Lin Jian Wei and another *v* Lim Eng Hock Peter
[2011] SGCA 29

Case Number : Civil Appeal No 138 of 2010

Decision Date : 31 May 2011

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Kristy Tan (Allen & Gledhill LLP) for the appellants; Chan Hock Keng and Koh Swee Yen (Wong Partnership LLP) for the respondent.

Parties : Lin Jian Wei and another — Lim Eng Hock Peter

Civil Procedure – Costs – Principles – Reasonableness

Civil Procedure – Costs – Principles – Proportionality

Civil Procedure – Costs – Taxation – Principles governing taxation of party and party costs

Civil Procedure – Costs – Taxation – Factors to be taken into consideration in the taxation of party and party costs

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 254.]

31 May 2011 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of a High Court Judge ("the Judge") awarding taxed costs of $650,000 under Section 1 of the Bill of Costs No 247 of 2009 ("BC 247") in respect of Suit No 514 of 2007 ("Suit 514"). The grounds of decision that explain the reasons for this extraordinary award of $650,000 are stated in *Lim Eng Hock Peter v Lin Jian Wei and another* [2010] SGHC 254 ("the costs decision"). This appeal is significant in at least two respects: first, no prior dispute on the assessment of costs on an indemnity basis has reached the Court of Appeal; and secondly, it squarely raises the vexing issue of striking a balance between justly compensating legal professionals against the need to ensure that the public's access to justice is not progressively eroded by exorbitant legal costs. In addition, this Court has also been asked to clarify the role that the principle of proportionality plays in the assessment of legal costs. Must legal costs in Singapore always be justified by reference to the complexities of the issues at stake and the benefits to be gained?

2 For the avoidance of doubt, we should state that we use the terms "taxing officer", "Registrar", "Judge" and "Court" on the issue of assessment of costs interchangeably as they discharge similar functions in this area at different stages of the process of taxation. Further, for the purposes of these grounds, the terms "lawyers", "counsel", "solicitors" and "legal professionals" refer to practising advocates and solicitors who are entitled under the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the LPA"), to lawfully receive remuneration for rendering legal services.

Background facts

3 The background facts pertaining to this Court's decision in *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 ("the defamation appeal") ordering that costs for the trial below in *Lim Eng Hock v Lin Jian Wei and another* [2009] 2 SLR(R) 1004 ("the HC defamation judgment") be taxed on an indemnity basis, which is at the heart of this appeal, will first be set out before we analyse the legal issues.

4 The respondent, Lim Eng Hock Peter, was involved in the formation of Raffles Town Club Pte Ltd ("the Company") and the setting up of Raffles Town Club ("RTC") from mid 1996 to April 2001. The Company was set up in 1996 to own and manage RTC. At the time of its inception, its shareholders were Mr Lawrence Ang, Mr William Tan and Mr Dennis Foo (collectively "the original shareholders"). The respondent was apparently instrumental in the formation of RTC. In June 1996, the respondent made his first investment in the RTC project by channelling funds through Mr Lawrence Ang, which gave him a 20% beneficial shareholding (see [17] of *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163). The respondent's share was subsequently enlarged. Sometime in June 1997, Mr Lawrence Ang held nearly 80% of the shares in Erasmia/the Company (Erasmia was the predecessor of the Company) and another company, Europa Holdings Pte Ltd ("EH"). However, the actual beneficial shareholding in Erasmia/the Company and EH was roughly in the proportion of 40:40:10:10, being the respective shares of the respondent, Mr Lawrence Ang, Mr William Tan and Mr Dennis Foo. Sometime in September 2000, disputes arose between the original shareholders. A settlement was eventually reached in April 2001. Pursuant to the settlement, the respondent and Mr Dennis Foo's shares in the Company (which approximated to a 50% stake in the Company and EH) were sold to Mr Lawrence Ang and Mr William Tan. After this was done, Mr Lawrence Ang and Mr William Tan entered into a "back to back" sale of 50% of the shares in the Company to the appellants, Lin Jian Wei and Tung Yu-Lien Margaret. The appellants and the first appellant's wife subsequently acquired all the shares in the Company in mid-2001.

5 Having explained how the appellants came to acquire their interests in the Company, we return to the narrative on how the parties became embroiled in the present proceedings. Much earlier, around November 1996, the Company invited "selected" members of the public to join the most "prestigious private club" in Singapore at a discounted price of $28,000. Those who had joined this club of supposedly "exclusive and limited membership" were later shocked to discover that there were over 19,000 members. Dissatisfied by the Company's failure to provide an exclusive club and upset by the problem of overcrowding at RTC, the members initiated proceedings against it in November 2001. This was after the appellants had taken over responsibility for RTC's operations from the original shareholders of the Company. The dispute eventually reached the Court of Appeal in August 2003. This Court held that there had been a breach of an implied promise by the Company to deliver to the plaintiffs a premier and exclusive club, see *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307. It later ordered that the Company pay $3,000 in damages to each claimant. This amounted to $45m, see *Raffles Town Club Pte Ltd v Tan Chin Seng and others* [2005] 4 SLR(R) 351. As the Company had insufficient funds to compensate the members, it proposed in 2005 a Scheme of Arrangement under s 210 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Companies Act") to its creditors. More than 90% of the scheme creditors (mainly members) voted in favour of the Scheme of Arrangement and it was subsequently approved by the Court. Pursuant to s 211(1) of the Companies Act, the Company/RTC was required to send an explanatory statement explaining, *inter alia*, the effect of the scheme.

6 On 7 November 2005, the Company/RTC dispatched a copy of the 391-page explanatory statement to each of the 17,374 scheme creditors. The respondent claimed that three passages in the explanatory statement ("the Extracts") had defamed him and he commenced Suit 514 against the appellants on 15 August 2007. The Judge dismissed the claim despite holding that the respondent had

been defamed. This was because he concluded that the statement had been published under the cover of qualified privilege (see the HC defamation judgment at [163]–[180]). In allowing the appeal, we agreed with the respondent that malice had been established and this defeated the defence of qualified privilege. Our grounds of decision may be found in the defamation appeal. We also directed that aggravated damages be awarded. Damages were subsequently assessed by us to be $140,000 and a further sum of $70,000 was awarded as aggravated damages (see *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 357 at [37]–[41]). As for costs, at the conclusion of the defamation appeal, we ordered that the costs of the trial be taxed on an indemnity basis as we found that the appellants were deliberately economical with the truth and had used the Extracts for the improper purpose of concealing their own questionable conduct in extracting cash reserves of the Company for their own use. Further, we held that the appellants had acted with express malice in publishing the Extracts concerning the respondent as they knew them to be untrue. We subsequently directed that costs of the trial below shall be for two counsel only.

Chronology of Events

7 As the appeal essentially turns on whether the award of $650,000 under Section 1 of BC 247 was excessive, reprising the timeline of the work preceding the filing of Suit 514 to the delivery of the costs decision will be helpful in making sense of the issues raised in this appeal:

	Date	**Event**
1	15 August 2007	The respondent commenced Suit 514 against the appellants.
2	7 January 2008	Summons No 5497 of 2007 and Summons No 5507 of 2007 came up for hearing before an Assistant Registrar ("AR"). Costs of the applications were not fixed.
3	10 January 2008	Summons No 64 of 2008 was heard before an AR. Costs were fixed at $1,500 to the respondent.
4	11 February 2008	Registrar's Appeal No 22 of 2008, *viz*, the respondent's appeal against the AR's decision given on 10 January 2008 that their application be dismissed with costs fixed at $1,500 was heard before Tan Lee Meng J. Consent orders were made.
5	22 February 2008	Summons No 4849 of 2007 ("SUM 4849/2007") was heard before Tan J. This was an application by the appellants for a determination pursuant to O 14 r 12 of the Rules of Court (Cap 332, R 5, 2006 Rev Ed) ("the ROC") that the words complained of by the respondent were not capable of bearing any meaning defamatory to the respondent and, alternatively, for the writ of summons and the statement of claim to be struck out under O 18 r 19 of the ROC or under the Court's inherent jurisdiction.
6	17-18 April 2008	SUM 4849/2007, Summons No 1702 of 2008 and the respondent's oral application were heard before Tan J. Costs were ordered to be agreed or taxed.

7	9 July 2008	Tan J dismissed the appellants' applications under SUM 4849/2007. Costs were ordered to be in the cause.
8	28 July 2008	Summons No 2078 of 2009, *viz*, the appellants' application to amend the Defence, was heard before an AR. Costs were to be agreed or taxed.
9	1 August 2008	Affidavits of Evidence in Chief ("AEICs") were filed. The respondent called one witness, *ie*, himself. The appellants filed three AEICs: (a) A joint AEIC by the appellants; (b) An AEIC of one Ms Moh Siang King (RTC's finance manager) and; (c) An AEIC of one Ms Denise Adams (a club expert).
10	11–15 August 2008	The defamation trial took place before the Judge for a total of five days. The trial was initially fixed for ten days. (a) The first two days were taken up by counsel for the respondent in his oral opening statement; (b) Two and a half days were spent by counsel for the appellants in cross-examination of the respondent; (c) Half a day spent in the re-examination of the respondent by counsel for the respondent; (d) The appellants submitted "no case to answer" and did not call any witness.
11	1 September 2008	Written closing submissions were exchanged between parties. (a) The appellants' closing submissions: 224 pages and 22 cases cited (b) The respondent's closing submissions: 171 pages and 7 cases cited
12	3 September 2008	Oral closing submissions were made by the parties before the Judge.
13	10 February 2009	The Judge gave his judgment dismissing the respondent's defamation claim in the HC defamation judgment ([3] above).
14	9 March 2009	The respondent appealed against the part of the HC defamation judgment given on 10 February 2009 where it was held that the appellants were able to rely on the defence of qualified privilege *vide* Civil Appeal No 25 of 2009 ("CA 25/2009").
15	31 March 2009	The respondent appealed against the HC defamation judgment on costs (given on 10 February 2009 and clarified on 24 March 2009) *vide* Civil Appeal No 38 of 2009 ("CA 38/2009").

