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

[2023] SGHC 178

Originating Claim No 236 of 2022 (Registrar's Appeals Nos 57, 58, 74 and 75 of 2023)

Between

Cova Group Holdings Ltd

… *Claimant*

And

(1) Advanced Submarine Networks Pte Ltd
(2) Tiong Woon Offshore Pte Ltd

… *Defendants*

JUDGMENT

[Civil Procedure — Costs — Security]

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Cova Group Holdings Ltd
v
Advanced Submarine Networks Pte Ltd and another

[2023] SGHC 178

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(Registrar's Appeals Nos 57, 58, 74 and 75 of 2023)
Goh Yihan JC
23 May 2023

27 June 2023 Judgment reserved.

Goh Yihan JC:

1 There are four appeals before me. The main issue raised by these appeals is whether the claimant, Cova Group Holdings Ltd, should provide security for costs to the two defendants. More specifically, in HC/RA 57/2023 ("RA 57"), the claimant appeals against the decision of the learned Assistant Registrar Gan Kam Yuin ("the AR") in HC/SUM 4255/2022 ("SUM 4255") ordering it to provide security of $25,000 to the second defendant, Tiong Woon Offshore Pte Ltd. Similarly, in HC/RA 58/2023 ("RA 58"), the claimant appeals against the decision of the learned AR in HC/SUM 4260/2022 ("SUM 4260") ordering it to provide security of $25,000 to the first defendant, Advanced Submarine Networks Pte Ltd.

2 In addition to RA 57 and RA 58, the claimant also appeals, by way of HC/RA 74/2023 ("RA 74") and HC/RA 75/2023 ("RA 75"), against the costs

orders that the learned AR made against the claimant in SUM 4255 and SUM 4260, respectively. These cost orders were made at a special hearing of SUM 4255 and SUM 4260 after the AR dismissed the defendants' oral applications to strike out the claimant's claim in the main action because the claimant had not put up the security ordered against it.

3 After considering the parties' submissions and other relevant documents, I dismiss the claimant's appeals in RA 57 and RA 58. I also dismiss RA 74 and RA 75. I provide the reasons for my decision in this judgment.

Background facts

4 I begin with the background facts, which apply to all four appeals. On or around 28 February 2019, the claimant agreed to rent its construction equipment ("the Equipment") to Global Explorer Sdn Bhd ("Global Explorer"), who was a subcontractor of the first defendant. The Equipment was loaded on board the barge MUTIARA 280 ("the Barge") and remains on board to the present day. The second defendant is the owner of the Barge.

5 Later, in 2021, Global Explorer became involved in a project known as the Yunlin Wind Power Project in Taiwan ("the Taiwan Project"). The Taiwan Project required the use of the Equipment, especially the carousel and tensioner. As such, the claimant wrote a proposal on 2 February 2021 ("the Proposal") to Global Explorer in respect of a purchase order for the rental of the carousel and tensioner. A finalised purchase order was then made on 8 February 2021 ("the Purchase Order").

6 The two defendants became involved in this dispute with the claimant due to the Taiwan Project. The first defendant became involved as it had

subcontracted Global Explorer to provide it with cable storage solutions, and this caused Global Explorer to rent the claimant's carousel and tensioner to the first defendant. As for the second defendant, it had chartered the Barge to the claimant for the duration of the Taiwan Project. This was so that the claimant could place its Equipment on the Barge.

7 On 7 July 2022, Global Explorer entered into liquidation in Malaysia. The claimant terminated the Proposal on 14 July 2022. Pursuant to the terms of the Proposal, the claimant was entitled to immediate possession of the carousel and tensioner. As such, the claimant wrote to the first and second defendants on 14 July 2022 and 22 July 2022, respectively. The claimant made known in its letters that it was the owner of the Equipment, and that no one should operate the Equipment without its express permission. However, on 19 July 2022, the claimant was notified that the second defendant had exercised a purported lien over the Equipment due to Global Explorer's failure to pay charter hire fees to it.

8 On 22 August 2022, the claimant, once again, wrote to the defendants to inform them that it owned the Equipment, and demanded their return. However, the defendants did not do so. Instead, the first defendant continued to use the carousel and tensioner for the purposes of the Taiwan Project. The second defendant also continued to maintain its purported lien over the Equipment. This state of affairs remains the status quo at the time of the hearing before me.

9 The claimant therefore commenced HC/OC 236/2022 ("OC 236") against the defendants (being the main action from which these present appeals arise). The claimant's pleaded case in OC 236 is that both defendants have

committed the torts of conversion, trespass, and detinue. The claimant also claims in OC 236 that the first defendant is liable for unjust enrichment.

10 The defendants have mounted several arguments in their pleaded defences against the claimant's claims in OC 236. In particular, the first defendant has said that, among others, one Mr Peter Parkinson ("Mr Parkinson"), acting on behalf of Global Explorer, represented to them that Global Explorer owned and had good title to the Equipment. Mr Parkinson is a director of Global Explorer and is also the sole director of the claimant. Similarly, the second defendant has also said that the claimant ought to be estopped from asserting ownership over the Equipment because Mr Parkinson had, by his conduct, represented that Global Explorer was the owner of the Equipment. Importantly for present purposes, both defendants have brought counterclaims against the claimant. In this regard, the first defendant has counterclaimed against the claimant for its losses suffered as a result of the injunction obtained by the claimant on 2 September 2022 in HC/SUM 3259/2022, which prevented the defendants from operating the Equipment. In turn, the second defendant has counterclaimed against the claimant for fraudulent misrepresentation and for conspiracy to cause loss by unlawful means.

11 Following the defendants' requests that the claimant provides security for costs, the parties engaged in negotiations. However, in the end, the claimant declined to provide security. The defendants therefore brought SUM 4255 and SUM 4260 to apply for security for costs before the learned AR. As I have stated above, the learned AR ordered the claimant to provide security of $25,000 to each of the defendants.

