IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 167

Suit No 219 of 2013

Between

Airtrust (Hong Kong) Ltd

… Plaintiff

And

PH Hydraulics & Engineering Pte Ltd

… Defendant

GROUNDS OF DECISION

[Civil procedure] – [Costs] – [Principles] – [Indemnity basis]

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v
PH Hydraulics & Engineering Pte Ltd

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Chan Seng Onn J:

1 These grounds pertain to my decision on the costs order for Suit No 219 of 2013 ("S 219/2013"). The trial for S 219/2013 was heard between July 2014 and August 2015. After hearing and considering the parties' evidence and submissions, I gave judgment for the plaintiff, finding that the defendant was in breach of a sale and purchase agreement between the parties. The judgment is reported as *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 1 SLR 1060 ("the Judgment").

2 The plaintiff sought to recover costs on an indemnity basis, arguing that the defendant's conduct of the case was so morally reprehensible and worthy of moral condemnation that indemnity costs were justified. I rejected the plaintiff's submission and ordered the defendant to pay the plaintiff costs of and incidental to the action on the standard basis, to be taxed if not agreed.

The plaintiff has appealed against my decision on costs, and I therefore set out the grounds for my decision.

3 During the course of oral and written submissions on costs, the parties referred me to a number of Singapore and English cases. In these grounds, I will discuss the authorities, summarise the relevant principles and explain the approach that I adopted to determine whether an order of indemnity costs was appropriate.

Background facts

The dispute

4 The detailed facts of the dispute are set out in the Judgment. It suffices for me to briefly summarise the events leading up to the commencement of S 219/2013.

5 In 2007, the plaintiff entered into a sale and purchase agreement ("the Agreement") with the defendant, which is a supplier, designer and manufacturer of heavy machinery for offshore use in the marine and oil and gas industry.[1] The Agreement was for the purchase of a 300 ton reel drive unit ("RDU") by the plaintiff from the defendant. Under the Agreement, the defendant was to ensure that the RDU was of merchantable quality, fit for the purpose for which it was intended and free from any latent or apparent defect in material or workmanship.[2] The defendant was also contractually required to perform all work diligently, carefully, in a good and workmanlike manner and in accordance with accepted industry standards.[3] The defendant was aware that

1 Judgment at [1].

2 Judgment at [11(d)].

the RDU was to be leased by the plaintiff to Trident Offshore Services, for the laying of undersea umbilical in the Bass Straits of Australia.[4]

6 The RDU was delivered to the plaintiff in April 2008 and thereafter mounted on board the "Maersk Responder". On 20 May 2009, after one complete reel of umbilical was laid, a major failure of one of the gearbox assemblies occurred during the laying of a second reel. The hydraulic drive motor and gear assembly on one of the two towers of the RDU became detached from its mounting and fell off.[5]

7 The plaintiff commenced S 219/2013 against the defendant on 19 March 2013, seeking damages for breach of contract. The plaintiff also claimed that the defendant misrepresented that it had obtained full and proper certification of the RDU when it provided ABSG Consulting Inc ("ABSG") with false input data.

The trial and my decision

8 The trial was concerned only with liability, with damages (if any) to be assessed at a later stage. It was a lengthy trial involving a total of 24 witnesses, including 7 expert witnesses who gave evidence on various aspects of the design and construction of the RDU. The length of the trial and its technicality were largely attributable to the fact that numerous design and manufacturing defects were alleged by the plaintiff. Much time was also consumed by debate between the experts on the cause of the catastrophic failure of the RDU.

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3 Judgment at [11(e)].

4 Judgment at [10].

5 Judgment at [4].

9 I delivered judgment on 30 November 2015. I held that the plaintiff was entitled to damages on the basis that the defendant had breached the Agreement by not delivering to the plaintiff an RDU that was of merchantable quality and fit for its purpose. I summarise my primary findings:

(a) There were a number of design failures in the RDU. The plaintiff failed to take into account the effects caused by (i) vessel roll;[6] (ii) fatigue;[7] and (iii) wind loading on the RDU structure.[8]

(b) The bolting arrangements, gears, braking system, sub-frame bearing housing and the bearing arrangement for the main shaft were inadequately designed for the purpose for which the RDU was to be used.[9]

(c) Various components of the RDU suffered from poor manufacturing quality.[10] The defendant also failed to perform any inspection or compliance checks to ensure that the grade of bolts was in accordance with the engineering drawings.[11] The defendant conceded that this was due to the poor training of its employees.[12]

(d) The defendant failed to perform the required design calculations for many critical components of the RDU.[13]

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6 Judgment at [23], [36] and [44].

7 Judgment at [45] to [51].

8 Judgment at [55].

9 Judgment at [56] to [125].

10 Judgment at [153] to [178].

11 Judgment at [180].

12 Judgment at [186].

(e) In addition, the defendant misrepresented to Ms Renuka Devi, Lead Structural Engineer of ABSG, that there was no need to consider wind load.[14] Further, the defendant used an inaccurate model (based on the use of ball joints rather than fixed joints where the transverse struts were bolted to the main base, and pin joints where the reel met the towers) for the purposes of the analysis conducted using the "STAAD.Pro" programme ("the STAAD.Pro analysis"). In so doing, the defendant deliberately and dishonestly misled ABSG into giving certification for the defendant's structural design of the RDU.[15]

(f) The defendant never obtained full certification of the design from ABSG, as mechanical and hydraulic design reviews were not carried out. But the defendant dishonestly misrepresented to the plaintiff that such full certification was obtained.[16]

(g) Clause 25 of the Agreement did not exclude the defendant's liability to pay damages to the plaintiff, given that the ABSG certification was fraudulently or dishonestly obtained and that the defendant had dishonestly misrepresented to the plaintiff that full ABSG certification had been obtained.[17]

10 Given the circumstances, I found that this was a case in which the defendant's behaviour was of such an outrageous and reprehensible nature as

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13 Judgment at [200].

14 Judgment at [229].

15 Judgment at [246].

16 Judgment at [248].

17 Judgment at [254] and [255].

to call for the imposition of punitive damages.[18] I therefore awarded the plaintiff damages for breach of contract and punitive damages to be assessed.[19]

The defendant's appeal

11 The defendant has filed an appeal only against the following aspects of my decision in S 219/2013:

(a) That the defendant had acted recklessly, dishonestly and/or fraudulently;

(b) That the defendant pay punitive damages to be assessed; and

(c) That clause 25 of the Agreement could not be construed to limit the extent of the damages payable by the defendant to the plaintiff.