16	30 July 2009	The appeals (CA 25/2009 and CA 38/2009) were heard by the Court of Appeal for about 2.5 hours.
17	8 October 2009	The Court of Appeal released its judgment in respect of the appeals in CA 25/2009 and CA 38/2009 in the defamation appeal ([3] above). The Court of Appeal found against the appellants (with damages to be assessed) and gave the respondent the following costs orders: (a) costs in the appeal on a standard basis; and (b) costs in Suit 514 on an indemnity basis.
18	13 October 2009	The respondent wrote in to, *inter alia*, request for certificate of costs for three solicitors for the hearing of Suit 514.
19	15 October 2009	The appellants wrote in and responded that the respondent's request for certificate of costs for three solicitors should have been directed to the Judge. In any event, the appellants submitted that certificate of costs for three solicitors should not be granted as it was wholly unjustifiable.
20	16 October 2009	The Court of Appeal directed that costs for the hearing of Suit 514 be for two counsel only.
21	29 December 2009	The respondent filed BC 247 in respect of Suit 514. In BC 247, the respondent claimed (subsequently clarified at the hearing) costs under Section 1 of BC 247 in the sum of $1,115,655 on the basis of the time spent by six solicitors/counsel in the matter totalling 2,309.3 hours.
22	30 December 2009	The respondent filed Bill of Costs No 248 of 2009 ("BC 248") in respect of CA 25/2009 and CA 38/2009. This is not the subject of the present appeal.
23	12 January 2010	The appellants filed their Notice of Dispute in response to BC 247 and BC 248.
24	25 January 2010 and 9 February 2010	The subject bill and BC 248 were heard by a taxing AR ("the taxing AR"). The taxing AR directed the appellants' counsel to inform the Court of the total number of hours spent by them in relation to Suit 514, CA 25/2009 and CA 38/2009. Counsel for the appellants informed the Court that their time spent as recorded was: (a) 1,149 hours in relation to the proceedings in Suit 514 (20 July 2007 to 24 March 2009); and (b) 129.1 hours in relation to the appeal proceedings (25 March 2009 to 30 July 2009). In respect of BC 247, the AR awarded the respondent costs under Section 1 of BC 247 in the amount of $400,000 thereby taxing off more than half of the amount which had been claimed by the respondent.

25	23 February 2010	The respondent filed Summons No 803 of 2010 for a review of the AR's decision to award costs under Section 1 of BC 247 in the amount of $400,000. The appellants filed Summons No 815 of 2010 for a review of the AR's decision to award, *inter alia*, $400,000 as costs under Section 1of BC 247.
26	9 March 2010	The applications for review of taxation were heard by the Judge. In respect of BC 247, the Judge increased the amount under Section 1 of BC 247 to $650,000. The award of $40,000 in respect of BC 248 was upheld by the Judge.
27	16 March 2010	The appellants filed Originating Summons No 279 of 2010 ("OS 279") applying to the Judge for leave to appeal to the Court of Appeal against his costs award of $650,000 on the grounds that, *inter alia*, the amount of the costs awarded was disproportionate and excessive. The appellants made due payment of the total taxed costs in BC 247 and BC 248.
28	23 March 2010	The appellants made payment of the total court fees due for the extraction of the Registrar's Certificates of BC 247 and BC 248.
29	19 April 2010	OS 279 was heard by the Judge. Leave to appeal was refused.
30	23 April 2010	The appellants filed Originating Summons No 391 of 2010 ("OS 391"), applying to the Court of Appeal for leave to appeal against the Judge's award of $650,000 on the grounds that, *inter alia*, the amount of costs awarded was disproportionate and excessive.
31	28 July 2010	The Court of Appeal issued its judgment on the assessment of damages for Suit 514. The respondent was awarded $210,000 as general and aggravated damages (see *Lim Eng Hock Peter v Lin Jian Wei and another and another Appeal* [2010] 4 SLR 357).
32	2 August 2010	OS 391 was heard by the Court of Appeal which granted the application. Notably, the Court of Appeal expressed the view that the appeal raised the issue of assessing indemnity costs, which was of importance to the legal profession as well as the wider community.
33	26 August 2010	The Judge released the costs decision ([1] above) which set out the grounds for his decision in allowing costs under Section 1 of BC 247 in the amount of $650,000 to the respondent.

An overview of the analytical framework adopted in the High Court's costs decision

An overview of the analytical framework adopted in the High Court's costs decision

Legal and factual complexity of the matter

8 The Judge in a detailed decision outlined the factors he considered in arriving at the award of costs of $650,000. He also made references to the particulars of Section 1 of BC 247 which set out, *inter alia*¸ the details of the pleadings, the interlocutory hearings and the 23 legal issues and various factual issues which gave rise to the legal and factual complexity of Suit 514.

9 Further, the Judge noted that there was nothing in the Notice of Dispute from counsel for the appellants asserting that any of the legal or factual issues were irrelevant or that it was unreasonable for counsel for the respondent to have considered them. The Judge then observed at [11] of the costs decision that:

> Even if I had any doubt on the reasonableness of the [respondent]'s counsel in considering them, I would have resolved it in favour of the [respondent] and would have awarded costs on the basis that it was not unreasonable for the [respondent]'s counsel to have carefully considered and researched each of those numerous legal issues set out above and to have carefully perused all the documents and thoroughly prepared the case including the evidence and the potential cross-examination of the [appellants] and their witnesses in support of the [respondent]s position on the various legal and factual issues for the interlocutory hearing before Tan Lee Meng J and the trial as the case may be.

10 In the course of these defamation proceedings, the appellants sought to rely on Suit No 46 of 2006 ("Suit 46") in support of their defence of justification. Suit 46 was an action by RTC against, *inter alia*, the respondent principally for the breach of directorship duties. The respondent's position *vis-a-vis* Suit 46 was that it was irrelevant to any justification defence in Suit 514 as the sting of the defamatory words were not in issue in Suit 46. The appellants argued that the emphatic stance adopted by the respondent in pleading that Suit 46 was entirely irrelevant to Suit 514 meant that not much time had been spent by the respondent's counsel in considering the matters raised therein. The Judge, however, thought that counsel for the respondent would, nevertheless, have had to meticulously prepare for the rebuttal of the matters and issues raised in Suit 46 in the event the Court found them relevant (see [17] of the costs decision).

Urgency of work and the importance of the claim

11 The Judge also found that urgent work had to be undertaken by counsel for the respondent because of voluminous documents disclosed at very late stages of the proceedings. For instance, there was late discovery by the appellants of over 100 arch files of documents and 40 cartons of working papers (which had been disclosed earlier in Suit 46) less than one month before the commencement of the trial for Suit 514. This was followed by further disclosure of 30 arch files of documents less than two weeks before the trial. A further 11 itemised documents were also disclosed by the appellants just one week before trial. During the trial, the appellants tendered 52 volumes of documents totalling 14,885 pages.

12 In respect of the importance of the claim, the Judge found that the defamatory statements in the Extracts would have seriously damaged the respondent's personal and professional reputation as a prominent businessman. Great care would have been taken by counsel for the respondent in advising him on whether to launch Suit 514 as the explanatory statement was drafted with the assistance of professional advisers, *ie*, lawyers from Allen & Gledhill LLP and accountants from Ernst & Young, who must have carefully vetted the explanatory statement before its publication. This was compounded by the fact that this was not a straightforward occasion of outright defamatory remarks made against

the respondent. Rather, it was a more nuanced case where the sting of the defamation resided in the subtext. Counsel for the respondent was thus given the benefit of the doubt by the Judge who found that it was not unreasonable for them to ensure that "the legal research done, the fact finding and perusal of all documents were as thorough as possible by spending much more time and effort on account of the importance of the matter to the [respondent]" ([29] of the costs decision).

Time and effort expended

13 Further, at [30] of the costs decision, the Judge took note of: (a) the hourly rate charged by each counsel for the respondent; and (b) the blended hourly rate based on the total amount claimed and the total number of hours spent by the team as a whole:

(a) Alvin Yeo, SC (20 years) -- 297.3 hours @ $900 per hour = $267,570

(b) Chan Hock Keng (14 years) --- 451.2 hours @ $750 per hour = $338,400

(c) Koh Swee Yen (3 years) --- 485 hours @ $425 per hour = $206,125

(d) Jacelyn Chan up to 29 January 2008 (3 years) --- 135.5 hours @ $425 per hour = $57,587.50

(e) Suegene Ang (1 year) --- 463.3 hours @ $325 per hour = $150,572.50

(f) Reina Chua (0.5 year) --- 477 hours @ $200 per hour = $95,400

Total time spent of 2,309.3 hours @ $483.11 (blended hourly rate) = $1,115,655 as the total amount claimed. (For 1 lawyer working for 2309.3 hours, it is equivalent to 288 man days at 8 hours a day or 12.5 man months based on 23 working days per month. If it is based on 2 lawyers working concurrently, then 2309.3 hours is equivalent to 2 lawyers working concurrently on the case for 6.25 months approximately. This gives a better overall sense of how long 2309.3 hours is.)

As counsel for the appellants did not make any specific submission on the figures, the Judge assumed (wrongly, as it turned out) that they were not contending that the charge out rates listed by counsel for the respondent were unreasonable or excessively high when compared to the prevailing market rate.

