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

[2022] SGHC 77

Suit No 509 of 2017

Between

COMFORT MANAGEMENT PTE LTD

… Plaintiff

And

(1) OGSP ENGINEERING PTE LTD
(2) PINTU KUMAR SARKER

… Defendants

And

OGSP ENGINEERING PTE LTD

… Plaintiff in Counterclaim

And

COMFORT MANAGEMENT PTE LTD

… Defendant in Counterclaim

JUDGMENT

[Civil Procedure — Costs — Principles — Depriving a party of costs]
[Civil Procedure — Costs — Principles — Ordering a successful party to pay costs]

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Comfort Management Pte Ltd
v
OGSP Engineering Pte Ltd and another

[2022] SGHC 77

General Division of the High Court — Suit No 509 of 2017
Vinodh Coomaraswamy J
15 September 2020, 7 March 2022

6 April 2022 Judgment reserved.

Vinodh Coomaraswamy J:

1 I gave my judgment on the merits of this action in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd and another* [2020] SGHC 165 ("*Comfort Management*"). This judgment deals with consequential issues arising from *Comfort Management*. Those issues are principally the costs of the action.

Introduction

2 The subject matter of the action was the air conditioning ducting system and mechanical ventilation works ("the Works") for a project in Jurong. Lead Management Engineering & Construction Pte Ltd ("Lead") subcontracted the Works to the plaintiff under what I shall call "the Lead Contract". The plaintiff in turn subcontracted the Works to the first defendant under what I shall call "the Comfort Contract". The Comfort Contract was a lump-sum contract at a

price of $1.25m. In all other respects, the Comfort Contract was back-to-back with the Lead Contract.

3 The second defendant was the plaintiff's project manager for the Works. The plaintiff engaged the second defendant to supervise the Works on site.

4 The first defendant commenced the Works in October 2013. In October 2014, before completing the Works, the first defendant demobilised its team and withdrew from the site. Various disputes arose between the parties. Those disputes led to the claims and counterclaims in this action.

5 Following an 8½-day trial, I held that first defendant owed the plaintiff a net sum of $363,030.51 (*Comfort Management* at [195]), subject only to any adjustment necessary to account for the incidence of goods and services tax ("GST").

6 I dismissed the plaintiff's claim against the second defendant in its entirety.

Consequential issues

7 The parties now address me on the following consequential issues:

(a) the costs of the action as between the plaintiff and the first defendant;

(b) the costs of the action as between the plaintiff and the second defendant; and

(c) The incidence of GST on the sum of $363,030.51 which the first defendant owes the plaintiff.

8 Having considered the parties' written and oral submissions, I hold as follows:

(a) The plaintiff is entitled to recover its costs of this action from the first defendant. However, three of the plaintiff's disbursements were not reasonable amounts for disbursements reasonably incurred. Further, given that the plaintiff failed on several of its claims and defences to the first defendant's counterclaims, I have exercised my discretion to deprive the plaintiff of 50% of the costs of this action.

(b) The second defendant is entitled to recover his costs of this action from the plaintiff. There is no basis to qualify the second defendant's entitlement to recover his costs from the plaintiff or to hold the first defendant directly or indirectly liable to the plaintiff for any part of those costs.

(c) The first defendant is obliged to pay GST at 7% on the net sum of $363,030.51 which it owes to the plaintiff.

9 I now set out the grounds for my decision. I begin with the issue of costs as between the plaintiff and the first defendant.

Costs as between the plaintiff and the first defendant

The claims and issues in this action

10 In this action, the plaintiff sought to recover a total of just over $1.5m from the first defendant on four claims: (i) a claim that the first defendant had failed to complete the Works; (ii) a claim that the first defendant had been overpaid for the proportion of the Works it had actually completed; (iii) a claim

that the first defendant was liable to the plaintiff for liquidated damages for delay; and (iv) a claim that the first defendant was liable to the plaintiff for defects in the Works.

11 The first defendant sought to recover a total of just over $780,000 from the plaintiff on two counterclaims: (i) a counterclaim for the costs of certain materials which the first defendant alleged it had ordered on the plaintiff's instructions; and (ii) a counterclaim in contract or on a *quantum meruit* for certain works which the first defendant had completed under two variation orders ("VO1" and "VO2").

12 The four claims and two counterclaims required me to decide six issues.

13 First, the percentage of the Works which the first defendant had completed before it withdrew from the site. I shall refer to this as "the Works Issue". The plaintiff's case was that the first defendant had completed only 65% of the Works before it withdrew. The first defendant's case was that it had completed all or substantially all of the Works before it withdrew.[1] I found that the first defendant had completed 95.29% of the Works before it withdrew (*Comfort Management* at [42]).

14 Second, taking into account the outcome of the Works Issue, whether the plaintiff had overpaid the first defendant by the sum of $417,320.06. I shall refer to this as "the Overpayment Issue". The Overpayment Issue depended on whether the plaintiff's progress payments to the first defendant (totalling $1,185,686.73) and its payment to the first defendant in compliance with an adjudication determination ("the AD") ($832,020.78 net of GST) exceeded the

[1] D1CS at paragraph 56.

value of the Works completed as found on the Works Issue. I dismissed the plaintiff's claim that it had overpaid the first defendant. I found instead that the plaintiff owed the first defendant a further $121,138.27 for the Works (*Comfort Management* at [55]).

15 Third, whether the first defendant was liable to pay liquidated damages of $81,000 to the plaintiff for 162 days of delay. I shall refer to this as the "Delay Issue". I found that the first defendant was indeed liable to pay liquidated damages to the plaintiff (*Comfort Management* at [76]).

16 Fourth, whether the plaintiff was entitled to recover from the first defendant back charges totalling $86,606.41 which Lead imposed on the plaintiff for alleged defects in the Works. I shall refer to this as "the Defects Issue". I dismissed the plaintiff's claim on this issue (*Comfort Management* at [88]).

17 Fifth, on the first defendant's counterclaim, whether the first defendant had ordered materials costing $30,178.80 on the plaintiff's instructions and was therefore entitled to recover the cost of that material from the plaintiff. I shall refer to this as "the Materials Issue". I dismissed the first defendant's counterclaim on the Materials Issue (*Comfort Management* at [168]).

18 Sixth, whether the first defendant was entitled to be paid for the work done under VO1 and VO2 and, if so, in what amount. I shall refer to this as "the Variation Orders Issue". On VO1, the plaintiff had paid the first defendant $115,700 out of the $130,000 which the first defendant claimed. I found that the first defendant was entitled to recover the remaining $14,300 (*Comfort Management* at [94]). On VO2, the first defendant claimed $621,828.73. I found that the first defendant was not entitled to recover that amount in contract but

was entitled to recover two-thirds of that amount, or $414,552, on a *quantum meruit* (*Comfort Management* at [153]).

19 As a result of my findings, and subject only to the incidence of GST, I found that the first defendant owed the plaintiff the net sum of $363,030.51 (*Comfort Management* at [195]). That net sum is computed as follows:

The defendant's entitlement for work done under the Comfort Contract (95.29% of $1.25m)	$1,191,125.00
Value of VO1	$130,000.00
Quantum meruit on VO2	$414,552.00
Less liquidated damages payable by the first defendant	($81,000.00)
Less the plaintiff's progress payments to the first defendant up to October 2014	($1,185,686.73)
Less the plaintiff's payment to the first defendant pursuant to the AD (net of GST)	($832,020.78)
Less back charges payable by the first defendant to the plaintiff for defects	Nil
Balance	**($363,030.51)**

The parties' submissions on liability for costs

20 Both the plaintiff and the first defendant claim to be the victor in this action. Each therefore submits that the other should be ordered to pay the costs of the action.

21 The plaintiff's submission proceeds as follows. As a result of this action, the first defendant has been adjudged liable to pay a substantial sum to the

plaintiff. The plaintiff could not have secured payment of that or any other sum from the first defendant if it had not commenced this action. The plaintiff is therefore the victor in this action and should recover its costs from the first defendant.

22 The first defendant's submission proceeds as follows. The plaintiff recovered only 26% of its total claim of just over $1.5m.[2] The first defendant succeeded on the more substantial Works Issue, Overpayment Issue and Defects Issue. On the Variation Orders Issue, the first defendant succeeded entirely on VO1 and substantially on VO2.[3] The only issues on which the first defendant did not succeed were the Delay Issue and the Materials Issue. These two issues were relatively minor issues both in terms of quantum and in terms of costs. The first defendant is therefore the victor in this action and should recover its cots from the plaintiff.

