# Sports Connection Pte Ltd v Deuter Sports Gmbh and Another
# [2007] SGHC 89

**Case Number** : Suit 280/2005, SUM 1482/2007

**Decision Date** : 30 May 2007

**Tribunal/Court** : High Court

**Coram** : Paul Tan AR

**Counsel Name(s)** : Shahiran Anis Bin Mohamed Ibrahim and B Rajasekharan (Asia Law) for the applicant; Aqbal Singh and Josephine Chong (Unilegal) for the respondent

**Parties** : Sports Connection Pte Ltd — Deuter Sports Gmbh; Foo Yeong Mien

30 May 2007 Judgment Reserved

**Assistant Registrar Mr Paul Tan:**

1 When a plaintiff makes an allegation against one of two co-defendants, which he now seeks to withdraw by an amendment to his pleadings, may the other co-defendant seek costs thrown away as a result of the amendment? In my judgment, he may. Because of the paucity of literature and case law on this point, I set out my reasons for arriving at this conclusion.

**The legal landscape on amendment of pleadings**

2 Under O 25 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"), amendments to pleadings may be allowed at any stage of the proceedings. This underscores a fundamental interest in the law to ensure that the rights of combating parties are not defeated by mere technicality and that their disputes are adjudicated only after each side has been given every opportunity to put in issue any matter they believe to be pertinent and relevant to the resolution of their legal conflict at trial. The Court of Appeal emphasised this principle in *Wright Norman v Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 523 ("*Wright Norman*") at [24], 519, as follows:

> [A]t the end of the day, the most important question which the court must ask itself is, are the ends of justice served by allowing the proposed amendment. Pleadings should not be used as a means to punish a party for his errors or the errors of his solicitors. All relevant issues should be investigated...

3 Even when amendments to pleadings are taken out extremely late in the day, such as after a trial on the merits of the original pleadings, leave may still be given to effect those amendments: *Wishing Star Ltd v Jurong Town Corp* [2006] SGHC 82. In the latter case, Choo Han Teck J posed the question in these vivid terms (at [4]):

> If a gladiator, having arrived at the coliseum with just a sword, and finding his opponent more heavily armed, asks for leave to increase his with a shield, or an extra blade, should his request be allowed? Should he be told that he was a professional, and ought therefore, stand by his choice of weapons; and if his predicament was of his own making, that is, in forgetfulness, ought he be assisted? To arm him better might have made it a more even fight, but would that have been fair to the other warrior who had come prepared? On the other hand, should we be so absorbed in the examination of the gladiators' weapons that we forget the fight, or misdirect ourselves as to the issue – fairly armed or fairly fought?

4 In many cases, this question posits a false dichotomy – for fairly armed usually means fairly fought. But there are circumstances when a choice has to be made; and it is clear that the courts lean on the side of allowing a party to amend his pleadings because there is an overriding concern in obtaining a substantively fair result. As practitioners of the law know, cases often evolve in response to, *inter alia*, new evidence that comes to light and a party should not be prevented from putting forward his best case in such a scenario.

5 Yet, there comes a point when the insistence that an amendment should be regarded as a mere formality begins to wear thin; when a substantively just result may be compromised if the amendment is allowed. This is especially so when the party opposing the amendment will suffer "irreparable prejudice" (see, *Anthony Wee Soon Kim v UBS AG* [2003] 2 SLR 554 at [18], 558). Even from the perspective of processural justice, a litigant is entitled to prepare his opposition on the basis of what has been pleaded and he should not be forced to change course at the whim and fancy of the amending party.

6 Whether or not prejudice is caused depends on the facts of each case; but it is established that "there is no injustice to the other party if he can be compensated by appropriate orders as to costs": see, *Ketteman v Hansel Properties* [1987] AC 189 at 212, cited in *Wright Norman* at [26], 520. As such, when amendments are brought sufficiently early and before trial (such as in the present application before me), it is not unusual to find that the responding party to the application for leave to amend will have no serious objection to the application; and that the real battleground will be in respect of the costs to be awarded.

