Tjong Very Sumito and others *v* Chan Sing En and others
[2011] SGCA 40

Case Number	: Civil Appeal No 234 of 2010
Decision Date	: 15 August 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Peter Gabriel and Shannon Ong (Gabriel Law Corporation) for the appellants; Nicholas Narayanan (Nicholas & Tan Partnership LLP) for the first respondent; Edwin Tong, Aaron Lee and Margaret Ling (Allen & Gledhill LLP) for the second and third respondents.
Parties	: Tjong Very Sumito and others — Chan Sing En and others

Civil Procedure – Interim orders – Security for costs

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 2 SLR 360.]

15 August 2011 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") made in *Tjong Very Sumito and others v Chan Sing En and others* [2011] 2 SLR 360 ("the Judgment"), where the Judge ordered that the appellants (the plaintiffs in Suit No 89 of 2010 ("the main action")) be required to furnish security for costs in the sum of $35,000 in favour of the first respondent (the first defendant in the main action) and $40,000 in favour of the second and third respondents (the fifth and sixth defendants in the main action respectively).

Procedural background

2 The appellants, who are citizens of Indonesia, commenced the main action against a total of 11 defendants. The first respondent applied by way of Summons No 1720 of 2010 under O 23 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC") for an order for security for costs against the appellants. This application was dismissed by an Assistant Registrar ("the AR") on the ground that the first appellant ("Sumito") was ordinarily resident in Singapore. The AR also refused to order security for costs against the second and third appellants (who are nominal plaintiffs, being nominee parties of Sumito). This part of his decision was based on the principle set out in *Singapore Civil Procedure 2007* (G P Selvam gen ed) (Sweet & Maxwell, 2007) ("*Singapore Civil Procedure*") at para 23/3/10 and the cases cited therein to the effect that security for costs will not normally be made against plaintiffs who have a co-plaintiff resident within the jurisdiction. [note: 1]

3 The first respondent filed an appeal, Registrar's Appeal No 234 of 2010 ("RA 234/2010"), against the AR's refusal to order security for costs. The second and third respondents also applied for security for costs against the appellants by way of Summons No 2961 of 2010. The Judge heard this application together with RA 234/2010. At the end of the hearings, the Judge reversed the AR's decision and made the orders mentioned above at [1].

Arguments below

Respondents' arguments below

4 In their submissions below the respondents did not strictly distinguish between arguments relevant to jurisdiction and those relevant to the exercise of the Judge's discretion under O 23 r 1(1) of the ROC (see [20] below). However, for clarity we have attempted to arrange their arguments according to such a distinction. The respondents' arguments before the Judge that were relevant to the court's jurisdiction to order security for costs were as follows. Firstly, the appellants were all ordinarily resident out of Singapore (under O 23 r 1(1)(*a*) of the ROC). [note: 2] In addition, the second and third appellants were nominal plaintiffs of Sumito (under O 23 r 1(1)(*b*) of the ROC). [note: 3] Finally, the respondents pointed out that the appellants were trying to evade the consequences of litigation by using multiple identities and multiple addresses (under O 23 r 1(1)(*d*) of the ROC). [note: 4] The applicable rules are set out at [20] below.

5 The respondents argued that the court should exercise its discretion to grant security for costs for the reasons mentioned above in support of a finding of jurisdiction as well as the fact that the appellants (a) had obtained a Mareva injunction against the first respondent without good grounds, [note: 5] (b) had done so on the basis of fabricated documents and without full and frank disclosure, [note: 6] (c) had initiated the main action against the respondents vexatiously, [note: 7] and (d) had no ready assets in Singapore against which the respondents could enforce any judgment obtained in their favour. [note: 8] In addition, the second and third respondents stated that Sumito was using false identity documents and that his probity could not be relied upon. [note: 9] The second and third respondents further highlighted the fact that their defence in the main action was likely to succeed. [note: 10]

Appellants' arguments below

6 As against the respondents' submissions on the court's jurisdiction to order security for costs, the appellants argued below that they were *not* ordinarily resident *outside* of Singapore for the purposes of O 23 r 1(1)(*a*). [note: 11] In addition, the second and third appellants were not nominal plaintiffs, nor were they proven unable to pay costs for the purposes of O 23 r 1(1)(*b*). [note: 12] As for his alleged changes in address (relevant under of O 23 r 1(1)(*c*)), Sumito argued that the last time that he had been proven to have changed his address was before the commencement of the main action. [note: 13]

7 As concerning the exercise of the court's discretion, the appellants argued that (a) as Sumito *was* ordinarily resident *in* Singapore, in any event the court should not order security for costs against him even if it found it had the jurisdiction to do so, [note: 14] (b) no security should be ordered against the second and third appellants as they are co-plaintiffs of Sumito, who was ordinarily resident in Singapore [note: 15] (the same ground relied upon by the AR), (c) they had a good arguable case in the main action, [note: 16] and (d) the respondents' applications were intended to stifle their claim in the main action. [note: 17] The appellants also denied the allegations regarding Sumito's supposedly questionable probity. [note: 18]

Decision below

8 The Judge below first restated the law that the words "ordinarily resident" in O 23 r 1(1)(*a*) were to be given their natural meaning, and that cases outside the security for costs context could be relevant on this issue (see [11]–[12] of the Judgment). The Judge then addressed the question of whether a person could be found to be ordinarily resident in more than one place at a specific point in time. After reviewing Singapore and Commonwealth case law, he concluded that he was not precluded from making such a finding (see [19] of the Judgment). [note: 19]

9 The Judge then addressed the evidence concerning Sumito's ordinary residence, finding that Sumito was ordinarily resident in Indonesia. He found that this sufficed to trigger his jurisdiction to order security for costs under O 23 r 1(1)(*a*) of the ROC (see [21] and [24] of the Judgment).