23 The first question, therefore, is the proper approach to take in awarding the costs of an action such as this, where there are multiple claims and counterclaims with each party winning some and losing others. Answering that question requires examining the source and scope of the court's power to award costs.

The first defendant must pay costs to the plaintiff

The general rule is that costs follow the event

24 The source of the court's power to award costs is s 18(2) read with paragraph 13 of the First Schedule to the Supreme Court of Judicature Act 1969

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2 D1CS at paragraph 43 and 60.

3 D1CS at paragraph 62.

(2020 Rev Ed). The court has a very wide discretion in exercising this power. Thus, O 59 r 2(2) of the Rules of Court (2014 Rev Ed) ("the Rules") provides that, subject only to express provision to the contrary, the court has "full power to determine by whom and to what extent the costs are to be paid".

25 The general rule is that, if the court is minded to make any order for costs at all, the court's discretion ought to be exercised to order costs to follow the event. As O 59 r 3(2) of the Rules provides:

> **When costs to follow the event (O. 59, r. 3)**
>
> …
>
> (2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

26 An order for costs to follow the event simply means that the successful party in the litigation is entitled to recover its costs of the litigation from the unsuccessful party. Gloster J set out a useful and condensed summary of the applicable principles in *HLB Kidsons (A Firm) v Lloyds Underwriters subscribing to Lloyds Policy No 621/PKID00101 & Others* [2007] EWHC 2699 (Comm) ("*Kidsons*") at [10]:

> … The court's discretion as to costs is a wide one. The aim always is to "make an order that reflects the overall justice of the case" (*Travellers' Casualty v Sun Life* [2006] EWHC 2885 (Comm) at paragraph 11 per Clarke J. [T]he general rule remains that costs should follow the event, i.e. that "the unsuccessful party will be ordered to pay the costs of the successful party": CPR 44.3(2). In *Kastor Navigation v Axa Global Risks* [2004] 2 Lloyd's Rep 119, the Court of Appeal affirmed the general rule and noted that the question of who is the "successful party" for the purposes of the general rule must be determined by reference to the litigation as a whole; see

> paragraph 143, per Rix LJ. The court may, of course, depart from the general rule, but it remains appropriate to give "real weight" to the overall success of the winning party: *Scholes Windows v Magnet (No 2)* [2000] ECDR 266 at 268. As Longmore LJ said in *Barnes v Time Talk* [2003] BLR 331 at paragraph 28, it is important to identify at the outset who is the "successful party". Only then is the court likely to approach costs from the right perspective. The question of who is the successful party "is a matter for the exercise of common sense": *BCCI v Ali (No 4)* 149 NLJ 1222, per Lightman J. Success, for the purposes of the CPR, is "not a technical term but a result in real life" (*BCCI v Ali (No 4)* (*supra*)). The matter must be looked at "in a realistic … and … commercially sensible way": *Fulham Leisure Holdings v Nicholson Graham & Jones* [2006] EWHC 2428 (Ch) at paragraph 3 per Mann J.

The starting point is to ascertain the event

27 The starting point in exercising the discretion to award costs is ascertaining the event: *Straker v Tudor Rose (a firm)* [2007] EWCA Civ 368 at [11] per Waller LJ. Adopting this as the starting point serves two purposes. First, it identifies the successful party and therefore the party who is *prima facie* entitled under the general rule to receive his costs. Second, it identifies the unsuccessful party and therefore the party who bears the burden of establishing whether and to what extent the court should depart from the general rule.

28 The event is the outcome of the litigation overall. Ascertaining in whose favour the event went in litigation therefore requires asking which party in substance and reality won the litigation, looking at its outcome in a realistic and commercially sensible way (*Kidsons* at [10], cited at [26] above). As Sir Thomas Bingham MR (as he then was) put it in *Roache v News Group Newspapers Limited and others* [1998] EMLR 161:

> The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a

> finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?

29 In commercial litigation, where the dispute is ultimately about money, the event is typically in favour of the party whom the court has found is entitled to receive money (*per* Ward LJ in *Burchell v Bullard* [2005] EWCA Civ 358 ("*Burchell*") at [33]; *per* Longmore LJ in *AL Barnes Limited v Time Talk (UK) Limited* [2003] EWCA Civ 402 ("*Barnes*") at [28]). That is especially true where the litigation comprises both claims and counterclaims and each party claims a balance in his favour (*per* Jackson J (as he then was) in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd and another* [2008] EWHC 2280 (TCC) ("*Multiplex*") at [72(i)]).

30 The decision of the English Court of Appeal in *Barnes* is particularly instructive. In that case, a contractor undertook and completed renovation works for an employer with no contract in place. The contractor sued the employer to recover a *quantum meruit* for the works. The employer brought a counterclaim alleging that the contractor's employee had been dishonest in procuring the engagement and in performing the works.

31 The trial judge found that the contractor was entitled to recover £216,000 from the employer for the works on a *quantum meruit*. But he accepted that the contractor's employee had indeed been dishonest. He therefore held that the employer was entitled to recover £87,000 from the contractor on the counterclaim. The employer therefore owed the contractor a net sum of £129,000 (*Barnes* at [24]).

32 On the costs of the action, the trial judge started by holding that each party should bear its own costs of and incidental to the expert evidence adduced

at trial. The expert evidence had been necessary purely to deal with the *quantum meruit* claim. The trial judge's reasoning was that each party was equally responsible for the works having been undertaken and completed with no contract in place and therefore that each party was equally responsible for the difficulties of proving the nature and the value of the works which had made the expert evidence necessary (*Barnes* at [26]). The trial judge then found that the bulk of the time at trial was taken up with proving whether the contractor's employee had been dishonest. Because the employer had won on that issue, the trial judge found that the employer should be seen as the successful party in the litigation. He accordingly ordered the contractor to pay half of the employer's costs (*Barnes* at [27]).

33 The English Court of Appeal set aside the trial judge's costs order. It ordered instead that the employer pay 25% of the contractor's costs (*Barnes* at [30]). Longmore LJ held that the contractor was the successful party because the result of the litigation was that the contractor had been found entitled to receive a substantial sum of money from the employer. The trial judge had therefore gone wrong in principle in two ways: (i) by failing to find that the event was in the contractor's favour; and (ii) by segregating the costs of the expert evidence as costs which need not follow the event. As Longmore LJ put it at [28]–[30]:

> 28. It does seem to me that the judge has, with the greatest respect, fallen into an error of principle. In what may generally be called commercial litigation…the disputes are ultimately about money. *In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure.* It is not irrelevant that it was [the employer] who felt the need to appeal the judge's judgment. It is not normally right to segregate a large element of the costs and thereafter to decide who the successful party is. It needs to be decided at the outset.

> 29. I do not, moreover, consider that the judge was right to segregate the costs associated with instructing experts and thus most of the costs of proving the claim…
>
> …
>
> 30. For these two reasons the exercise of discretion by the judge was vitiated by an error of principle. If he had asked himself who was the successful party, before segregation of the effective costs of proving the *quantum meruit* claim, he would in my judgment have had to answer that it was the [contractor] who recovered more than the [employer] had ever offered and thus it must be the [contractor] who [was] the successful party. The question would then be what proportion, if any, of their costs should they recover. That question is now for this court. The judge was, of course, correct to be influenced by the fact that most of the time spent in court was spent on an issue on which the [contractor] failed and that that issue was whether one of the [contractor's] employees had acted dishonestly, albeit at "the least serious end of the spectrum". Bearing that matter in mind, I would hold that the [contractor's] success should be reflected by the recovery of a small proportion of their costs. I would fix that proportion at 25% and would accordingly allow the cross-appeal to that extent.
>
> [emphasis added]

34 Implicit in Longmore LJ's criticism of the trial judge's approach is the fundamental importance of identifying the successful party at the very outset of exercising the discretion to award costs. Doing so makes it more likely that the discretion will be approached from the right perspective (see *Kidsons* at [10], cited at [26] above). Further, once the successful party has been identified, the court will be able to attach real weight to that party's success throughout the exercise of the discretion to award costs, as the court is obliged to do (*Re Elgindata (No. 2)* [1992] 1 WLR 1207 ("*Elgindata*") at 1213H per Nourse LJ).

35 Thus, if the trial judge in *Barnes* had attempted to identify the successful party at the outset of his exercise in awarding costs, he would have found that it was the contractor. It would then have followed that the contractor was *prima facie* entitled under the general rule to receive its costs from the employer. And

that it was for the employer to persuade the trial judge that he should depart from the general rule and to what extent he should do so.