**What is an appropriate order as to costs**

7 In a majority of cases where amendments are made before the commencement of trial, the most appropriate order should be to reserve costs to the trial judge. This means that the responding party will get costs of and occasioned by the amendment at the end of the trial unless for some reason, the trial judge decides otherwise. Such an order gives the trial judge the widest latitude to make an appropriate cost order, taking into account all the circumstances leading up to and during the trial. It is within this contextual matrix that the conduct and success of the respective parties, as well as the extent and reasonableness of both the amendment and the consequential expenses incurred by the responding party are best assessed. However, as with all cost orders, the Assistant Registrar or Judge hearing the application to amend retains an overall discretion to adjust costs in order to reflect the true state of affairs between the parties. In this regard, the Court of Appeal has held that (see *Soon Peng Yam and another (trustees of the Chinese Swimming Club) v Maimon bte Ahmad (administratrix of Sukinah bte Haji Hassan, deceased)* [1996] 2 SLR 609 at [32], 619):

> The power to award costs is fundamentally and essentially a discretionary power. Even though the general principle is for the substantially successful party to receive his costs, the overriding concern of the court must be to exercise its discretion to achieve the fairest allocation of costs.

8 Thus, where amendments are relatively minor, parties often accept that costs should be in the cause. Another example of when reserving costs to the trial judge may be inappropriate is where parts of a statement of claim or defence are being deleted and withdrawn from trial. In such a situation, the respondent has chalked up expenses as a result of getting up and preparing for trial on the issues pleaded by the amending party, which have now been rendered otiose as a consequence of the proposed amendment. Because these issues are not proceeding to trial, and the trial judge will not be able to make any cost orders in respect of these matters, it would be apposite for the Assistant Registrar or the Judge hearing the application to, among others, order, if not, fix *costs thrown away*. This conclusion is easy enough to reach in a bilateral fight – one plaintiff against one

defendant. Any allegation that either party makes of the other has to be defended. As a corollary, any allegation that is subsequently withdrawn will naturally mean that the responding party would have incurred expenses in mounting a defence that is no longer necessary. These expenses are clearly compensable.

9 But where there are multiple parties, and where a plaintiff makes an allegation that was always only against *one* co-defendant but not the other, and he now seeks to withdraw that allegation, is the other co-defendant nonetheless entitled to costs thrown away?

10 In my view, there is no reason in principle why the answer should be in the negative. If indeed the second co-defendant was put to work as a result of the original pleadings, any change in the plaintiff's pleadings that would render the expenses incurred no longer of utility should also be compensated. This takes into account the legal and practical reality that the fates of co-defendants are often intertwined and that even though an allegation is made against only one of them, the other co-defendant will have to keep himself apprised of the developments in the other's case. This is especially so when the claim against both defendants arises from substantially the same facts or where an allegation has an incidental impact on both defendants, such as where there is a charge of collusion or agreement.

11 In order to ascertain whether costs thrown away are justified, two questions should be asked. First, have costs, in fact, been thrown away? And second, are the costs claimed to have been thrown away reasonable in the circumstances?

12 The first question is a rather obvious one. If the expenses involved in preparing to defend the allegations that are now being deleted are not wasted because the preparation continues to be of utility in one way or another, costs thrown away should not be ordered. This reasoning was adopted in *Choo Ah Kiat v Ang Kim Hock* [1983] 2 MLJ xciv, albeit in the context of costs thrown away as a consequence of an adjournment (at xcv):

> [The defendant's counsel's] 'getting up' is not wasted nor must it be incurred over again for the next trial date. Getting-up is always for the trial. If the trial is adjourned wherein is 'getting up' wasted? True, counsel has to refresh his memory as regards 'getting up' for the next trial date but this is certainly not 'getting up' again. I do not imagine counsel, in refreshing his memory, would repeat exactly wheat he did for his original 'getting up'.
>
> [emphasis added]

13 The second criterion, while seemingly straightforward, is somewhat more complex and takes on special significance in cases involving multiple parties. The basic premise is that costs claimed must always be reasonable. This is made explicit under the taxing provisions of O 59 rr 27(2) and (3) of the Rules, which state that:

> (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]