10 The Judge also concluded that in addition to being ordinarily resident in Indonesia, Sumito was simultaneously also ordinarily resident in Singapore, although he added a qualification that this was not a necessary finding for his purposes (see [25] of the Judgment). He then held that a plaintiff found to be ordinarily resident both in Singapore as well as another jurisdiction could still have security for costs ordered against him (see [34] of the Judgment).

11 Having found that he had jurisdiction to order security for costs, the Judge took note of the fact that the appellants lacked assets in Singapore, the fact that neither parties' case in the main action was obviously stronger, and the fact that no evidence was produced to prove the application for security was oppressive (see [38], [39], [45] and [46] of the Judgment). He therefore allowed the application of the second and third respondent and allowed the appeal of the first respondent, ordering the appellants to provide $40,000 as security for the costs of the second and third respondents and $35,000 as security for the costs of the first respondent, in all cases up to and including the date for filing the List of Documents in the main action (see [48] of the Judgment).

12 Although the Judge noted the AR's findings that the second and third appellants were nominal plaintiffs (see [9] of the Judgment), he eventually stated that it was unnecessary to make any findings in relation to this issue under O 23 r 1(1)(*b*) as his jurisdiction had already been triggered under O 23 r 1(1)(*a*) (see [35] of the Judgment). We note that he also did not go on to address the argument that costs are not normally ordered against foreign parties with co-plaintiffs ordinarily resident in Singapore (see [7] above).

Appellants' and respondents' cases

13 The Appellants' arguments essentially focused on the fact that Sumito is ordinarily resident in Singapore. They contended that any individual who is ordinarily resident in Singapore *cannot* fall within the scope of O 23 r 1(1)(*a*) of the ROC, even if he is also ordinarily resident outside of Singapore. This was based on the premise that the rule only targets plaintiffs who are not amenable to the process of the court. [note: 20] In this connection they argued that the Judge had erred in not considering an Australian case, *ie*, *Rivera v Australian Broadcasting Corporation* [2005] FCA 661, ("*Rivera*"), which they asserted was an authority in their favour that was brought to the court's attention below. [note: 21]

14 The appellants also argued in the alternative that, in any event, a person cannot be ordinarily resident in more than one place at any one moment for the purposes of O 23 r 1 of the ROC except in exceptional circumstances. [note: 22] They sought to distinguish certain English cases that stated otherwise on the ground that those cases did not concern the question of security for costs under any equivalent of O 23 r 1(1)(*a*) and/or did not actually result in a finding that a propositus was ordinarily resident in more than one place. [note: 23] On this premise, they sought to argue that

Sumito must be found to be ordinarily resident in Singapore only. [note: 24] In any event, the appellants also argued that based on the objective facts Sumito is not ordinarily resident in Indonesia. [note: 25]

15 The appellants finally argued that even if jurisdiction to order security for costs was found, the discretion to do so ought not to have been exercised. This was because the appellants were ordinarily resident within Singapore and had a good arguable case in the main action. [note: 26] We note that the appellants did not seek to revisit the argument made below that no security should be ordered against the second and third appellants as a co-plaintiff of theirs (*ie*, Sumito) was ordinarily resident in Singapore (see [7] above).

16 In addition to the arguments mentioned, which were already raised at the hearing below, the appellants also wished to raise a new point at this appeal, namely that the second and third respondents had unduly delayed applying for security for costs and that this justified the dismissal of their application. [note: 27]

17 The respondents supported the view, contrary to that of the appellants (see [13] above), that the rationale for ordering security for costs against a plaintiff ordinarily resident out of Singapore was in fact to ensure the availability of a fund within jurisdiction to meet any costs order obtained in favour of the defendant(s). This rationale also applied to plaintiffs concurrently ordinarily resident both inside and outside of Singapore, meaning that the court should be able to order security for costs against such plaintiffs. [note: 28] Beyond that the respondents' arguments generally supported the position taken by the Judge.

Issues before this court

18 The issues that are raised in this appeal can be broadly categorised under the following heads:

(a) Whether it is possible for a court to find that a plaintiff is concurrently ordinarily resident in more than one place for the purposes of O 23 r 1(1)(*a*) of the ROC.

(b) What the underlying rationale is for jurisdiction under O 23 r 1(1)(*a*) of the ROC – whether it is to ensure the plaintiff's amenability to the process of the court or to ensure the availability of a fund to facilitate the payment of costs to the defendant(s) if so ordered.

(c) Assuming a plaintiff is found to be ordinarily resident in Singapore *as well as* outside it, whether jurisdiction is triggered under O 23 r 1(1)(*a*) of the ROC.

(d) If jurisdiction is triggered under O 23 r 1(1) of the ROC, whether and to what extent the fact of ordinary residence in Singapore is relevant to the exercise of the court's discretion to order security for costs.

(e) On the facts, whether the appellants are ordinarily resident in Indonesia, Singapore, or both, and therefore whether jurisdiction is triggered under O 23 r 1(1)(*a*) of the ROC.

(f) Whether, in the circumstances of the case, the Judge had erred in exercising his discretion under O 23 r 1(1) of the ROC to order security for costs against the appellants.

We will also be considering the new argument of undue delay raised by the appellants at this appeal in relation to the application of the second and third respondents for security for costs.

19 We should mention that although at the hearing below questions relating to the scope of O 23 r 1(1)(*b*) of the ROC and the status of the second and third appellants as nominal plaintiffs were raised, they are no longer live issues in this appeal (see [15] above). We will, therefore, not be addressing them in this judgment.

Our decision

The applicable rules of court

20 We will begin our consideration by looking at the applicable rules of court. Order 23 r 1(1) of the ROC provides:

> **Security for costs of action, etc. (O. 23, r. 1)**
>
> **1**. —(1) Where, on the application 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 just.