12 With these background facts in mind, I turn to the broadly applicable law.

The applicable law

The analytical framework

13 The applicable law is not in dispute. The defendants' applications for security for costs were made pursuant to O 9 r 12(1) of the Rules of Court 2021 ("O 9 r 12(1)") ("ROC 2021"). Parenthetically, while both defendants also claim to have made their applications pursuant to s 388 of the Companies Act 1967 (2020 Rev Ed) ("Companies Act"), I note that this was never indicated in their summonses below. I do not think that it is proper for either defendant to raise s 388 in the course of their submissions here or below when their summonses never indicated that they were proceeding on the basis of s 388. In any event, this is not material to the outcome since the considerations that a court should have in deciding whether to order security for costs under O 9 r 12(1) or s 388 are largely similar. Returning to the case at hand, O 9 r 12(1) provides as follows:

> **Security for costs (O. 9, r. 12)**
>
> **12.**—(1) The defendant may apply for security for the defendant's costs of the action if the claimant—
>
> (*a*) is ordinarily resident out of the jurisdiction;
>
> (*b*) is a nominal claimant who is suing for some other person's benefit (but not suing in a representative capacity) or is being funded by a non-party, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so; or
>
> (*c*) has not stated or has incorrectly stated the claimant's address in the originating claim or originating application, or has changed the claimant's address during the course of the proceedings, so as to evade the consequences of the litigation.

> (2) If the claimant is a company, section 388 of the Companies Act also applies.

14 The predecessor of O 9 r 12(1) in the Rules of Court (2014 Rev Ed) ("ROC 2014") is O 23 r 1(1) ("O 23 r 1(1)"), which provides as follows:

> **Security for costs of action, etc. (O. 23, r. 1)**
>
> **1.**—(1) Where, on the applicable of a defendant to an action or other proceeding in the Court, it appears to the Court—
>
> (*a*) that the plaintiff is ordinarily resident out of the jurisdiction;
>
> (*b*) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;
>
> (*c*) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or
>
> (*d*) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,
>
> then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks fit.

15 It will be apparent that O 9 r 12(1) replicates the four grounds in O 23 r 1(1) (albeit in only three grounds) that enliven the court's discretion to order security for costs. However, O 9 r 12(1) omits the entire passage in O 23 r 1(1) which refers to the court's consideration of whether, having regard to all the circumstances of the case, it is just to order security for costs. I do not think that this omission in O 9 r 12(1) means that this consideration is no longer relevant, and that a court can simply order security for costs upon the defendant satisfying any of the three grounds within. Indeed, there is nothing in either the *Report of the Civil Justice Commission* (2017) (Chairperson: Justice Tay Yong

Kwang) ("*Civil Justice Commission Report*") or the *Report of the Civil Justice Review Committee* (2018) (Chairperson: Indranee Rajah SC), both of which laid the foundations for the ROC 2021, to suggest that this was the intention of the drafters of the ROC 2021.

16 As such, in considering whether security for costs should be ordered pursuant to O 9 r 12(1), a two-stage framework such as the one set out in the High Court decision of *Siva Industries and Holdings Ltd v Foreguard Shipping I Singapore Pte Ltd* [2017] SGHCR 5 at [4] should be applied:

(a) first, whether the court's discretion to order security for costs under O 9 r 12(1) (or s 388 of the Companies Act) has been enlivened; and

(b) second, whether it is just to order security for costs having regard to all the relevant circumstances.

17 In considering whether it is just to order security for costs at the second stage, it is important to have regard to the Ideals in O 3 r 1 of the ROC 2021. As I had the occasion to observe in the High Court decision of *Dai Yi Ting v Chuang Fu Yuan (Grabcycle (SG) Pte Ltd and another, third parties)* [2022] SGHC 253 at [13]–[14], the Ideals are "akin to constitutional principles by which the parties and the Court are guided in conducting civil proceedings" and they are "to be read conjunctively" (see *Civil Justice Commission Report* at p 6). In sum, these Ideals relate to the promotion of expeditious (O 3 r 1(2)(*b*)) and cost-effective proceedings (O 3 r 1(2)(*c*)) that are achieved by the efficient use of court resources (O 3 r 1(2)(*d*)), and are all ultimately tailored towards the achievement of fair and practical results (O 3 r 1(2)(*e*)), which ensure the fair access to justice (O 3 r 1(2)(*a*)).

The relevant circumstances in deciding whether it is just to order security for costs

18 I turn now to consider the relevant circumstances that a court should consider in deciding whether it is just to order security for costs. In this regard, the cases applying O 23 r 1(1) of the ROC 2014 or s 388 of the Companies Act have accepted a non-exhaustive list of circumstances that a court can consider, which are by and large the same regardless of which provision applies. For example, the Court of Appeal in *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and another* [1999] SLR(R) 112 set out some factors that would typically be considered relevant to an application for security for costs at [18]–[25]:

(a) whether the claimant has a *bona fide* claim;

(b) the claimant's financial standing;

(c) the ease of enforcing any judgment for costs against the claimant;

(d) the relative strengths of parties' cases; and

(e) whether the application for security for costs has been taken out oppressively to stifle the claimant's action.

19 Similarly, in the context of s 388 of the Companies Act, the Court of Appeal in *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 ("*SIC College*") at [76] accepted the circumstances which Judith Prakash J (as she then was) listed out in the High Court decision of *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2001] 3 SLR(R) 208 (at [10]), as follows:

(a) whether the company's claim is *bona fide* and not a sham;

(b) whether the company has a reasonably good prospect of success;

(c) whether there is an admission by the defendants on the pleadings or elsewhere that money is due;

(d) whether the application for security was being used oppressively;

(e) whether the company's want of means has been brought about by the defendants, such as delay in payments;

(f) lateness in taking out the application.

In addition to these circumstances, the Court of Appeal in *SIC College* also pointed to the fact that "it is often inappropriate to award security for costs where the claim and counterclaim are co-extensive", which is a weighty factor (at [77]). Indeed, this is a circumstance that the claimant has raised quite strongly in the present case.