14 So it is with costs thrown away. In *Lim Hong Seng v East Coast Medicare Centre Pte Ltd* [1995] 2 SLR 685 ("*Lim Hong Seng*"), costs thrown away were ordered in favour of a defendant who had put up a counterclaim that had to be abandoned in the light of the plaintiff's discovery of a certain fact. In my view, it is implicit in the court's discussion (particularly at [73], 703 to [76], 704) that had the pleading of the counterclaim been unreasonable, costs thrown away would not have been ordered. This is most clearly borne out in the conclusion to the discussion, where Judith Prakash JC (as she then was) held (at [76], 703-4):

> In my judgment, the defendants are entitled to the costs of the amendment to para 8 of the statement of claim and the abandonment of their counterclaim. It was not for the defendants to tell the plaintiff how to run his case. He might very well have initially omitted to rely on the express right of way after carefully considering the options open to him. The defendants were not to know that this omission resulted from ignorance rather than a considered strategy. *Once the plaintiff posed his case in a certain manner the defendants were entitled to take all courses open to them to meet it including the formulation of the counterclaim. They then had to drop the counterclaim because of the plaintiff's belated discovery of the true position*. The costs they had incurred were thrown away by reason of the plaintiff's change in direction. The defendants are entitled to recover those costs.
>
> [emphasis added]

15 Where there are multiple parties, the reasonableness of one co-defendant incurring costs in reviewing the evidence and the case relating to an allegation made only against the other co-defendant becomes more difficult to ascertain. In embarking on what is an essentially fact-bound inquiry, a court should have regard to the following non-exhaustive considerations:

(a) The legal and factual relationship between the parties;

(b) The extent to which the case of the party seeking costs is linked to his co-defendant's or co-plaintiff's cases;

(c) The extent to which the deleted pleadings, in particular, are related to the case of the party seeking costs; and

(d) Whether facts or arguments raised in respect of the deleted pleadings might or would have had an impact on the conduct of the case of the party seeking costs and/or the latter's rights and liabilities.

16 Ultimately, the inquiry is directed at one overarching investigation: notwithstanding the fact that the deleted allegation was not made directly against the party seeking costs, would a legally-advised litigant nonetheless have found it prudent or necessary to keep himself informed of the developments in his co-plaintiff's or co-defendant's case in relation to that allegation? If so, the expenses incurred and now thrown away are reasonable.

17 I pause to consider whether the reasonableness of the *amending party* in altering his position is a factor that the courts may take into account in determining *whether* to order costs thrown away

(and not the *quantum* of costs to be awarded). This is certainly the position under the UK's Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003 (SI 2003/2171), which defines costs thrown away as "costs of the proceedings resulting from any *neglect or delay of the legal representative* during (but not prior to) the proceedings". [emphasis added] Thus, it appears from a short commentary by Peter T. Hurst in *Civil Costs* (London: Sweet & Maxwell, 3rd ed, 2004) at para 11-027 that:

> The adjudicator may make an order as to costs thrown away provided he is satisfied that a party has incurred costs in the proceedings unnecessarily as a result of the neglect or the delay of the legal representatives.

18 In the hearing before me, I asked both counsel for the applicant, Mr A Shahiran Anis bin Mohamed Ibrahim and the first defendant, Mr Aqbal Singh, for their views on the theory as to whether the reasonableness of the amending party in amending his pleadings should negate any claim to costs thrown away. Their unanimous answer was that it would not. Upon reflection, I agree. The reason for my view is that, apart from this unique statutory provision, which finds no expression in our case or statutory law, an order granting costs thrown away is not intended to be punitive in the sense that it does not signal any blameworthiness on the part of the amending party. All it is is recognition that having amended one's pleadings, it is necessary to compensate the other party for work that he has incurred on the basis of the original pleadings, which he has now found useless because of the amendment. That the amendment was necessitated by the neglect or delay of the amending party is a consideration that may affect the quantum of costs awarded in respect of the application itself; but these are not pre-requisites to an order for costs thrown away. Furthermore, as I understand the reasoning in *Lim Hong Seng* (though this was a case concerning costs thrown away as a result of discovery rather than an amendment), it did not seem to matter to the court that the party who had caused costs to be thrown away was not really at fault for adopting a certain position initially, and then having to alter his pleadings subsequently as a result of a discovery that he argued the other party knew about all along. As Prakash JC held at [76], 704, "once the plaintiff posed his case in a certain manner the defendants were entitled to take all courses open to them to meet it including the formulation of the counterclaim." Similarly, if a plaintiff pleads his case on a basis that now has to be deleted, the responding parties are entitled to costs thrown away regardless how justified the plaintiff may be in bringing its case on the original pleadings. In addition, there is also the practical difficulty in attempting to assess whether the amendment is being proposed in good faith. As Mr Shahiran correctly pointed out, there is a danger that such an inquiry might result in a court pre-judging the merits of the case.

