

## Second bite of the cherry on legal costs?

Harry Elias Partnership LLP successfully defeats an appeal to the Appellate Division on a contractual claim for unrecovered costs of prior proceedings

### Introduction

1. Our Partner, Tan Chau Yee, and Senior Associates, Kok Yee Keong and Marcus Ho, successfully defended the appeal in *CGG v CGH* [2021] SGHC(A) 7<sup>1</sup>, where the Appellate Division of the High Court of Singapore<sup>2</sup> clarified the ambit of the rule in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 (SGCA) ("**Maryani**"). This is significant, as previously, there was arguable ambiguity on whether the *Maryani* rule – that unrecovered costs of prior proceedings cannot be claimed in a subsequent claim *for damages* – was limited to claims for damages only or whether it also extends to other types of claims, such as a contractual claim.
2. This article covers key learning points from *CGG v CGH* [2021] SGHC(A) 7 regarding the recovery of legal costs and the enforcement of contractual indemnity on costs, which litigants and lawyers ought to be mindful of during the pursuit of legal proceedings.

### Case Summary

3. The Appellant (Husband) and Respondent (Wife) entered into a Deed of Separation, pursuant to which, divorce proceedings were commenced, and an Interim Judgment was granted which included a Consent Order in the terms of the Deed. A few years later, the Wife applied to the Family Justice Courts ("**FJC**") to vary the Consent Order in order to clarify certain terms of the order ("**FJC Summons**"). The FJC Summons was declined by the District Judge, and costs of \$2,000 all-in was ordered in favour of the Husband.
4. Subsequently, the Husband commenced civil action in the High Court against the Wife for the sum of \$329,975.45, being the unrecovered legal fees, GST and disbursements incurred by him for defending the FJC Summons. He relied on a provision in the Deed and Consent Order which stipulated that if a party seeks to revisit the ancillary matters in breach of the Deed or Consent Order, that party shall indemnify the other party for any and all legal fees and disbursements incurred ("**Indemnity Provision**"). The Husband's claim was dismissed by the High Court Judge who found that the *Maryani* rule applied and it precludes the Husband's claim, and further, that the principles of *res judicata*, in particular, issue estoppel and abuse of process, also applied to bar the Husband's claim. The Husband then appealed to the Appellate Division.

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<sup>1</sup> The *ex tempore* judgment may be viewed at: [https://www.elitigation.sg/gdviewer/SUPCT/gd/2021\\_SGHCA\\_7](https://www.elitigation.sg/gdviewer/SUPCT/gd/2021_SGHCA_7)

<sup>2</sup> The Appellate Division hears all civil appeals from the High Court which are not allocated to the Court of Appeal. Further appeal to the Court of Appeal requires leave and only on points of law of public importance. In *CGG v CGH* [2021] SGHC(A) 7, the coram comprises the Honourable Belinda Ang JAD, Woo Bih Li JAD and See Kee Oon J.

5. The Appellate Division affirmed the High Court judgment and dismissed the appeal. The Husband raised several arguments on appeal, and we examine *some* of these arguments to elucidate the key learning points from the appeal decision.
6. The Husband argued that his right to claim costs under the Indemnity Provision had only arisen after the FJC decision and therefore he could not have pursued the Indemnity Provision in the FJC proceedings and had to commence separate proceedings in the High Court. The Appellate Division rejected the argument and found that the Husband's right under the Indemnity Provision had arisen when the Wife filed the FJC Summons, and that the FJC decision merely confirmed the date of the breach. Further, his right would have crystallised by the time he was asked to make submissions on costs for the FJC Summons. Therefore, the Indemnity Provision could have and should have been raised before the FJC. The Appellate Division also commented at the appeal hearing that this situation was similar to debt recovery claims by banks and financial institutions who would seek to enforce the contractual indemnity on costs within the same proceedings (at the costs hearing stage) in which the principal debts were adjudicated.
7. The Husband also argued that the FJC did not have jurisdiction to determine issues on the interpretation of the Indemnity Provision because the purpose of the FJC proceedings was to determine the Wife's variation application only. The Appellate Division disagreed and held that insofar as the Indemnity Provision deals with the issue of costs of the FJC proceedings, the FJC can hear and determine such disputes.
8. The Husband then argued in the alternative that he had elected to reserve the right to claim on the Indemnity Provision in separate proceedings as it was an independent contractual right. The Appellate Division disagreed as there was no record of any reservation of rights by the Husband when the FJC costs order was made, and that in any event, the Husband was not entitled to oust the *Maryani* rule which requires all claims for costs to be raised within the same proceedings in which the costs were occasioned and before the costs order was made. Further, that the *Maryani* rule does not distinguish between a claim for costs as damages and a claim for costs based on a primary obligation; that if the substance of the subsequent claim, however it is framed, is for unrecovered legal costs, it is prohibited by the *Maryani* rule.
9. In deciding that the *Maryani* rule applies, the Appellate Division reiterated the underlying rationale and principles of the rule, as follows:
  - 9.1. The procedural law on costs is such that the full recovery of legal costs by the successful party is the exception rather than the norm. This is due to the policy considerations of: (a) enhancing access to justice, (b) achieving finality in litigation, and (c) suppressing parasitic litigation.
  - 9.2. In a claim for unrecovered costs of prior proceedings, there is an apparent tension between the above policy of the procedural law on costs (which limits liability to pay costs) and the policy of substantive law in awarding compensation for a civil wrong (which seeks to make whole the victim of the wrong). The latter ordinarily results in a greater quantum than the former.
  - 9.3. To resolve this tension, the policy considerations underlying the law on costs *inform* the substantive law by limiting the measure of the successful party's recovery of costs. This is given effect to by, amongst others, the *Maryani* rule.