It would be seen that this rule creates a two-stage test, consisting of the "jurisdiction" stage and the "discretion" stage. It is only if the applicant-defendant can show that the court has jurisdiction to order security against the plaintiff under one of the four grounds set out in O 23 rr 1(1)(*a*)–(*d*) that the court would then proceed to consider whether it would, in the circumstances, exercise its discretion to order security in favour of the defendant. For the purposes of this appeal, O 23 r 1(1)(*a*) contains the most relevant ground of jurisdiction.

The standard of review

21 On an appeal to the Court of Appeal, if it is shown that the court below had correctly decided the question of whether it had jurisdiction to order security for costs, the only remaining question would then relate to the exercise of the court's discretion in making the order. In such a situation the appellate court's review function is limited. This was enunciated by this court in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 at [34] in these terms:

> It is trite law that an appeal against the exercise of a judge's discretion will not be entertained unless it be shown that he exercised his discretion under a mistake of law, in disregard of principle, under a misapprehension as to the facts, or that he took account of irrelevant matters,

> or the decision reached was "outside the generous ambit within which a reasonable disagreement is possible". …

This passage was quoted in *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)* [2009] 2 SLR(R) 166 at [17], where this court also stated (at [18]) that "the starting presumption would be that the Judge had rightly exercised his discretion."

Multiple ordinary residences

22 At [11] of the Judgment, the Judge explained the meaning of the term "ordinarily resident" as follows:

> The words "ordinarily resident" should be given their natural and ordinary meaning; the expression is not a term of art with any technical or special meaning. Thus, in [*Akbarali v Brent London Borough Council*] [1983] 2 AC 309 ("[*Akbarali*]"), the House of Lords held that (at 343):
>
> > ... 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.
>
> It is the state of mind of the "propositus" that is paramount in determining ordinary residence. Not only should the place of residence be adopted voluntarily (as opposed to enforced presence in a particular jurisdiction by reason of kidnapping or imprisonment *etc*), there should also be a degree of settled purpose. In this regard, in his Lordship's judgment in [*Akbarali*], Lord Scarman observed that (at 344):
>
> > ... The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the 'propositus' intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

All parties do not dispute the correctness of this basic definition of the term "ordinary residence"; nor do we disagree with it. It will be seen from this passage that a person's ordinary residence is to be determined not only by his or her physical presence in a place, but also his mental attitude and purpose in relation to that place. In other words, the test for "ordinary residence" depends to a significant degree upon the state of mind of the person. It also connotes residence in a place with some degree of continuity apart from accidental or temporary absences: see *Levene v Commissioners of Inland Revenue* [1928] AC 217 at 225.

23 The position taken by the appellants at this appeal is that a person can only be ordinarily resident in one place at any one time, although he can change his ordinary residence from time to time. We observe that this sits rather curiously with an affidavit deposed by Sumito on 18 August 2010 for the hearing below in which he states, "… I am advised and verily believe that a person can be ordinarily resident in more than one country." [note: 29] With regard to their present position, the appellants relied very much on the case of *Wishing Star Ltd v Jurong Town Corp* [2004] 1 SLR(R) 1 ("*Wishing Star*"), which also concerned security for costs. There the High Court stated the following (at [3]–[4]):

3 A branch is but a part of the company. When reference is made to the term "ordinarily resident", it applies to the company and not to its branches. The question arises as to whether a company can be ordinarily resident in a jurisdiction where its branches are located. Generally speaking, it would do violence to the language to hold that anyone, whether a corporate body or an individual person, may be said to be ordinarily resident in more than one place at a time. A person or a company may always set up more than one residence in as many jurisdictions as they can afford – but a house is not a home. Support for this view can be gleaned from the judgment of the court in *Jones v Scottish Accident Co* (1886) 17 QBD 421 at 423:

> An individual carrying on business in Scotland with branches in England is resident at the place where he carries on his business; why should we adopt a different rule for a company?

Security for costs may be sought against a corporation under the Companies Act only if that corporation is not "ordinarily resident" in Singapore. Having a registered branch does not necessarily satisfy that criteria. It is no more than having another address, another house. We want to be satisfied that the corporation has deeper roots than that so that it may be excused from providing security for costs in the event that it fails in the action. Hence, having registered an office or even carrying on some of its business through that address may not be sufficient in this regard. …

4 Therefore, in itself, the mere fact that a company has a branch within the jurisdiction does not confer any special reason to deny a defendant from getting security for costs. It is possible that a company who has a registered office elsewhere prefers to operate principally from its branch. In such a case, it is possible that the company may be said to be ordinarily resident in the jurisdiction where that branch is located. Thus, courts have preferred to apply "the central management and command of the company" test. … [S]ome exceptions must be recognised. An example would be those cases in which the management and control is divided. It is, of course, possible that a company comprising of, say three main shareholders and directors, may have three equally dominant centres of management if each of the three operate in like-manner and extent in different jurisdictions. In such cases, the company may be said to be ordinarily resident in each of the three jurisdictions for the purposes of an application for security for costs. On the affidavit evidence, it does not appear that Wishing Star Ltd falls into this category. It has a branch, and a reasonably active one involved in a major construction project here. But the seat of management of the company is still in Hong Kong.