The event is in the plaintiff's favour

36 I therefore start by identifying the successful party in this action. The critical feature of this action is that, after resolving and setting off the claims against the counterclaims, I found in *Comfort Management* that the plaintiff was entitled to receive a substantial sum from the first defendant. I therefore find that the plaintiff is the successful party in this action.

37 I arrive at that finding even though I accept all of the following to be correct. The plaintiff recovered only 26% out of its $1.5m claim. The plaintiff secured an unqualified success on only two of the six issues: the Delay Issue and the Materials Issue. Those two issues were minor both in terms of quantum and costs. The plaintiff secured only partial success on another two out of the six issues: the Works Issue and the Variation Orders Issue. Even then, my finding on the Works Issue and the Variation Orders Issue were much closer to the first defendant's position than to the plaintiff's. And the plaintiff failed outright on the remaining two issues: the Overpayment Issue and the Defects Issue.

38 But, in my view, all of that is outweighed by the fact that the result of this litigation is that the first defendant must pay a substantial sum to the plaintiff. The plaintiff could not have recovered that or any other sum if it had not commenced action against the first defendant and succeeded. It is for that reason that I find that the plaintiff is the successful party in this litigation despite the entirely valid points which the first defendant advances about the qualified nature of the plaintiff's success.

39 The event in this action is therefore in the plaintiff's favour. Under the general rule, the plaintiff is *prima facie* entitled to recover the costs of this action from the first defendant. The question which follows is whether I should exercise the discretion to depart from the general rule on the facts of this case. As I have mentioned, I have decided to exercise my discretion to deprive the plaintiff of 50% of its costs. I now explain why.

Discretion to depart from the general rule

40 In the remainder of this judgment, I consider only the court's discretion to depart from the general rule on the grounds that a successful party has failed on certain claims or issues which he raised in the litigation. I therefore do not consider the court's discretion under O 59 r 7 of the Rules to order a successful party to pay all or part of the unsuccessful party's costs arising from the former's misconduct or neglect or from his unreasonable or improper act or omission. There is no suggestion that there is any basis in the facts of this case on which to exercise the discretion under O 59 r 7.

41 When a court departs from the general rule because a successful party has failed on certain claims or issues, the court can make two broad types of costs orders. The first type deprives the successful party of the right to recover all or part of his costs of the action from the unsuccessful party. I shall call this a "Type I order". The second type requires the successful party to pay all or part of the unsuccessful party's costs. I shall call this a "Type II order".

Discretion to be exercised judicially

42 Even though the court's discretion to award costs is wide (O 59 r 2(2) of the Rules) and even though its discretion to depart from the general rule (O 59

r 3(2)) and to make a Type I order (O 59 r 6A) or a Type II order (O 59 r 6A and O 59 r 7) is equally wide, that discretion must nevertheless be exercised judicially. This means simply that the discretion must be exercised on fixed principles, adhering to reason and justice and not to private opinion or whim or even benevolence or sympathy, so as to produce results which are legal and regular rather than arbitrary, vague or fanciful: *Sharp v Wakefield* [1891] AC 173 at 179. The general rule coupled with a judicial discretion not to follow it gives every party a reasonable expectation that, if he succeeds, he will recover his costs from the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [134].

43 Parties will act on this reasonable expectation *ex ante* when deciding to litigate, whether to continue to litigate, how much of their resources to commit to the litigation and to which claims and issues in the litigation to commit those resources. Most importantly, parties will rely on this expectation when assessing whether to make or to accept offers of settlement under O 22A of the Rules or *Calderbank* offers at common law (see *Calderbank v Calderbank* [1976] Fam 93; *Cutts v Head and another* [1984] 2 WLR 349).

44 The court should therefore be slow to defeat this reasonable expectation *ex post* by declining to follow the general rule in a manner which is not stable and predictable. Furthermore, departing too far and too often from the general rule creates uncertainty and gives parties an incentive to engage in unproductive and undesirable satellite litigation over costs alone. Jackson LJ warned against this danger in the decision of the English Court of Appeal in *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 ("*Fox*") at [62]:

> There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in [the English equivalent of O 59

> r 3(2)] too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in a (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example.

The discretion at common law

45 In *Elgindata* at 1214A, the English Court of Appeal formulated five principles to regulate at common law the judicial discretion to depart from the general rule by making a Type I or a Type II order:

(a) first, costs are in the discretion of the court;

(b) second, the general rule is that costs should follow the event except when it appears to the court that in the circumstances of the case some other order should be made;

(c) third, the general rule does not cease to apply simply because the successful party had raised issues or made allegations at trial that failed; but the successful party could be deprived of all or part of his costs where he had caused a significant increase in the length of the proceedings;

(d) fourth, where the successful party raised issues or made allegations improperly or unreasonably, the court could not only deprive him of his costs (a Type I order) but could also order him to pay all or part of the unsuccessful party's costs (a Type II order); and

(e) fifth, the fourth principle implied that a successful party who neither improperly nor unreasonably raised issues or made allegations

which failed ought not to be ordered to pay any part of the unsuccessful party's costs.

46 The *Elgindata* principles draw a clear distinction between a Type I order and a Type II order. More importantly, they set out a fundamentally stricter justification for a Type II order than for a Type I order. The third *Elgindata* principle stipulates that a Type I order is not justified unless the successful party raised issues or made allegations which failed *and* which caused a significant increase in the length of the proceedings. The fourth *Elgindata* principle stipulates that a Type II order is not justified unless the successful party raised issues or made allegations *improperly or unreasonably*, with no reference to any increase in the length of the proceedings. The fifth *Elgindata* principle stipulates that a successful party who has failed on certain issues or allegations but who did not raise them improperly or unreasonably should not ordinarily be the subject of a Type II order. The worst that can happen to that party is a Type I order. But that in turn requires, under the third *Elgindata* principle, that the issues or allegations on which the successful party failed caused a significant increase in the length of the proceedings.

47 The Court of Appeal in *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 ("*Tullio*") endorsed the *Elgindata* principles (at [24]). These principles therefore bind me.

The discretion under the Rules

48 In December 2001, seven years after *Tullio*, the Rules were amended to include a new O 59 r 6A:

> **Costs due to unnecessary claims or issues (O. 59, r. 6A)**
>
> 6A. In addition to and not in derogation of any other provision in this Order, where a party has failed to establish any claim or issue which he has raised in any proceedings, and has thereby unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings, the Court may order that the costs of that party shall not be allowed in whole or in part, or that any costs occasioned by that claim or issue to any other party shall be paid by him to that other party, regardless of the outcome of the cause or matter.

49 In one sense, O 59 r 6A of the Rules is unnecessary. Order 59 r 3(2), which pre-dates O 59 r 6A, already allowed the court to depart from the general rule if "it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs". Those words are wide enough to cover every conceivable type of costs order and every combination of circumstances as justification, not just a Type I or a Type II order on the justification contemplated by O 59 r 6A of the Rules.

50 But the purpose of O 59 r 6A is to draw specifically to the attention of litigants – and indeed to the attention of the court itself – that the discretion to make a Type I or a Type II order exists whenever a party succeeds in the proceedings overall but two criteria are satisfied: (i) the successful party "has failed to establish any claim or issue which he has raised in [the] proceedings"; *and* (ii) the successful party "has thereby unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings".

51 The scheme of Order 59 r 6A of the Rules stipulates a single justification for both a Type I and a Type II order. This is quite different from the scheme of the *Elgindata* principles. Those principles require a fundamentally stricter justification for a Type II order than for a Type I order (see [46] above). It could be said that the Rules Committee, by drafting O 59 r 6A in this way, intended to abolish the distinction drawn at common law between the two types of orders as set out in the *Elgindata* principles as endorsed by *Tullio*.

A Type II order is fundamentally different from a Type I order

52 I nevertheless consider that, even if a successful party satisfies the twin criteria stipulated in O 59 r 6A of the Rules, a Type II order requires some additional justification. I am not precluded from adding this gloss to O 59 r 6A because the factors enumerated in that rule are not intended to be exhaustive or to detract from the width of the discretion conferred by O 59 r 2(2) *Lim Lie Hoa v Ong Jane Rebecca and others and another appeal* [2005] 3 SLR(R) 116 at [61].

53 I consider this gloss necessary because, for reasons of both principle and pragmatism, a Type II order is fundamentally different from a Type I order in kind and not merely in degree.

(1) Principle

(A) THE COMPENSATORY OBJECTIVE

54 The principle on which the general rule rests is the indemnity principle. The indemnity principle holds that a party who succeeds in litigation is accorded complete justice if and only if he recovers compensation for the costs of the litigation in addition to the compensation he is entitled to under the substantive

law: *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155 ("*Ng Eng Ghee*") at [6]–[7]. Complete justice as between party and party therefore requires the successful party to receive an indemnity from the unsuccessful party for all of his costs of the litigation.

