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

[2022] SGHC 318

Suit No 1145 of 2020 (Summons No 5541 of 2020)

Between

(1) The Agency for Policy Coordination on State Property of Mongolia
(2) Erdenet Mining Corporation LLC
(3) Erdenes Oyu Tolgoi LLC

… *Plaintiffs*

And

(1) Batbold Sukhbaatar
(2) Cheong Choo Young
(3) Kim Hak Seon
(4) Cliveden Trading AG
(5) Eoin Barry Saadien
(6) Everest VC Pte Ltd
(7) Ponduver Pte Limited

… *Defendants*

JUDGMENT

[Civil Procedure — Mareva injunctions — Inquiry as to damages]

The Agency for Policy Coordination on State Property of Mongolia and others
v
Batbold Sukhbaatar and others

[2022] SGHC 318

General Division of the High Court — Suit No 1145 of 2020 (Summons No 5541 of 2020)
Philip Jeyaretnam J
7 November 2022, 14 December 2022

21 December 2022 Judgment reserved.

Philip Jeyaretnam J:

Introduction

1 When a freezing order is discharged and consideration is given to whether to enforce the undertaking as to damages and order an inquiry into damages, does the difference between the costs ordered upon discharge and the full costs incurred constitute relevant loss? This relates to the question whether there is an arguable case that the applicant for the inquiry has suffered loss, which is one of three questions for consideration; the other two being whether the injunction order was wrongly asked for and whether special circumstances exist to justify the refusal of an inquiry (see *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others and another matter* [2016] 2 SLR 737 at [35] and [36]).

Procedural history

2 This matter involved a claim of corruption against a former prime minister of Mongolia brought in the name of three agencies of the Mongolian government by the Metropolitan Prosecutor's Office of Mongolia ("MPOM"). MPOM initially instructed an international law firm King & Spalding International LLP ("K&S") to pursue proceedings in various jurisdictions, one of which was Singapore. K&S instructed a Singapore law firm, Rev Law LLC ("Rev Law").

3 By my decision in *The Agency for Policy Coordination on State Property of Mongolia and others v Batbold Sukhbaatar and others* [2021] SGHC 91, delivered on 16 April 2021, I discharged the freezing order that had been granted against the fifth and sixth defendants on 27 November 2020 (the "Freezing Order").[1] At [37] of that judgment, I invited submissions on whether there should be an inquiry into damages. A procedural history and an outline of the claims made may be found in that judgment (at [5]–[16]) as well as in an earlier judgment concerning party representation, namely *The Agency for Policy Coordination on State Property of Mongolia and others v Batbold Sukhbaatar and others* [2021] 5 SLR 556 (at [2]–[12]). For present purposes, it suffices to note that the plaintiffs had provided an undertaking on the following terms:[2]

> If the Court later finds that [the Freezing Order] has caused loss to the [defendants], and decides that the [defendants] should be compensated for that loss, the [plaintiffs] shall comply with any order the Court may make.

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1 HC/ORC 6507/2020.

2 Schedule 1 to HC/ORC 6507/2020, para 1; see also affidavit of Sarah Yasmin Walker dated 26 November 2020, para 148.

4 On 16 August 2021, I ordered that the question of an inquiry as to damages be reserved to the trial or earlier disposal of these proceedings.[3]

5 On 15 July 2022, I granted Rev Law's application for their discharge as solicitors for the plaintiffs.[4] The basis for this application was that K&S, and hence, Rev Law, had ceased to receive instructions from the prosecutors in Mongolia. A partner in K&S attested to the efforts made to obtain meaningful instructions,[5] and also suggested that the lack of meaningful instructions resulted from the first defendant's attempts to procure the dismissal of the court actions by means other than meeting the case against him on the merits, namely by engaging directly with persons employed within the plaintiffs or at the office of the prosecutors.[6]

6 As the plaintiffs remained unrepresented and took no further steps, the fifth and sixth defendants took out an application for the action against them to be dismissed. This was granted on 9 September 2022.[7] The case against them having been disposed of without trial, the fifth and sixth defendants renewed their application for an inquiry as to damages. The application came on for hearing before me on 7 November 2022.