12 I have set out the reasons for my decision in the Judgment. I will now explain my decision on costs, against which the plaintiff has taken up an appeal.

Submissions on costs

13 On 18 May 2016, I heard the parties' oral submissions on the basis on which costs were to be awarded. The plaintiff sought costs on an indemnity basis, claiming that there were exceptional circumstances which warranted a departure from the usual cost basis.[20] It argued that the defendant's conduct of the case was "so morally reprehensible and warranting of moral

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18 Judgment at [272].

19 Judgment at [274] and [275].

20 Plaintiff's costs submissions dated 17 May 2016 at [15].

condemnation" that costs on an indemnity basis was justified, citing *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd and others* [2016] 1 SLR 748 ("*Sandipala*") and *Wong Meng Cheong and another v Ling Ai Wah and another* [2012] 1 SLR 549 ("*Wong Meng Cheong*").

14 The plaintiff's submissions can be summarised as follows:

(a) The defendant failed to give full and proper disclosure of all relevant documents and materials, despite being the only party who had access to direct evidence of the design and manufacture of the RDU. The defendant's disclosure of documents regarding the STAAD.Pro analysis carried out by Dr Liu Li ("Dr Liu") was made belatedly.

(b) The defendant suppressed important facts, which came to light only in the midst of trial, prejudicing the expeditious disposal of the matter.

(c) The defendant sought to keep away the individuals most connected with the design of the RDU. It called further witnesses in the midst of trial, and one of the witnesses on the defendant's List of Witnesses did not appear at trial.

(d) The defendant consistently maintained plainly unsustainable, unmeritorious or unreasonable arguments, notwithstanding concessions by the defendant's witnesses and the lack of evidentiary basis for such arguments.

15 The defendant emphasised that following *Sandipala* and *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274 ("*Tan Chin Yew*

Joseph"), the burden on a party who seeks an order for indemnity costs is a high one. The defendant pointed out that the plaintiff had amended its pleadings five times, and the third amended Statement of Claim was only given to the defendant after the plaintiff had filed its closing submissions.[21] Thus the plaintiff's case was not crystallised until the trial was over and the plaintiff was ready to file its closing submissions. Disclosure of documents by the defendant was based on the plaintiff's pleaded position, which was in a state of flux. The plaintiff had not shown that the defendant's conduct of the trial crossed the threshold for an award of indemnity costs to be made.

16 I will describe the parties' submissions in greater detail later in these grounds. After considering the parties' oral and written arguments, I rejected the plaintiff's submission that this was an appropriate case for costs on an indemnity basis to be ordered, and awarded costs to the plaintiff on the standard basis, to be taxed if not agreed.

The law on indemnity costs

17 When costs are taxed on the indemnity basis, all costs are allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred, and any doubts in these respects will be resolved in favour of the receiving party: O 59 r 27(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court"). This is to be contrasted to an order of costs on the standard basis, where the party in whose favour the costs order is made is allowed a reasonable amount in respect of all costs reasonably incurred, and any doubts are resolved in favour of the paying party: O 59 r 27(2). O 59 r 27(4) establishes that where a costs order is made without an

[21] Defendant's costs submissions dated 18 May 2016 at pp 6 and 15.

indication of the basis of taxation, costs will be taxed on the standard basis. This demonstrates that an order of costs on the indemnity basis is the exception rather than the norm and requires justification. As observed by Chan Sek Keong CJ in *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 ("*CCM Industrial*") at [32], indemnity costs "are an exception and have to be exceptionally justified". Similarly, in *Lee Kuan Yew v Vinocur John and others* [1996] 1 SLR(R) 840 at [30], S Rajendran J expressed the view (citing Chao Hick Tin J in *Lee Hiok Ping v Lee Hiok Woon (sued as executors and trustees of the estate of Lee Wee Nam, deceased)* (Suits Nos 1401/73 and 2457/81, unreported) ("*Lee Hiok Ping*")), that costs on the indemnity basis "should only be ordered in a special case or where there are exceptional circumstances".

18 The starting point for a determination of whether indemnity costs are appropriate in any given case is O 59 r 5 of the Rules of Court. O 59 r 5 reads as follows:

> **Special matters to be taken into account in exercising discretion (O. 59, r. 5)**
>
> 5. The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account –
>
> (a) any payment of money into Court and the amount of such payment;
>
> (b) the conduct of all the parties, including conduct before and during the proceedings;
>
> (c) the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution; and
>
> (d) in particular, the extent to which the parties have followed any relevant pre-action protocol or practice direction for the time being issued by the Registrar.

19 As observed in *Tan Chin Yew Joseph* (at [98]), the list in O 59 r 5 is not exhaustive. O 59 r 5 requires the court to consider the stated factors where it is appropriate to do so, but it is certainly free to (and indeed should) take into account other circumstances of the case in determining whether there is a proper case to make an award of indemnity costs.

20 In the UK, Part 44.2 of the Civil Procedure Rules ("CPR") sets out a number of factors that the court must consider in determining what order to make on costs:

> **Court's discretion as to costs**
>
> **44.2**
>
> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of these costs; and
>
> (c) when they are to be paid.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –
>
> (a) *conduct before, as well as during, the proceedings* and in particular the extent to which the parties followed the Practice Direction – Pre-action Conduct or any relevant pre-action protocol;

> (b) *whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue*;
>
> (c) *the manner in which a party has pursued or defended its case or a particular allegation or issue;* and
>
> (d) *whether a claimant who has succeeded in the claim; in whole or in part, exaggerated its claim.*
>
> [emphasis added]

21 In my view, Part 44.2(5) of the CPR provides useful pointers on the type of conduct that is relevant for the court's consideration when deciding whether indemnity costs should be awarded.

22 The circumstances in which indemnity costs have been awarded are extremely varied. Lord Woolf CJ (as he then was) in *Excelsior Commercial & Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson (a firm) and anor* [2002] EWCA Civ 879 ("*Excelsior*") at [32] went so far as to suggest that there is "an infinite variety of situations which can come before the courts and which justify the making of an indemnity order".

23 Without attempting to be prescriptive, there are, from my review of the case law, the following broad categories of conduct by a party which may provide good reason for an order of indemnity costs to be made:

(a) Where the action is brought in bad faith, as a means of oppression or for other improper purposes;

(b) Where the action is speculative, hypothetical or clearly without basis;

(c) Where a party's conduct in the course of proceedings is dishonest, abusive or improper; and

(d) Where the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process.