20 In an earlier High Court decision of *SW Trustees Pte Ltd (in compulsory liquidation) and another v Teodros Ashenafi Tesemma and others (Teodros Ashenafi Tesemma, third party)* [2023] SGHC 160, it was suggested that the non-exhaustive list of circumstances be properly rationalised through the purposes behind the provision of security for costs (at [19]). In this regard, it was suggested that the provision of security for costs can be resolved into at least three key purposes, namely: (a) to protect the defendant, who cannot avoid being sued, by enabling him to recover costs from the claimant out of a fund within the jurisdiction in the event that the claim against him by the claimant proves to be unsuccessful, (b) to ensure, within the limits of protecting the defendant, that the claimant's ability to pursue his claim is not stifled, and (c) to maintain a sense of fair play between the parties even amidst the cut-and-thrust of civil litigation. In the present case, I will structure my analysis through the framework of these purposes as well.

First stage: the defendants come within one of the grounds in O 9 r 12(1)

21 At the first stage of the applicable framework, I need to decide whether the court's discretion to order security for costs under O 9 r 12(1) has been enlivened because the defendants have managed to satisfy one of the three grounds within that rule. In my view, it cannot be seriously disputed that the claimant is ordinarily resident out of the jurisdiction. The claimant was incorporated in 2015 in the Republic of the Marshall Islands ("MI"). Accordingly, the defendants come within one of the grounds in O 9 r 12(1) and the court's discretion to order security for costs is enlivened.

22 However, as all parties rightly recognise, it is no longer an inflexible rule or practice that a claimant resident abroad will be ordered to provide security for costs (see the Court of Appeal decision of *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 ("*Wishing Star*") at [14]). Accordingly, it is still necessary for me to consider if the relevant circumstances warrant the provision of security for costs. That being said, the fact that a claimant is resident abroad remains a relevant circumstance. As Judith Prakash J (as she then was) held in the High Court decision of *Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017 ("*Zhong Da Chemical*") at [19], citing Prof Jeffrey Pinsler, *Singapore Court Practice 2006* (LexisNexis, 2006) at p 596, that it would be ideal if the defendant does not experience the inconvenience and expense of enforcing his judgment in a different jurisdiction. Prakash J also added that neither should the defendant's entitlement to costs be delayed by the process of enforcement and lengthy procedures which might operate in the foreign jurisdiction. As such, even if a claimant is ordinarily resident in a jurisdiction that enjoys reciprocity with Singapore in relation to the enforcement of judgments, security for costs may still be ordered. This is

because the defendant would similarly be put through the inconvenience and expense of enforcing a judgment in a foreign jurisdiction. I will return to this factor at the second stage of the applicable framework.

23 In a related vein, the claimant raises the principle that no order for security for costs should be made if there is a co-claimant resident within the jurisdiction (see *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 23/3/10). In this regard, the claimant says that it has been notified that the defendants intend to bring Mr Parkinson as a third party to OC 236. Accordingly, the claimant says that Mr Parkinson will be a co-claimant since the defendants intend to seek an indemnity from him. Thus, given that Mr Parkinson is ordinarily resident in Singapore, the claimant submits that security for costs should not be made against it on the basis that it is a foreign claimant. I bring this up at this point for two reasons. First, I reject the claimant's reliance on this principle on the present facts because the defendants have not formally brought Mr Parkinson in as a party to OC 236. As such, there is nothing for me to go on based on the facts. Second, and more significantly, even if Mr Parkinson is a co-claimant, that does not nullify the fact that the defendants have come within the relevant ground in O 9 r 12(1). This is because all that matters is that there is *a* claimant who is ordinarily resident out of the jurisdiction. O 9 r 12(1) does not provide that *all* the claimants need to be so. Indeed, the High Court in *Lek Swee Hua and another v American Express International Inc* [1990] 2 SLR(R) 514 held that the court has the discretion to order security for costs to be furnished by a foreign claimant even where there are co-claimants resident within the jurisdiction (at [10]).

24 Accordingly, I find that the defendants have come within the ground in O 9 r 12(1)(*a*) that pertains to the claimant being ordinarily resident out of the

jurisdiction. The court's discretion to order security for costs in favour of the defendants is therefore enlivened. This brings me to the second stage of the applicable framework, which requires me to consider whether it is just to order security for costs having regard to all the relevant circumstances.

Second stage: the relevant circumstances point towards the provision of security for costs

The circumstances that pertain to protecting the defendants against adverse costs consequences

25 First, I consider the circumstances that pertain to protecting the defendants against adverse costs consequences.

The prospects of the defendants succeeding in the proceedings

26 I consider specifically the prospects of the defendants succeeding in the proceedings, subject to the practical circumstance that the court will not investigate in considerable detail the likelihood of success in the action. In this regard, the defendants have mounted several defences against the claimant's claims in OC 236. These defences centre on, among others, representations made by Mr Parkinson that Global Explorer owned and had good title to the Equipment.

27 The claimant resists the defendants' defences. In relation to the first defendant, the claimant says that there is a low likelihood of it succeeding in its defences in OC 236. In particular, the claimant points out that the first defendant has said in its supporting affidavit to SUM 4260 that the "key issues in dispute include whether the [c]laimant is a legitimate company at all and whether the

[c]laimant actually owns the Equipment".[1] The claimant says that these defences are without merit because it has furnished more than sufficient proof that it owns the Equipment. The evidence includes the certification of equipment ownership, purchase orders, invoices, and payment receipts.

28 In relation to the second defendant, the claimant says that its arguments are untenable as the claimant was never involved in any discussions with the second defendant in relation to the Equipment. The claimant is also not a party to the contract between Global Explorer and the second defendant. As such, the claimant submits that it could not have known of the existence of any representations that Global Explorer owned and had good title to the Equipment. In essence, the claimant says that the second defendant is really trying to impute Mr Parkinson's knowledge to the claimant because he is the claimant's sole director. In this regard, the claimant submits that there is no hard and fast rule that the knowledge or conduct of a sole director or shareholder must be attributed to the company (see the Court of Appeal decision of *Red Star Marine Consultants Pte Ltd v Personal Representatives of Satwant Kaur d/o Sardara Singh, deceased and another* [2020] 1 SLR 115 ("*Red Star Marine*") at [41]).