14 The Judge thought that the disparity between the time expended by counsel for each party, *ie*, 1,149 hours by counsel for the appellants and 2,309.3 hours by counsel for the respondent, was due to the fact that the former had prior involvement in Suit 46 and therefore had intimate knowledge of the matter. The same, however, could not be said of counsel for the respondent who had not been involved in Suit 46.

15 Nonetheless, the Judge accepted the argument made by counsel for the appellants that there was some overlap in the time spent and the work done by the legal team for the respondent, *viz*, some time was spent on minor interlocutory applications for which costs had been fixed, some overlap pertained to the getting up process by the replacement of one of the respondent's solicitors handling the matter, and there was also some overlap of issues in SUM 4849/2007 before Tan J and that of the main trial. The Judge considered that a balance had to be struck in respect of the overlap of issues given that counsel would have required some refreshment because of the four-month lapse between the two hearings.

The multiplier and multiplicand approach: hours allowed and charge out rate

16 To give credit for overlap and double counting in relation to matters where costs had been fixed earlier, the Judge recognised only 1,100 hours of time spent by the respondent's counsel. This, in his view, represented a fair and reasonable amount of time and effort needed to be expended by two counsel on Suit 514, having regard to all the circumstances of the case.

17 He then applied a blended charge out rate of $600 per hour, thus giving a total of $660,000 based on 1,100 hours. This figure was then rounded down to $650,000 as the amount of costs to be awarded (on an indemnity basis) under Section 1 of BC 247 (at [39] of the costs decision).

Comparing taxation precedents by reference to "hours claimed"

18 In deciding whether the amount of $650,000 under Section 1 of BC 247 was in line with taxation precedents of comparable cases, the Judge correctly emphasised that no two cases were entirely identical. However, the Judge then adopted a mathematical time costing approach in examining and comparing prior taxation precedents (at [42]–[46] of the costs decision):

> 42 ... Dividing the actual costs awarded by the court by the number of hours *claimed* would give the hourly rate based on the hours *claimed* . This hourly rate could be used to make a comparison whether the actual costs awarded have been excessive when the hourly rate computed for the "hours *claimed*" is shown to be much higher than other comparable cases, or whether the actual costs awarded have been manifestly inadequate when the hourly rate computed for the "hours *claimed*" is shown to be way below that of other comparable cases. However in most cases, no information is provided in the comparable cases about the actual hours allowed by the court as the reasonable number of hours expended. In most cases, the court simply states the final total quantum of costs allowed without stating what was the total number of hours allowed that was reasonable. Hence, it is not possible to compute the hourly rate for the "hours *allowed*" for the purpose of comparison.
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> ...
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> 44 ... In the absence of information in the comparable cases of the hourly rate for the "hours allowed", a comparison based on the hourly rate for the "hours allowed" cannot be carried out. The only way is to compare the present case with the comparable cases based on the hourly rate for the "hours *claimed*".
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> 45 As can be seen from the comparable cases brought to my attention (see Annex A to [the costs decision]), the hourly rate for the "hours claimed" ranged from $133 to $500 per hour claimed. The present case of $281 for each hour claimed is in fact very reasonable being somewhere mid-way in the range of the hourly rates established from the comparable cases. This rate for each hour claimed of $281 is in fact much below that of the other two defamation cases assessed on a standard basis which were $345 per hour claimed for Jeyasegaram David (alias David Gerald Jeyasegaram) v Ban Song Long David [2005] 1 SLR(R) 1 and $339 per hour claimed for Oei Hong Leong v Ban Song Long David and others [2005] 1 SLR(R) 277. On no account based on the available information from the comparabIe cases of the hourly rate for the "hours *claimed*" can it be said that the amount I awarded of $650,000 is excessive and out of the normal range. At this juncture, it is worth reiterating that making a comparison based merely on an absolute award of costs without dividing by the number of hours whether as *claimed* or *allowed* is not at all helpful and is overly simplistic and flawed. The best way is to compare the hourly rate based on the "hours *allowed*". The second best way is to compare the hourly rate for the "hours

claimed" (assuming genuine claims by counsel on hours spent) when no information is available on the number of hours *allowed* by the court during the taxation of those comparable cases.

46 In this case, I have given the hours allowed as 1,100 hours so that future comparisons may be made based on the hourly rate for the "hours *allowed*". With time, more benchmarks could be established for comparison purposes based on the hourly rate for the "hours *allowed*".

[emphasis in italics in original, emphasis in underline added]

Issues on appeal

The appellants' submissions

19 Counsel for the appellants, Ms Kristy Tan ("Ms Tan"), submitted that although the Judge's award of $650,000 was effectively a discount from the respondent's original claim of $1,115,655, this amount was still wholly disproportionate, manifestly excessive and unreasonable in the light of all the circumstances of the case. After all, Suit 514 was only a six-day trial with the respondent alone testifying, and the whole matter was disposed of within a year of its commencement. She forcefully submitted that the principle of proportionality demanded a steep reduction in the amount awarded by the Judge.

The respondent's submissions

20 Counsel for the respondent, Mr Chan Hock Keng ("Mr Chan"), argued that the appellants' reliance on the doctrine of proportionality was misplaced. Mr Chan referred to the position in England and Wales where rr 44.5(1)(*a*) and (*b*) of the Civil Procedure Rules (SI 1198 No 3132) (UK) ("the CPR"), which is reproduced below, at [39], expressly stated that the principle of proportionality does not apply to taxation on an indemnity basis.

21 Given that the provision for taxation on an indemnity basis under O 59 r 27(3) of the ROC was modelled on O 62 r 12(2) of the English Rules of the Supreme Court 1965 as contained in *The Supreme Court Practice 1997* vol 1 (Sweet & Maxwell, 1996) ("the English RSC 1965"), which has since been replaced by the CPR in 1998, it was submitted that the original position under O 62 r 12(2) of the English RSC 1965 should be followed in Singapore (see [35] below). For taxation on an indemnity basis under O 62 r 12(2) of the English RSC 1965, unless it was clear that the costs were of an unreasonable amount or were unreasonably incurred, the item must be allowed to the receiving party (see *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59 at 71D–71G).

22 Following from this, Mr Chan submitted that the principle of proportionality had no bearing on costs taxed on an indemnity basis in Singapore. He asserted that only the principle of reasonableness was applicable when party and party costs are taxed on an indemnity basis.

The decision of the Court

The Court's role in the assessment of legal costs

23 Before we address the specific issues raised in this appeal, it will be helpful to first outline the Court's supervisory role and power of intervention in the general scheme of taxation of legal costs in Singapore. The material statutory provisions dealing with this are to be found in the LPA and the ROC.

The LPA

(a) Non-Contentious Business

24 A remuneration order can be made by a committee (constituted in accordance with ss 108(1) and (2) of the LPA) ("the Committee") under s 108(3) of the LPA to regulate the remuneration of solicitors in non-contentious business. In making a remuneration order, the Committee has to take into account the following considerations:

> (a) the position of the party for whom the solicitor or law corporation or limited liability law partnership is concerned in the business, that is, whether as vendor or purchaser, lessor or lessee, mortgagor or mortgagee, and the like;
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> (b) the place where, and the circumstances in which, the business or any part thereof is transacted;
>
> (c) the *amount of the capital money or rent to which the business relates*;
>
> (d) the skill, labour and responsibility involved therein on the part of the solicitor or law corporation or limited liability law partnership; and
>
> (e) *the number and importance of the documents prepared or perused, without regard to length*.
>
> [emphasis added]

25 As for agreements made with respect to remuneration of non-contentious business between a solicitor and client under s 109(1) of the LPA, a taxing officer may, where the client objects to the agreement as *unfair* or *unreasonable* on taxation, enquire into the facts and certify them to the court. If on that certificate it appears *just* to the Court that the agreement should be cancelled, or the amount payable thereunder reduced, the Court may order the agreement to be cancelled, or that the amount payable be reduced, and may give such consequential directions as the Court thinks fit (see s 109(6) of the LPA). Plainly, the supervisory jurisdiction of the Court in its oversight of such costs arrangements is extremely broad.

(b) Contentious business

26 In dealing with an application to enforce an agreement entered into between a solicitor and client for contentious business under s 111 of the LPA, the Court may, if it appears that the agreement is in all respects *fair* and *reasonable* enforce the agreement in such manner and subject to such conditions (if any) as to the costs of the application as the Court thinks fit (see s 113(3) of the LPA). If, however, the terms of the agreement are deemed by the Court to be *unfair* or *unreasonable*, the agreement may be declared void under s 113(4) of the LPA. Where the Court directs that the agreement be given up to be cancelled, the Court may direct that the bill be taxed (see s 113(5) of the LPA). Again, the Court is conferred a broad supervisory role in assessing legal costs notwithstanding any prior agreement between the solicitor and the client.