10. Apart from the *Maryani* rule, the appeal was also dismissed on 2 *additional* grounds:
  - 10.1. Issue estoppel: the issue of costs had been determined in the FJC costs order.
  - 10.2. Extended doctrine of *res judicata*, i.e. abuse of process: the Husband could have and should have pursued the Indemnity Provision in the FJC proceedings.
11. Another key issue of the appeal was whether the Indemnity Provision which stipulated “*any and all legal fees*” was to be interpreted to mean 100% full indemnity of all legal fees incurred or indemnity basis under Order 59 of the Rules of Court (the latter is usually about one-third more than standard basis<sup>3</sup>, but almost invariably insufficient to cover the full legal fees incurred<sup>4</sup>). As the Husband’s claim was precluded in law, there was no necessity to deal with this issue. Nonetheless, the Appellate Division opined that the broad wording of the Indemnity Provision conferred only a right to costs taxed on indemnity basis (i.e. not 100% full indemnity), and that costs are at the discretion of the court which may override any agreement on legal costs to avoid manifest injustice.

### Learning points for future cases

12. This case is a reminder for litigants and lawyers that any claim for costs must be pursued within the proceedings in which the costs were occasioned, and *before* the costs order is made. If a party is not yet prepared to make costs submissions, the prudent course is to request an adjournment of the costs hearing, or to request an order that costs be taxed if not agreed. Otherwise, if a cost order is made, the *Maryani* rule and *res judicata* apply, and the successful party is not entitled to further costs. This is regardless of how the successful party frames his subsequent claim, whether in contract, equity, tort, etc., as the substance of such claim is still for the unrecovered costs of prior proceedings. If there is a costs order and the successful party wishes to claim further costs, he must seek the “*appropriate recourse*”<sup>5</sup>, which may include a request for further arguments before the same coram or to appeal the costs order.
13. Contracting parties should also be mindful of how costs indemnity provisions are phrased. If the intention is to cover 100% full indemnity of all legal fees incurred, given that this is the exception rather than the norm, the indemnity provision should be worded in an unambiguous and unequivocal manner. The usual boilerplate wordings of “*full indemnity*” or “*all costs*” or “*any costs*” are unlikely to be sufficient, as there are many case authorities (especially actions by banks and financial institutions) where the indemnity provision in question had adopted such language, but the court had only awarded costs on indemnity basis instead of 100% full indemnity.

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<sup>3</sup> *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 (SGCA) at [83]: “... 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.”

<sup>4</sup> *Maryani* at [13]: “...It is important at this juncture for us to make clear that an award of costs on an indemnity basis, which although a higher measure of costs than the default standard basis, is a misnomer as it does not entail a full (or literal) indemnity as such...”

<sup>5</sup> *CGG v CGH* [2021] SGHC(A) 7 at [20].

14. Even if the indemnity provision provides for 100% full indemnity, the successful party should be mindful that the court retains the discretion on the quantum of costs, including to order taxation, and therefore, it does not amount to a blank cheque.

### Conclusion

15. The issue of costs is often treated as secondary during the pursuit of legal proceedings as the substantive reliefs sought take centre stage. However, if not properly considered in advance, the successful party might unwittingly find himself recovering only a portion of the full costs that he may be entitled to in law. Therefore, it is prudent to have in mind the above principles and practical tips when preparing for legal proceedings.

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