7 Counsel for the fifth and sixth defendants confirmed that the loss relied upon was, as stated in their written submissions filed on 30 April 2021, limited

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3 Minute Sheet, 16 August 2021, HC/S 1145/2020 (HC/SUM 5541/2020), page 3.

4 Minute Sheet, 15 July 2022, HC/S 1145/2020 (HC/SUM 2460/2022), page 2.

5 Affidavit of Sarah Yasmin Walker dated 6 July 2022, paras 2 and 23–32.

6 Affidavit of Sarah Yasmin Walker dated 6 July 2022, paras 19–20 and 23–24.

7 Minute Sheet, 9 September 2022, HC/S 1145/2020 (HC/SUM 2151/2022); HC/ORC 4649/2022.

to their "full legal expenses incurred for the purposes of complying with and applying to discharge the [Freezing Order], **less** any award of costs (ordered on a party-and-party basis)" [emphasis in original].[8] At the same hearing when I reserved the question of an inquiry as to damages, I also assessed costs in respect of the fifth and sixth defendants' application to discharge the Freezing Order, awarding them $32,500 in costs and also $11,471.02 for disbursements.[9] The latter sum was what they had sought for disbursements, but for costs they had sought a higher figure of $65,000.[10]

8 The fifth and sixth defendants have suggested that their full legal expenses incurred in relation to complying with and applying to discharge the Freezing Order are in the region of $230,000.[11] At the hearing before me they accepted that all of the items for which they would claim damages in any inquiry ordered are items that they claimed as costs and were thus included in my assessment of costs described in the preceding paragraph.[12]

Issue

9 An inquiry as to damages should only be ordered if there is an arguable case of loss. Otherwise, the inquiry would be a pointless exercise. Given that I discharged the Freezing Order in the first place because of the absence of a real risk of dissipation and the proceedings have subsequently been dismissed for want of prosecution, I would enforce the undertaking and order an inquiry if

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8 Minute Sheet, 7 November 2022, HC/S 1145/2020, page 2; Fifth and sixth defendants' Submissions on Costs dated 30 April 2021 ("DSOC"), para 18.

9 Minute Sheet, 16 August 2021, HC/S 1145/2020 (HC/SUM 5541/2020), page 3.

10 DSOC, para 25.

11 DSOC, para 9.

12 Minute Sheet, 7 November 2022, HC/S 1145/2020, page 2.

there is an arguable case of loss. Accordingly, the issue is whether the difference between the full legal expenses incurred by the fifth and sixth defendants and those assessed by the court as party-and-party costs is recoverable as damages pursuant to an undertaking as to damages.

10 I will consider this issue in two parts:

(a) the general rule for non-recoverability of costs as damages and its rationale; and

(b) whether there is an exception where an undertaking as to damages is being enforced.

The general rule

11 The general rule has been expressed by the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 ("*Maryani Sadeli*") at [20] to [21], as follows:

> 20 The *general* rule on the recovery of costs of previous legal proceedings as damages in subsequent proceedings is clear: such costs which were unrecovered previously *cannot* be recovered in a subsequent claim for damages, at least in so far as it involves a *same-party* case.
>
> 21 Whatever costs that a party seeks to recover should be dealt with in those same proceedings for which the costs were incurred, and the incidence of unrecovered costs cannot thereafter be the subject of subsequent legal action. …
>
> [emphasis in original]

12 This case was not initially cited to me, and I requested counsel for the fifth and sixth defendants to address me on it.

13 The Court of Appeal in *Maryani Sadeli* encapsulated its rationale at [27], following a discussion of Devlin LJ's judgment in the English Court of Appeal decision of *Berry v British Transport Commission* [1962] 1 QB 306, as follows:

> … [A]part from bringing down the costs of litigation, the general rule is also *necessary* in order to promote the objective of our legal regime on costs to *enhance access to justice*. …
>
> [emphasis in original]

14 The Court of Appeal further noted two additional policies, namely "*the need to achieve finality in litigation as well as the need to suppress parasitic litigation*" [emphasis in original] (*Maryani Sadeli* at [32]; see also *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 ("*Then Khek Koon*") at [179] and [183]).