19 With the principles articulated above in mind, I turn to the application proper.

**The background to SUM 1482/2007**

20 According to the Statement of Claim ("SOC"), the applicant, who is also the plaintiff in the main action, Suit No. 280 of 2005, is a company registered in Singapore that imports, exports, retails and trades wholesale in local and foreign brands of backpacks and other camping, outdoor and sporting products. I shall refer to the applicant as Sports Connection. The respondent in this application, and originally the *first* defendant in Suit No. 280 of 2005 prior to the amendment, is a company registered in Germany, and manufactures, exports, and sells backpacks and outdoor products under the "Deuter" trademark. I shall refer to the respondent as Deuter Sports. In accordance with a distributorship agreement, the Sports Connection was appointed as Deuter Sports' sole and exclusive distributor in Singapore for Deuter products since 1992 ("the Distributorship Agreement"). The last renewal of this agreement was on 28 November 2002, and the contract was due to expire on 31 December 2005.

21 Originally the *second* defendant in the main action, Mr Foo Yeong Min was formerly a general manager in Sports Connection and was involved in the planning and supervision of its business. In April 2004, he resigned from Sports Connection and was employed by Deuter Sports as its Asia Regional Manager.

22 In the meantime, a dispute arose between Sports Connection and Deuter Sports over the performance of Sports Connection's obligations under the Distributorship Agreement, which Sports Connection pleaded eventually led to its wrongful removal as sole distributor of Deuter products in Singapore.

23 Among the various allegations made by Sports Connection in the SOC before its present amendment, was an accusation that "from or about September 2004, [Deuter Sports] had unlawfully conspired with [Mr Foo] to damage [Sports Connection's] business in Singapore, Malaysia and Thailand with the sole or predominant purpose of injuring [Sports Connection]." In support of this allegation, the following particulars were pleaded:

(a) Deuter Sports employed Mr Foo as its Asia Regional Manager on September 2004;

(b) Mr Foo began to canvass and source for alternative distributors in Singapore, Malaysia and Thailand for Deuter Sports without notice to Sports Connection and while the Distributorship Agreement was still in force;

(c) One of the other regional managers of Deuter Sports, one Mr Bill Hartrampf, together with Mr Foo, had begun to find and meet with prospective distributors (whom were in direct competition with Sports Connection), even prior to Deuter Sports' wrongful repudiation of the Distributorship Agreement;

(d) Mr Foo had been divulging sensitive information relating to various clients and distributors of Sports Connection to Deuter Sports and its prospective distributors; and

(e) Subsequent to Deuter Sports' confirmation of a new distributor, it wrongfully terminated Sports Connection's Distributorship Agreement on 27 January 2005.

24 It was also alleged that after the wrongful termination of the Distributorship Agreement, Deuter Sports conspired to distribute its products to Sports Connection's former wholesale accounts and clients at the same venues and areas of the latter's retail shop. In this regard, it was claimed that the conspiracy caused Sports Connection loss in the amount of $4m from August 2004 to December 2005; and that such loss persisted as a result of the conspiracy to place Deuter products in direct competition with sporting products sold by Sports Connection.