29 While the claimant has also addressed the other defences raised by the defendants, it is sufficient for me to focus on the aforementioned defences. This is because once I find that the defendants have raised a plausible defence, then it must follow that they would have a good prospect of defending against OC 236. Indeed, given that the court will not generally enter into a detailed examination of the merits at this stage of the proceedings (see the High Court

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[1] Affidavit of Djelassi Khaled dated 24 November 2022 at p 7.

decision of *Sembawang Engineering Pte Ltd v Priser Asia Engineering Pte Ltd* [1992] 2 SLR(R) 358 at [25]), I am of the view that, in assessing whether the defence has a good prospect of success, it is generally sufficient for a defendant to raise a plausible defence. On these premises, I find that the defendants have a good prospect of succeeding in their defences.

30 First, in relation to the first defendant, I accept that there is an arguable case concerning the veracity of the documents which the claimant provided to prove its ownership of the Equipment. For instance, many of the documents are, in fact, undated certificates that the claimant has drawn up purporting to certify its ownership of the Equipment that do not even bear signature guarantees. As such, I accept that there is an arguable case that these documents which the claimant relies on actually show that the Equipment may have been purchased and paid for by another entity.

31 Second, in relation to the second defendant, I find that there is an arguable case that Mr Parkinson's knowledge can be imputed to the claimant on the basis that he is the claimant's sole director. Indeed, even by the claimant's own case, whether a director's knowledge can be attributed to the company is dependent on the legal and factual context of the case (see *Red Star Marine* at [41]). If this is correct, then I do not see how the claimant can deny the possibility that the second defendant can show that, on the facts, Mr Parkinson's knowledge should be so attributed. Indeed, even as a proposition of law, the second defendant has raised authorities, such as the Court of Appeal decision of *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 at [70] and the UK Supreme Court decision of *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2016] AC 1 at 36, which show that director's knowledge should be attributed to the company where the

infringement of third-party rights is the subject of an action against the company. I do not think that these authorities can be dismissed out of hand in the circumstances of the present case.

32 Accordingly, I find that the defendants have a reasonable prospect in succeeding in their respective defences. This is therefore a factor that weighs in favour of ordering security for costs.

The ease by which the defendants may enforce a judgment for costs

33 In relation to the ease by which the defendants may enforce a judgment for costs in their favour, I find that they may encounter some difficulty and inconvenience given that the claimant is ordinarily resident out of the jurisdiction. In the first place, while the claimant has said that it has substantial assets in the form of the Equipment within the jurisdiction that can easily satisfy any judgment for costs, the fact is that the ownership of the Equipment is the very subject matter being challenged in OC 236. As such, if it is eventually shown that the claimant does not own the Equipment, then it would naturally mean that the claimant has no assets against which the defendants upon which they can use to satisfy any judgment for costs.

34 Moreover, as Prakash J held in *Zhong Da Chemical* at [19], it would be ideal if the defendant does not experience the inconvenience and expense of enforcing his judgment in a different jurisdiction. Therefore, while it is not an immutable rule that security for costs will be ordered in respect of foreign claimants, I find that this is a suitable case to do so. This is because I do not think that the claimant has substantial assets in Singapore which the defendants can use to satisfy any costs orders made in their favour. Moreover, it may be difficult for the defendants to enforce any judgment against the claimant in the

MI as there is no reciprocal treaty for the enforcement of foreign judgments between the MI and Singapore. This is another factor weighing in favour of granting security for costs (see the Court of Appeal decision of *Ooi Ching Ling Shirley v Just Gems Inc* [2002] 2 SLR(R) 738 at [26]).

The circumstances that pertain to avoiding stifling the claimant's ability to pursue its claim

35 Second, I consider the circumstances that pertain to avoiding stifling the claimant's ability to pursue its claim.

The prospects of the claimant succeeding in the proceedings

36 While I have found that the defendants have a reasonable prospect of succeeding in the proceedings, this does not preclude a finding that the claimant likewise has a reasonable prospect of succeeding here. I find that the claimant has such a reasonable prospect.

37 First, in relation to the first defendant, just as I have said that the documents which the claimant has provided to prove its ownership of the Equipment are questionable, it is equally plausible that the documents prove such ownership. At this point of the proceedings, it is simply not possible to state so one way or the other, nor should I attempt to do so. Second, as for the second defendant, just as I have said that whether Mr Parkinson's knowledge can be attributed to the claimant is dependent on the factual and legal context, it must be that the claimant may eventually prevail on this point.

38 Accordingly, I find that the claimant has a reasonable prospect of succeeding here as well. Thus, this is a factor that goes against the provision of security for costs.

An order for security for costs precluding the claimant from pursuing its claim

39 As for whether an order for security for costs would preclude the claimant from pursuing its claim, the claimant says that an order for security for costs for the sum of S$50,000 which the defendants seek would unfairly stifle its claims. To this end, the claimant says that its bank statements from February 2022 to February 2023 show that it lacks the means to satisfy an order for security for costs. The claimant highlights that it has been earning almost no profit over the last few months and its only project is slated to end in May 2023. Moreover, the claimant says that the first defendant has not made certain payments to it for the use of the Equipment. Finally, the claimant also says that it is not able to continue conducting its business of leasing out the Equipment to third parties as the second defendant has retained the Equipment on the Barge. As such, there is a chance that the claimant would not be able to continue with the proceedings in OC 236 and would be "driven from the judgment seat".