55 A Type I order is consistent with the compensatory objective of the indemnity principle. As I have shown, the correct approach to exercising the discretion as to costs is to ascertain the event and thereby to identify the successful party in the litigation at the outset of the exercise (see [26] and [34] above). A Type I order therefore operates merely to deprive a successful party of all or part of the costs to which he would otherwise be entitled. It amounts to no more than withholding an element of compensation from him despite his success in the litigation overall. The worst case for a successful party under a Type I order is that he has to bear all of his costs himself.

56 A Type I order leaves intact the successful party's right to compensation by way of an indemnity and merely reduces the quantum of the indemnity. Although a court which makes a Type I order can, in an extreme case, reduce the quantum of the indemnity to zero, the fact remains that the quantum cannot go *below* zero. An indemnity in favour of the successful party with a quantum of zero is nevertheless consistent with the indemnity principle, albeit at the very margins.

57 A Type II order is not merely inconsistent with the compensatory objective of the indemnity principle; it is the very antithesis of it. A Type II order requires a party who has established a right to recover compensation under the substantive law to compensate its opponent for the costs of the litigation

necessary to vindicate that right and recover that compensation. A Type II order therefore not only nullifies but reverses an integral aspect of the compensatory justice which the indemnity principle seeks to accord to a successful party in litigation.

(B) THE DISCIPLINARY OBJECTIVE

58 The indemnity principle has a second objective: to incentivise discipline in litigation. By shifting the costs of litigation to the unsuccessful party, the indemnity principle focuses the minds of parties – and in modern times, the minds of those who fund litigation or who insure litigants for their costs – on the need to assess carefully the strength of their case and their prospects of success not only at the outset of the litigation but also as it progresses (*per* Valerie Thean J in *Element Six Technologies Ltd v IIa Technologies Pte Ltd* [2020] SGHC 140 ("*Element Six*") at [27] citing Dyson J (as he then was) in *R v Lord Chancellor, Ex parte Child Poverty Action Group and another matter* [1999] 1 WLR 347 at 356)).

59 A Type II order is inconsistent also with the disciplinary objective of the indemnity principle. A party will have little incentive to exercise discipline in litigation by making reasonable concessions or reaching reasonable compromises at any stage if the consequences of pressing on with a weak case to judgment includes a realistic prospect of securing a Type II order against the successful party. Further, a party who has a strong case but who is risk averse will be incentivised to make unjustified concessions or compromises if he apprehends even a small risk of a Type II order. The risk averse are typically persons of modest means. For a person of modest means, the risk of a Type II order is a more significant deterrent than even the worst case scenario on a Type I order. Unlike his own costs, he will have had no knowledge of or control over

the amount and nature of his opposing party's costs as those costs were mounting up.

60 The Court of Appeal in *Ng Eng Ghee* at [1] recognised that "unmerited barriers in the path of recovering reasonably incurred costs might well have the chilling effect of deterring parties, in future, from legitimately pursuing or defending their rights". In that context, a Type II order is not simply a barrier to recovery: it is a reversal of recovery. A Type II order has fundamentally different consequences on the balance of incentives and disincentives facing those who seek access to justice than a Type I order, with disproportionate impact on litigants of modest means.

61 I turn now to consider the pragmatic differences between a Type I order and a Type II order.

(2) Pragmatism

62 Taxing costs under a Type II order is a substantially more difficult task than taxing costs under a Type I order. A Type II order creates at least three additional difficulties. First, a Type II order requires the court to tax parts of *both* sides' costs. Second, it will be difficult if not impossible in any litigation, no matter how simple, to segregate the costs of an individual issue: (i) from the common costs of the litigation; and (ii) from the costs of litigating the other issues in the litigation. By common costs, I mean those costs which the successful party would have had to incur even if he had not raised the issues on which he failed. Finally, the difficulty of the task is compounded by requiring the costs assessor to unravel all of this in retrospect and with hindsight at the time of taxation (see *Smithkline Beecham plc and another v Apotex Europe*

Limited and others [2004] EWCA Civ 1703 ("*Smithkline Beecham*") per Jacob LJ at [5]).

63 On the other hand, a Type I order requires the court to tax only the successful party's costs. implementing the order follows as a matter of mere arithmetic. Further, a Type I order enables the court to take a broad brush or a rough and ready approach to assessing the appropriate deduction to make from those costs to account for the claims or issues on which the successful party failed. After all, the goal is simply to arrive at a costs order which "reflects the overall justice of the case" (*Travelers Casualty and Surety Co of Canada v Sun Life Assurance Company of Canada (UK)* [2006] EWHC 2885 (Comm) ("*Travelers Casualty*") at [11] per Clarke J).

64 The exercise necessary to assess both sides' costs issue by issue for a Type II order is therefore itself likely to lead to delay, increased costs and satellite litigation. Not only that, but assessing costs issue by issue is likely to make no contribution to increasing precision in the award of costs or in the quality or completeness of the justice rendered to both parties in the litigation. As Jacob LJ put it in *Smithkline Beecham*:

> 27. … Although an issue-by-issue approach is likely to produce a "fairer" answer and is likely to make parties consider carefully before advancing or disputing a particular issue, it should not be thought that it is capable of achieving a "precise" answer. The estimation of costs, like that of valuation of property, is more of an art than a science. True it is that one can measure certain things (such as pages of witness statements or transcript devoted to a particular issue) but they can only be indicia to be taken into account. It would be dangerous to rely upon them as absolutes. Indeed brevity of a document, or a cross-examination, may be the result of great care: was it Hazlitt who apologised for the length of a letter, excusing himself on the grounds that he had not enough time to compose it?

> 28. It follows that there is no "precise" figure of costs which, in theory with perfect measurement tools, one could reach. The best that can be achieved is an estimate which is necessarily going to be somewhat crude. The costs in this case are very great, reflecting the much larger sums at stake. We were told the total figure is about £8m for both sides all in (trial, appeal, interlocutory matters). This reflects the much bigger sums at stake for a top-selling pharmaceutical. Mr Watson pointed out that a 1% difference given to one side or the other could amount alone to £80,000. He is right, but that does not mean that anything like an accuracy of 1% can be achieved.

65 It is for all these reasons that the CPR urges English judges to follow the general rule or make a Type I order (*ie*, a proportional or percentage order) whenever practicable rather than to make a Type II order (see Rule 44.2(7) of the CPR). Lord Phillips MR drew attention to this provision of the CPR in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 ("*English*") at [115] to [116]:

> 115 …[W]e would emphasise that the Civil Procedure Rules requires that an order which allows or disallows costs by reference to certain issues should be made only if other forms of an order cannot be made which sufficiently reflect the justice of the case: see rule 44.3(7).… In our view there are good reasons for this rule. An order which allows or disallows costs of certain issues creates difficulties at the stage of the assessment of costs because the costs judge will have to master the issue in detail to understand what costs were properly incurred in dealing with it and then analyse the work done by the receiving party's legal advisers to determine whether or not it was attributable to the issue the costs of which had been disallowed. All this adds to the costs of assessment and to the amount of time absorbed in dealing with costs on this basis. The costs incurred on assessment may thus be disproportionate to the benefit gained. In all the circumstances, contrary to what might be thought to be the case, a "percentage" order, under rule 44.3(6)(a), made by the judge who heard the application will often produce a fairer result than an "issues based" order under rule 44.3(6)(f). Moreover such an order is consistent with the overriding objective of the Civil Procedure Rules.
>
> 116 In general the question of what costs order is appropriate is one for the discretion of the judge and an

> appellate court will be slow to interfere in its exercise. But the considerations mentioned in the preceding paragraphs are ones which a judge should bear in mind when considering what form of order ought to be made in order properly to apply rule 44.3(7). These considerations will in most cases lead to the conclusion that an "issues based" order ought not to be made. Wherever practicable, therefore, the judge should endeavour to form a view as to the percentage of costs to which the winning party should be entitled or alternatively whether justice would be sufficiently done by awarding costs from or until a particular date only, as suggested by rule 44.3(6)(c).

In *Smithkline Beecham*, Arden LJ (as she then was) cited this passage to support her agreement with Jacob LJ that it is impossible to achieve great precision in awarding costs and counterproductive to attempt to do so.

66 In this context, it appears that Jackson LJ's criticism in *Fox* of departing too readily from the general rule (see [44] above) would apply equally to the court too readily making Type II orders.