25 Specific allegations only against Mr Foo were also levelled. It was pleaded that he had breached express and implied terms of employment agreements entered into with the plaintiff on 13 April 2000 (when he was promoted to the position of General Manager) and 30 October 2000 by, *inter alia*:

(a) Failing to protect and, in fact, divulging confidential information relating to the plaintiff's business and customers;

(b) Seeking employment with the 1st defendant, who was a direct competitor;

(c) Soliciting orders from persons and companies who were or had been customers of the

plaintiff during his tenure with the plaintiff;

(d) Failing to act with good faith, fidelity and loyalty to the plaintiff;

(e) Failing to obey the reasonable and lawful directions of the plaintiff;

(f) Acting in a manner that destroyed the trust and confidence between Mr Foo and Sports Connection;

(g) Failing to act with due skill, care and competence;

(h) Failing to carry out his duties with due diligence.

26 It was also pleaded that Mr Foo had, *inter alia*:

(a) Caused loss and continued to cause loss by being involved in the sale of the Deuter products to Sports Connection's customers and clients;

(b) Threatened and threatens to continue engaging in the abovementioned breaches of contract unless restrained by an order of court;

(c) Demoralised Sports Connection's staff in Malaysia by revealing his intention to resign;

(d) Engaged in "go-slow" tactics when he was refused his increment;

(e) Failed to recover debts owing to Sports Connection for seven months, causing the plaintiff to suffer financially;

(f) Deliberately and negligently caused large and totally inappropriate stocks to be ordered on behalf of Sports Connection, which the latter could not sell in Singapore;

(g) Caused Sports Connections to be sued by Crumpler Design in Suit No. 1024 of 2003.

27 As a result of a settlement between Sports Connection and Mr Foo on 1 March 2007, this application was brought to effect substantial amendments to the pleadings in the SOC. In essence, the amendment sought to delete causes of action alleged against Mr Foo and to remove the allegation of conspiracy between Mr Foo and Deuter Sports. In the place of these allegations, Sports Connection now says that it has suffered loss due to:

(a) Deuter Sports' breach of its obligation under the Distributorship Agreement by employing Mr Foo; and the latter's assistance in looking for alternative distributors in Singapore, Malaysia and Thailand without notice to Sports Connection while the Distributorship Agreement was still in force;

(b) Deuter Sports distributing its products to Sports Connection's former wholesale accounts and clients at the same venues and areas as the latter's retail shops after it had wrongfully terminated the Distributorship Agreement; and

(c) Deuter Sports' prompt delivery of products to its new distributors, which had been ordered by Sports Connection prior to the termination of the Distributorship Agreement but not delivered.

**The present application**

28 Mr Singh did not dispute that I should exercise my discretion to allow the applicant's amendment to the pleadings. However, he contended that the defendant was entitled to:

(a) Costs thrown away;

(b) Costs of the application itself; and

(c) Consequential costs – *ie*, the costs of redrafting and amending and filing the Defence and Counterclaim, and also of considering the plaintiff's Reply and Defence to Counterclaim thereafter.

***Costs thrown away***

29 I shall first deal with costs thrown away since this was the central focus of the parties before me.

30 Mr Singh submitted that the following matters were no longer in issue, and that preparation for these issues has been incurred unnecessarily:

(a) The job designation, role and responsibility of Mr Foo in the Sports Connection for a period of 10 years prior to the former joining Deuter Sports;

(b) The circumstances relating to Mr Foo's resignation from Sports Connection;

(c) Mr Foo's employment history following his resignation from Sports Connection, and the significance of Mr Foo allegedly being employed by Deuter Sports as its Asia Regional Manager for Singapore, Malaysia and Thailand;

(d) The entire cause of action based on the allegation that both defendants had conspired with one another as reflected in the following overt acts:

(i) Whether Mr Hartrampf had worked with Mr Foo prior to the termination of the Distributorship Agreement to engage new distributors for Deuter products;

(ii) Whether Mr Foo had divulged sensitive information relating to Sports Connection's various clients and distributors to Deuter Sports and its new distributors; and

(iii) Whether the termination of the Distributorship Agreement was a result of the aforesaid acts of conspiracy.