The ROC

27 The amount of costs to be allowed upon taxation, subject to any Court order, is in the discretion of the Registrar (see Appendix 1 to O 59 of the ROC, para 1(1)). In the assessment of costs of the present appeal, the ROC requires the Registrar to take into account all the relevant circumstances of the case, and in particular, the considerations listed in para 1(2) of Appendix 1 to

O 59 of the ROC ("Appendix 1 considerations"):

> **Amount of costs**
>
> 1. —(1) The amount of costs to be allowed shall (subject to any order of the Court) be in the discretion of the Registrar.
>
> (2) In exercising his discretion the Registrar *shall have regard* t o *all the relevant circumstances*, and in particular to —
>
> (*a*) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
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> (*b*) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;
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> (*c*) the number and importance of the documents (however brief) prepared or perused;
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> (*d*) the place and circumstances in which the business involved is transacted;
>
> (*e*) the urgency and importance of the cause or matter to the client; and
>
> (*f*) where money or property is involved, its amount or value.
>
> [emphasis added]

28 We preface our preliminary analysis of this provision by noting, first, that in every taxation the Registrar "*shall* have regard to all the relevant circumstances" [emphasis added]. This is a mandatory directive. Second, particular regard ***shall*** be given to the six considerations stated. It can be seen that within this catalogue of considerations, one of the principles permeating all of them is that of reasonableness. This is not dissimilar to the overriding consideration of "fairness" and/or "reasonableness" governing the Court's supervisory jurisdiction for non-contentious matters and costs agreements for contentious matters (see above at [25]–[26]). It also bears mention that the Judge's undue focus on time and the charge out rates as dominant considerations does not resonate with the broader requirements of this provision.

29 While it is true that there is no express reference to the principle of proportionality under the applicable ROC governing the present assessment, it seems plain to us that aspects of such a requirement are indeed an inarticulate premise in several of the above considerations. The Appendix 1 considerations make generous references to the "complexity", "difficulty", "novelty", "urgency" and "importance" of the matter at hand. All of these criteria severally and jointly import the principle of proportionality in the task of assessing legal costs. In addition, the reference in para 1(2) (*f*) to the amount or value of the money or property involved is also highly significant. This appears to be an even clearer indication that there must be a measure of proportionality between the amount claimed and the stake in dispute (see [57]–[59] below). In our view, it cannot be seriously argued that the overriding requirement of this provision to "have regard to *all the relevant circumstances*" [emphasis added] does not include consideration of the principle of proportionality.

30 Professor Jeffrey Pinsler SC has also rightly pointed out that although proportionality had not been expressly identified as a consideration in the taxation process prior to the amendment *via* the Rules of Court (Amendment No. 3) Rules 2010 ("S 504/2010") (with effect from 15 September 2010),

"Singapore's rules of civil procedure have increasingly reflected facets of proportionality" (see Jeffrey Pinsler SC, "Proportionality in Costs" (2011) 23 SAcLJ 125 ("Proportionality in Costs") at p 126). He also perceptively observes that "[o]ver the last ten years, various rules of court have been amended to emphasise that litigants can no longer assume that they will recover costs simply on the basis of success" (see Proportionality in Costs at p 126). *An objective of these procedural changes and our current case management procedures is indeed to ensure that parties are made aware that the manner in which litigation is pursued has a direct bearing on the costs that may ultimately be recovered*. We explain below, at [43], the reason for the recent amendment to para 1(2) of Appendix 1 to O 59 of the ROC. It now expressly directs the taxing Registrar in exercising his discretion to consider the aforesaid considerations and also to have regard to the principle of proportionality ("the express proportionality rule"). For ease of reference we reproduce the current para 1 of Appendix 1 to O 59 of the ROC:

> **Amount of costs**
>
> 1. —(1) The amount of costs to be allowed shall (subject to any order of the Court) be in the discretion of the Registrar.
>
> (2) *In exercising his discretion the Registrar shall have regard to the principle of proportionality and all the relevant circumstances* and, in particular, to the following matters:
>
> (*a*) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
>
> (*b*) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;
>
> (*c*) the number and importance of the documents (however brief) prepared or perused;
>
> (*d*) the place and circumstances in which the business involved is transacted;
>
> (*e*) the urgency and importance of the cause or matter to the client; and
>
> (*f*) where money or property is involved, its amount or value.
>
> [emphasis added]

Principles governing costs awarded on an indemnity basis

31 The assessment of party and party costs in Singapore is made on one of the two bases for taxation, *ie*, the standard basis or the indemnity basis, as stipulated in O 59 rr 27(2) and (3) of the ROC respectively:

> (2) On a taxation of costs on the *standard basis*, there shall be *allowed a reasonable amount in respect of all costs reasonably incurred* and *any doubts* which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount *shall be resolved in favour of the paying party*; and in these Rules, the term "the standard basis", in relation to the taxation of costs, shall be construed accordingly.
>
> (3) On a taxation on the *indemnity basis*, *all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred* and *any doubts* which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in

amount *shall be resolved in favour of the receiving party*; and in these Rules, the term "the indemnity basis", in relation to the taxation of costs, shall be construed accordingly.

[emphasis added]

3 2 *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) at para 59/27/5, p 1219 succinctly summarises the position as follows:

The indemnity basis is also characterised by the reasonableness principle and reflects the former 'solicitor and own client' basis. The standard basis is inclusionary so that the recovery of costs depends on meeting the principle of inclusion. Under the indemnity basis, which is exclusionary in nature, all costs are included unless they come within the scope of the principle of exclusion. Although the principle of the standard and indemnity bases is the same, the distinction between them lies in determining whether any doubts about the reasonableness of the costs should be resolved in favour of one party or the other. In the case of standard basis, any doubts are to be resolved in favour of the paying party; in the case of the indemnity basis, any doubts are to be resolved in favour of the receiving party.

33 Both the appellants and respondent were in agreement with regard to the general principles governing an award of costs on an indemnity basis: any doubt as to the reasonableness of costs shall be resolved in favour of the receiving party. The parties, however, vigorously disagreed on whether proportionality ought to have had any bearing in the Judge's assessment of costs (see [19]–[22] above).

The position prior to the insertion of the express proportionality rule

34 Prior to the amendment to the ROC *via* S 504/2010, there appears to have been a difference of views as to whether the principle of proportionality has been incorporated in the Singapore civil justice system: see, in the context of taxation/costs assessment, James Leong, "The Practice of Procedural Proportionality in the Civil Justice System of Singapore", 22nd AIJA Annual Conference (17–19 September 2004) <http://www.aija.org.au/ac04/papers/ Leong.pdf> (accessed 31 May 2011); Proportionality in Costs at p 127; and *VV and another v VW* [2008] 2 SLR(R) 929 at [28] where a High Court judge suggested that "there is nothing in Singapore law, unlike the position in England, which compels the taxing officer to give regard to the principle [of proportionality]".

(a) Order 62 r 12 of the English RSC 1965 and O 59 r 27 of the ROC

35 The position under the English RSC 1965 is as follows:

Basis of taxation (O.62 r.12)

12.—(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party ...

(2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party ...

Mr Chan maintained that since the Singapore ROC was modelled on the English RSC 1965 (see [21] above), the English position in respect of taxation on an indemnity basis *prior* to the introduction of the CPR should be adopted. As O 62 r 12(2) of the English RSC 1965 only made reference to "reasonableness", the position in Singapore should logically be based on the principle of reasonableness.

36 The local provisions which deal with the basis of taxation in the ROC are that of O 59 rr 27(2) and (3) (see [31] above). Admittedly, the terms of those rules are similar to that in O 62 r 12 of the English RSC 1965. However, Mr Chan's submissions that "reasonableness" is the only relevant test in determining the amount of costs to be allowed will only be correct if O 59 r 27 of the ROC is read in isolation from other provisions under the ROC pertaining to the assessment of costs or taxation and a very thin definition of the concept of reasonableness is adopted. In our view, the six Appendix 1 considerations (along with all the relevant circumstances of the case) cannot be ignored given that they *govern* the Registrar's exercise of discretion in assessing the amount of costs to be allowed.

(b) Appendix 1 to O 59 of the ROC and its predecessors

37 The original Appendix 1 considerations were first found, in the local context, in Part X of Appendix 1 to O 59 of the Rules of the Supreme Court, 1970 (SL Supp No 59) ("the ROC 1970") which dealt with the exercise of a taxing officer's discretion in respect of "discretionary costs" under the then existing scale of costs system. Notably, this scale of costs system was abolished in 1991 pursuant to the recommendations of the Rules of the Supreme Court Working Party's Third Report dated 11 September 1991 in favour of a "*bottom-line*" approach, *ie*, focusing on *what is the total a party has to pay at the end of the day* (at p 3). The abolition of the scale of costs system and the transposition of the considerations in Part X of Appendix 1 to O 59 of the ROC 1970 as a standalone paragraph under the heading of "amount of costs" in para 1(2) of Appendix 1 to O 59 of the ROC 1970 were effected *via* Rules of the Supreme Court (Amendment No 3) Rules 1991. These considerations under Appendix 1 to O 59 of the Rules of the Supreme Court (Cap 322, R5, 1990 Ed) and, subsequently, the Rules of Court (Cap 322, R5, 2006 Rev Ed) remained unchanged until the express proportionality rule was incorporated *vide* S 504/2010.

38 Part X of Appendix 1 to O 59 of the ROC 1970 appears to have been modelled after para 1(2), Part X of Appendix 2 to O 62 of the English RSC 1965 which, in turn, was based on Part X of Appendix 2 to the Supreme Court Costs Rules 1959 (UK) (contained in *The Annual Practice 1965* vol 1 (Sweet & Maxwell, 1964) at p 1999/340). Although it appears that the English RSC 1965 and the ROC have a common genesis, it will be shown at [39]–[43] below that, despite the similar terms of the considerations that need to be taken into account in the exercise of a taxing officer's discretion under the English RSC 1965 (now the CPR) and the ROC, our legal costs scheme evolved differently from the English system.

(c) The local scheme of assessment of legal costs

39 The difference is especially stark between the present CPR scheme in England and the ROC. For instance, under r 44.5 of the CPR, the proportionality principle applies to standard costs and not indemnity costs:

> **Factors to be taken into account in deciding the amount of costs**
>
> 44.5
>
> (1) The Court is to have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the *standard basis* –

(i) proportionately and reasonably incurred; or

(ii) were proportionate and reasonable in amount, or

(b) if it is assessing costs on the *indemnity basis* –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

[emphasis added]

There is no similar bifurcation in the ROC, both before and after the incorporation of the express proportionality rule. Therefore, statements on the principle of proportionality from English cases (particularly those construing the CPR, see [45] below) must be considered with reserve.