24 The High Court in *Wishing Star* relied on the analogy between individual and corporate parties made in *Jones v The Scottish Accident Insurance Company, Limited* (1886) 17 QBD 421 ("*Jones*"), where Cave J stated (at 423):

> ... The language of Order XI. [regarding service of a writ out of jurisdiction] does not expressly apply to companies, but the analogy of the practice with regard to individuals is against the present application. In the case of a man residing and carrying on business in Scotland, but having branch establishments in England, it is clear that leave would not be given to issue a writ for service out of the jurisdiction; it would be absurd to say that he was ordinarily resident in England *because he had a branch establishment there*; and a plaintiff in such a case would be unable to bring himself within sub-s. (*c*) of Order XI., r. 1. If that is the way in which the Courts have dealt with the case of an individual, why should they not deal in the same way with that of a company? An individual carrying on business in Scotland with branches in England is resident at the place where he carries on his business; why should we adopt a different rule for a company? …

[emphasis added]

25 Cave J's point was that an individual did not become ordinarily resident in a place *just because* he had a branch of his business there, when it was clear that his main residence and business was elsewhere. One should be careful not to extend the scope of what a judge says to situations which were not within his contemplation. For the sake of argument, even if we further extended the example given by Cave J to a person having branches of his business in several (not just one) foreign countries, we would agree with him that this fact, without more, would not mean that that person was concurrently ordinarily resident in those several countries if it was clear that his main residence and business was in one specific place. The logic of Cave J's conclusion, in the *specific context* of his example, cannot be faulted. But this is not to say that a person cannot be ordinarily resident in more than one jurisdiction in other appropriate circumstances. Cave J did not, on the facts of the case before him, expressly address that possibility. Similarly, the High Court in *Wishing Star* was making the same point that having a registered branch or a house in a jurisdiction did not, without more, mean that a company or person was ordinarily resident in that jurisdiction. Indeed, the court in *Wishing Star* explicitly recognised (at [4]) a scenario where having a branch in a foreign jurisdiction could lead to acquiring ordinary residence in that jurisdiction, namely, where the branch was a place of principal operation. It even went further to say that where several branches were equally dominant centres of management, the company could be said to be ordinarily resident in the various jurisdictions of those branches at the same time.

26 Admittedly, if one were to compare [3] with [4] of *Wishing Star*, there appears, at first blush, to be a slight inconsistency between them. This is because at [3] the court stated that "[g]enerally speaking, it would do violence to the language to hold that anyone, whether a corporate body or an individual person, may be said to be ordinarily resident in more than one place at a time". But it should be noted that this sentence begins with the words "[*g*]*enerally* speaking" [emphasis added]. Clearly the court was conscious that in certain *particular* circumstances a company or a person could be ordinarily resident in more than one jurisdiction. At [4] of *Wishing Star*, the court there indeed elaborated on one such set of circumstances. As such, we cannot see how the appellants could rely upon *Wishing Star* to contend that in law, a company or an individual can only be ordinarily resident in one jurisdiction at any one time. It seems to us that this assertion is based on an erroneous appreciation of the opinion of the court in *Wishing Star*.

27 We would reiterate that what *Wishing Star* and *Jones* established is that the place of ordinary residence of a company is the place of its central management. The rationale for this is that establishing a place as a place of central management would indicate the settled purpose of the company to do business from there (see *Akbarali v Brent London Borough Council* [1983] 2 AC 309 at 344 as quoted in the Judgment at [11], reproduced above at [22]). If, for instance, all the directors and managers of the company were away from that location for a corporate retreat, the ordinary residence of the company would remain there; it would not be shifted to the place of the retreat. This is because the place of ordinary residence is based on a settled purpose, not on the temporary physical presence of the company's directors or managers. If the settled purpose of the management is that its principal operations be divided among several places, as described in *Wishing Star* at [4], the ordinary residence of the company could very well be in those several places simultaneously. The same would follow in the case of an individual. It is a question of fact and evidence as to whether it has been shown that the person has indeed adopted and established two (or more) places of ordinary residence. The fact that he cannot physically be in more than one place at the same time is immaterial. It is the settled purpose that would be determinative. Once this purpose is established, temporary absence from a place does not *per se* alter the fact that a company or an individual is still ordinarily resident there.

28 At this juncture, we should refer to the case of *In re Little Olympian Each Ways Ltd* [1995] 1 WLR 560 ("*Little Olympian*"), which was cited by the appellants. In *Little Olympian* at 568, Lindsay J held that to determine where a corporation ordinarily resides, the court must ascertain where its central management and control actually resides. This holding, as mentioned above, is uncontroversial. Lindsay J also stated, in *obiter* (at 565–566):

> … [T]he context of Ord. 23, r. 1(1)(a) [of the English Rules of the Supreme Court 1965, *in pari materia* with O 23 r 1(1)(*a*) of the ROC] is, at lowest, consistent with the propositus having only one ordinary residence. If that is not so one gets to the position, surely uncontemplated, that whereas a man ordinarily resident here could not have an order made against him by reason of his impecuniosity, if he also were to be ordinarily resident out of the jurisdiction then there would be jurisdiction to make an order against him. Both the word "ordinarily" and the framework of Order 23 should incline me to a meaning for "ordinarily resident" in this case such that, other than in exceptional circumstances, I should be able to envisage only one such residence.

While this is a strong statement, it is still a qualified one. It envisages that it is still possible for a person to be ordinarily resident in more than one jurisdiction "in exceptional circumstances". At the end of the day, as stated above at [27], the question of multiple places of ordinary residence is a matter of evidence.

29 Moreover, there are other recent cases which have taken a less conservative approach (and, one could say, perhaps a more appropriate approach in this modern age of globalisation) than *Little Olympian* in addressing this question of ordinary residence. We note that it is now becoming more common for individuals to have multiple homes and places of business across the globe, more than one of which they might possibly have adopted as their ordinary residence. One English case adopting the more progressive approach is *Leyvand v Barasch and others* (2000) The Times 23 March 2000 ("*Leyvand*"), decided by Lightman J. Although on the facts of *Leyvand* Lightman J did not consider it necessary to make a finding that the plaintiff was ordinarily resident in more than one place simultaneously, he did make the following remark in *obiter* (at [5]):

> The fact that the Claimant is ordinarily resident out of the jurisdiction confers on the Court jurisdiction to order him to provide security. *It is well established that a claimant may have two ordinary residences, one within the jurisdiction and one outside. The fact that a claimant who is ordinarily resident outside the jurisdiction is also ordinarily resident within the jurisdiction does not preclude the Court [from] ordering security*. For Order 23 [of the English Rules of the Supreme Court 1965] confers jurisdiction to order security in the case of a claimant "ordinarily resident out of the jurisdiction" and not in the case of a claimant "not ordinarily resident within the jurisdiction". ... [emphasis added]

We would further note that Lightman J added (at [8]) that if it were necessary for him to do so he would have held that the claimant was ordinarily resident in England as well as in Israel.