40 Despite the above, the claimant has maintained that it is *not* impecunious. In my view, it is inconsistent for the claimant to take this position and yet assert that it does not have the means to satisfy an order for security for costs. This is because the claimant's impecuniosity must be judged with reference to whether it can pay the amount of security (if ordered). In other words, a claimant can only be said to be impecunious when it cannot meet the order for security. This is because considerations of impecuniosity in this context are tied to the notion that ordering security might unfairly stifle the claimant's claim if the claimant is unable to provide the security ordered (see the High Court decision of *Ong Jane Rebecca v Pricewaterhousecoopers and others* [2009] 2 SLR(R) 796 ("*Ong Jane Rebecca*") at [33]). Therefore, only where the claimant is unable to meet the order for security that the court might

regard its "impecuniosity" as a factor that weighs against the ordering of security.

41 Returning to the present case, I do not think that the claimant's financial position, while uncertain, would result in its claims being stifled if an order for security for costs in the sum of S$50,000 is made. In its affidavit dated 12 April 2023, the claimant stated that it was expected to generate an average monthly revenue of US$62,500 for the next 1.5 months. Even if I consider the costs of legal fees and the claimant's average monthly expenditure, which it says amount to S$30,000 and US$10,629.24, respectively, this does not account for the possibility that the claimant will undertake new projects which can generate the revenue it needs to satisfy an order for security. Indeed, as of the date of the aforementioned affidavit, the claimant stated that it is "in talks with a few parties".[2] More tellingly, the claimant has not taken the position that it will be *unable* to meet the sum of S$50,000 that the defendants seek; rather, it has only gone as far to say that it would be in a "precarious financial situation".[3] As such, I do not think that the claimant can say that its pursuit of OC 236 will be stifled if security for costs were granted.

Impecuniosity of the claimant arising out of the defendant's alleged breaches

42 Given my conclusion that the claimant has not proven that it is impecunious such that the granting of security would stifle its claims, its related assertion that its impecuniosity has been brought about by the defendants' conduct also falls away. It cannot be said that the impecuniosity of the claimant

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2 8th Affidavit of Peter James Thomas Parkinson dated 12 April 2023 at p 10.

3 8th Affidavit of Peter James Thomas Parkinson dated 12 April 2023 at p 10.

arises out of the defendants' alleged breaches when the assertion that the claimant is impecunious is not made out to begin with. Be that as it may, I take this opportunity to summarise the principles applicable to cases where a claimant alleges that its impecuniosity arises out of the defendant's alleged breaches.

43 First, it is well established that the court may consider the extent to which the claimant's impecuniosity may be due to the actions of the defendant which form the basis for the claimant's claim (see *SIC College* at [76(e)]; see also the Supreme Court of British Columbia decision of *Gray v Powerassist Technologies Inc* [2001] BCJ No 1722 at [19(c)]). This principle may be traced back to the early decision of *Farrer v Lacy Hartland & Co* (1885) 28 Ch D 482, where Bowen LJ opined (at 485):

> Suppose the plaintiff in that case had been right on the point of law, his insolvency would have arisen from the wrongful act complained of in the action. To have required security for costs on the ground of an insolvency which (if the plaintiff was right) the defendant had wrongly caused, might have been a denial of justice.

44 Second, so as to rely on its impecuniosity to resist an order for security for costs, a claimant must prove to the court's satisfaction that its impecuniosity was caused by a defendant's alleged breaches. In *Coonwarra Pty Ltd v Cornonero Pty Ltd (No 2)* [2019] VSC 702, the Supreme Court of Victoria held that the allegation that the claimant's impecuniosity was caused by the defendant must have a "strong evidentiary foundation". This can be established by the claimant proving that it was in a good financial state before interacting with the defendant (at [52(b)]). As the same court explained in the subsequent decision of *Re Southbank Liquor Stores Vic Pty Ltd* [2021] VSC 404 ("*Southbank Liquor*") at [65], evidence for such allegations must be clear as the

court would not go into a trial within a trial at this interlocutory stage of proceedings. Indeed, given the interlocutory nature of a security for costs application, it would not be practicable for the court to examine the evidence before it with a "fine-tooth[ed] comb" (see the High Court decision of *Frantonios Marine Services Pte Ltd and another v Kay Swee Tuan* [2008] 4 SLR(R) 224 ("*Frantonios*") at [44]).

45 Third, so as to rely on its impecuniosity to resist an order for security for costs, the claimant must show that the defendant's conduct contributed to the claimant's impecuniosity. As the Australian courts have held, it is not enough that the defendant's conduct is merely a contributing factor. Rather, the defendant's conduct must be the material cause of the claimant's impecuniosity (see *Southbank Liquor* at [65] and the Supreme Court of Victoria decision of *Re Credit Clear Ltd* [2021] VSC 287 at [58]). While it is unnecessary for me to decide the point here, this is, in my view, a fair position to adopt. Indeed, where a defendant's conduct only contributed to the claimant's impecuniosity to a small extent, it would still be just to allow the defendant's application for security for costs.

The circumstances that pertain to a sense of fair play: overlap between the defence and counterclaim

The parties' positions

46 Returning to the present case, the claimant also submits that an order for security for costs would be inappropriate as there is substantial overlap in (a) the first defendant's defence and counterclaim for damages suffered arising from the injunction obtained by the claimant, and (b) the second defendant's defence and counterclaim for fraudulent misrepresentation and conspiracy to cause loss

by unlawful means. The claimant says that these factors point away from the granting of security as the overlap means that it would canvass the same issues in the course of defending the counterclaims and in pursuing its main claim. The claimant argues that the effect of this is, if it is successful in defending the counterclaims, it would have effectively proven its own claim. As such, the claimant says that if it is unable to provide security and its claim is struck out, it would be unfair if it succeeds in defending the counterclaims and yet be unable to obtain judgment for its claim. Moreover, from the overlap, the claimant contends that it follows that the costs that the defendants are incurring to defend themselves are costs necessary to prosecute their own counterclaims in any case, making this an inappropriate case to grant security for costs in favour of the defendants.