40 Our decision in *Lock Han Chng Jonathan (Jonathan Luo Hancheng) v Goh Jessiline* [2008] 2 SLR(R) 455 ("*Jonathan Lock*") is a vivid illustration of the importance of costs being maintained at a reasonable and proportionate level to, *inter alia*, the amount claimed. In our brief grounds of decision (see [7] of Appendix attached to *Jonathan Lock*), we noted that *Jonathan Lock* was an incredible case in that all the appellant wanted was $375 (being $285 for costs of repair of his damaged motorcycle and $90 for loss of use) for which he eventually agreed to settle at $182.50. However, due to the contest of wills between the solicitors involved, *unnecessary expenditure* was incurred in terms of court fees and disbursement, which exceeded $100,000, even before the date of the hearing before the Court of Appeal. This was certainly a case where the Court applied the principle of proportionality as the solicitors' costs claimed were wholly disproportionate to the amount contested. The solicitors had lost sight of the principle of proportionality and as a result had behaved unreasonably in clocking up unnecessary hours.

41 Upon closer examination of the relevant provisions of the LPA, it is apparent that the principle of proportionality has also been implicitly entrenched there. For instance, ss 109(6) and 113(4) of the LPA confer on the Court the power to, *inter alia*, cancel or declare as void *any* non-contentious business or contentious costs agreement between a solicitor and client that is found to be *unfair* or *unreasonable*. In our view, any claim for costs that is disproportionate to the value of the claim is unreasonable and therefore also unfair. Further, the Appendix 1 considerations, and in particular the requirement that *where money or property is involved, its amount or value* has to be taken into account, is further affirmation that proportionality must be shown in establishing that the claim of costs is reasonable having "regard to all the circumstances" of the matter.

42 It is apt to pause here to address Mr Chan's assertion that prior to the amendment in September 2010, proportionality had no role in taxation under the ROC and that (by way of deduction) "reasonableness" and "proportionality" are two separate and distinct principles. Viewed from the *macro* level, symmetry was obviously intended between the Court's exercise of its supervisory role in costs agreements for non-contentious and contentious business (see [25]–[26] above) and that of the process of taxation. Given that the Court has the powers to uphold or strike down (in whole or in part) any costs agreement which is *unfair* and/or *unreasonable* in its supervisory role, it is abundantly clear that a thin definition of reasonableness is not the appropriate yardstick to be adopted by the Court. Further, as mentioned in [41] above, we are of the view that any costs which are disproportionate are also unreasonable and to that extent *unfair*. As costs agreements for

non-contentious and contentious business and the process of taxation are all part of the same scheme of assessing legal costs, it seems odd to suggest that the Court has to bear in mind the principles of reasonableness and fairness (which import the principle of proportionality) in its supervisory capacity under the provisions of the LPA for agreements on costs but has to exclude the principle of proportionality when assessing costs under the ROC. The untenability of the respondent's position is further amplified when one examines at the *micro* level the factors enumerated in para 1(2) of Appendix 1 to O 59 of the ROC which undoubtedly incorporate the principle of proportionality, albeit not expressly.

43 We also note that the Rules Committee did not appear to think that the introduction of the express proportionality rule fundamentally altered the approach to the assessment of costs. In approving the incorporation of the principle of proportionality in para 1(2) of Appendix 1 to O 59 of the ROC, the Rules Committee accepted the Rules of Court Working Party's Second Report dated 20 August 2010, which declared at Annex 2, para 1(c):

> c) Amendment to Appendix 1 of Order 59 *to expressly incorporate* a principle of proportionality into paragraph 1 of Appendix 1.
>
> *This amendment acts as* ***a reminder to practitioners and a guide*** *to taxing registrars* ***that proportionality is a key principle in the award of costs*** .
>
> [emphasis in italics and in bold italics added]

Reasonableness, proportionality and necessity

(a) Reasonableness

44 Order 59 r 27(3) of the ROC states that:

> (3) On a taxation on the indemnity basis, *all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred* and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these Rules, the term "the indemnity basis", in relation to the taxation of costs, shall be construed accordingly. [emphasis added]

45 The English Court of Appeal in *Lownds v Home Office* [2002] 1 WLR 2450 ("*Lownds*") explained the relationship between the concepts of reasonableness and proportionality in the context of the CPR. Lord Woolf CJ, delivering the judgment of the Court, suggested a two-stage approach at [31]:

> *There has to be a global approach and an item by item approach*. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR r 44.5(3) states are relevant. *If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable*. *If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable*. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. *This in turn means that reasonable costs will only be recovered for the*

items which were necessary if the litigation had been conducted in a proportionate manner. [emphasis added]

(b) Proportionality

46 It is clear from the passage above that Lord Woolf considered proportionality and reasonableness as distinct concepts for the purposes of assessment of costs under the CPR. This approach of including proportionality in the assessment of party and party costs on a standard basis was quite different from that practised in England and Wales *prior* to the introduction of the CPR, as stated at [2] of *Lownds*:

> The only test was that of reasonableness. The problem with that test, standing on its own, was that it *institutionalised*, as reasonable, *the level of costs which were generally charged by the profession at the time when the professional services were rendered*. [emphasis added]

47 By compartmentalising proportionality and reasonableness as distinct concepts, Lord Woolf's analysis did not in practice address the difficulties that existed prior to the introduction of the CPR, where reasonableness, as a standalone concept, was incapable of capping costs from reaching outrageous proportions. This is because the *Lownds* approach leads to proportionality being "qualified" by reasonableness in the sense that costs which were reasonably incurred and of reasonable amount could be recoverable *even if* they were disproportionate. The problem with this approach can be illustrated by the following example. Assume, for instance, a complex case which justified payment of legal fees to the successful plaintiff well in excess of the amount claimed. Under the methodology laid down in *Lownds*, the full amount of the fees is recoverable, even if they are disproportionate to the amount claimed, provided they are reasonable. *It seems odd to us that if the overall costs are disproportionate to the value of the case how the amount claimed could ever be considered to have been reasonably incurred?*

48 We are not alone in entertaining such a concern. It is noteworthy that the *Lownds* approach has been roundly criticised by Jackson LJ in his masterful review of the English scheme of legal costs (see *Review of Civil Litigation Costs: Final Report* (The Stationery Office, 2009) ("the Jackson Final Report")). The views of Sir Anthony May in respect of the *Lownds* approach (which was delivered at the Cardiff Seminar on 19 June 2009) were cited at para 4.7, p 35 of the Jackson Final Report:

> I do not for a moment question the correctness of the *Lownds* decision *as an application of the law and [the CPR] as they now stand*. But the tension remains. *I do think we should ask whether, in the expensive world of adversarial litigation, a litigant should be able to recover from a losing opponent costs which it was reasonable and necessary for the winner to spend, even though the resulting amount may be out of all proportion to the amount claimed or the amount recovered?* ***Assessments which have to concentrate retrospectively on what the winning party has spent will always risk producing a disproportionate result*** . [emphasis in italics and in bold italics added]

49 At para 5.13, p 37 of the Jackson Final Report, Jackson LJ recommended the abandonment of the practice in *Lownds* in favour of an approach which *prioritises* proportionality:

> ... I propose that in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. *The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR rule 44.5(3). The court should then stand back and consider whether the total figure is*

proportionate. If the total figure is not proportionate, the court should make an appropriate reduction. [emphasis added]

(c) Necessity

50 Other than the problematic approach of favouring reasonableness over proportionality in the assessment of costs, *Lownds* was also criticised for its awkward reintroduction of the much derided Victorian test of necessity into the modern concept of proportionality under the CPR: see the Jackson Final Report at para 5.11, p 37 and *Cook on Costs 2011: A guide to legal remuneration in civil contentious and non-contentious business* (Lexis Nexis, 2011 Ed) ("*Cook on Costs*") at p 181. *Lownds* at [28] stated that:

> The reference in paragraph 11.2 [of the UK Costs Practice Direction] to *costs "which are necessary"* is the *key to how judges in assessing costs should give effect to the requirement of proportionality. If the appropriate conduct of the proceedings makes costs necessary then the requirement of proportionality does not prevent all the costs being recovered either on an item by item approach or on a global approach*. The need to consider what costs are necessary is not a novel requirement. It was reflected by the former provisions of RSC Ord 62 which applied to the taxation of costs prior to 1986. Rule 28(2) dealt with costs on a party and party basis and stated: "there shall be allowed all such costs as were necessary or proper for the attainment of justice ..." [emphasis added]

Interestingly, the so-called Victorian notion of necessity (which was embodied in the rules up until its removal in 1986) and the provisions under the English Rules of the Supreme Court 1883 (UK) (contained in *The Annual Practice 1923* (Sweet & Maxwell Ltd, 41st Annual Issue) at p 1356) ("the English RSC 1883") relating to costs and the taxing registrar's exercise of discretion in awarding discretionary costs under the then scale of costs system seem also to point towards the principle of proportionality.

(1) Order 65 r 27(29) of the English RSC 1883 on "necessity"

51 Order 62 r 28(2) of the English RSC 1965, as mentioned in *Lownds* (see [50] above), which deals with costs on the (old) party and party basis, states as follows:

> **Costs payable to one party by another or out of a fund (O 62 r 28)**
>
> 28.— ...
>
> (2) Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.