30 The Judge had quoted and relied on this passage of Lightman J in coming to his decision (see [16] of the Judgment). What is significant is that *Leyvand* was endorsed, albeit in *obiter*, by the Federal Court of Australia in *Logue v Hansen Technologies Ltd* [2003] FCA 81 ("*Logue*") at [24]. Both *Leyvand* and *Logue* were in turn applied by the New South Wales Supreme Court in *Corbett v Nguyen & Ors* [2008] NSWSC 1265 ("*Corbett*"), where there was an actual finding (at [21] and [24]) that the plaintiff was ordinarily resident both in Vietnam and in New South Wales, Australia, simultaneously.

31 In so far as the Australian courts are concerned, as early as 1992 the Federal Court of Australia, in the case of *Re Kenneth Dudley Taylor; Ex parte Natwest Australia Bank Ltd* (1992)

37 FCR 194, had clearly accepted that a person could be ordinarily resident in more than one country. Quoting Lockhart J at [18] – [19]:

> … At first blush it may seem strange to say that a person can be ordinarily resident in more than one country at the same time; but on closer analysis it is not. Plainly you cannot be physically present in more than one place at the same time. But the lifestyles of people vary greatly. Some people in the ordinary pursuit of their lives regularly or customarily live in more than one place, each of which has an element of permanence about it and is not merely a place of casual or intermittent resort.
>
> Most people, if asked where they were ordinarily resident at a particular time, would name but one place: their home, because that would be the only place in which they normally or customarily live, although they may travel to other places on holidays or business intermittently. Other people may have two or more houses or flats and stay for various purposes and varying lengths of time in each. It may, depending on the circumstances, be permissible to say that at a particular time they are ordinarily resident in each of the places, though they may be at that time physically present somewhere else. …

32 The appellants did not address these cases directly, saying only that in "the English authorities" the *ratio* did not include a finding that the *propositus* was ordinarily resident in more than one place. [note: 30] While this was true in *Leyvand* and the Australian case of *Logue*, such a finding was actually made in *Corbett*.

33 It seems to us that as a matter of principle, we cannot see any reason why a person cannot be ordinarily resident in more than one jurisdiction. This is a question of fact. We note that some countries, like England and Australia, do permit their citizens to have dual nationality – it would not be unlikely for such persons to have more than one ordinary residence. In any event, there is nothing to stop a person (even if his country of citizenship, like Singapore for example, does not permit dual nationality) from establishing a second home in another country and thus, in turn, have two (or even more than two) ordinary residences. This leads us to the next question: Does a factual finding that a party is ordinarily resident in Singapore *as well as* in another country, preclude the court from exercising jurisdiction under O 23 r 1(1)(*a*) of the ROC? To answer this question, we will first consider the rationale underlying jurisdiction under O 23 r 1(1)(*a*).

Rationale underlying jurisdiction under O 23 r 1(1)(a) of the ROC

The appellants' argument: ensuring amenability to jurisdiction

34 The parties have urged this court to recognise different underlying rationales as the basis for jurisdiction under O 23 r 1(1)(*a*) of the ROC. The appellants argued that this jurisdiction is fundamentally based on ensuring that a plaintiff is amenable to the court's enforcement jurisdiction; where the plaintiffs are already amenable in this way, the courts should not invoke this jurisdiction to order security for costs. The corollary of this is that where a plaintiff is ordinarily resident in Singapore, the court should have no jurisdiction to order costs against him, *notwithstanding that he may also be ordinarily resident out of Singapore* (in spite of the words of O 23 r 1(1)(*a*)). [note: 31] The appellants justify their position by raising the example of a person with no ordinary residence. The appellants submitted that since the rationale of O 23 r 1(1)(*a*) is to ensure the plaintiff's amenability to jurisdiction, it must be interpreted to give jurisdiction to order security against a person ordinarily resident in no jurisdiction (again, in spite of the words of the rule). The appellants asserted that to interpret the rule otherwise would give the "absurd" result that the court could not have jurisdiction

to order security for costs against such a person. [note: 32]

35 We accept that it is theoretically possible, though rather unlikely, for a person to have no ordinary residence, since they may not have voluntarily adopted any place with the settled purpose of residing there. This was indeed the finding of the Federal Court of Australia in relation to the plaintiff in *Rivera* at [50] (reproduced at [44] below). However, we fail to see how this example supports the appellants' position. The rule's positive formulation strongly suggests that where a person has no ordinary residence in any jurisdiction, jurisdiction to order security for costs is not triggered under O 23 r 1(1)(*a*). That seems to be the clear intention of the framers of the rule, whom we can assume were mindful to strike a specific balance between the rights of plaintiffs and defendants. In this light, the appellants did not explain precisely what was so "absurd" about the stated outcome. On the contrary, we find the appellants' proposed approach unintuitive because it renders completely meaningless the clear express words of O 23 r 1(1)(*a*), which gives the court jurisdiction where "the plaintiff *is* ordinarily resident *out of* [Singapore's] jurisdiction" [emphasis added].