47 On the other hand, the first defendant says that there is no substantial overlap between its defence and counterclaim. Even if there is some overlap between its defence and counterclaim, the first defendant argues that this is not a case where its entire defence is subsumed within its counterclaim, thereby militating against an order for security for costs. As for the second defendant, it says that the overlap between its defence and counterclaim is not a bar to an award for security for costs. In any event, the second defendant argues that the circumstances it relies upon in its defence and counterclaim are not inextricably linked with the facts relied upon by the claimant in its claim. As such, the second defendant says that the concern that the claimant may be "hobbled" in its defence to the counterclaim by the second defendant does not arise.

The applicable law

48 I now turn to the applicable law. As the Court of Appeal stated in *Wishing Star* at [19]–[20], it is trite that the overlap between a defence and

counterclaim is one consideration that the court may take into account in assessing whether to order security for costs. However, as the High Court opined in *PT Muliakeramik Indahraya TBK v Nam Huat Tiling & Panelling Co Pte Ltd* [2006] SGHC 154, it cannot be that in all cases of overlap, "regardless of the respective merits of the parties' cases and the circumstances in each individual case, such a defendant will invariably be deprived of security for costs" (at [17]). Indeed, the Court of Appeal in *SIC College* emphasised that whether security for costs can be ordered in the face of overlapping claims should ultimately turn on the facts of each case (see *SIC College* at [81] and [83]).

49 In deciding *when* the overlap between the defence and the counterclaim is relevant (and when it is not), it is important to rationalise *why* the courts have considered such overlap to be a relevant factor in deciding whether to order security for costs in favour of the defendant. In my respectful view, in deciding this issue, the courts are really concerned with the overarching question of whether ordering security where there is overlap would give an unjust advantage to one party in the litigation to the prejudice of the other. This is because, in ordering security, the courts are concerned with "achiev[ing] equality in procedure" and with not giving any party "an unfair or unequal advantage" (see Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 4th Ed, 2021) at para 10.310). More specifically, the concern is that granting security in favour of the defendant when there is an overlap between the defence and counterclaim might give the defendant an unjust advantage in the litigation.

50 This unjust advantage arises for two cumulative reasons. First, if security were ordered and not paid, the claim would be struck out, but the same

issues would still be litigated in the counterclaim (see the English High Court decision of *Ardila Investments NV v ENRC NV (Zamin Ferrous Ltd, Part 20 defendant)* [2015] 2 BCLC 560 at [67]). In this scenario, having regard to the *effect* of ordering security, it may not be fair for a court to order security for costs. This is precisely what was contemplated in the English Court of Appeal decision of *B J Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43 ("*Crabtree*"), where Bingham LJ said as follows at 52:

> It is, however, *necessary, as I think, to consider what the effect of an order for security* in this case would be if security were not given. It would have the effect, as the defendants acknowledge, of preventing the plaintiffs pursuing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. It seems quite clear and, indeed, was not I think in controversy – that in the course of defending the counterclaim all the same matters would be canvassed as would be canvassed if the plaintiffs were to pursue their claim, but on that basis *they would defend the claim and advance their own in a somewhat hobbled manner, and would be conducting the litigation (to change the metaphor) with one hand tied behind their back.* I have to say that that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation.
>
> [emphasis added]

51 In this case, as Bingham LJ observed in *Crabtree*, there may be injustice if the claimant succeeds in its defence to the counterclaim, and that defence raises the very issues that its claim raises. This is especially so if the claim would have succeeded if it were not stifled by the order of security. Indeed, the Court of Appeal in *SIC College* at [84] alluded to this very scenario when, citing the English High Court decision of *Dumrul v Standard Chartered Bank* [2010] 2 CLC 661 at [18], it said that "an unfair result may still be occasioned if the plaintiff succeeds in his defence [to the counterclaim] by relying on the same issues he raised in his main claim, and after having 'incurred all the costs

required to bring that claim to judgment in the prosecution of his defence of the … counterclaim', he would still be unable to secure judgment on his claim". Relatedly, it follows that the extent of the unfair advantage must depend on the *degree* of overlap as well: the greater the overlap, the more likely that the defendant would gain an unjust advantage if security for costs were ordered.

52 Second, and in *addition* to the first reason, the injustice of ordering security in favour of the defendant also lies in the likelihood that the defendant would have brought a claim against the claimant in any case, regardless of whether the claimant has claimed against the defendant. In this scenario, having regard to the *effect* of ordering security, it may not be fair to order security for costs where there is a substantial overlap between the defence and counterclaim. This is because an order for security here will be inconsistent with one of the purposes of so ordering, which is to protect a defendant, *who cannot avoid being sued*, against the costs of the litigation. Thus, a defendant, who would have advanced its overlapping counterclaim regardless of whether the claimant brought its claim, should not be protected against the costs of defending the claimant's claim by way of security for costs. This is again what was contemplated in *Crabtree*, in which Bingham LJ said (at 52–53):

> One comes back, I think, at the end of the day to the reflection that this is a rule intended to give a measure of protection to a defendant who is put to the cost of defending himself against a claim made by an impecunious corporate plaintiff. It may in some cases be fair and just to make such an order even though the defendant is himself counterclaiming, but I am persuaded that it would be wrong to do so here because the costs that these defendants are incurring to defend themselves may equally, and perhaps preferably, be regarded as costs necessary to prosecute their counterclaim. Of course, as Mr Phillips points out, they may decide later not to prosecute their counterclaim, but that would be a different situation from that which now presents itself before the court and upon the basis of which we have to rule. *The fact that the plaintiffs are plaintiffs and the defendants are counterclaiming defendants instead of*

> *the other way round appears on the facts here to be very largely a matter of chance. …*
>
> [emphasis added]

53 As Bingham LJ alluded to in *Crabtree*, ordering security against the claimant might have the unintended effect of providing security for the defendant's costs of pursuing its *counterclaim* for claims that would have been brought against the claimant *in any event*. In such cases, the fact that the claimants are claimants, and the defendants are counterclaiming defendants (instead of the other way round) is largely a matter of chance, depending on which of the parties first commence an action against the other. Accordingly, there is no reason why the defendants should gain an advantage in the litigation simply because they commenced their (counter)claim later in time than the claimants.