15 Finally, the Court of Appeal described unrecovered legal costs as part and parcel of the Singapore legal system (*Maryani Sadeli* at [34]):

> Ultimately, *our* legal regime on costs recovery is calibrated in a manner such that full recovery of legal costs by the successful party is the exception rather than the norm. What we need to bear in mind is that this state of affairs is not something which exists to prejudice the winning party in litigation, but is a manifestation of the law's policy of *enhancing access to justice for all*. Put another way, unrecovered legal costs is something which is part and parcel of resolving disputes by seeking recourse to *our* legal system and all parties who come before our courts must accept this to be a *necessary incidence* of using the litigation process. It is in this light that the general rule must be understood.
>
> [emphasis in original]

16 More recently, the Court of Appeal in *Senda International Capital Ltd v Kiri Industries Ltd* [2022] SGCA(I) 10 ("*Senda*") noted at [45] that "the entitlement of a party to costs recovery is not a s*ubstantive right*; it is an incident of the legal system's scheme for costs recovery, which in turn is driven by social

policy" [emphasis in original]. The Court of Appeal at [51] and [52] distinguished the policy considerations underpinning the separate costs regime for the Singapore International Commercial Court from those underpinning the costs regime in the High Court. In relation to the latter, the Court of Appeal cautioned at [46] that awarding the full extent of costs incurred by the successful party may diminish access to justice by deterring the pursuit of legitimate claims by litigants for fear of unaffordable or otherwise prohibitive adverse costs. Moreover, a policy based on full indemnification may mean that the costs awarded to a successful party would depend on the ability of that party to expend resources on the litigation, which will advantage the better-resourced litigant and promote inequality of arms.

17 Considerations of access to justice therefore require that costs awarded under O 59 of the Rules of Court (2014 Rev Ed) ("ROC 2014") are assessed at a level that would enable a litigant with reasonable merits to pursue justice. This involves "the application of an *objective* standard to determine the level of recoverable costs in each case, shaped by the normative question of what *ought* to be the amount of costs a successful party can recover for the particular work done in the context of the dispute in question, irrespective of the level of costs the successful party may have actually incurred in the legal proceedings" [emphasis in original] (*Senda* at [47]). Specifically, the court relies on costs precedents, as well as the guidelines to be found in Appendix G of the Supreme Court Practice Directions 2013.[13] In other words, costs must be tailored to the attributes of each case and what is generally accepted to be recoverable in

[13] Supreme Court Practice Directions 2013, Appendix G: Guidelines for Party-and-Party costs awards in the Supreme Court of Singapore.

similar cases, as opposed to subjective factors such as how much individual litigants might have been willing to spend (*Senda* at [48]–[50]).

18 I pause to consider a possible point of principle that might be thought to arise from the change in the English Rules of the Supreme Court in 1986 (the "RSC"), which was adopted in Singapore. Previously, costs assessed on a party-and-party basis were of costs "necessarily incurred". However, the former O 62 of the RSC was recast to enable the successful party in litigation to recover costs either on: (a) the standard basis, which allows costs reasonably incurred and reasonable in amount; or (b) the indemnity basis, which allows costs except where unreasonable in amount or unreasonably incurred, with costs on a standard basis being the norm in civil litigation (see James Edelman, *McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2021) at para 21-004). Order 59 rr 27(2) and 27(3) of the ROC 2014 were taken virtually verbatim from the recast O 62 rr 12(1) and 12(2) of the RSC (see *Then Khek Koon* at [215]). A key difference between costs on the standard basis and costs on the indemnity basis is that in the former, any doubts are resolved in favour of the receiving party whereas in the latter, any doubts are resolved in favour of the paying party (see O 59 rr 27(2) and 27(3) of the ROC 2014).

19 Thus, if an amount of costs is fixed on the basis that that is the amount reasonably incurred, it could be argued that any difference between that amount and the full amount incurred is not reasonable, and so on ordinary principles of assessment of damages should not be recoverable as damages either. This is superficially attractive, until one recalls that the yardstick for reasonableness for the assessment of costs by the court is not the market alone, but takes into account proportionality as well as considerations of access to justice that I have earlier outlined at [13]–[17]. The balance struck is reflected in Appendix G. As

the Court of Appeal observed in *Senda* at [49] in relation to the assessment of costs by reference to Appendix G:

> … [Appendix G] infers a reasonable amount of fees that may be charged for various types of work, which are then expressed in ranges to account for the reality that there will be variances from one case to the next in terms of complexity (see Appendix G at para 2). The effect of Appendix G means that, even catering for the specificities of individual cases, the level of recoverable costs will generally remain within the ranges set out therein, which represent the level of fees which members of the public and the legal profession would generally accept as reasonable. It is consistent with access to justice considerations that costs are assessed by reference to these generally accepted levels and, again, are not dependent on subjective factors such as how much the individual litigant might have been willing to spend.