24 I emphasise that this is not meant to be an exhaustive list of circumstances in which indemnity costs may appropriately be ordered. These categories are not closed. I also accept that these categories are not necessarily distinct analytically. A party's conduct may be characterised in different ways, and very often such a party may, in the same litigation, exhibit several types of such conduct. For instance, an action that is identical to that brought in parallel proceedings overseas may be regarded not only as wasteful litigation but litigation that is also oppressive and/or commenced for an improper purpose. A completely unmeritorious action brought purely to intimidate and harass the defendant is not only clearly without basis, but also commenced with intent to oppress rather than from a legitimate desire to vindicate one's rights. The above categories merely represent an organisation of case law by the general types of conduct that the courts have found sufficient to warrant an order of indemnity costs. They are *descriptive* rather than *prescriptive* categories.

Where the action is brought in bad faith, as a means of oppression or for other improper purposes

25 In *Amoco (UK) Exploration Company v British American Offshore Limited* [2002] BLR 135 (*"Amoco*"), the plaintiff claimed that the defendant breached a contract for the provision of a drilling unit. Langley J held that the plaintiff's case failed at almost every point. While Langley J observed (at [2]) that the fact of success, however resounding, was not sufficient of itself to justify an award of costs on an indemnity basis, he also noted (at [5]) that the plaintiff's ulterior purpose in commencing the action was to put commercial pressure on the defendant to re-negotiate the commercial contract. It was not

founded on any genuine belief that the defendant's drilling unit could not do the job for which it was intended. The plaintiff's motive was revealed by the fact that its case was constantly changing, as it sought unsuccessfully to find a basis on which it could justify what it had done (at [6]). Langley J held (at [6]) that if a party embarks on or brings upon itself and pursues litigation of such magnitude in such circumstances, and thereafter suffers a resounding defeat involving a rejection of much of its evidence, that provides a proper basis on which it is appropriate to award indemnity costs.

26 *Wong Meng Cheong* involved a claim by two deputies of the deceased that a transfer of property carried out by the deceased prior to his death should be declared null and void. They argued that the deceased lacked the mental capacity to execute the transfer or that it was procured by undue influence. Lai Siu Chiu J dismissed the plaintiffs' claim, finding (at [195]) that the plaintiffs had not acted properly in commencing the litigation and that the litigation was not carried out *bona fide*. Their attempt to set aside the transfer was not to protect the deceased's interests but rather to increase their inheritance. Further, the costs of commencing the action were entirely out of proportion to the amount of liquid funds available in the estate. Lai J also found (at [200]–[202]) that (i) the plaintiffs failed to provide their main expert witness with the necessary information to form a reliable opinion; (ii) they frequently prevaricated in the witness stand and argued with counsel during cross-examination; and (iii) prior to the suit, the plaintiffs had threatened the first defendant with "seven years of litigation" and had expressed their desire to go through "four bruising rounds in court". Lai J therefore found that "the conduct of the entire action was therefore an exercise in oppressing the defendants". An award of indemnity costs was made in favour of the first defendant.

Where the action is speculative, hypothetical or clearly without basis

27 In *Tan Chin Yew Joseph*, the plaintiff was a certified financial analyst who commenced an action against a futures broker for wrongfully closing out his open futures contract, causing him to suffer a loss. The defendant responded that it had the right to close out the plaintiff's positions because he was in breach of his margin obligations. Vinodh Coomaraswamy J held in favour of the defendant, finding the plaintiff's claim to be wholly unmeritorious. The defendant sought indemnity costs.

28 Coomaraswamy J agreed (at [100]) that the plaintiff's case was thin and ultimately irreconcilable with the contemporaneous documents and the law. Much of the plaintiff's case was merely an afterthought which was dispatched quickly during cross-examination. Coomaraswamy J referred to Tomlinson J's observation in *Three Rivers District Council v The Governor and Co of the Bank of England (No 6)* [2006] EWHC 816 (Comm) ("*Three Rivers*") that a plaintiff in such a position was "taking a high risk and can ordinarily expect to pay indemnity costs when his claim fails". I will further explain Tomlinson J's important decision in *Three Rivers* subsequently.

29 However, after a consideration of all the circumstances, Coomaraswamy J did not find that the plaintiff's conduct as a whole rose to the necessary level to make it appropriate for an award of indemnity costs against the plaintiff. Although the plaintiff's action was misguided, it was a good faith attempt to secure compensation for trading losses for which he genuinely thought he was entitled; he had no ulterior motive in bringing the proceedings. Further, the plaintiff did not conduct his case in an oppressive or unreasonable manner or cause costs to be incurred irrationally or disproportionately. Counsel for the plaintiff conducted the case with economy

and did not protract the cross-examination by pursuing irrelevant issues or hopeless leads. Thus Coomaraswamy J ordered that costs be paid by the plaintiff on the standard basis.

Where a party's conduct in the course of proceedings is dishonest, abusive or improper

30 *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2011] 1 SLR 582 ("*Raffles Town Club*") was my decision on costs following a suit by Raffles Town Club against several of its former directors for breach of fiduciary duties. Judgment was given in favour of the defendants in the main action. The defendants argued that the action consisted of speculative litigation and that the current directors and shareholders of the plaintiff had not acted *bona fide* because (i) the plaintiff's claims were entirely inconsistent with its previous positions; (ii) the plaintiff relied on documents which were inadmissible in law; and (iii) it also adopted tactics that caused embarrassment to one of the defendants, such as the inclusion of criminal allegations in its Statement of Claim and the distribution of Notes of Evidence of the cross-examination of one of the defendants pertaining to his matrimonial proceedings which touched on his personal affairs.

31 In that case, I found (at [32]) that while the plaintiff's conduct could be criticised, these matters did not evince such a degree of dishonesty, impropriety or abuse of judicial process as to warrant a departure from the usual basis of costs.

32 The Court of Appeal's decision in *Heng Holdings SEA (Pte) Ltd v Tomongo Shipping Co Ltd* [1997] 2 SLR(R) 813 ("*Heng Holdings*")

demonstrates that even if the losing party failed to disclose relevant material, this does not mean that indemnity costs ought to be awarded to the winning party as a matter of course. Rather, the seriousness of the non-disclosure must be considered.