54 In sum, in the light of these cumulative reasons, the fact that there is overlap between the defence and the counterclaim is not determinative. The court will, instead, consider whether the *effect* of ordering security for costs is to give one party an unjust advantage in the litigation. For instance, in a scenario where either of the cumulative reasons that undergirds the unjust advantage discussed above are not applicable, the court might still consider it just to order security for costs *despite* the overlap.

The first defendant's defence and counterclaim

55 Having regard to the principles discussed above, I first consider the supposed overlap between the first defendant's defence and counterclaim for damages arising from the injunction obtained by the claimant. For the reasons that I will develop, I conclude that while there might be substantial overlap

between the first defendant's defence and its counterclaim, this should not preclude an order for security for costs.

56 As a starting point, I agree with the claimant that there is a substantial overlap between the defence and the counterclaim. The first defendant is counterclaiming for its alleged losses suffered as a result of an injunction that the claimant had obtained against it, which allegedly had the effect of preventing the first defendant from using and/or operating the Equipment. To establish this, the first defendant would have to prove that (a) the injunction was wrongly granted, and that (b) it has suffered loss as a result. Therefore, in order to prove that the injunction was wrongly granted, the first defendant would need to show that the claimant had no basis to prevent the first defendant from using the Equipment. The first defendant would need to, among others, successfully dispute the claimant's ownership over the Equipment or its right to assert its ownership against the first defendant. Seen in this way, the first defendant's counterclaim overlaps with its defence to the claimant's claims in tort and unjust enrichment, which are based on the defendant's assertions that the claimant is not a legitimate company and that, in any case, the claimant is not the owner of the Equipment (see [27] above). As such, the only non-overlapping issue between the first defendant's defence and counterclaim is the extent of loss caused by the injunction.

57 Despite this overlap, I do not think that ordering security for costs in favour of the first defendant would give it an unjust advantage in the litigation. This is because I find that the first defendant would not have brought a counterclaim for damages allegedly suffered as a result of the injunction if the claimant had not commenced the claim and obtained the injunction pursuant to it. In this regard, it will be recalled that the second reason for why ordering

security for costs confers an unjust advantage to the defendant is the likelihood that the defendant would have claimed against the claimant in any event even if the claimant had not first commenced proceedings against the defendant (see [52]–[53] above). Conversely, in the present scenario, where the first defendant's overlapping counterclaim could only have arisen due to the commencement of the claimant's claim, there is no injustice of ordering security in favour of a defendant.

58 Indeed, this scenario was what Bingham LJ alluded to in the English Court of Appeal decision of *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307 ("*Hutchison*") at 317, as follows:

> … The trend of authority makes it plain that, even though a counterclaiming defendant may technically be ordered to give security for the costs of a plaintiff against whom he counterclaims, such an order should not ordinarily be made if all the defendant is doing, in substance, is to defend himself. Such an approach is consistent with the general rule that security may not be ordered against a defendant. *So the question may arise, as a question of substance, not formality or pleading: is the defendant simply defending himself, or is he going beyond mere self-defence and launching a cross-claim with an independent vitality of its own?*
>
> [emphasis added]

Similarly, the Court of Appeal in *SIC College* held (at [85]) that "a court will ordinarily not order security for costs in respect of a counterclaim that arises in respect of the same matter or transaction upon which the claim is founded if it is *in substance the nature of a defence*" [emphasis added]. Although these statements were made in the separate context of whether security for costs should be ordered *against* a defendant in respect of its counterclaim, they nevertheless illustrate the broader principle that the defendant should not be penalised if its counterclaim is merely contingent on the claimant's

commencement of its claim, such that, in the words of Bingham LJ in *Hutchison*, it cannot be said that the counterclaim has an "independent vitality of its own".

59 In the round, I do not think that the first defendant's counterclaim, in the words of the English Court of Appeal in *Hutchison* (at 317), is a "cross-claim with an independent vitality of its own". Rather, I regard the first defendant's counterclaim as being "in substance the nature of a defence". Accordingly, the purpose of granting security for costs, which is to protect an *unwilling* defendant who cannot avoid being sued, would not be defeated by the grant of security for costs.

The second defendant's defence and counterclaim

60 I turn now to address the parties' argument regarding the alleged overlap between the second defendant's defence and counterclaim. The claimant argues that while the second defendant's counterclaim includes claims for fraudulent misrepresentation and conspiracy to cause loss by unlawful means, the alleged facts that the second defendant relies on in support of its counterclaim are essentially the same as those raised in support of its defence. As such, the claimant says that the second defendant would need to prove essentially the same allegations in its defence and the counterclaim.

61 The second defendant does not dispute that there is some overlap between the defence and the counterclaim. It, however, argues that the facts that the claimant is relying upon for its defence to the counterclaim are not inextricably linked to the facts that it needs to establish in the main claim. Therefore, if security is ordered and the claimant's claim is struck out for failure to provide security, there is nothing unjust even if the claimant succeeds in its

defence to the counterclaim because it does not mean that the claimant would have been entitled to succeed in its main claim.

62 I agree with the second defendant that, while there is some overlap, its defence comprises significant factual elements that do not overlap with its counterclaim. In other words, there is no *substantial* overlap between the second defendant's defence and its counterclaim. To start with, there is some overlap because the claimant's claims against the second defendant in the torts of trespass, detinue, and conversion are premised, among others, on the claimant's assertion that it has ownership over the Equipment. In its defence, the second defendant says that the claimant is estopped from asserting such ownership because of representations that it made to the second defendant. This assertion overlaps with the second defendant's counterclaim for the claimant's fraudulent misrepresentation (see [28] above).