36 Far from being persuaded that the appellants' proposed rationale justifies departure from the express words of O 23 r 1(1)(*a*), on the contrary it seems to us that their contention concerning the rationale of that rule is effectively rebutted by the express words of the rule. Only by rejecting their proposed rationale can we avoid the truly absurd prospect of interpreting the rule to mean the exact opposite of what it says. To illustrate the difficulties with the appellants' suggested rationale we offer the example of a person who is invariably physically present in Singapore but not *ordinarily* resident there (perhaps because of a lack of settled intention to reside there). He would be no less amenable to the process of the Singapore courts than someone who is ordinarily resident here. The logical consequence of the appellants' contention, based on their proposed rationale for O 23 r 1(1)(*a*), is that jurisdiction under that ground would *not* arise against such a person, *even if they were ordinarily resident out of jurisdiction*. This would again obviate the express words of the rule.

37 We note that the Judge (at [33] of the Judgment) also found that the issue of amenability to process could not be the main rationale (the "be all and end all") behind the decision whether or not to order security for costs. He came to this conclusion by distinguishing the cases relied upon by the appellants for their proposition. As further support for his conclusion, he pointed out that the court still retains the discretion not to make an order for security even against foreign plaintiffs who are not amenable to process. While we agree with the Judge's conclusion (for the reasons stated at [36] above), we feel the need to make an observation with regard to this last reference to the discretion. We must caution against the conflating of, on the one hand, factors or grounds which relate to jurisdiction and, on the other hand, those which are relevant to the exercise of the court's discretion as to whether security for costs should be ordered (see [40] and [48] below). In discussing the question of whether jurisdiction is established under the first stage of the O 23 r 1(1) process, not all arguments relating to the later stage where the discretion is exercised may be relevant (although some of them may be, as at [40] below).

38 Another reason to reject the appellants' proposed rationale was put forward by the first respondent: in principle, a person can be amenable to Singapore's judicial process in any country if they use the mechanism provided in O 11 of the ROC for service out of jurisdiction. [note: 33] We would say that this argument is, at best, only partially valid as the O 11 procedure does not fully remove the inconvenience and cost of foreign enforcement that underlies the "non-amenability to process" argument relied on by the appellants.

The respondents' argument: ensuring availability of a fund to facilitate payment of costs

39 To turn to the respondents' proposed rationale, they argued that the foundation of jurisdiction under O 23 r 1(1)(*a*) of the ROC is the need to ensure that a fund exists within the jurisdiction to facilitate payment of costs without the risks, expenses and delay of foreign enforcement. [note: 34] In support of this proposition they cited the decision of this court in *Ooi Ching Ling Shirley v Just Gems Inc* [2002] 2 SLR(R) 738 ("*Shirley Ooi*") at [27] as follows:

> … The whole point of ordering a foreign plaintiff or appellant to furnish security is to ensure that a fund would be available within the jurisdiction of this court against which the successful defendant or respondent could enforce the judgment for costs: see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 at 422. Without such further security there is a real risk that JGI could be left with a costs order which would be unenforceable or only enforceable with great difficulty and expense, plus delay.

The respondents also relied on a case following *Shirley Ooi* , namely the High Court decision in *Pacific Integrated Logistics Pte Ltd v Gorman Vernel International Freight Ltd* [2007] 1 SLR(R) 1017 ("*Pacific Integrated Logistics*") at [7], where it was stated:

> … The purpose behind O 23 r 1(1)(*a*) is not limited to protecting a defendant in the extreme situation where an order of costs would otherwise be a "paper judgment". On a more nuanced level, it is also aimed at *reducing* the time and expense involved in enforcing such orders. As stated by our Court of Appeal in *Ooi Ching Ling Shirley v Just Gems Inc* [2002] 2 SLR(R) 738 at [19], one of the rationales for granting security against a foreign plaintiff is "*the delay or expense* that will arise in enforcing the costs order abroad". [emphasis in original]

To these quotations we would add the following statement of the Federal Court of Australia in *Logue* at [18]:

> … [T]he purpose of ordering security for costs against an applicant "ordinarily resident outside Australia" is to create a fund within this country against which a successful respondent may enforce a judgment for costs thereby enabling the avoiding of the risks, uncertainties and delays of attempting to enforce such a judgment in the applicant's claimed country of residence…

40 We would again caution, as we did above (at [37]), that care should be taken to differentiate between factors relevant to jurisdiction and those relevant to the exercise of discretion. The passages cited from *Shirley Ooi* (at [27]) and *Pacific Integrated Logistics* (at [7]) were written in the context of the exercise of the discretion against a foreign plaintiff *after* jurisdiction had already been established. That said, in this specific instance we find that the rationale stated in those cases is relevant in relation to determining the basis for jurisdiction. This is further supported by the very similar passage in *Logue* (at [18]), which was written in the context of determining the meaning of the phrase "ordinarily resident outside Australia" for the purposes of finding jurisdiction to order security for costs.

41 While we recognise that "ease of enforcement" is a rationale for the jurisdiction under O 23 r 1(1)(*a*), we must state that it is not a determinative factor in all questions arising under that rule. This caveat was recognised by the Judge at [34] of the Judgment in relation to the exercise of his discretion: we would add that it is equally applicable in relation to the question of jurisdiction. It is established law, for example, that the impecuniosity of a plaintiff who is a natural person cannot of itself found jurisdiction to give security for costs (see *Ho Wing On Christopher and others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 ("*Christopher Ho*") at [71]). This is in spite of the fact that enforcement of costs against such a plaintiff may be impossible, to say nothing of risky, expensive or delayed. Therefore, while the inconvenience of enforcing costs against a plaintiff

ordinarily resident out of Singapore is one rationale for the jurisdiction provided under O 23 r 1(1)(*a*), inconvenience of enforcement in general is neither a necessary nor a sufficient ground of jurisdiction. Recourse must always be had first and foremost to the wording of the four grounds of jurisdiction under O 23 r 1(1).