33 In *Heng Holdings*, the appellant submitted that it ought to be awarded costs on an indemnity basis, following the Court of Appeal's finding that the Mareva injunction against the appellant should be set aside. The appellant argued that the respondent had obtained the Mareva injunction in consequence of non-disclosure of material facts. The Court of Appeal disagreed. L P Thean JA, delivering the judgment of the Court, held at [2] that the Court had not decided the question of non-disclosure of material facts, but had simply held that the Mareva injunction should not have been granted on the ground that there was no evidence of dissipation of assets by the appellants. Thean JA also found that in any event, "even if there were matters alleged by the appellants to be material which had not been disclosed, they were *not of a serious enough nature t*o warrant an order for costs on an indemnity basis [emphasis added]".

34 This was reiterated in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155, a decision of the Court of Appeal on the costs orders to be made following two appeals that arose from the collective sale of a condominium development, Horizon Towers. Judgment in the appeals was given in favour of the appellants. The appellants submitted that costs should be ordered against the respondents on the indemnity basis because the respondents had suppressed information during discovery by failing to disclose a written offer for Horizon Towers. Further, the respondents had conducted the Horizon Board proceedings in an unjustifiably adversarial

manner, for instance by asserting legal privilege over the advice given by the original sale committee's solicitors.

35 The Court of Appeal found (at [32]) that different aspects of the respondent's conduct certainly merited varying degrees of criticism, but took the view that the matters alleged by the appellants did not compel a departure from the usual basis of costs. The Court of Appeal referred to its earlier decision in *Heng Holdings* for the proposition that costs on a standard basis may be ordered notwithstanding a material non-disclosure of facts.

Whether the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process

36 In *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65, the plaintiff commenced proceedings in England against the defendant merchant bank for breach of an agreement. The defendant filed a defence and counterclaim. Three months later, the plaintiff commenced proceedings in Queensland, Australia, against the defendant and other brokers for damages for breach of the agreement. The plaintiff then sought a stay of the counterclaim in the English courts and offered to stay its own English claim so as to permit the whole matter to be litigated in Queensland.

37 Sir Nicolas Browne-Wilkinson V-C (as he then was) held (at 70) that the plaintiff was required to elect which set of proceedings he wished to pursue. If the plaintiff wished to pursue the Australian action, then the English action must be dismissed and not merely stayed. Sir Browne-Wilkinson gave leave to discontinue the claim and stayed the counterclaim, and ordered the plaintiff to pay costs of the claim and counterclaim on an indemnity basis (at

73). The plaintiff should not have commenced two sets of proceedings relating to the same subject matter, either in the same jurisdiction or in two different jurisdictions. By doing so, it duplicated the costs which would have to be incurred by the defendant.

38 In *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*"), the appellants commenced proceedings for an injunction to restrain the respondent from effecting payment of a sum of money to any party other than the appellants, and further sought damages. The respondents replied that the appellants' action was commenced in breach of an arbitration clause in the sale and purchase agreement, and applied for a stay of court proceedings in favour of arbitration. An assistant registrar dismissed the stay application but the respondent succeeded on appeal and was granted a stay. The appellants' appeal to the Court of Appeal was dismissed.

39 The Court of Appeal (at [19]) cited with approval Colman J's decision in *A v B (No 2)* [2007] 1 Lloyd's Rep 358, where Colman J held (at [10]-[11] and [15]) that the procedural consequence of a party's breach of an arbitration or jurisdiction agreement, which causes the opposing party reasonably to incur legal costs, ought to be an award of the whole, and not merely part, of the opposing party's reasonable legal costs. The breach of such a clause so as to derive an unjustifiable procedural advantage amounted not only to a breach of contract, but also a misuse of the judicial facilities offered by the courts. Thus it was "so serious a departure from 'the norm' as to require judicial discouragement". The Court of Appeal found (at [71]) that the appellants had pursued an entirely unmeritorious appeal, causing the respondent to incur additional costs, and dismissed the appeal with indemnity costs.

40 In *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96, the Court of Appeal reserved judgment on the parties' appeal against a decision of Kan Ting Chiu J. While judgment was reserved, the appellant commenced an action in Indonesia, claiming the same reliefs and on the same grounds as those relied on in the Singapore action. The respondent applied to the Singapore High Court for an injunction to restrain the appellant from proceeding with the Indonesian action. This was ultimately granted. The appellant appealed, seeking to set aside the injunction. The Court of Appeal dismissed the appeal, finding (at [20]) that there was blatant, opportunistic and egregious abuse, given that the appellant had commenced the Indonesian action after Kan J had dismissed its claim on the merits, and after the Court of Appeal had heard the appeal against Kan J's decision. In relation to costs, the Court of Appeal held (at [26]) that the sole reason why the appellant was not ordered to pay costs on an indemnity basis, despite its blatant attempt to frustrate and/or undermine the judicial process, was that the respondent's conduct was not beyond reproach either, given its undue delay in applying for an anti-suit injunction (see [23]).

41 The recent case of *Sandipala* also involved concurrent litigation commenced by the plaintiff in Singapore and Indonesia. The first and third defendants successfully applied for an anti-suit injunction to restrain the plaintiff from pursuing the Indonesian litigation against the third defendant and the parent company of the first defendant, and sought indemnity costs against the plaintiff. George Wei J awarded indemnity costs, finding (at [12]) that it was wasteful and oppressive for the plaintiff to have commenced proceedings on the same or similar subject matter in two separate jurisdictions when it had clearly no good reasons for doing so. Wei J observed, however, that it did not necessarily follow that indemnity costs would be appropriate in

every case where an anti-suit injunction is granted; each case turns strictly on its own individual facts.

The approach of the English courts

42 The English courts have consistently emphasised that morally reprehensible conduct of a party in the course of litigation is not a necessary condition for an order of indemnity costs to be made against that party. In the view of the English courts, the relevant question is whether there is something in the conduct of a party or the circumstances of the case that takes the case "out of the norm". I will discuss the relevant authorities.