31 In relation to the issues above, Mr Singh argued that the following work had to be done:

(a) Scrutinising each and every pleading filed against and by Mr Foo;

(b) Scrutinising voluminous documents tendered for discovery by both Sports Connection and Mr Foo (of which there were approximately 260 pages of discovery from Mr Foo alone) in respect of the allegations of conspiracy involving Mr Foo;

(c) Preparing affidavits and evidence on the basis of Sports Connection's original pleadings;

(d) Researching and getting up in respect of the issues of conspiracy and inducing breach of contract;

(e) Extensive communication with clients (who are based in Germany) and with Mr Foo's solicitor to rebut, corroborate, verify and support the various allegations in connection with the conspiracy claim. Correspondence, including attachments, filled 4 arch-lever files;

(f) Following the course of litigation between Sports Connections and Mr Foo, including the analysis of numerous applications for further and better particulars and amendments to pleadings; and

(g) Having to consider whether to claim contribution from Mr Foo.

32 Before me, Mr Singh claimed that the work described in [30] and [31] above involved some 200 hours of work, and accordingly sought $60,000 in costs thrown away. Because of the objections raised by Mr Shahiran (see [33] below), I directed Mr Singh to file and serve a list itemising the work done in relation to the allegations withdrawn and in relation to which he was claiming costs thrown away. Mr Singh duly submitted a *pro forma* bill of costs ranging 30 pages, in which $80,000 was claimed for costs thrown away (representing 300 hours of work). Disbursements amounting to $2,037.49 were also claimed.

33 Mr Shahiran did not contest that Deuter Sports was entitled to some costs thrown away; but not in the amount of $80,000. Citing the decision in *Hong Cheng Air-Conditioning Engineering Pte Ltd v Wee Siong Engineering Services Pte Ltd* [2003] SGHC 51 ("*Hong Cheng*"), Mr Shahiran submitted that costs ordered should be somewhere between $2,500 and $3,500. This was because the case against the respondent was, and continued to be, a straightforward claim for breach of contract. While it may be true that Deuter Sports had to investigate the claims made against Mr Foo when he was named as the second defendant in the main action, the allegation of conspiracy was based on particulars that applied to Deuter Sports' alleged breach of the Distributorship Agreement as well. This, in turn, was a claim that continued to be pressed.

34 As stated above, I must first address whether the work done has, in fact, been wasted. In my judgment, Mr Shahiran's position that the allegations of conspiracy and breach of contract were simply alternative heads of claim based on similar facts underrepresents the distinct nature of the work involved in defending each of these claims. An allegation of conspiracy involves a detailed examination of the relationship between the two defendants that is unnecessary in a vanilla claim for breach of contract. Even though the amended pleadings continue to suggest that Deuter Sports and Mr Foo cooperated in looking for new distributors in breach of the Distributorship Agreement, this is quite different from alleging that they did so with the sole or predominant purpose of injuring the applicant. Thus, while I accept there is some overlap (in so far as the applicant continues to argue that the respondent had wrongfully engaged the services of Mr Foo), it is not exaggeration to hold that there is work unique to an allegation of conspiracy that Deuter Sports had to do.

35 As for the allegations directed against Mr Foo, it is apparent from my recitation of the supporting facts that they involved work that is significantly different from the contractual claim that now remains. In particular, the pleadings contained accusations that Mr Foo had acted in bad faith and that he was out to sink Sports Connection by liasing with direct competitors, failing to obey instructions, demoralising staff and divulging sensitive information even prior to his resignation from the plaintiff. If indeed it were reasonable for the respondent to investigate these pleadings, it would have incurred work that is now rendered otiose.

36 This leads to the second inquiry: were the expenses wasted reasonably incurred by Deuter Sports? In respect of the conspiracy claim, there can be no doubt that since Deuter Sports was also subject to the same allegation, its withdrawal from the pleadings should be compensated by an order for costs thrown away. This leaves the charges against Mr Foo. Was it reasonable for the respondent to be actively engaged in scrutinising those charges? In my judgment, it was. This is a case where the cases of Deuter Sports and Mr Foo were inextricably meshed largely due to Sports Connection's own claim that the Deuter Sports and Mr Foo were in cahoots to cause it financial injury. Therefore, the natural inference must be that any act allegedly committed by Mr Foo to sabotage Sports Connection was potentially an act that was done pursuant to that conspiracy. This, in turn, had a direct impact on Deuter Sport's conduct of its own case. It is no answer to suggest that these acts of sabotage were alleged only against Mr Foo. Any prudent solicitor would be wary of the possibility that the SOC could always be amended so that these very particulars are alleged Deuter Sports. This would not have been paranoia given that Sports Connection was, at that point, alleging a conspiracy between Deuter Sports and Mr Foo. Accordingly, I find that Deuter Sports was fully justified in reviewing the accusations against Mr Foo as well as the evidence and developments relating to those allegations.