67 For reasons of pragmatism, therefore, a Type II order is justified only if the issues on which the successful party failed in the litigation can be segregated from the common costs and the other issue-based costs so that they can be quantified without that exercise itself leading to increased costs, further delay and satellite litigation. I should note at this point that all of the difficulties associated with making a Type II order are present, although perhaps not to the same degree, when the court fixes costs as a gross sum under O 59 r 9(4)(*b*) of the Rules rather than ordering the costs to be taxed.

68 A Type I order also requires the issue-based costs to be susceptible to segregation. However, because a Type I order takes a broad brush or a rough and ready approach to deprive the successful party of a flat proportion or

percentage of its costs, the segregation need not be as neat as it would have to be for a Type II order.

(3) An example

69 For these reasons of both principle and pragmatism, I consider the difference between a Type I order and a Type II order to be a difference of kind and not just a difference of degree. That difference of kind can best be illustrated by an example.

70 Assume that a plaintiff (P) brings an action against a defendant (D) which raises three issues. There is no counterclaim. To secure judgment, P needs to succeed on only one of the three issues in the action. After a trial, the court decides that P succeeds on the first and second issues but fails on the third. That suffices for P to recover compensation from D. Assume further that a reasonable amount for costs reasonably incurred by each party for the entire litigation, assessed in accordance with the Guidelines for Party-and-Party Costs Awards in Appendix G of the Supreme Court Practice Directions ("the Costs Guidelines") is $100,000 broken down as follows:

Issue	Reasonable amount for costs reasonably incurred		Successful party
	By P	By D	
First	$50,000	$50,000	P

Issue	Reasonable amount for costs reasonably incurred		Successful party
	By P	By D	
Second	$30,000	$30,000	P
Third	$20,000	$20,000	D
Total	**$100,000**	**$100,000**	

71 The court can exercise its discretion to make a costs order which follows the general rule. If it does, P will recover the full $100,000 in costs from D, even though P failed on the third issue. This is because P succeeded in the litigation overall. The event is therefore in his favour. He is awarded an indemnity of $100,000 to complete the justice which the litigation has accorded him. In our costs regime, this indemnity is not an actual indemnity but a deemed indemnity assessed in accordance the Costs Guidelines (see *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 at [163]–[165]).

72 The court can exercise its discretion to depart from the general rule by making a Type I order. It if does, it will deprive P of his costs on the third issue ($20,000) and order D to pay P his costs only of the first and second issues ($80,000). This is equivalent to awarding P only 80% of his costs. The court will have arrived at the order by applying the indemnity principle on the first and second issues and by ignoring the indemnity principle on the third issue. An order of this type is what the English cases call a "proportional" costs order (see

Rule 44.2(6)(*a*) of the English Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) ("the CPR")).

73 The court can exercise its discretion to depart from the general rule by making a Type II order. If it does, it will order D to pay P's costs of the first and second issue ($80,000) and order P to pay D's costs of the third issue ($20,000). After setting the two sums off against each other, D will be ordered to pay costs of $60,000 to P. This type of order is what the English cases call an "issue-based" costs order (see Rule 44.2(6)(*f*) of the CPR and *Multiplex* at [72(iv)]).

74 The Type II order in this example appears to be no different from a Type I order that D pay P 60% of his costs or, to put it another way, a Type I order depriving P of 40% of his costs. But that is not the conceptual basis of the order. The conceptual basis involved the court *applying* the indemnity principle on the first and second issues and *reversing* the indemnity principle on the third issue.

75 The difference can be seen even more clearly by varying the example to assume it would have been reasonable for D to have incurred costs of $50,000 for the third issue rather than $20,000. The effect of the same Type II order would be that D would owe P $50,000 in costs on the first and second issues, but that P would owe D $50,000 in costs on the third issue. The net effect of this Type II order would be the same as an order requiring each party to bear its own costs of the entire action. But the conceptual basis would be fundamentally different.

76 This illustrates why I consider a Type I order and a Type II order to be different in kind, not merely in degree. A Type II order reverses the objectives of the indemnity principle and therefore the objectives of the general rule that costs should follow the event.

Type II orders under O 59 r 6A of the Rules

77 The difference in kind between a Type I order and a Type II order is unjustifiably elided or eroded if O 59 r 6A of the Rules is read as permitting the court to make a Type II order on precisely the same justification as a Type I order, despite the width of the court's discretion to make costs orders under O 59 r 2(2) and to depart from the general rule under O 59 r 3(2).

78 It is therefore my view that a Type II order requires some justification in addition to the twin criteria set out in O 59 r 6A of the Rules. That additional justification is best captured by the requirement in the fourth *Elgindata* principle of improper or unreasonable conduct in raising a claim or issue (see [45(d)] above).

79 *Kidsons* is an example of a party who raised issues unreasonably. The event in *Kidsons* was in favour of the defendants. Applying the general rule would therefore result in an order that the defendants recover all of their costs of the litigation from the plaintiff. But the defendants raised two substantial defences only to abandon both of them before trial. The plaintiff estimated, on a broad brush approach, that it had incurred just over £225,000 in costs in preparing to meet these two defences (at [14]).

80 Gloster J held that the defendant was liable to pay the plaintiff's costs of preparing to meet these defences even though the defendant was the successful party in the litigation overall (at [14]–[16]). Rather than ordering the plaintiff's costs of those two issues to be taxed in addition to the defendant's costs of the entire action, Gloster J gave effect to her decision by allowing the plaintiff to deduct the gross sum of £225,000 from the taxed costs which the plaintiff would ultimately have to pay the defendants.

The English position

81 It appears that the English courts were initially enthusiastic about the discretion to make a Type II order under their equivalent of O 59 r 6A of the Rules. The high water mark of this enthusiasm appears to be the decision of the English Court of Appeal in *Summit Property Limited v Pitmans (a firm)* [2001] EWCA Civ 2020 ("*Pitmans*"). That was an action for professional negligence. The plaintiff failed in the action because it could not establish causation. But the plaintiff did succeed in establishing breach of duty, which took up most of the time at trial. The trial judge ordered the plaintiff to pay 30% of the defendants' costs and the defendants to pay 65% of the plaintiff's costs. At [16]–[17], Longmore LJ held that a successful party could be subject to a Type II order even if he did not act unreasonably or improperly, following *A.E.I. Rediffusion Music Limited v Phonographic Performance Limited* [1999] 1 WLR 1507:

> 16. In my judgment, it is … no longer necessary for a party to have acted unreasonably or improperly before he can be required to pay the costs of the other party of a particular issue on which he (the first party) has failed. That is the substance of what the Master of the Rolls was there saying [in *A.E.I.* Rediffusion Music Limited v Phonographic Performance Limited [1999] 1 WLR 1507 at 1522H to 1523B]….
>
> 17. It is thus a matter of ordinary common sense that if it is appropriate to consider costs on an issue basis at all, it may be appropriate, in a suitably exceptional case, to make an order which not only deprives a successful party of his costs of a particular issue but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue, without it being necessary for the court to decide that allegations have been made improperly or unreasonably

Chadwick LJ expressed similar enthusiasm in *Johnsey Estates (1990) Ltd v The Secretary of State for the Environment* [2001] EWCA Civ 535 at [21]–[22].

82 Other English cases, some of which I have already cited (see *Fox* at [44] above, *Smithkline Beecham* at [64] above and *English* at [65] above), have re-emphasised the conceptual importance of ascertaining the event and identifying the successful party at the outset of the exercise of awarding costs and the pragmatic difficulties associated with making a Type II order.

83 Another instructive case is the decision of the English Court of Appeal in *Burchell*. In that case, a contractor sued an employer. The employer raised counterclaims against the contractor. The contractor succeeded on the claim, but the employer succeeded on parts of the counterclaim. The result of the litigation was that the employer owed a net sum to the contractor. The trial judge made separate costs orders, awarding the costs of the claim to the contractor and the costs of the counterclaim to the employer. On appeal, Ward LJ held (at [29]–[30]) that the recorder was right not to have awarded the contractor the costs of both the claim and the counterclaim, right not to have made a Type II order on the claim and on the counterclaim but was wrong to have made two costs orders, each following the separate events on the claim and the counterclaim. He ought to have made a single Type I order instead:

> 29. The modern tendency is at least to consider the award of costs on an issue by issue basis. The Recorder addressed that but dismissed it because of the difficulty in the preparation of a bill of costs and the enormous complication of the process of detailed assessment. I agree with that. I also agree with him that it is better, if possible, to deal with the matter another way. His judgment shows, however, that he did not find another way: he resorted to costs following the event. In doing so I fear he fell into error.
>
> 30. His error in my judgment was to fetter his discretion and not to go on to consider, as he should have considered, what alternatives were available to him. The most obvious and frequently most desirable option is that signposted in CPR 44.3 paragraph (6)(a), namely to order a proportion of the party's costs to be paid. The Recorder had directed his mind to paragraph (6)(f), namely ordering costs relating only to a

> distinct part of the proceedings, but he seems to have overlooked paragraph (7) which required him, where he would otherwise have considered confining costs to part of the proceedings only, to make instead, where practicable, an order under (6)(a) for a proportion of the costs. Ordering a proportion of costs obviates all the difficulties he acknowledged in an assessment of how much is properly to be allocated to each and every issue considered in isolation. Better by far to decide, despite the difficulty and imprecision of the calculation, that the relevant issue or issues should bear a percentage of the costs taken overall. As the Recorder erred in principle, the appeal on this aspect must be allowed.