The assessment of damages in relation to costs incurred by a party, if available in principle as a substantive right, would, by contrast, consider reasonableness principally in terms of whether the costs actually incurred were reasonable in terms of the market for advocates of the appropriate expertise and experience in relation to the matter concerned, including the matter's value, complexity and importance.

20 This does not mean that full legal costs are not potentially recoverable as damages in claims against third parties. For example, A may claim against B for damages arising from a wrong committed by B that caused A to incur legal costs in commencing proceedings against or defending against proceedings brought by C, or that caused the waste of legal costs incurred in such a proceeding. Such loss may occur, for instance, where a legal professional has been negligent and the client has had to commence a legal proceeding that he would not have had to pursue but for such negligence, perhaps in an effort to mitigate his loss.

Possible exception where there has been an undertaking as to damages

21 I turn then to the question of whether there is an exception to the general rule – that the shortfall between costs assessed and costs incurred is not recoverable as damages against the same party – when an undertaking as to damages has been given by a party as a condition for the grant of an injunction.

22 I would first dispose of the point made by counsel for the fifth and sixth defendants during the hearing before me on 7 November 2022 that the case of *Maryani Sadeli* may be distinguished on the basis that the general rule identified in that case applies to claims for damages in subsequent proceedings whereas the undertaking as to damages in the present case was given and sought to be enforced in the same proceedings.[14] It is true that the *dicta* in *Maryani Sadeli* (see [11] above) relate to claims for damages made in subsequent proceedings. However, that is simply a consequence of how such a claim might ordinarily be mounted. When a party to a proceeding seeks costs against another party to the same proceeding, he does so pursuant to the court's jurisdiction to order costs and not pursuant to a substantive right to damages. Most successful parties, whether plaintiff or defendant, are likely to find that their outlay in costs exceeds the quantum they are awarded pursuant to the court's powers to award costs.

23 The fifth and sixth defendants contend that the undertaking makes all the difference. But it is hard to see why this should be so as a matter of principle. The undertaking operates as if it were a contract between the applicant for an injunction and the respondent to it that the applicant would not prevent the respondent from doing that which the respondent was restrained from doing by the terms of the injunction, a principle most recently restated in the Privy

[14] Minute Sheet, 7 November 2022, HC/S 1145/2020, page 3.

Council decision on appeal from the Cayman Islands Court of Appeal in *Ennismore Fund Management Ltd v Fenris Consulting Ltd* [2022] UKPC 27 ("*Ennismore*") at [54].

24 On 9 December 2022, I invited[15] the plaintiffs and the fifth and sixth defendants to address me on the case of *Ennismore*, given that they had not cited it before me. In further submissions filed on 14 December 2022, the fifth and sixth defendants submit that under the approach in *Ennismore*, they are entitled to seek and be awarded any damages sustained by reason of the Freezing Order, which includes "the legal costs and expenses for and consequential to the application to set aside the [Freezing Order] (less the sums paid by the [plaintiffs] as party-and-party costs)".[16] I disagree.

25 In my view, an undertaking as to damages concerns *loss caused by the issuing of the injunction*. The question is what loss the respondent has suffered as a result of not being able to do what he would otherwise have been free to do. A typical example in the context of a freezing order would be not being able to sell an asset while the injunction is in force. This may result in loss where the market is falling. There could also be disruptions to the respondent's business or an increase in his borrowing costs. The question is whether these losses flow from the existence of the injunction which stopped the respondent from doing what the applicant, by way of the undertaking, contracted not to prevent the respondent from doing.

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15 Letter from the Court dated 9 December 2022 at para 2(b).

16 5th and 6th Defendants' Further Submissions on Whether an Inquiry of Damages Should be Conducted dated 14 December 2022 ("DFS") at paras 7–9.