43 In *Reid Minty (a firm) v Gordon Taylor* ("*Reid Minty*") [2002] 2 All ER 150, May LJ, giving the primary judgment of the Court of Appeal, held (at [27] and [28]) that it was not correct that costs are only awarded on an indemnity basis if there has been some sort of moral lack of probity or conduct deserving of moral condemnation on the part of the paying party. If costs are awarded on an indemnity basis, in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted, but this will not necessarily be so in every case. Similarly, in *Victor Kermit Kiam II v MGN Limited* [2002] 2 All ER 242 ("*Kiam*"), Simon Brown LJ referred to *Reid Minty* and held as follows:

> 12. I for my part, understand the Court there [in *Reid Minty*] to have been deciding no more than that *conduct, albeit falling short of misconduct deserving of moral condemnation,* can *be so unreasonable as to justify an order for indemnity costs*. With that I respectfully agree. To my mind, however, *such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight.* An indemnity costs order made under Rule 44 (unlike one made under Rule 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory…

[emphasis added]

Simon Brown LJ's observations are instructive as they define the level of unreasonableness a party's conduct must display before indemnity costs may be contemplated – the conduct must be unreasonable to a high degree, and not merely wrong or misguided in hindsight.

44 *Noorani v Calver (No 2/Costs)* [2009] EWHC 592 (QB) ("*Noorani*") involved a claim for damages against the defendant for libel and slander. The slander claim was struck out on the first day of trial, and the claimant discontinued the proceedings on the third day. The defendant sought an order for indemnity costs. Coulson J reviewed the authorities and restated the relevant principles (at [8] and [9]). In brief, indemnity costs are "no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted". A party's conduct must, however, be "unreasonable to a high degree". The court must decide "whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs". Coulson J identified various examples of conduct which had led to an order for indemnity costs, such as the use of litigation for ulterior commercial purposes (citing *Amoco*) and the making of an unjustified personal attack (citing *Clark v Associated Newspapers* [1998] EWHC Patents 345). The pursuit of a hopeless claim or a claim which the party pursuing it should have realised was hopeless could also lead to such an order (citing *Wates Construction Limited v HGP Greentree Alchurch Evans Limited* [2006] BLR 45).

45 Coulson J found (at [19], [20] and [31]) that the claimant in *Noorani* was using the libel proceedings to pursue personal vendettas, and that the

proceedings were an unjustified attack on the defendant's reputation. More significantly, the claim was pursued and maintained on an entirely false basis of which the claimant was always aware, and should never have been brought at all. In fact, the claimant had on the balance of probabilities given instructions for the malicious calls to the defendant that the defendant complained of. Coulson J thus held (at [33]) that it was appropriate for the court to "mark its grave concern about the underlying claim and the claimant's conduct of it", and ordered that the claimant pay the defendant's costs on an indemnity basis.

46 The aforementioned case of *Three Rivers* involved exceptionally lengthy and large-scale litigation commenced by the liquidators of a bank against the Bank of England. 256 days of trial elapsed before the liquidators abandoned their claim that the Bank of England had acted in a knowingly unlawful and dishonest manner. Given the hopelessness of the plaintiff's allegations and the manner in which it pursued its claims, Tomlinson J (as he then was) had no doubt that this was an appropriate case in which indemnity costs should be awarded.

47 At [25], Tomlinson J set out valuable guidance on the principles that should guide a court's decision on the circumstances in which it is appropriate to make an award of costs on an indemnity basis. For present purposes, I highlight Tomlinson J's view that when the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is that of "unreasonableness":

> (1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.

(2) **The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.**

(3) **Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an *a fortiori* ground, but rather unreasonableness.**

(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.

(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

(6) *A fortiori*, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively *inter alia* by hostile cross examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a [claimant] has discontinued only at a very late stage in proceedings;

> (a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;
>
> (b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;
>
> (c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;

> (d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;
>
> (e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;
>
> (f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;
>
> (g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat.

[emphasis added in bold]

I note that in Tomlinson J's view, dishonest conduct or conduct otherwise attracting moral condemnation is not a distinct category of conduct warranting an award of indemnity costs, but rather a subset of the larger class of "unreasonable" conduct.

48 In *Excelsior*, Lord Woolf CJ suggested that there may be cases where an order of indemnity costs is appropriate even though the losing party's conduct cannot be described as unreasonable. After considering *Reid Minty* and *Kiam*, Lord Woolf stated as follows (at [31]):

> 31. … An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. *If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case had been unreasonable.* Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate

> manner. *Again the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate.*
>
> 32. I take those two examples only for the purpose of illustrating the fact that there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order. It is because of that that I do not respond to Mr Davidson's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances when they should not. In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. *This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement.*
>
> [emphasis added]

A useful approach

49 To reiterate, it may be appropriate for a court to make an order of indemnity costs where the action or a party's conduct falls into any of the following categories:

(a) Where the action is brought in bad faith, as a means of oppression or for other improper purposes;

(b) Where the action is speculative, hypothetical or clearly without basis;

(c) Where a party's conduct in the course of proceedings is dishonest, abusive or improper; and

(d) Where the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process.

I emphasise that these are descriptive and non-exhaustive categories. They are not to be applied mechanically. As observed by Wei J in *Sandipala*, each case turns strictly on its own individual facts. The question of costs is always a matter for the discretion of the court, and this is a discretion that must be exercised judicially: Chao J in *Lee Hiok Ping*.

50 The English approach, as described above, has been to ask whether there is some conduct or circumstance which takes the case "out of the norm". This enquiry, however, appears to me to be rather too broadly stated and may not be of immediate and obvious practical utility in every case. In my view, a focus on the unreasonableness of the party's conduct may be preferred. As a baseline inquiry, it may be useful for a court to ask itself whether the party's conduct was so unreasonable as to justify an award of indemnity costs. Such conduct must reflect a high degree of unreasonableness, and cannot merely be wrong or misguided in hindsight: *Kiam* at [12]. Such unreasonableness, however, need not rise to the level of dishonesty or moral iniquity for it to attract indemnity costs. But in my judgment, the extent of a party's dishonest and unscrupulous intentions and actions, where present, will be relevant factors for the court to take into account.

51 I make three further observations. First, it is relevant to consider whether, and if so to what extent, the party's conduct caused *prejudice* to the other party. It may be legitimate for the court to decide that in the circumstances, although a party acted unreasonably, the prejudice caused was of a sufficiently small degree that it would be inappropriate for indemnity costs to be ordered against that party.