84 I should note at this point that the English practice is different in intellectual property cases. The practice there appears to be to make Type II orders as far as reasonably possible. That is because the nature of typical intellectual property litigation lends itself more readily to Type II orders (see *Smithkline Beecham* at [25]–[26] per Jacob LJ for patent cases and *Specsavers International Healthcare Ltd and others v Asda Stores Ltd* [2012] EWCA Civ 494 at [30] per Kitchin LJ (as he then was) for trade mark cases).

Conclusion

85 Bearing all of this in mind, my view is that the principles applicable when assessing costs in a matter where there are multiple claims and issues are as follows:

(a) The ultimate objective in making a costs order is to produce a result which is fair to both the successful and the unsuccessful parties (*Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107 at [5] per Finkelstein and Gordon JJ) and which reflects "the overall justice of the case" (see *Kidsons* at [10] cited at [26] above).

(b) The general rule is that costs follow the event. The first step is therefore to determine the event in the litigation. This is necessary as the

first step in order to identify the party who is entitled to an award of costs under the general rule (see *Kidsons* at [10] cited at [26] above).

(c) The fact that the successful party raised claims or issues in the litigation on which it failed is not, in itself, a reason for departing from the general rule (*Elgindata* (see [45(c)] above); *Element Six* at [30]).

(d) A Type I order is justified under O 59 r 6A of the Rules if two criteria are satisfied: (i) the successful party failed to establish a *discrete* claim or issue which he raised in the litigation *and* (ii) the successful party thereby unnecessarily or unreasonably protracted or added to the costs or complexity of the litigation.

(e) These two criteria do not, in themselves, justify a Type II order. A Type II order is justified under O 59 r 6A of the Rules only if three criteria are satisfied: (i) the successful party failed to establish a discrete claim or issue which he raised in the litigation; (ii) the successful party thereby unnecessarily or unreasonably protracted or added to the costs or complexity of the litigation; *and* (iii) the successful party raised the claim or issue improperly or unreasonably (*Elgindata*; *Tullio*).

(f) Even if the three criteria for making a Type II order are satisfied, the court should consider making a Type I order instead, if it is practicable to do so. The court should make a Type II order only if it considers that there are good reasons to incur the additional time, cost and complexity associated with taxing or assessing all or part of *both* sides' costs in order to ascertain the net costs payable under the order. Where, however, the court fixes costs as a gross sum under O 59

r 9(4)(*b*) of the Rules rather than ordering the costs to be taxed, this factor is of less weight.

(g) Whether the court makes a Type I order or a Type II order, the successful party should ordinarily recover all of his common costs of the action (*Multiplex* at [72(viii)]; *Medway Oil and Storage Co Ltd v Continental Contractors Ltd & Ors* [1929] 1 AC 68, cited in *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 59/3/2).

86 None of this is of course intended to be prescriptive, exhaustive or even comprehensive. In particular, it is not intended to prescribe how the discretion to award costs should be exercised in those classes of litigation where, by reason of the characteristics of typical litigation in that class, the court may more readily be prepared to make Type II orders than in general commercial litigation (see [84] above). This may go some way towards explaining any difference of emphasis in my distillation of the principles and the analysis in *Element Six*, which dealt with a costs order in patent litigation (see *Element Six* at [32]–[36]).

87 Further, as I have mentioned, this analysis leaves out of account the court's discretion to make a Type II order under O 59 r 7 of the Rules. That discretion arises by reason of a party's misconduct or neglect or his unreasonable or improper act or omission. That includes but is wider than a party's decision to raise a claim or issue in the litigation on which he fails. Further, the court may make a Type II order under O 59 r 7 even if the party's act or omission did not protract or add to the costs or complexity of the litigation. As I have mentioned, there is no suggestion that this case comes within the scope of O 59 r 7.

88 Having set out the principles which justify departing from the general rule to make either a Type I or Type II order, I return to the facts of this case to consider whether either type of departure from the general rule is justified.

A Type I order is justified

89 In my view, this is a case in which a Type I order is justified.

The six issues are sufficiently discrete

90 I accept the first defendant's submission that the six issues which the claims and counterclaims raised in this action are sufficiently discrete.

91 The plaintiff submits that a Type I order is inappropriate because all of the issues in this action as between the plaintiff and the first defendant were intertwined and were connected to the same project. I do not accept the plaintiff's submission. It is true that all of these issues arose from the same project. But that is to apply the test at too high a level of generality. This is especially so for construction litigation, where disputes arising from the same project can very often arise on quite separate facts and raise quite different questions of law. Taking the plaintiff's argument to its logical conclusion, every action arising from the same project would give rise to claims and counterclaims which are so intertwined and interconnected so as never to justify a Type I or a Type II order. That would tilt the general rule too far in favour of the successful party in the litigation overall and frustrate the objective of O 59 r 6A of the Rules and the *Elgindata* principles.

92 When examined at the appropriate level of generality, I find that the six issues (see [12]–[19] above) were sufficiently discrete in terms of the facts, the law and the evidence to make a Type I order. For example, the Works Issue, the

Overpayment Issue, the Liquidated Damages Issues and the Variation Orders Issue each engaged different factual and legal arguments.

93 The Works Issue dealt with the proportion of the Works which the first defendant had completed. Determining this issue required an analysis of a distinct set of documents and the evidence of the second defendant and Mr McGeoch.

94 The Overpayment Issue required me to construe cl 6.1(c) of the Lead Contract. I found that, because the Comfort Contract was back-to-back with the Lead Contract, that clause governed the plaintiff's obligation to pay the first defendant. The outcome of the Overpayment Issue then applied the outcome of the Works Issue to the contract price under the Comfort Contract as a matter of arithmetic.

95 The Liquidated Damages Issue required me to analyse the first defendant's submission that: (i) the liquidated damages clause was a penalty clause and therefore void and unenforceable; (ii) that, even if delay were proven, the plaintiff had suffered no actual loss because Lead had not imposed liquidated damages under the Lead Contract on the plaintiff for the delay; and (iii) that the delay was due to the substantial and extensive variations which the plaintiff required the first defendant to carry out.

96 The Variation Orders Issue comprised two discrete issues. The issue on VO1 was a pure question of fact, unrelated to the other issues. VO2 raised discrete questions of fact and law. On VO2, I found that the first defendant was not entitled to recover in contract because the first defendant had failed to prove that the contractual condition precedents for issuing VO2 had been satisfied. But I allowed a large part of the first defendant's *quantum meruit* claim.

97 I therefore accept the first defendant's characterisation of the issues in this action and of the plaintiff's degree of success on each issue. To summarise:

(a) The plaintiff failed partially on the Works Issue. The proportion of the Works which I found the first defendant had completed was far closer to the first defendant's case that it had completed of all or substantially all of the Works than to the plaintiff's case that the first defendant had completed only 65% of the Works.

(b) The plaintiff failed on the Overpayment Issue. As such, I found that a sum was due to the first defendant despite the plaintiff's progress payments and the payment under the AD.

(c) The plaintiff succeeded on the Delay Issue.

(d) The plaintiff failed on the Defects Issue.

(e) The plaintiff failed partially on the Variation Orders Issue. The plaintiff failed entirely on VO1. And the plaintiff failed partially on VO2. It succeeded on the contractual claim but failed on the *quantum meruit* as to two-thirds.

(f) The plaintiff succeeded on the Materials Issue.

These issues added unnecessarily to the length and complexity of the proceedings

98 Considering the six issues in the round together with their outcomes, I consider that the plaintiff unnecessarily added to the length and the complexity of the proceedings by pursuing the Works Issue, the Overpayment Issue, the Defects Issue and the Variation Orders Issue.

99 For example, with respect to the Works Issue and the Overpayment Issue, a substantial amount of the factual and expert evidence in this action and of the time at trial was taken up with establishing just how much of the Works the first defendant had completed before it withdrew from the site in October 2014.