42 As stated in *Christopher Ho* at [72], under the law on security for costs, there is a wider public policy of balancing access to the courts for certain high-risk categories of plaintiffs against the need to ensure defendants get their costs if they win. This balance is struck by the rule-framers based on multiple factors. If it was the intention of the framers of the rules that every person who is ordinarily resident in Singapore should not in any circumstances be required to furnish security for costs, O 23 r 1(1)(*a*) would have been worded differently, perhaps such as to trigger jurisdiction where it appears to the court "that the plaintiff is *not* ordinarily resident *within* the jurisdiction". Instead, the rule is formulated the other way such as to give jurisdiction where it appears to the court "that the plaintiff *is* ordinarily resident *out of* the jurisdiction" [emphasis added]. It seems to us, perhaps, too simplistic to suggest that there should be only one specific rationale for the rule. The words of O 23 r 1(1)(*a*) are clear and we do not see the need to exhaustively explore the precise rationale for the rule in this judgment.

Is jurisdiction triggered under O 23 r 1(1)(a) for persons ordinarily resident in Singapore as well as in another jurisdiction?

43 In the light of the discussions in [39] to [42] above, it should be clear that we believe a plaintiff ordinarily resident out of jurisdiction would come within O 23 r 1(1)(*a*) even though he or she is also concurrently ordinarily resident within jurisdiction. On their part, the appellants argued that once a party is found to be ordinarily resident in Singapore, the jurisdiction in O 23 r 1(1)(*a*) *cannot* apply to that party. This is based partly on the rationale already rejected at [36] above and partly on the authority of various cases.

44 One of the cases heavily relied upon by the appellants was *Rivera* (cited at [13] above). There the court stated (at [50]):

> It may be accepted that Mr Rivera is not a person who is ordinarily resident in Australia, if that is the relevant question to ask. Indeed, if his actual residence at the moment is considered, it might be said that he is not ordinarily resident anywhere. Although Order 28 rule 3 requires the Court to *take into account* the fact that an applicant is ordinarily resident outside Australia, there is much to be said for the view that the rule really contemplates that the Court *takes into account* ordinary residence outside Australia as proof that the applicant is not resident ordinarily in Australia. The place outside Australia where the applicant ordinarily resides is, of itself, of no relevance. What is really relevant is the absence of residence in Australia. However, the rule is expressed in the reverse. It requires there to be *taken into account* the fact, if it be a fact, that the applicant is ordinarily resident outside Australia. … [emphasis added]

The applicable procedural rule in *Rivera* was the 23 December 2004 version of the Federal Court Rules (SR 1979 No 140) (Cth) ("the Federal Court Rules"), which is similar to the current version. The relevant parts of O 28 r 3 of that version of the Federal Court Rules (which we will call "the Australian rule") state:

> **3 Cases for security**
>
> (1) When considering an application by a respondent for an order for security for costs under section 56 of the [Federal Court of Australia] Act [1976 (Cth)], the Court *may take into*

account the following matters:

(a) that an applicant is ordinarily resident outside Australia;

…

[emphasis added]

45 The appellants argued that the Judge erred in law by not referring to *Rivera* (see [13] above). However, as pointed out by the respondents, the procedural rule applicable in *Rivera* was quite different from our O 23 r 1(1)(*a*) of the ROC. The Australian rule has no jurisdictional triggers; instead it treats the fact that the plaintiff is ordinarily resident outside Australia as one of the factors to be "taken into account" to inform the court's discretion in making an order for security. The passage from *Rivera* cited above should be read in this light. As the Australian rule merely prescribes soft-edged discretionary factors, it is understandable that a court could interpret the concept of "ordinary residence outside Australia" as being similar to that of "lack of ordinary residence in Australia" for the purposes of exercising its discretion. However, under our O 23 r 1(1)(*a*), the test of being "ordinarily resident out of the jurisdiction" is a hard-edged and specific requirement (what the court in *Pacific Integrated Logistics* at [5] aptly called a "*threshold condition*" [emphasis in original]). The court should not seek to modify it.

46 As will be discussed later (at [51] below), for the purposes of the court exercising its discretion under O 23 r 1(1), the fact that a plaintiff ordinarily resident out of Singapore is *also* ordinarily resident *in* Singapore is a factor which the court should take into account in determining whether security for costs should in fact be ordered. That was effectively the substance of the ruling in *Rivera* at [50]: there it was stated that the court should *take into account* the fact, if established, that the plaintiff was also resident in Australia in determining whether to order security. Given that the Judge had taken this factor into account in the exercise of his discretion, the fact that he had omitted to expressly refer to *Rivera* is quite immaterial.

47 The appellants also referred to the English cases of *Fitzgerald and Others v Williams and Others* [1996] QB 657 and *Berkeley Administration Inc and Others v McClelland and Others* [1990] 2 QB 407. However, as pointed out by the respondents, [note: 35] both those cases did not consider the case of a plaintiff ordinarily resident both within and out of jurisdiction. We agree that they ought to be distinguished on that basis.

48 It seems to us that some parts of the appellants' Case appeared to conflate the question of jurisdiction with the exercise of the court's discretion in making (or maintaining) a security for costs order. In their Case, the appellants quoted the following passage from Jeffrey Pinsler, *Singapore Court Practice 2009* (LexisNexis, 2009) ("*Singapore Court Practice*") at p 553:

> An interesting point arises if the plaintiff, having given security on the ground that he was out of the jurisdiction, subsequently settles permanently in the jurisdiction. It is submitted that as it may no longer be just (depending on the circumstances) to require the plaintiff to continue to provide security, the court should have the discretion pursuant to O 23 or its inherent jurisdiction to order the security to be returned to the plaintiff. ...