26 By contrast, an application to set aside the injunction is the choice of the respondent. In a sense, it can be described as a legal proceeding brought in respect of the alleged breach of the notional contract, not dissimilar from legal proceedings brought in respect of contractual and other claims. As with any other legal proceeding, the respondent is entitled to seek the costs of doing so pursuant to the court's jurisdiction to order costs. The expenses incurred by the respondent from applying to set aside the injunction are not damages flowing from the existence of the injunction. It is one part of the respondent's overall costs of his legal battle in the matter as whole.

27 Seen in this light, the recovery of the respondent's costs of applying to set aside an injunction must be subject to the same policy considerations that govern the recovery of that respondent's costs of successfully defending the action, namely, the need to enhance access to justice, achieve finality in litigation and suppress parasitic litigation (see [13]–[17] above). As the Court of Appeal stated in the passage cited at [15] above: "unrecovered legal costs is something which is part and parcel of resolving disputes by seeking recourse to *our* legal system and all parties who come before our courts must accept this to be a *necessary incidence* of using the litigation process" [emphasis in original].

28 Given that the decision in *Senda* post-dated the hearing I also invited the plaintiffs and the fifth and sixth defendants to make further submissions on the policy considerations underlying the making of an award of costs in the High Court identified in that case (see [16]–[17] above).[17] The fifth and sixth defendants submit that the Court of Appeal in *Senda* did not state as a foregone conclusion that a successful litigant could never recover its full legal costs. They

[17] Letter from the Court dated 9 December 2022 at para 2(a).

argue that there are exceptions to the general position that the court should not award the full extent of costs incurred by the successful party (*eg*, where there is a contractual agreement that a litigant may recover costs on an indemnity basis), and that the enforcement of an undertaking as to damages should be recognised as one such exception.[18] The fifth and sixth defendants further contend that the enforcement of an undertaking as to damages lies outside of the High Court's costs regime and thus does not undermine the policy considerations that the costs regime aims to protect.[19]

29 However, as explained above at [26], the fifth and sixth defendants' costs of applying to set aside the Freezing Order are part of their overall costs in the matter as a whole, the recovery of which was first sought pursuant to the court's jurisdiction to order costs. In this regard, the fifth and sixth defendants have not explained why the recovery of such costs should not be subject to the policy considerations identified in *Senda* nor how allowing a parallel avenue of recovery by recourse to the undertaking as to damages would not undermine those policy considerations. Moreover, the example provided by the fifth and sixth defendants of awarding the full extent of costs incurred by a party pursuant to a term in the contract between parties is completely different from the case at hand. Agreeing to pay full costs in the event of an action brought upon a contract is different from simply agreeing to pay damages for breach of a notional contract that the applicant would not prevent the respondent from doing that which the respondent was restrained from doing by the terms of the injunction; giving an undertaking in respect of the latter does not entail any agreement to the former.

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18 DFS at paras 11–12.

19 DFS at para 13.

30 Finally, the absence of authority on this point itself reflects the practice that costs incurred in applying to discharge an injunction are sought by recourse to the court's jurisdiction to order costs and not as damages pursuant to an undertaking by the applicant. It is not uncommon for a respondent to seek from a foreign applicant both a fortification of the undertaking as to damages and security for costs. While costs would not be a factor in the application for a fortification of the undertaking, regard would be had to the likely costs that might eventually be ordered by the court pursuant to its costs jurisdiction in the application for security for costs. This demonstrates that the distinction between damages and costs is workable, accepted and effective in the context of interlocutory injunctions. That distinction should not be eroded by allowing the recovery of the fifth and sixth defendants' costs as damages pursuant to the plaintiffs' undertaking.

Conclusion

31 I therefore decline to order an inquiry as to damages, and make no order as to costs of the fifth and sixth defendants' application for such an inquiry.

Philip Jeyaretnam
Judge of the High Court

Plaintiffs absent and unrepresented;
First defendant absent;
Yoong Joon Wei, Aaron (Yang Junwei) (Rajah & Tann Singapore LLP) for the second, third and seventh defendants (watching brief);
Fourth defendant absent and unrepresented;
Lum Kwong Hoe Melvin and Joel Raj Moosa (Quahe Woo & Palmer LLC) for the fifth and sixth defendants.