100 By way of further example, the plaintiff pursued the Defects Issue even though it was unable to adduce any contemporaneous evidence to support its claim that Lead imposed back charges of $86,606.41 on the plaintiff for the rectification costs which Lead had allegedly incurred as a result of the first defendant's defective work.

101 By raising these issues, therefore, I am satisfied that the plaintiff unnecessarily added to the length and complexity of this action. I therefore consider it just, in the exercise my direction under O 59 r 6A of the Rules and the third *Elgindata* principle, to make a Type I order depriving the plaintiff of 50% of its costs of this action. I consider that doing so suffices on a broad brush approach to compensate the plaintiff, consistently with the indemnity principle, for the common costs of this action, the costs of the issues on which it succeeded entirely and a just proportion of the costs of those issues on which it succeeded partially, all the while attaching real weight to my finding at the outset of this exercise that the plaintiff was the successful party in this litigation overall.

102 I now consider whether to make a Type II order instead of a Type I order. This would award to the first defendant all or part of its costs of defending the plaintiff's claims and advancing the first defendant's counterclaims even though, as I have found, the plaintiff succeeded in the litigation overall.

A Type II order is not justified

103 I decline to make a Type II order. I arrive at that conclusion for two reasons.

104 First, I cannot say that the plaintiff's decision to advance the issues on which it failed in whole or in part was unreasonable or improper in itself. Accordingly, the plaintiff's decision to raise these issues does not justify a Type II order. As Clarke J said in *Travelers Casualty* (at [12]):

> If the successful Claimant has lost out on a number of issues it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. It is a fortunate litigant who wins on every point.

105 Second, as I have explained, a Type II order raises a number of practical difficulties. It is difficult to separate the common costs of the litigation from the issue-based costs. It is even more difficult to separate the issue-based costs from each other. I do not consider that it is practicable to make a Type II order, particularly bearing in mind the marginal utility of doing so, if any, in achieving precision or justice in achieving the compensatory or disciplinary objectives of the indemnity principle (see [64]–[65] and [83] above).

106 I now turn to fix the quantum of costs which the plaintiff is entitled to recover from the first defendant.

The quantum of the plaintiff's costs reasonably incurred

The parties' cases on quantum

107 The trial of this action took 8½ days. In its costs schedule filed together with its closing written submissions, the plaintiff indicated that the costs it

would be seeking as against both defendants if it succeeded in this action was $413,000 for professional fees under Section I plus $393,099 in disbursements under Section III.[4] Now that the plaintiff knows the outcome of the litigation, the plaintiff submits that the first defendant ought to pay the plaintiff between $330,000 and $380,000 for professional fees plus between $280,000 and $320,000 for disbursements.[5]

108 The first defendant's case on quantum is that a reasonable amount for professional fees reasonably incurred by either party in this action would be $195,000, albeit that it is the first defendant's case that that sum is to be paid by the plaintiff to the first defendant.

109 The first defendant derives that figure of $195,000 by applying the daily tariff of $20,000 to $30,000 per day of trial for construction disputes set out in Part III(A)(i) of the Costs Guidelines which were in force at the time of trial. It is common ground that it is those Costs Guidelines which apply and not the Costs Guidelines now in force. The first defendant therefore takes the daily tariff at the midpoint of the range, *ie*, $25,000. Applying that rate for the first five days of trial at 100% of that figure and for the remaining 3½ days of trial at 80% of that figure, *ie* $20,000, the first defendant arrives at the figure of $195,000. That implies a multiple of 7.8 on the daily tariff: [(100% x 5 x T) + (80% x 3.5 x T)] = 7.8 x T (where "T" represents the daily tariff).

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4 PBoD, Plaintiff's Costs Schedule (Amendment No. 1) at p 62.

5 PCS at paragraph 15.

Professional fees

110 I do not accept the plaintiff's submission that a reasonable amount for professional fees reasonably incurred in this action is in the range of $330,000 to $380,000. These figures divided by 7.8 imply a blended daily tariff of between $42,300 and $48,700, rounded off. That is well beyond the daily tariff stipulated in the Costs Guidelines. When asked to explain this deviation, plaintiff's counsel accepted that this action was not of sufficient complexity to justify a departure from the daily tariff set out in the Costs Guidelines. She justified the professional fees of $330,000 to $380,000 on the basis that the Costs Guidelines cover the professional fees only for the trial itself, and do not cover professional fees for pre-trial and post-trial work. On that basis, her submission in fact was that a reasonable amount for professional fees for the 8½-day trial alone was $195,000. The difference between that figure and the range of $330,000 to $380,000 which the plaintiff claims is therefore for the professional fees of pre-trial and the post-trial work.

111 I do not accept the plaintiff's submission. The Costs Guidelines used the number of days of trial as a proxy for the complexity of the entire matter. The figure of $195,000 derived in accordance with the Costs Guidelines is therefore the guideline for the professional fees of the entire action, and not simply for the trial itself. This figure was intended by the Costs Guidelines to be a deemed indemnity covering all work done in an action resulting in a trial of 8½ days' duration, from the date solicitors are first instructed up to and including all post-trial matters.

112 That is confirmed by comparing the applicable Costs Guidelines to the Costs Guidelines currently in force. The current Cost Guidelines expressly specify different tariffs for pre-trial work, trial work and post-trial work.

Plaintiff's counsel submits that this serves merely to confirm the premise on which the applicable Costs Guidelines rested. I do not accept that submission. By specifying expressly that separate tariffs will now apply for pre-trial, trial and post-trial work, the current Costs Guidelines have changed the premise on which the applicable Costs Guidelines rested.

113 Further, I do not accept that there is any rational basis for professional fees in the range of $330,000 to $380,000 which the plaintiff now claims. The plaintiff indicated in its costs schedule that it would claim the total sum of $413,000 for professional fees if it succeeded in the *entire* action, *ie* as against *both* the first defendant *and* the second defendant. It now claims professional fees in the range of $330,000 to $380,000 on the basis that between 80% and 92% of that sum of $413,000 can be apportioned to its claim against the first defendant alone. I accept the first defendant's submission that the plaintiff has provided no rational basis for this apportionment. Plaintiff's counsel does not explain in her written submissions how she arrived at those figures. And she accepted in her oral submissions that she could not do so.

114 I therefore accept the first defendant's submission that a daily tariff of $25,000 is the appropriate daily tariff for this action. The issues were neither particularly complicated nor particularly straightforward. The daily tariff which is appropriate is therefore at the midpoint of the range stipulated in the Costs Guidelines. It follows from this that I accept the first defendant's submission that $195,000 is the appropriate deemed indemnity for the professional fees which the plaintiff reasonably incurred in this action. For reasons I have already given, the Costs Guidelines intend this figure to account for all work in the action, *ie* pre-trial work, trial work and post-trial work.

115 Accordingly, I find that $195,000 is a reasonable amount for the professional fees which the plaintiff reasonably incurred in this action.

Disbursements

116 In addition to its professional fees, the plaintiff is also entitled to recover from the first defendant a reasonable amount for the disbursements which the plaintiff reasonably incurred in this action. The plaintiff quantifies its disbursements as amounting to between $280,000 and $320,000.[6] Out of that sum, the first defendant objects to three items: (i) $249,333.19 representing the professional fees paid to Mr McGeoch; (ii) $23,000 representing the hearing fees which the plaintiff paid for the trial of this action; and (iii) $24,686.24 representing transcription fees which the plaintiff paid for the trial of this action.

117 I accept the first defendant's submissions that these figures are unreasonable in amount. I therefore do not allow these three disbursements in full.

(1) Mr McGeoch's fees

118 I allow the plaintiff to recover only 20% of Mr McGeoch's fees. This amounts to $49,866.64.

119 In my decision on the Works Issue and the Overpayment Issue in *Comfort Management* at [48], I found that Mr McGeoch's evidence that the first defendant had completed only 65% of the Works when it withdrew from the site did not assist me. This was because Mr McGeoch assumed in his report that *all* of the outstanding items when the first defendant withdrew were within the

6 PCS at paragraph 15.

scope of the Works rather than variations: *Comfort Management* at [47]. My finding was contrary to that assumption. As a result, his report did not ultimately assist me on these two issues. However, I did find some parts of Mr McGeoch's evidence of some assistance on the Materials Issue and the Variation Orders Issue.

120 On a broad brush approach, I consider that only 20% of Mr McGeoch's expert evidence was of assistance to me. This is not intended to be a criticism of Mr McGeoch, his expertise or his report. As an expert witness, he cannot be faulted for assuming the factual case of the party appointing him to be correct. My finding is merely that 80% of Mr McGeoch's fees are not a reasonable amount for costs which the plaintiff reasonably incurred. Therefore, his fees are irrecoverable to that extent from the first defendant as between party and party.