37 The question now is quantum.

38 It is indisputable that the court will take into account the following factors in assessing the amount of costs to award:

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty 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 matter 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.

39 In the end, however, the court is obliged to undertake a holistic appraisal of the entire circumstances of the case. As V K Rajah JC (as he then was) held in *Khng Thian Huat and Anor v Riduan bin Yusof and Anor* [2005] 1 SLR 130 at [21]:

> *The assessment of costs ought not to be a clinical scientific exercise divorced from considerations of intuitive fairness.* The court almost invariably ought to "look at all the circumstances of the case including any matters that led to the litigation": *Ho Hon Kim v Lim Geok Kim Betsy (No 2)* [2001] 4 SLR 603 at [12].
>
> [emphasis added]

40 In addition to the work done, Mr Singh also drew my attention to the fact that the amendments were brought late in the day. In particular, there was an order made at a pre-trial conference on 25 January 2007 that Sports Connection was to have confirmed whether the conspiracy claim against Deuter Sports and Mr Foo was going to stand by 5 February 2007. This was

not done until the present application. At that same pre-trial conference, affidavits of evidence in chief were to be filed by 29 March 2007, set down for trial was to be by 9 April 2007, and trial dates were fixed for 7 to 15 May 2007, which had to be subsequently vacated. Mr Singh also suggested that costs thrown away as a result of the deleted charges should be calculated as though Deuter Sports had won those issues at trial.

41 As stated above, while Mr Shahiran did not take issue with the fact that Deuter Sports should be awarded some costs thrown away, he did contend that the amount requested was too high. In his reply to Mr Singh's further submissions (at [32] above), Mr Shahiran argued that Deuter Sports were aware since December 2006 that the conspiracy claim might be dropped entirely as a result of ongoing settlement negotiations with Mr Foo. The present amendment simply confirmed that, and in fact, would assist in clarifying, narrowing and crystallising the issues for trial. In addition to *Hong Cheng*, I was referred to *Tan Wai Kok and Anor v Hart Engineering Pte Ltd* (Suit No. 857 of 2003) ("*Tan Wai Kok*") where extensive amendments were made to the pleadings, and where the court fixed costs at $10,222.40, exclusive of court fees.

42 To begin with, I do not share Mr Shahiran's view that *Tan Wai Kok* or *Hong Cheng* are instructive for the purpose of deciding this application. As I read *Tan Wai Kok*, it is not even clear if the costs awarded were costs thrown away. Before the Assistant Registrar, there was argument as to whether a previous court order that "costs of and occasioned by" the amendment included costs thrown away, and the Assistant Registrar was of the opinion that it did not. There was a review, and Andrew Ang J increased the costs awarded, but it is not at all obvious that this was because he was taking into account costs thrown away. In any event, it is not sufficient to state that *Tan Wai Kok* is analogous to the present application merely because the amendments in both cases are extensive. Not all of the amendments in *Tan Wai Kok* introduced new issues; and the party seeking costs did not have to study allegations made against another party. As for *Hong Cheng*, there are no details as to the extent of the expenses that had been thrown away, apart from the final figure put on them by the court. It appears to me, however, that the case is, again, not analogous to the present application because in *Hong Cheng*, the original pleadings (of two-paragraphs) simply alleged a sum owing. Therefore, any costs thrown away would be much less in comparison to the present application where whole causes of action in respect of which expenses were incurred are being deleted. While case law, if similar, would greatly assist the courts, the fact-dependant nature of assessing costs requires that each case be approached anew and that cases cited are not uncritically adopted.

43 On the other hand, I also reject Mr Singh's contention that a deleted allegation should be treated as though it had been won by the responding party. Surely the costs of a party who has succeeded at trial will be appreciably higher on account of the amount of work done, *inter alia*, during trial itself, which is not a consideration where the application to amend is brought before trial.