63 However, this overlap is insubstantial when viewed against the entirety of the second defendant's counterclaim, which comprises an additional claim in the tort of conspiracy to cause loss by unlawful means. I conclude thus by referring to the elements of the tort of conspiracy to cause loss by unlawful means, which requires the second defendant to establish, among others, that: (a) there was a combination of two or more persons to do certain acts, (b) the alleged conspirators had the intention to cause damage or injury to the second defendant by those acts, (c) the acts were unlawful, (d) the acts were to be performed in furtherance of the agreement, and (e) the second defendant suffered loss as a result of the conspiracy (see the Court of Appeal decision of *Simgood Pte Ltd v MLC Barging Pte Ltd and others* [2016] SGCA 46 at [13]). As is evident, many of these elements are not directly related to the claimant's ownership of the Equipment. I therefore do not think that the second defendant

would gain an unfair advantage if security for costs were ordered in its favour. This is because, even if the claimant succeeds in defending itself against the claim in conspiracy to cause loss by unlawful means, it does not follow that the claimant would be able to establish its own claim, which is mainly premised on its ownership over the Equipment and its right to assert such ownership. Accordingly, I do not think that the overlap is so substantial as to be a weighty factor pointing against the granting of security for costs.

64 For all of these reasons, I agree with the learned AR that the overlap between the defendants' defences and counterclaims does not militate against an order for security for costs.

Summary: the defendants are entitled to security for costs

65 Having regard to the first and second stages of the analytical framework, as well as the relevant circumstances at the second stage, I agree with the learned AR that it is just to order security for costs in favour of the defendants.

The quantum of security for costs

66 Finally, I see no reason to disturb the learned AR's determination of the appropriate quantum of security. In this regard, it is trite that the court has complete discretion in the amount of the security to be provided and will determine the appropriate sum considering the circumstances of the case (see the High Court decision of *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 ("*Credit Suisse*") at [53]; citing an earlier edition of Prof Jeffrey Pinsler, *Singapore Court Practice* (LexisNexis, 2023) ("*Singapore Court Practice*") at para 9/12/12).

67 A court exercising this discretion will consider several factors, including: (a) the claimant's financial circumstances (see *Ong Jane Rebecca* at [33]–[34]); (b) the degree of overlap between the claim and the counterclaim and/or between the defence and the counterclaim, as the case may be (see *SIC College* at [81]–[82]); (c) whether the defendant is seeking to raise defences at trial that had already been considered (see the Singapore International Commercial Court decision of *B2C2 Ltd v Quoine Pte Ltd* [2018] 5 SLR 105 at [37]); and (d) the relevant costs guidelines provided for in, for instance, Appendix G to the Supreme Court Practice Directions 2021 (see *Credit Suisse* at [58]).

68 Additionally, some further considerations which, although made in the context of determining the quantum of security furnished for the purposes of an appeal, are also helpful (see *Singapore Court Practice* at para 57/3/7; cited with approval in the Court of Appeal decision of *Yuanta Asset Management International Ltd and another v Telemedia Pacific Group Ltd and another* [2017] SGCA(I) 2 at [4]):

> … The court may take into account any circumstances for the purpose of making this determination including … foreign residency, the merits of the appeal, the conduct of the appellant (for example, whether he has acted in a manner which shows a clear intention to avoid potential liability for costs), potential difficulties in enforcing a judgment for costs including delay and expense and whether the application for further security is made promptly.

69 To these factors, I would also add that the assessment of quantum should be undertaken in a broad-brush manner. The assessment should not be an opportunity for parties to descend into the minutiae, which would not be warranted given the interlocutory nature of such applications. Ultimately, the assessment of quantum is simply concerned with the "probable cost to which

the applicant will be put" (see Jim Delany, *Security for Costs* (Law Book Company, 1989) at p 121), with the caveat that the court does not set out to give full indemnity to a defendant (see the English High Court decision of *T Sloyan & Sons (Builders) Ltd and another v Brothers of Christian Instruction* [1974] 3 All ER 715 at 720).

70 On the facts, the claimant submits that the quantum ordered by the learned AR would be oppressive and stifling, and that the quantum of security should be no more than S$10,000 for each defendant. I reject that contention as I have earlier concluded that the claimant has not shown that its financial position, while uncertain, would result in its claims being stifled if an order for security for costs in the sum of S$50,000, being S$25,000 each in respect of the two defendants, is made (see [41] above).

Conclusion

71 For all these reasons, I dismiss the claimant's appeals in RA 57 and RA 58, and order that the claimant furnishes security for the defendants' costs up the stage of, and including, discovery. The quantum of security is to be fixed at the sums of $25,000 each for the first and second defendants. To be clear, the learned AR's orders in relation to the form of security will apply.

72 Following my decision to dismiss the claimant's appeals in RA 57 and RA 58, I also dismiss its appeal in RA 74 and RA 75 for the following reasons. First, because I have dismissed RA 57 and RA 58, RA 74 and RA 75 are rendered nugatory as RA 74 and RA 75 are contingent on RA 57 and RA 58 succeeding. Second, while the learned AR declined to strike out the claimant's claim in SUM 4255 and SUM 4260, the fact remains that SUM 4255 and SUM 4260 were necessitated by the claimant's failure to provide security by

the stipulated deadline. I agree with the learned AR that the claimant should not be allowed to benefit from its non-compliance with the orders to provide security for costs. The learned AR is therefore justified in departing from the general principle that costs should follow the event.

73 Unless the parties are able to agree on an appropriate costs order for the present appeals, they are to tender written submissions, no more than seven pages each, within 14 days of this judgment.

Goh Yihan
Judicial Commissioner

Lee Koon Foong Adam Hariz, Tan Shi Yun Jolene and Sonia Elizabeth Rajendra (Joseph Tan Jude Benny LLP) for the claimant;
Ramachandran Doraisamy Raghunath, Cathryn Neo Mei Qin and Vincent Lee Hong Hui (PDLegal LLC) for the first defendant;
Chia Chee Hyong Leonard and Abirame S (Asia Ascent Law Corporation) for the second defendant.