(2) Hearing fees and transcription fees

121 I can take the hearing fees and transcription fees together.

122 The first defendant's submission is that it should not, in principle, be responsible for any part of the plaintiff's disbursements which are referable to the plaintiff's failed claim against the second defendant. The first defendant therefore asks for the hearing fees and the transcription fees to be disallowed in part.

123 I accept this submission. The plaintiff claims $23,000 for the hearing fees and $24,686.24 for the transcription fees. Taking a broad brush approach, I accept that 25% of the trial was taken up by the plaintiff's unsuccessful claim against the second defendant. I therefore allow the plaintiff to recover only 75% of these two disbursements. This amounts to $35,764.68.

Conclusion on disbursements

124 Leaving aside these three disputed items, the plaintiff's claim for disbursements is $22,980.57 (being $320,000 less the total of $249,333.19, $23,000 and $24,686.24). The first defendant does not take any objection to the disbursements comprised in that figure of $22,980.57.

125 To that figure, I add back 75% of the hearing fees and transcription fees ($35,764.68) and 20% of Mr McGeoch's fees ($49,866.64) to arrive at the figure of $108,611.89. That figure represents my finding as to a reasonable amount for disbursements which the plaintiff reasonably incurred in this action.

Conclusion as against the first defendant

126 Order 59 r 1(1) of the Rules defines "costs" as including disbursements. On my findings so far, a reasonable amount for the costs which the plaintiff reasonably incurred in this action is $303,611.89, comprising $195,000 for professional fees plus $108,611.89 for disbursements.

127 I must now deprive the plaintiff of 50% of its costs in accordance with my Type I order. I therefore allow the plaintiff's costs as against the first defendant only in the sum of $151,805.95.

Costs as between the plaintiff and the second defendant

The plaintiff's claim against the second defendant

128 The plaintiff's claim against the second defendant was that he had breached his duties to the plaintiff in contract and in tort and had acted in conflict of interest by over-certifying the sum due from the plaintiff to the first defendant for the Works it had actually completed before it withdrew from the

site (see *Comfort Management* at [4]). The plaintiff therefore sought to recover from the second defendant in this action the amount by which it had allegedly overpaid the first defendant.

129 I dismissed the plaintiff's claim against the second defendant in its entirety.

130 First, I dismissed the plaintiff's claim that the second defendant had over-certified the Works completed by the first defendant. This conclusion followed my findings on the Works Issue. Further, even if there was over-certification, I was satisfied that the plaintiff had not suffered any loss. I found that any payment made by the plaintiff to the first defendant was premised entirely on Lead's certification. The plaintiff did not rely on the second defendant's certification when paying the first defendant's progress claims.

131 Second, I dismissed the plaintiff's allegation that the second defendant was in conflict of interest by working with the first defendant to procure and supply ducting materials and manpower for the project. The plaintiff failed to prove that the second defendant had breached his duties or that he had caused the plaintiff to suffer loss in the sum of the alleged overpayment. I found that the plaintiff's claims against the second defendant was "an *ex post facto* allegation of impropriety with no legal or factual basis" (see *Comfort Management* at [190]).

The plaintiff must pay costs to the second defendant

132 The second defendant was wholly successful in his defence. The event in this action as between the plaintiff and the second defendant is clearly and entirely in the second defendant's favour. The general rule indicates that costs

should follow the event. There is no basis for any type of departure from the general rule, whether by making at Type I order, a Type II order or otherwise.

133 The second defendant is therefore entitled to recover his costs from the plaintiff without qualification.

The quantum of the second defendant's costs

134 In his costs schedule, the second defendant claimed $271,780 for professional fees and $12,438.40 for disbursements.[7]

135 The plaintiff submits that the second defendant's claims are excessive. The plaintiff submits that a reasonable figure for professional fees is between $100,000 and $120,000. The plaintiff arrives at this figure by applying the daily tariff for ordinary contractual disputes under the applicable Costs Guidelines, ranging between $15,000 and $17,000. The plaintiff seeks to apply this daily tariff because it submits that the plaintiff's claim against the second defendant was contractual in nature. The plaintiff also submits that most of the 8½ days of trial related to the plaintiff's claim against the first defendant, such that costs payable to the second defendant should be even lower than the lower end of the range.

136 I do not accept the plaintiff's submission. The plaintiff has not characterised its claims against the second defendant correctly. In my view, the claims which the plaintiff asserted against the second defendant certainly included contractual issues. But those claims also included issues of tort and construction law.

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7 Second Defendant's Submissions on costs, p 23.

137 Furthermore, I accept that the second defendant's evidence was critical to the resolution of the claims and counterclaims as between the plaintiff and the first defendant. This included the Works Issue, the Overpayment Issue, the Delay Issue, the Defects Issue and the Variation Orders Issue. Much of the second defendant's involvement in this action was therefore relevant both to the plaintiff's claim against the first defendant as well as to the plaintiff's claim against the second defendant. Thus, it was reasonable for the second defendant to be present and to be represented throughout the 8½ days of trial.

138 However, I also accept the plaintiff's submission that it was the first defendant that defended the bulk of the claims in the action and pursued a counterclaim. Seen in this light, the figure of $271,780 which the second defendant claims in his costs schedule for professional fees is unreasonably high. That is no doubt why the second defendant's counsel moderated that figure to $154,000 in oral submissions. This includes $148,000 for the professional fees of the action and $6,000 for the professional fees of two interlocutory applications for which costs were reserved.

139 The second defendant's counsel also asks for GST to be added to the professional fees. The figures set out in the applicable Costs Guidelines for professional fees are all-in figures. There is no scope to add GST to those figures.

140 As for disbursements, the second defendant claims the sum of $12,438.40. This figure appears to me to be a reasonable sum for disbursements reasonably incurred. I therefore allow this figure in full.

141 I therefore accept that a reasonable amount for costs reasonably incurred by the second defendant in this action is $166,438.40 comprising $154,000 for professional fees and $12,438.40 for disbursements.

No recourse to the first defendant

142 I accept the first defendant's submission that this is not a case where the plaintiff can hold the first defendant liable directly or indirectly for the costs which the plaintiff will have to pay the second defendant for the plaintiff's failed action against him.

143 In my view, save for the Works Issue, the plaintiff's claims against the second defendant were separate and distinct from the plaintiff's claims against the first defendant. Further, even where there was an overlap with the Works Issue, the plaintiff's claims against the second defendant lacked merit. And, in any event, I resolved the Works Issue closer to the first defendant's position than to the plaintiff's.

144 In my view, therefore, the plaintiff acted unreasonably in bringing this claim against the second defendant. There is no justification for visiting the costs of that failed claim on the first defendant either directly or indirectly.

145 Accordingly, the plaintiff must pay the second defendant his costs of this action without any right to recover those costs from the first defendant.

GST

146 It is common ground that the defendant is obliged to pay GST on the outstanding sum of $363,030.51 which I found the first defendant to owe the plaintiff. It is also common ground that the rate of GST to be applied is 7%. I

therefore accept that the quantum of GST applicable to the outstanding sum is $25,412.14.

147 The plaintiff is therefore entitled to have judgment entered in its favour as against the first defendant in the principal sum of $388,442.65.

Conclusion

148 For all of the foregoing reasons, I now enter judgment in this action as follows:

(a) The defendant shall pay to the plaintiff:

(i) The sum of $388,442.65; and

(ii) Interest on the said sum of $388,442.65 at the rate of 5.33% per annum from 6 June 2017 to 6 April 2022 pursuant to s 12(1) of the Civil Law Act 1909 (2020 Rev Ed).

(b) The plaintiff's claim against the second defendant is dismissed in its entirety;

(c) The first defendant shall pay to the plaintiff the costs of and incidental to this action, such costs fixed at $151,805.95.

(d) The plaintiff shall pay to the second defendant the costs of and incidental to this action, such costs fixed at $166,438.40.

149 This action and all matters consequential upon my decision in *Comfort Management* are now concluded.

Vinodh Coomaraswamy
Judge of the High Court

Paul Wong, Zhulkarnain bin Abdul Rahim, Andrea Gan, Philip Teh and Francis Wu (Dentons Rodyk & Davidson LLP) for the plaintiff and defendant in counterclaim;
Nicholas Lazarus (Justicius Law Corporation) for the first defendant and plaintiff in counterclaim;
Lalwani Anil Mangan and Adrian Teo (DL Law Corporation) for the second defendant.