52 Second, it is important for the court to bear in mind the *context and nature of the dispute* in ascertaining whether the case is of such an exceptional nature that it is appropriate to depart from the standard basis of costs. In *Goh Eileen née Chia and another v Goh Mei Ling Yvonne and another* [2014] 3 SLR 1356, the plaintiff failed in their attempt to remove the defendants as joint tenants to a flat. The defendants sought to recover costs on an indemnity basis. Quentin Loh J considered *Raffles Town Club* and *Tan Chin Yew Joseph*, and found that the case was not sufficiently exceptional to warrant an order of costs on an indemnity basis. Loh J considered (at [50]) that at the heart of the case was a family dispute where siblings were fighting over their parents' flat; "[l]ike most family disputes, emotions ran deep and tempers flared; various allegations, valid or otherwise, were made both in and out of court". Given the circumstances, this was not a case where indemnity costs were appropriate. In my view, this shows the need for the court also to be sensitive to context and to adopt a judicious and perceptive approach to the issue of costs.

53 Third, although it was suggested in *Excelsior* that there may be situations where indemnity costs could be ordered despite the absence of unreasonable conduct, these will, in my judgment, be rare cases. In the circumstances hypothesised by Lord Woolf in *Excelsior* where indemnity might be ordered even where the conduct was not unreasonable, the trial judge must consider whether there is some compelling and exceptional reason for indemnity costs. As stated by Simon Brown LJ in *Kiam*, there is *in general* a penal element to the ordering of indemnity costs; a stigma attaches to the making of such an order. In considering whether it is appropriate to order costs on the indemnity basis, a judge ought to bear Simon Brown LJ's observation well in mind.

My decision

54 Having considered the plaintiff's arguments for an award of indemnity costs, I did not find that the defendant displayed such a degree of unreasonable or improper conduct as to warrant a departure from the usual costs basis.

Alleged failure to give full and proper disclosure

55 The plaintiff alleged that the defendant failed to disclose certain relevant documents and materials.[22] It referred to various passages within the Judgment where I observed that the defendant had not adduced evidence to support its case.

56 As a preliminary point, I emphasise that I have drawn the necessary inferences against the defendant from its failure to provide such evidence. This is clear from the Judgment, as I will subsequently explain. In essence, the defendant's failure to produce calculations, drawings and other documents demonstrating that reasonable care was taken to ensure that the RDU design and manufacture was fit for purpose merely provided a basis for me to draw the inference that such measures were not undertaken by the defendant. This undermined the defendant's case and contributed in large part to the plaintiff's success in its claim. In that sense, any failure to disclose – either because there was nothing to disclose since the defendant had not done the necessary calculations or design work, or because the defendant refused to disclose material that it possessed because the material if disclosed would not have been helpful to the defendant's case – merely served to prejudice the defendant's case rather than the plaintiff's.

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22 Plaintiff's costs submissions dated 17 May 2016 at Annex A.

57 The plaintiff referred to [190] and [191] of the Judgment, where I stated that it was standard engineering practice to maintain a technical manual setting out the design calculations of the RDU for later inspection. Such records should have been properly kept and maintained. Given that not all the design calculations for the bolts, gears, bearings, brakes and safety factors used were produced to the court, I drew the inference that complete design calculations for all the bolts, gears, bearings and brakes were never done by the defendant or, if they were done, they were deliberately not disclosed.

58 I think the view that I expressed in [190] and [191] is clear: while deliberate non-disclosure was a possible reason for the lack of evidence, it was equally possible that complete design calculations were never carried out (and therefore could not possibly be disclosed). Contrary to what the plaintiff suggested, I did not draw any concrete conclusion in the Judgment that the defendant in fact possessed such calculations but refused to disclose them. In any case, the effect of this inference is beyond doubt: the defendant failed to satisfy the court that it had properly designed the RDU. The non-production of design calculations merely served to undermine the defendant's case and not the plaintiff's. The evidential burden of proof fell squarely on the defendant to show that notwithstanding the plaintiff's evidence that the RDU was not fit for purpose, the defendant had in fact carried out design calculations to ensure the satisfactoriness of the RDU design and that it had therefore properly discharged its contractual obligations.

59 The plaintiff also referred to my finding at [231] of the Judgment that no records of emails or notes of discussions between Dr Liu and the defendant were produced. The conclusion that I drew from this paucity of evidence is made clear at [233]: I believed that there were discussions between Dr Liu and

the defendant on how to get the RDU structure to pass the STAAD.Pro analysis and the unity checks with minimal change to the actual structural design, as major changes would have come at significant cost and delay to the defendant. They therefore tinkered with the input criteria or input boundary conditions to be used in the STAAD.Pro analysis. The result was, again, that I disbelieved the defendant's case that Dr Liu's STAAD.Pro analysis was properly carried out. I found (at [238]) that Dr Liu's treatment of the bolted joints as ball joints was due more to a deliberate and dishonest effort to try to get a pass for the unity checks, regardless of the true nature of the joints. Any prejudice from the non-production was therefore caused only to the defendant and not the plaintiff.

60 Next, the plaintiff referred to [179] of the Judgment where I found that the defendant failed to adduce documentary evidence to show that it had carried out inspections of the critical bolts at the struts and tower bolted joints during the manufacturing process, to ensure compliance with design drawings. But again, if no inspections had been carried out, then there would of course be no such records of inspections. This was in fact precisely the inference that I drew at [180] of the Judgment: "I infer that it was *more likely than not*, that *the Defendant did not perform any inspection or compliance checks* to ensure that the grade of bolts actually installed in the RDU at the critical connections was in accordance with the engineering drawings. *If the Defendant had done so, the inspection records for the high strength bolted connections would have been readily available* and the wrong grade of bolts of 8.8…would never have been used on the RDU that was delivered to the Plaintiff. [emphasis added]"

61 The plaintiff then suggested that the original STAAD.Pro input file was not disclosed, that only some of the production drawings were disclosed

and that none of the design drawings were disclosed. It also complained that certain STAAD.Pro documents were disclosed very belatedly. I have already explained that any such non-disclosure, either because such designs and calculations did not exist or because the defendant simply chose not to disclose them, merely served to prejudice the defendant's case. At [191] of the Judgment, I found that the defendant's failure to explain the lack of design calculations led precisely to such an inference. At [266], I stated that the defendant's failure to produce any comprehensive design file or calculations save for what was in the Confidential Bundle, which was inadequate, provided the basis for my inference that "comprehensive engineering calculations were not performed to ensure that the design of the RDU would meet the specifications and the user requirements as made known to the Defendant".