The commentaries in respect of O 62 r 28(2) as found in *The Supreme Court Practice 1973* vol I (I H Jacob gen ed) (Sweet & Maxwell Ltd, 1972) at Part 1, p 946 are to the following effect: that "[i]t is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an *excessive* amount of costs"; and, *per* Sir R Malins VC in *Smith v Buller* (1874-1875) LR 19 Eq 473 at p 475, "the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them." We note that the origins of O 62 r 28(2) of the English RSC 1965 can be traced back

to O 65 r 27(29) of the English RSC 1883, which states as follows:

> **Costs to be allowed on taxation**:
>
> 29. On every taxation the taxing master shall allow all such costs, charges and expense, as shall appear to him to have been *necessary or proper for the attainment of justice or for defending the rights of any part*y, but save as against the party who incurred the same *no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other person, or by other unusual expenses*. [emphasis added]

52 We agree with the observation made in the Jackson Final Report at para 5.10, p 37 that the fact that it had been *necessary* to incur certain costs is relevant in proving/disproving a *head of claim* but is not decisive of whether such costs were proportionate. This is because we are of the view that necessity is not synonymous with proportionality. However, it appears that the criticism in para 5.10 overlooked the fact that proportionality applies not only to each item in a bill of costs or proving/disproving a head of claim, but to the entire claim for costs. Necessity is not the same as proportionality but is one of the interplaying factors (alongside, *inter alia*, reasonableness) that goes towards showing that the costs claimed were proportionate in view of all the relevant circumstances of the case. That necessity is part and parcel of the consideration of proportionality is reinforced in para 11.2 of the UK Costs Practice Direction 2010, which makes reference to "costs which are necessary". According to *Lownds* (at [28]), necessity is the *key* to how judges should give effect to the requirement of proportionality in assessing costs. This is further acknowledged by the Jackson Final Report at para 4.3, p 33, which states that "[necessity] now forms a crucial part of the exegesis of proportionality".

(2) Order 65 r 27(38) of the English RSC 1883 on "correlationship"

53 Another Victorian provision which hinted at the principle of proportionality is O 65 r 27(38) of the English RSC 1883, which stipulates as follows:

> **Considerations by which taxing officer's discretion must be influenced**
>
> (38.) As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the *nature and importance of the cause or matter, the amount involved*, *the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances* … [emphasis added]

54 The local equivalent of O 65 r 27(38) of the English RSC 1883 can be found in O 62 r 58 of the Civil Procedure Rules of the Supreme Court 1934 ("the Civil Procedure Rules 1934") which states:

> Considerations by which Registrar's discretion must be influenced
>
> 58 – (I) As to fees and allowances which are discretionary, the same shall, unless otherwise provided, be allowed at the discretion of the Registrar, who, in the exercise of such discretion, shall take into consideration the other fees and allowances to the advocate and solicitor, if any, in respect of the work to which any such allowance applies, *the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear*

the costs, the general conduct and costs of the proceedings, and all other circumstances.

[emphasis added]

Both O 65 r 27(38) of the English RSC 1883 and O 62 r 58 of the Civil Procedure Rules 1934 suggest that there ought to be a correlation between the costs claimed by the solicitor and the "nature and importance of the cause or matter", "the amount involved", "the interest of the parties", "the fund or persons to bear the costs, the general conduct and costs of the proceedings" as well as "all other circumstances". In our view, these are also very broad considerations that necessitate a reference to the concept of proportionality.

55 The more recent views on "correlationship" should also be highlighted. Although the relationship between the total of the costs incurred and the financial value of the claim may not always be a reliable guide, the Jackson Final Report at para 5.7, p 36, nevertheless, acknowledged that it is necessary to consider proportionality of costs by reference to, *inter alia*, the sums at stake. Jackson LJ even went as far as proposing at para 5.15, p 38 that proportionality should be redefined to the effect that "[c]osts are proportionate if, and only if, the costs incurred bear a reasonable relationship to … the sums in issue in the proceedings". Professor Adrian Zuckerman, who has been openly critical of *Lownds*, summarised proportionality in the following way in *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2nd Ed, 2006) ("*Civil Procedure: Principles of Practice*") at para 26.88:

> The aim of the proportionality test is to maintain *a sensible correlation* between costs, *on one hand, and the value of the case, its complexity and importance, on the other hand*. [emphasis added]

We share the views and concerns of Jackson LJ and Prof Zuckerman, especially in the light of para 1(2) (*f*) of Appendix 1 to O 59 of the ROC, which makes *express* this consideration in the assessment of costs. When one juxtaposes the provisions of O 65 r 27(38) of the English RSC 1883 and O 62 r 58 of the Civil Procedure Rules 1934 against the views in the Jackson Final Report at para 5.7, p 36 and *Civil Procedure: Principles of Practice* at para 26.88, it seems that proportionality, as a principle or consideration in the context of assessment of legal costs, is neither a modern nor novel innovation of the 21st century, having found expression as early as 1883.

(d) The interplay between reasonableness, proportionality and necessity

56 We think that costs that are plainly disproportionate to, *inter alia*, the value of the claim cannot be said to have been reasonably incurred. Thus, in assessing whether costs incurred are reasonable, it needs to be shown that the costs incurred were not just reasonable and necessary for the disposal of the matter, but also, in the entire context of that matter, proportionately incurred. Prof Pinsler SC (in Proportionality in Costs at p 131) is correct in suggesting that proportionality may be regarded as a "reasonable" concept; it is reasonable that the costs of litigation be measured against the ultimate objective, and that it therefore may be characterised as an element of reasonableness.

57 As we have pointed out earlier (above at [29]–[30] and [40]–[43]), the amendment to the ROC in September 2010 was intended to merely make express what had always been an inherent feature of legal costs assessment in Singapore. The proportionality of the costs claimed to the stake in dispute has always been crucial in assessing whether a claim for costs is reasonable: see *Jonathan Lock*; see also *Shorvon Simon v Singapore Medical Council* [2006] 1 SLR(R) 182 where this Court stated that "the issue that stubbornly prevails [in the context of review of taxation] is whether the

award of the sum [by the taxing Registrar and/or Judge] was *manifestly excessive and to that extent wrong*" [emphasis added] (at [36]).

58 Having set out our view that the principle of proportionality has always been a feature of the assessment of legal costs, be it taxation on a standard or indemnity basis, we now proceed to consider whether the Judge's award of $650,000 was appropriate in the prevailing circumstances.

Whether the Judge's award of $650,000 was reasonable and proportionate

The various methodologies employed

(1) The "blended rate" methodology

59 The blended rate methodology adopted by the Judge in [30] of the costs decision (see [13] above) was novel. Prior to the costs decision, this methodology has not, to our knowledge, been directly applied in a similar fashion in taxation proceedings. In our view, the blended rate approach is problematic as it can either severely over or under compensate the successful party, depending on which member of the team actually does the bulk of the work. For instance, in a case where there are a great deal of documents discovered but the legal and factual issues are themselves relatively straightforward, the time spent on discovery work (which may not be strictly necessary) will be disproportionately rewarded. In this matter, we note that two of the most junior members of the respondent's legal team (who have only half and one year's experience, respectively) claimed to have spent close to a combined 940 hours on Suit 514. This raises the question of why should less experienced lawyers who often do more routine (as opposed to creative) work receive similar rewards to that of the more senior lawyers who take the lead in a matter? Unsurprisingly, the problem of over-compensation, especially to the more junior members of the legal team, is evident in the Judge's application of the blended rate methodology where he applied a blended charge out rate of $600 per hour (which he then multiplied with 1,100 hours) (at [39] of the costs decision). This, effectively, was a substantial mark up from the blended charge out rate of $483.11 which he had calculated earlier in [30] of the costs decision.

(2) The use of "hours claimed" as a point of reference in comparing taxation precedents

60 Further, the formula devised by the Judge in comparing taxation precedents by reference to the yardstick of "hours claimed" ironically fails to adequately acknowledge the peculiarities arising in different matters despite his earlier acknowledgment that no two cases are alike (see [18] above). An assessment based on the hourly rate for time supposedly spent fails to take into account the several factors that a taxing Registrar or Judge is *required* by the ROC to consider. *Taxation of costs is a complex discretionary process involving a holistic assessment of several interplaying considerations that cannot be reduced to a simple mathematical formula. It requires the careful and rigorous exercise of contextual discretion*.

(3) The multiplier multiplicand approach

61 We are of the view that the straightforward application of a multiplier multiplicand approach is not desirable as it can lead to unjust results. The High Court in *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1996] 3 SLR(R) 165 had correctly cautioned against adopting such an approach in the assessment of costs, echoing concerns voiced in *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 1 WLR 1504, *per* Donaldson J at 1509G:

> [I]t is wrong always to start by assessing the direct and indirect expense to the solicitor,

represented by the time spent on the business. This must always be taken into account, but it is not necessarily, or even usually, a basic factor to which all others are related. *Thus, although the labour involved will usually be directly related to, and reflected by, the time spent, the skill and specialised knowledge involved may vary greatly for different parts of that time. Again not all time spent on a transaction necessarily lends itself to being recorded, although the fullest possible records should be kept*.

This error is compounded if, as an invariable rule, the figure representing the expense of recorded time spent on the transaction is multiplied by another figure to reflect the other factors. The present case provides an illustration of this error. *The responsibility and value of the property involved were linked factors, but neither was affected by whether the recorded time spent was 30 hours or 60 hours. Yet the application of a multiplier would double the responsibility/value factor, if the recorded time spent had happened to be 60 rather than 30 hours*.