44 In the present application, I took into consideration the following factors. First, I agree with Mr Singh that there was delay – even if unintentional – in bringing the application to amend. I do not accept that it is a fair argument to say that Deuter Sports should have ceased incurring expenses on the claim of conspiracy once it knew of the *possibility* of Sports Connection dropping that allegation. Until an allegation is amended, it is not unreasonable for the party against whom that allegation is made to continue preparing for trial on that issue. Moreover, the settlement negotiations were only in relation to Mr Foo; therefore, it was perfectly reasonable for Deuter Sports to think that Sports Connection would continue to maintain the allegation of conspiracy against it. Secondly, I also accept that substantial amount of work had gone into defending the conspiracy claim as well as reviewing the developments in the allegations made against Mr Foo (see [30] and [31] above) over two years. This was compounded by the fact that, among others, Mr Foo was separately represented and that

Deuter Sports was based overseas. This meant that significant expenses would have been necessary in order to receive information relating to Mr Foo's case and to take instructions in relation thereto. This is borne out by the heavy correspondence detailed in Mr Singh's *pro forma* bill of costs.

45 Nonetheless, the sum sought by Mr Singh is, in my judgment, exorbitant. While Mr Singh's bill details significant work, at least some of this, including correspondence and court attendances, would have had to be incurred irrespective of the allegation of conspiracy and the charges against Mr Foo. In addition, work done in drafting the affidavits is not entirely wasted given that the claim of contractual breach remains against Deuter Sports. Furthermore, while the documentation may have been on the hefty side, the legal issues involved were not particularly complex, as seen by Mr Singh's very candid admission that only four authorities were referred to in their preparation.

46 Having regard to the circumstances of this case, I have decided that an award of $27,000 inclusive of disbursements fairly represents the expenses thrown away.

***Costs of the application***

47 When Mr Singh first appeared before me, he sought a sum of $5,000 as costs of the application. However, Mr Singh claimed that as a result of my direction that he file a list setting out the expenses for which he was claiming costs thrown away, a sum in the amount of $15,000 was warranted.

48 I do not accept that the expenses incurred in preparing the *pro forma* bill of costs necessitates a three-fold increase in the costs sought for. In order to present his first estimate (of $60,000) in the hearing before me, Mr Singh must have undertaken a review of his files. He was able to explicate, for instance, the amount of work that his firm did on the case that had now been rendered unnecessary by the amendment. The only additional work that I had asked for was a more complete itemisation of the expenses wasted so as to be able to ground my decision in the facts, especially in light of the diametrically opposed estimates of the appropriate award in terms of costs thrown away proposed by Mr Shahiran and Mr Singh.

49 Accordingly, I am of the view that an award in the amount of $5,000, inclusive of disbursements, fairly represents the costs incurred, including attendance in court on 28 April 2007, which was then adjourned, the hearing before me on 4 May 2007 and the preparation involved for both the hearing on 4 May 2007 and the further submissions that I had required. I also took into account that while Mr Singh did get more costs than what Mr Shahiran was prepared to concede, my award was still far less than what Mr Singh proposed.

***Consequential costs***

50 As a result of the present application, Deuter Sports will have to make amendments to its own pleadings and affidavits. Mr Singh anticipated a sum of $5,000 plus reasonable disbursements. In my judgment, the consequential costs should not be that high because the amendment is to delete, rather than add, new causes of action. Therefore, consequential amendments would not be hefty and an award of $2,500 inclusive of disbursements would be appropriate.

**Conclusion**

51 In summary, my orders are as follows:

(a) The application to amend Sports Connection's statement of claim is allowed;

(b) Costs thrown away in the amount of $27,000 inclusive of disbursements is payable to Deuter Sports;

(c) Costs of the application in the amount of $5,000 inclusive of disbursements is payable to Deuter Sports; and

(d) Consequential costs in the amount of $2,500 inclusive of disbursements is payable to Deuter Sports.

*Application allowed; costs payable to the respondent fixed at $34,500 inclusive of disbursements.*