62 In the circumstances, I considered that any dearth of evidence or non-disclosure by the defendant operated solely in the *plaintiff's* favour rather than the defendant's. Following the trial, the defendant's inability to produce compelling evidence, coupled with the plaintiff's own evidence showing inadequacies in the design and manufacture, left me in no doubt that the defendant was in breach of the Agreement. I found that the material before me was more than adequate for me to reach a conclusive determination of the matter. The defendant utterly failed to discharge the evidential burden that it bore following the evidence given by the plaintiff's factual and expert witnesses. Accordingly, little if any prejudice from the non-production was caused to the plaintiff. This was therefore not a persuasive ground on the facts of this case for a departure from the standard basis of costs.

Alleged suppression of important facts

63 The plaintiff submitted that the defendant suppressed evidence, choosing to bring forth fresh evidence only in the midst of trial.[23] It referred to the cross-examination of Dr Yang Ting ("Dr Yang"), the defendant's project manager, during which it was revealed that the defendant had subcontracted the STAAD.Pro analysis to Dr Liu. The existence of Dr Liu was not known prior to this.

64 While I agreed that the defendant should have made it known that the STAAD.Pro analysis was conducted by someone other than the defendant itself, I did not find upon a consideration of all the circumstances that the plaintiff was prejudiced. Following Dr Yang's explanation, Dr Liu was called by the defendant as a witness and the plaintiff had full opportunity to cross-examine Dr Liu. Dr Liu appeared in court to give evidence on no less than five separate days, *ie* 20 March, 29-30 July and 5 August 2015. Following Dr Liu's evidence, I was satisfied that:

(a) Dr Liu and the defendant did not want wind load to be considered in the analysis because they knew that additional wind load would result in a failure of the unity checks. They therefore deliberately and dishonestly misrepresented to ABSG that there was no need to consider wind load because the reel was to be housed in a cabin: Judgment at [229].

(b) Dr Liu and the defendant discussed at length on how to get the RDU structure to pass the STAAD.Pro analysis and the unity checks,

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[23] Plaintiff's costs submissions dated 17 May 2016 at Annex A.

by tinkering with the input criteria and the input boundary conditions: Judgment at [233].

(c) Despite Dr Liu being given every opportunity to explain how he exercised his professional judgment to support his remodelling of bolted fixed joints as ball joints, Dr Liu failed to give a satisfactory explanation. In fact, Dr Liu did no calculations for the rigid bolted connections for the RDU before he proceeded to treat them as ball joints. Dr Liu's treatment of the bolted joints as ball joints was due to a deliberate and dishonest effort to ensure that the RDU structure passed the unity checks: Judgment at [234], [235] and [238].

(d) Dr Liu and the defendant deliberately presented to ABSG an inaccurate depiction of the reel as fixed in the X direction with notional pin joints, when in fact there were no pin joints: Judgment at [241] to [245].

65 Following my consideration of Dr Liu's evidence, I found (at [246]) that the defendant had fraudulently modelled the critical structural connections of the RDU in order to mislead ABSG into providing certification. In my judgment, the fact that Dr Liu turned up as an unexpected witness for the defendant did not ultimately cause prejudice to the plaintiff, given that the plaintiff was given full opportunity to cross-examine Dr Liu and that the plaintiff was thereafter able to prove to the requisite high degree of probability that the defendant, acting with Dr Liu, had acted fraudulently. I did not think that the defendant had planned at the outset to prevent Dr Liu from testifying. Counsel for the defendant arranged for Dr Liu to be called as the defendant's witness soon after it became clear that the defendant's own engineering staff

had not performed the STAAD.Pro analysis themselves but the defendant had instead subcontracted the analysis to Dr Liu.

66 The plaintiff also argued that it only became aware that the RDU design was based on the Punj Lloyd unit during the last tranche of the trial in July and August 2015, and that the defendant did not voluntarily disclose the specifications of the Punj Lloyd unit.

67 I agreed that the defendant should have informed the plaintiff earlier that the defendant had not designed the RDU from scratch, but had instead relied on an earlier Punj Lloyd design from which it made modifications. But the mere fact that the RDU design was modified from the Punj Lloyd design was not of consequence to my findings. As stated at [194] of the Judgment, no inference of fraud should be drawn from the fact alone that the RDU design was modified, because design is an iterative process. The real question was whether the necessary design calculations were done to ensure the suitability of the final design of the RDU for the functions it was meant to perform. I refer also to [193] and [199] of the Judgment, where I accepted the plaintiff's submission that the defendant had failed to adduce evidence of any initial design calculations necessary to ensure that following the modifications to the Punj Lloyd design, the plaintiff's RDU design would be able to meet its specifications and perform up to expectations in terms of merchantable quality and fitness for purpose. I was also assisted by the evidence of Mr Lei Chengyi ("Mr Lei"), the defendant's former design engineer, that the junior design engineer (Ms Tan Sin Liu ("Ms Tan")) made only negligible changes to the Punj Lloyd design. In the circumstances, the defendant's late disclosure regarding the relevance of the Punj Lloyd design ultimately did not prevent the

issue from receiving sufficient ventilation through the evidence of Dr Yang, Mr Lei and Ms Tan, who were all witnesses called by the defendant.

Alleged attempt to keep individuals connected to the dispute away from trial

68 The plaintiff further claimed that the defendant sought to keep certain individuals away from trial. It referred to Mr Gan Kwok Chang, Mr Lei, Dr Liu, Ms Tan and Mr Derek Chua. I rejected the plaintiff's submission. I did not think that there was any basis for an allegation that the defendant attempted to keep these witnesses away so that their evidence would not be known to the court, nor had the plaintiff adduced any evidence that the defendant sought to do so. I certainly made no such finding in the Judgment. In any case, I found that the defendant had called these witnesses and the plaintiff had full opportunity to cross-examine these witnesses on their roles and on the available documents to its satisfaction.

69 The plaintiff also pointed out that Mr Hu Xuya ("Mr Hu") never appeared at trial. I considered that even if Mr Hu had indeed appeared, he would not have been able to render very much assistance (if at all) to the court or to the plaintiff's case. As Ms Tan testified (and as I have discussed at [192] of the Judgment), Mr Hu did not in reality have much involvement in the design process at all, even though the design of the RDU had been assigned to Mr Hu and Ms Tan. Mr Hu designed the Punj Lloyd unit, but because he was occupied with other jobs at the material time, the design was mainly done by Ms Tan under the guidance of Mr Lei.[24] Mr Lei also confirmed this during cross-examination.[25] The plaintiff did not refer me to anything suggesting that

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[24] NE 20 March 2015, p 104 lines 4 to 11; p 110 lines 23 to 25.