[emphasis added]

(4) The reliance on charge-out rates as claimed in BC 247

62 We should also explain why we think it is unhelpful to focus on charge out rates which are unilaterally set by law firms. Charge out rates are what a particular client will pay his own solicitor for the work done for a fixed period of time (usually hourly). They are not always the best *indicia* of what the Court ought to assess as reasonable compensation for the expertise of a competent solicitor of a certain standing. The Judge in this matter had no reference points for determining that the charge out rates claimed were in accordance with market practice. Here, we note that the Law Society has not published any guidelines on the charging of costs. All in all, some of the charge out rates claimed by the respondent's counsel in this matter did indeed raise questions of reasonableness.

63 For example, we note that one of the younger members of the respondent's legal team, who was then a solicitor of one year's standing, had been charged out at an impressive rate of $325 per hour. The total claim for her contributions taking into account the time spent was $150,572.50. How she spent this time was not explained. Indeed, no breakdown was given as to how any of the solicitors had spent their time. Interestingly, we note that one of the solicitors constituting the respondent's legal team was involved in the matter only until 29 January 2008. Although the Judge considered the solicitor's handing over of the matter at [37] of the costs decision, he did not adopt a granular approach in examining such issues, *eg*, how much of her work was subsequently repeated and what had happened to her work product, *etc*. It would be preferable that such matters be clarified by counsel at the assessment.

(5) Qualitative and quantitative factors to be taken into account pursuant to para 1(2) of Appendix 1 to Order 59 of the ROC

64 The Judge stated that where there is doubt as to the reasonableness of the amount of costs claimed by the respondent, he would resolve it in favour of the respondent (*ie*, the receiving party) in light of the fact that taxation was conducted on an indemnity basis (see, for instance [11], [19] and [29] of the costs decision). This observation is correct in principle in so far as the Judge was referring to the *burden of proof* in a taxation on an indemnity basis. *However, the fact that any doubt will be resolved in favour of the receiving party in a taxation on an indemnity basis does not mean that a taxing Registrar or Judge should invariably accept whatever is claimed by the receiving party at face value*. The danger in accepting an item or the amount claimed on its face value as counsel for the appellants supposedly did not object to the charge out rates as listed by counsel for the respondent (as illustrated at [30] of the costs decision), is that the amount claimed therein might not bear a

reasonable or proportionate relationship to that of the wider legal profession. It is wrong to retrospectively reward without questioning the time claimed to have been spent in getting up because this is dependent on several imponderables including the expertise of the counsel involved and the nature of the work done. Why should a party be allowed ordinarily to recover party and party costs that manifestly exceed the value of the claim?

65 Thus, an initial assessment must be made to determine whether the item or the amount claimed has been reasonably and properly incurred. The quantum then has to be assessed for reasonableness and proportionality by reference to the Appendix 1 considerations and all the relevant circumstances of the case. Only in matters where the Court is still left in real doubt at the end of a searching review process should doubts about reasonableness be resolved in favour of the receiving party. It seems to us that this rigorous process was not properly applied by the Judge in this matter. In determining the appropriate quantum of costs to be ordered, the Registrar is to take into account the Appendix 1 considerations (see [31] above). A plain reading of this paragraph shows that all the six considerations had to be taken into account by the Judge. Ordinarily, no single factor should be accorded undue emphasis or weight in the assessment of costs to be awarded.

(6) The emphasis on "time" by the Judge

66 In the costs decision, the Judge worked through the items listed in Form 18 Appendix A of the Supreme Court Practice Directions, step-by-step (see [8]–[14] of the costs decision). Nonetheless, it appears to us that undue emphasis had been placed by the Judge on the time/hour factor, as shown in [14] and [42] of the costs decision:

> 14 … *[I]t is more worthwhile in my view not to debate on the degree of the overall complexity, simplicity or novelty of the matter but to look at the actual particulars provided in the Bill of Costs in order to assess holistically how much time and effort is reasonably needed given the nature of each of the numerous matters set out in the Bill which had to be attended to, some of which may be relatively simple whilst others may be relatively more complex or more novel*.
>
> ...
>
> 42 … Often the information is not detailed enough to make proper comparisons. However, *I find that the number of hours claimed by counsel in the Bill of Costs for the comparable cases, assuming that they are all bona fide and accurate, is a good proxy or indicator for the amount of time and effort needed to attend to all the matters in each case, which would have taken into account the difficulty and complexity of the various matters because a more difficult matter or issue would naturally require more getting up and more time and effort to attend to*. All of this would somehow be captured within the overall time taken as claimed by counsel.
>
> [emphasis added]

67 In our view, the Judge should have first assessed the matter on the scale of relative complexity. Had he done this, he would have concluded that the legal and factual issues in this matter were not particularly complex and the time claimed to have been spent in getting up on this matter by the respondent's counsel was clearly over the top. There was likely to have been a significant degree of overlap or repetition of the work done by the solicitors. By placing an undue emphasis on the significance of the time said to have been spent by the respondent's counsel, even though he subsequently discounted this, the Judge erred in preferring a quantitative approach (as opposed to qualitative) in taxation.

6 8 *Cook on Costs* astutely notes that litigation costs have become increasingly "hypnotised with time" (at p 364). The irony in placing undue weight on time as a factor is that it becomes the "painful plodder's charter" which essentially penalises the efficient and rewards the inefficient (*Cook on Costs* at p 371). Clients who engage inefficient (or even incompetent) counsel would be doubly penalised if the time spent becomes the key consideration in taxation. This is, of course, undesirable as skilled work completed with expedition should always be better rewarded in preference to inefficiency.

69 Another potential problem arising from an undue fixation with time in the assessment of costs is that it encourages "timesheet padding" by counsel. Although with the aid of technology the time expended by each solicitor for work done can today be accurately and systematically recorded, the aggregate figures cannot tell the whole or, often, even the real work narrative. Was the time spent reasonably and efficiently? Counsel usually perform a range of tasks, bookended by the very mundane tasks requiring little intellectual input and by the intellectually challenging and creative work of devising arguments about novel points of law or the evaluation of how to present complex factual issues. The problem with placing undue emphasis on time is that it approximates to "time costing". A strict time costing regime would compound the problem of timesheet padding and may lead to astonishing claims of enormous amounts of hours spent irrespective of, for example, the nature of the subject matter or the amount claimed.

70 It cannot be gainsaid that the quality of work and effort cannot always be accurately captured by timesheets. Not infrequently, timesheets incorporate and embed substantial aspects of inefficiency and overlapping work. They should not always be taken at face value. Instead, taxing Registrars and Judges should always approach claims for large amounts of time spent with an attitude of healthy agnosticism. They ought to carefully assess at the outset the actual amount of time that might be required by competent counsel to do the relevant work. Unfortunately, from time to time, bills of costs *do* overstate the amount of work and play up the complexity of the matter in dispute. Here, we note that the respondent's counsel had originally claimed that there were 23 legal issues to be resolved and this required some 2,309.3 hours of work. However, given the respondent's stance from the outset that Suit 46 was irrelevant *and* having taken into account that some allowance of time should be given to the respondent's legal team to familiarise themselves with the issues raised in Suit 46, it is still difficult to understand how a total of 2,309.3 hours (which was 1,160.3 hours more than the time stated to have been spent by the appellants' counsel) was claimed to have been spent by the counsel for the respondent. Even the Judge must have felt that the time spent and the complexity of the matter had been overstated as he ultimately awarded only about half of the amount claimed of $1,115,655.

71 In summary, although it is true that the importance and complexity of the matter and the difficulty or novelty of questions raised affects the amount of time spent, it ought to be appreciated that the time spent, while significant, is *but only one of a number of reference points* to gauge the reasonableness and proportionality of the amount to be taxed. A taxation award should result from an exercise in judgment, not arithmetic, whatever arithmetical cross-checks may be employed (*per* Donaldson J in *Treasury Solicitor v Regester* [1978] 1 WLR 446).

(7) Other relevant circumstances of the case

72 In our view, the 23 legal issues listed in BC 247 could easily be reduced to three or four general categories. Bearing in mind that the matter involved just a six-day hearing (including the interlocutory applications before Tan J) and only one witness took the stand, the sum of $650,000 allowed by the Judge was unreasonable and disproportionate. Counsel for the appellants also drew our attention to the fact that the Court of Appeal allowed costs to be for two counsel only (see [7] above). Under O 59 r 19 of the ROC, costs for two solicitors are allowed without the need for certification, subject

to the Court being satisfied at the taxation that the use of the two solicitors was reasonable. Ms Tan submitted that because costs were allowed for two counsel (as opposed to three or more), that was an indication that the subject matter was not complex. Ms Tan was correct in this regard. In directing that costs were to be assessed on the basis of two counsel, this Court was merely reiterating that such costs were reasonable and not that a greater margin of appreciation be given in the subject taxation. It must also be pointed out that although costs were allowed only for two counsel, BC 247 claimed costs for the work of six solicitors and counsel (see above at [13]) with considerable overlapping of work. This does not seem to have been appropriately factored into the Judge's assessment.

