow the appeal and set aside the SICC's costs orders in relation to the respondents' post-transfer costs. In its place, we make the following orders as to the costs of S 1:

(a) BCBCS is liable to BR for its post-transfer costs to the following extent. From the claimed figure of $4,947,753.70 (see Costs Judgment

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at [67]), costs solely attributable to BCBC's withdrawn claim (which are to be determined in the manner outlined below) are to be deducted. The resulting figure is subject to a 10% discount for the respondents' lack of particularisation (see Costs Judgment at [67]), and a further 70% discount (see [31] above).

(b) BCBC is liable to BI for its post-transfer costs, in so far as these are solely attributable to BCBC's withdrawn claim. Because this is a subset of the total costs claimed by BR and BI collectively, and which the SICC considered should be discounted by 10% on account of the lack of particularisation, we consider that the final amount determined to be payable by BCBC to BI should be subject to the same discount of 10%. As to the actual quantum of such costs, we expect the parties should be able to agree on this, but in the unlikely event they are not able to, they are to write to the court, within 14 days of this judgment, to indicate their respective positions (this to be no longer than five pages), to enable us to fix the quantum.

96 We make no order as to the costs of this appeal. While the appellants have prevailed, they have only done so by reason of the new points they have taken on appeal. The usual consequential orders apply.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

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Jonathan Hugh Mance
International Judge

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