[25] NE 29 July 2015, p 62 lines 11 to 22.

Mr Hu would not have given evidence to the same effect, or that the defendant failed to produce Mr Hu in court for a reason other than this.

Alleged insistence on unmeritorious or unreasonable arguments

70 According to the plaintiff, the defendant consistently maintained "plainly unsustainable, unmeritorious or unreasonable issues".[26] It referred to the defendant's arguments that there were no design or manufacturing defects and that that the cause of the accident was a "sudden and immense force" impacting on the gears. The plaintiff suggested that the defendant maintained these arguments notwithstanding the concession by Mr Alan Gregory Hooper ("Mr Hooper"), the defendant's expert witness, and the "lack of evidentiary basis" for these assertions.

71 I had no hesitation in rejecting the plaintiff's submission. It is easy in hindsight to say that it must have been obvious that there was no merit to the defendant's arguments. The truth is that this was a very technical trial involving a number of experts and many allegations of defective manufacture and design. Given the amount of evidence that was adduced over the course of the trial, I was not prepared to reach conclusions on many of the technical issues with any degree of certitude until I had reviewed the relevant documents, calculations, transcripts and submissions after the trial.

72 I refer for instance to the experts' varying opinions on the cause of the catastrophic failure of the RDU on 20 May 2009. As I have described at [201] to [222] of the Judgment, although much time was spent by both parties' experts attempting to ascertain the cause of the failure, it was an immensely

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[26] Plaintiff's costs submissions dated 17 May 2016 at Annex A.

difficult task to determine the true source of the accident. This was due to the fact that (i) the persons who were present on the vessel during the accident and who might have witnessed it were not available to give evidence; and (ii) there was a multitude of possible hypotheses on what could have gone wrong. The defendant's theory that there was a sudden unexpected increase in force during the laying of umbilical had to be assessed and ultimately rejected on a technical basis, *ie* that there was no possibility that an obstruction on the seabed could have snagged the umbilical, given Mr Eilert Halvorsen's finding during a prior seabed survey that the umbilical laying route was free of such obstructions (see [203] of the Judgment).

Further observations

73 I will make two further observations. First, I did not find that counsel for the defendant, Mr Daniel John, had conducted the defence during the trial in an unjustifiably obstructive or adversarial manner. On the contrary, Mr John was economical both in his cross-examination and submissions and did not place any unreasonable hurdles in the way of the plaintiff's cross-examination of the defendant's witnesses. Largely for this reason, I found that the trial was not unnecessarily prolonged. Its length was due primarily to the technical complexity of the issues and the number of factual and expert witnesses involved. When it became clear during the trial that certain other witnesses would be able to provide useful relevant evidence, Mr John had been cooperative and arranged for them to testify. I note that counsel's economical conduct of the trial was one of the grounds for Coomaraswamy J's decision not to order indemnity costs in *Tan Chin Yew Joseph* (at [100(b)]) and I agree that this is a relevant factor for consideration. It is part of the overall inquiry on the reasonableness of a party's conduct at trial.

74 My second observation pertains to Mr Hooper. In *Balmoral Group Limited v Borealis (UK) Limited and ors* [2006] EWHC 2531 (Comm), Clarke J (as he then was) ordered the plaintiff to pay the defendant's costs on an indemnity basis only in respect of the work of the defendant's expert in dealing with the report of the plaintiff's expert, and the costs of the defendant's counsel and solicitors' attendance in court on those days when the plaintiff's expert was giving evidence (at [36]). The defendant pointed to the fact that the plaintiff's expert witness had presented his evidence in a way that required the defendant to spend an inordinate amount of time trying to understand what it meant and when the defendant had done so, to unravel it sufficiently to reveal its fallacies (at [16]). Clarke J found that the approach taken by the plaintiff's expert witness and the flaws in his evidence had taken the case "out of the norm" (at [18]). The report of the plaintiff's expert was far from transparent and had deficiencies which shielded the weaknesses in some of the plaintiff's technical case. It had led to unnecessary costs (at [33]). Clarke J rejected (at [20]) the plaintiff's submission that it should not be made to shoulder additional burden in costs because of the deficiencies of their independent expert. He held as follows:

> 20. I do not accept that a litigant is able to distance himself from his expert in that way. The expert, whatever his duties, is still the witness of the party calling him. Serious failings by an expert may make it just to order indemnity costs, unless the expert and the party calling him can, for these purposes, be distinguished. In my view they cannot. As between the party calling the expert and the opposing party the risk should rest with the former.

75 Just as the deficiencies of an expert's conduct at trial may impugn the conduct of the party calling the expert, so in my view the fair, frank and efficient manner in which the expert gives evidence and assists the court should result in the accrual of credit to that party. I found that Mr Hooper's

responses were largely delivered in a fair, concise and highly professional manner, and I was impressed by his objectiveness as an expert witness for the defendant. He was even prepared to give responses that did not lend support to the defendant's case. He was a credible and fair witness and rendered much assistance to the court. He was therefore a credit to the defendant's conduct of the case.

Conclusion

76 In summary, I did not find that the plaintiff had succeeded in persuading me that the defendant had acted so unreasonably as to justify an order of indemnity costs. I was not satisfied that the defendants had sought to deliberately suppress evidence, witnesses or key facts. In fact the paucity of such evidence, in particular the failure of the defendant to show that design calculations had been carried out, ultimately undermined the defendant's case and led me to draw adverse inferences against it. Little or no prejudice was caused to the plaintiff by the defendant's conduct. While many of its defences were ultimately found to be inconsistent with the evidence and were therefore rejected, they were not so implausible that a technical assessment could be dispensed with; they had to be analysed and tested by expert evidence.

77 I concluded that there was nothing substantial in the matters alleged by the plaintiff to warrant a departure from the usual basis of costs and I therefore ordered that the defendant bear the plaintiff's costs of and incidental to the

litigation on the standard basis, to be taxed if not agreed.

Chan Seng Onn
Judge

Tan Chuan Thye SC, Avinash Pradhan, Alyssa Leong and Arthi Anbalagan (Rajah & Tann Singapore LLP) for the plaintiff;
Tan Chee Meng SC, Josephine Choo and Wilbur Lim (WongPartnership LLP) for the defendant.