(8) Taxation precedents

73 The award of $650,000 when measured against the taxation precedents brought to our attention is also plainly excessive. The taxation precedents reveal that costs under Section 1 of bills of costs were allowed in the region of $600,000 only when the matters typically involved highly specialised and/or novel points of law as well as the consideration of evidence from multiple factual and/or expert witnesses in lengthy hearings. For example, Bill of Costs No 195 of 2006 (Suit No 609 of 2002 between *Trek Technology (Singapore) Pte Ltd v F E Global Electronics Pte Ltd and others and other suits*) involved a consolidated suit which related to a specialised and technical area of patents and inventions and as noted at p 87, item 6.3 on the 146-page bill itself, was "believed to be the longest and most intensive patent litigation in Singapore". It involved an eight-day trial with nine factual witnesses and three expert witnesses testifying. Costs in the sum of $668,000 were eventually awarded by the High Court. Bill of Costs No 296 of 2004 (Suit No 149 of 2001 between *PT Bumi International Tankers v Man B&W Diesel S E Asia Pte Ltd and another*), on the other hand, involved a claim based on negligence which required highly technical expert evidence in relation to the malfunctioning of ship engines due to defective design and manufacture of component parts of an oil tanker. A 28-day trial was required and a total of 15 witnesses testified. The quantum of $600,000 claimed by the receiving party was (rightly) not disputed by the paying party. In stark comparison, neither of these features of legal and factual complexity is present in this appeal.

74 Further, the award of costs at $650,000 by the Judge was out of step with the award of costs in other defamation cases. For example, in Bill of Costs No 215 of 2005 (Suit No 670 of 2003 between *Oei Hong Leong v Ban Song Long David and others*), the successful party claimed party and party costs at $320,000. The defamation claim required a 16-day trial during which six factual witnesses and one expert witness were called. The first and second defendants (*ie*, the receiving party) were represented by a Senior Counsel. The plaintiff's closing submissions and reply ran up to 151 and 179 pages, respectively. The closing submissions for the first and second defendants were 302 pages with 40 authorities cited. The bill was taxed on a standard basis. The Registrar awarded costs in the sum of $180,000. In Bill of Costs No 253 of 2006 (Suit No 1222 of 2003 *Pertamina Energy Trading Ltd v Credit Suisse*), a banking fraud case involving a substantial amount of more than $17.5m, a 12-day trial was held and 14 factual witnesses and two expert witnesses were called to testify. A certificate of costs for two counsel was awarded and the bill was directed to be taxed on an indemnity basis. The Registrar awarded costs in the sum of $459,000.

75 We accept that some aspects of the pre-trial work in this matter required urgent attention from counsel for the respondent given the late discovery of voluminous documents just a month before the commencement of the main trial. However, this should be viewed against the respondent's unequivocal (and correct) stance right from the outset that Suit 46 was entirely irrelevant. It seems to us that it would have been plain to any competent solicitor that Suit 46 was a red herring and it was quite unnecessary to spend much time to arrive at that view. We also accept Ms Tan's submission, which was not disputed by Mr Chan, that as respondent's counsel were informed of the

appellants' decision not to call the subpoenaed witnesses on 31 July 2008, two days after the pre-trial conference, there was no need to do any substantive preparation work for their cross-examination.

76 It should also be noted that the total damages awarded to the respondent was in the sum of $210,000. This is an amount well below the High Court's jurisdiction for civil matters. This is a material fact which should be taken into account even though the respondent did not object to the action being tried in the High Court. Further, though this is not an absolute rule, the concept of proportionality requires that there ordinarily be some correlation between the quantum of damages awarded and the costs taxed.

77 Notably, the respondent has affirmed at [34] of his affidavit dated 17 May 2010 that the sum claimed under Section 1 of BC 247, *ie*, $1,115,655, was not the total costs which he had incurred in commencing and maintaining Suit 514 against the appellants. We are of course mindful that members of the Bar need to be adequately compensated with a fair return for the provision of their professional services. However, a balance needs to be struck between that and the wider public interest in preventing legal costs from escalating disproportionately. If the time spent (and not the reasonableness of the claim for the work done) is the key consideration, "over-lawyering" and inefficiency within the legal profession could be encouraged. As access to the Court should not be confined to only those with deep pockets, it is important for the Court to bear in mind that generous taxation awards may extend existing costs boundaries and that this would in time raise the overall costs of litigation. In respect of the respondent's claim, while costs taxed on an indemnity basis should ordinarily approximate the amount recovered under the solicitor and client costs, this should be subject to the caveat that the costs incurred thereunder are neither unreasonable nor disproportionate. The precedents we have referred to above as well as the quantum of damages, namely the sum of $210,000, recovered by the respondent ineluctably lead to the conclusion that the Judge's award of $650,000 for Section 1 of BC 247 is disproportionate and therefore unreasonable.

Summary on the process of taxation

78 The approach that should be adopted in taxation is that the Court should first assess the relative complexity of the matter, the work supposedly done against what was reasonably required in the prevailing circumstances, the reasonableness and proportionality of the amounts claimed on an item by item basis and thereafter, assess the proportionality of the resulting aggregate costs. In this exercise, all the Appendix 1 considerations are relevant. In the general scheme of things, no single consideration ordinarily ought to take precedence. In every matter, this calls for careful judgment by reference to existing precedents and guidelines. A taxing officer should consider the complexity of the issues of fact and law which arose in the matter against the backdrop of the statements as to the amount of time spent by the solicitors and also the seniority of the counsel involved in order to determine whether the costs claimed for the amount of time spent is reasonable and proportionate. For instance, in a scenario involving a taxation of party and party costs where a Senior Counsel is engaged for a straightforward matter that a competent senior associate could have handled with ease, the taxing officer in exercising his discretion should bear in mind the principle of proportionality in that the conduct of the litigation should be in a manner which bears some correlation to the amount or nature of the claim and award costs accordingly without undue deference to the costs claimed at a Senior Counsel rate.

79 We conclude by placing the Judge's assessment of costs in its proper context. The total amount of damages recovered by the respondent was $210,000 (pertinently, this amount had not been assessed when the Judge made his award of costs). The entire trial before the High Court did not exceed six days and was not a particularly complex matter. There is no precedent that has given

costs on an indemnity basis of such magnitude, having regard to the damages awarded. The reference to costs being assessed on the basis of two counsel was no more than a reiteration of what the ROC already prescribed. What clients are willingly prepared to pay their counsel on a solicitor and own client basis is a private matter. However, when a successful party seeks to recover from the unsuccessful party costs which are wholly disproportionate to the injury caused to him, the Court should not sanction it. An undue retrospective hypnotic fixation with the time spent by counsel and/or their charge out rates will often lead to disproportionate costs being awarded. In our view such an approach is fundamentally wrong as it disregards the factors stipulated as relevant by the ROC and may lead to compensating inefficiency.

80 In this matter, it seems to us that perhaps because the respondent was over-anxious to clear his name, few legal stones were left unturned by his counsel. Indeed, based on the time said to have been spent by the respondent's legal team, *ie*, 2,309.3 hours, it seems to us that several stones were repeatedly turned over by different members of the team of six solicitors and counsel. Costs for two counsel assessed on an indemnity basis is certainly not a charter to visit upon the paying party disproportionate costs which a substantial client may be willing and prepared to pay to his counsel on a solicitor and own client basis. We think that for all the reasons mentioned above, a sum of $250,000 would justly compensate the respondent for the costs incurred on an indemnity basis in respect of Section 1 of BC 247. Our decision, in the prevailing circumstances, takes into account, among the other considerations, the complexity of the matter, the time that ought to have been reasonably spent on the matter, the amount of damages awarded, recent precedents on costs and the principle of proportionality.

Conclusion

81 In the result, we set aside the Judge's order and substitute the sum of $650,000 awarded by the Judge under Section 1 of BC 247 with a sum of $250,000. The appellants are to have the costs of this appeal, which we fix at $15,000 inclusive of reasonable disbursements. The usual consequential orders are to follow.

Final observations

82 The award of damages at $210,000 (note that but for the aggravated damages, the damages recoverable by the respondent would have been only $140,000) is lower than our award of costs of $250,000. The Judge was not aware of this figure of $210,000 as he assessed costs before damages had been quantified by us (see timeline as set out at [7] above).The assessment of fair legal costs poses particular difficulties in cases, such as the present, where the party and party costs taxed on an indemnity basis is likely to be higher than the damages awarded to the successful plaintiff. This problem persists in cases where parties litigate to pursue or protect a principle. There are two countervailing factors in this case which have to be taken into consideration: on one hand, the appellants were, ostensibly, exercising their freedom of speech, albeit irresponsibly, whereas, on the other hand, the respondent was eager in vindicating his reputation (and rightly so) given our finding that the appellants had put forward the indefensible defence of justification. Thus, in the pursuit of what was subjectively perceived to be of great importance to the respective parties, there was an escalation in costs (see [77] above where the respondent deposed that he had incurred more than $1m in maintaining Suit 514 against the appellants).

83 The Court has to ensure that a fair balance is struck in every assessment of costs. We accept that timesheets, an important management tool for law firms, have a role to play in an assessment but they should not be given the status of a decisive costing mechanism. Undue reliance on undifferentiated time costing may result in overcompensating inefficiency at the expense of

productivity and encourage disproportionate fee claims. This would not be desirable, particularly, when the opposing party has to foot the bill. Taxing officers should also note that costs taxed on an indemnity basis are the equivalent of the solicitor and client costs under the old regime. Ordinarily, under the old regime, solicitor and client costs were about one third more than party and party costs (which were awarded on a stricter basis than the former common fund basis which the current standard basis is modelled on) and only "necessary or proper" costs were allowed. Despite the overhaul in 1991 to the ROC which led to the introduction of two (as opposed to the previous four) bases of taxation, there now appears to be a general practice whereby costs assessed on an indemnity basis are taken to be usually one third more than that assessed on a standard basis. It should be noted, however, that this is not a hard and fast rule which applies invariably each time costs are ordered to be taxed on an indemnity basis.

84 We would also add that as a matter of sound practice, *trial* costs in claims for unliquidated damages should ordinarily not be assessed before damages have been agreed or determined. This is because it is only after the amount of damages has been determined can the taxing officer satisfactorily assess whether the quantum of costs awarded is proportionate to the stake in the controversy.