Having done this, they made the following contention: [note: 36]

> If the learned author is correct that it may not be just for a person initially ordinarily resident outside of jurisdiction but subsequently becomes ordinarily resident in the jurisdiction to continue

to provide security, *a fortiori* it would not be just to order that a person, who was and always have [*sic*] been ordinarily resident within the jurisdiction, to provide security for costs.

It would be apparent that in the above passage from *Singapore Court Practice*, Professor Pinsler was not addressing the issue of jurisdiction under O 23 r 1(1)(*a*) but rather the much more specific question of whether in the light of changed circumstances (the plaintiff subsequently settling permanently within jurisdiction) an order for security for costs made against him earlier should continue. Even within that narrow context, which is not relevant to this appeal, the tentative language used by the author is noteworthy: "it *may* no longer be just (*depending on the circumstances*) to require a plaintiff to continue to provide security" [emphasis added].

49 The respondents in their turn relied on several cases where the Australian courts stated that they had jurisdiction to order security for costs against plaintiffs both ordinarily resident in and out of jurisdiction. The relevant passages were *Logue* at [24], *Corbett* at [11] and *Robson & Ors v Robson* [2010] QSC 378 at [35]–[36] (a passage citing *Logue* and *Corbett*). Those cases were decided under Order 28 r 3(1)(a) of the 26 November 2002 version of the Federal Court Rules, r 42.21(1)(a) of the Uniform Civil Procedure Rules 2005 (Reg 418 of 2005) (NSW) and r 671(e) of the Uniform Civil Procedure Rules 1999 (SL No 111) (Qld) respectively. Unlike the relevant rule in *Rivera* (as discussed above at [45]), those rules, like O 23 r 1(1)(*a*) of the ROC, were part of a two-stage process. The rules cited provided that ordinary residence outside jurisdiction was one of several possible triggers for the court's jurisdiction to order security for costs. Once jurisdiction is established under those rules, a second discretionary stage follows. In fact, *Logue* and *Corbett* were decided under rules practically *in pari materia* with ours. These factors make the cases mentioned highly persuasive authority for the respondents' proposition.

50 On the basis of these authorities and, even more importantly, on a plain reading of O 23 r 1(1)(*a*) (see [36] and [42] above), in our judgment, the court has jurisdiction to order security for costs against a person ordinarily resident in Singapore if he or she is *also* ordinarily resident *out* of jurisdiction.

Relevance of ordinary residence in Singapore for the purposes of exercising discretion to order for security for costs

51 Although ordinary residence in Singapore does not bar the court's jurisdiction in making an order for security for costs in respect of a plaintiff who is also ordinarily resident elsewhere, the fact of ordinary residence in Singapore is highly relevant in the exercise of the court's discretion under O 23 r 1(1) of the ROC. Essentially, the relevant findings in cases relating to the exercise of discretion to order security for costs such as *Leyvand* (at [5] and [8]), *Logue* (at [24]), *Corbett* (at [11]) and *Rivera* (at [50]) show that where a plaintiff is ordinarily resident in the jurisdiction, this is a strong factor in favour of the court refusing to exercise its discretion to order security for costs. This was recognised by the Judge below, who took note of this principle and the fact that it is in opposition to the usual rule that other matters being equal, security is normally ordered against plaintiffs resident outside of jurisdiction (at [36]–[37] of the Judgment). We believe this to be a well-founded principle that should be considered by the court in the exercise of its discretion to order security for costs.

Where are the appellants ordinarily resident and was jurisdiction triggered under O 23 r 1(1)(a) of the ROC?

52 The Judge considered the objective evidence relating to the appellants' place of ordinary residence at [21] of the Judgment and concluded that the appellants were ordinarily resident in Indonesia. There is hardly any basis upon which we could demur from this finding of the Judge, which

was based on the evidence before him. We have not been given any cogent reason to depart from that finding of the Judge.

53 The Judge found it significant that the appellants consistently provided their Indonesian addresses in various legal documents. For example, the first and third appellants provided an Indonesian address when registering themselves as directors of a Singapore incorporated company, Venus International Productions Pte Ltd. The appellants argued that they were not given a chance to explain this before the Judge, [note: 37] stating that it was possible that they did not realise that they were required to provide their "usual residential address" under ss 173(2) and (6) of the Companies Act (Cap 50, 2006 Rev Ed) for this purpose. We are not persuaded by this explanation. In our view, even if they subjectively did not know or understand the details of that statutory requirement, their provision of Indonesian addresses still showed that they were at least putting forward Indonesian addresses as their main address for business use. These are the addresses that would appear when customers or other interested parties performed Accounting and Corporate Regulatory Authority searches on the company or its directors. The same reasoning holds true in respect of the Indonesian addresses provided by the appellants in court documents for a separate litigation against the 11th defendant in the main action. The appellants sought to explain in the court below that these addresses were "simply a means of identification and for contact purposes". [note: 38] With this having being said, they cannot then deny that by furnishing the Indonesian addresses they regarded these addresses as suitable to identify and contact them. This in turn shows their intention to do business from Indonesia.

54 At this appeal, the appellants argued that the fact that a person holds himself out as being ordinarily resident in a place is not determinative of the question of his real ordinary residence. [note: 39] While this is technically true, the fact of holding-out is still highly relevant and was rightly given weight below. Here we would underscore the fact that Sumito and the second appellant are persons who have various businesses in Indonesia and Singapore. They are not ignoramuses, nor are they novices in legal proceedings. They would have appreciated the significance of those legal documents in which they were required to fill in their personal particulars.

55 Based on all the factors described above, we are of the opinion that the finding of the Judge that the appellants are ordinarily resident outside jurisdiction should be upheld. As such, based on our finding above at [50], the Judge was correct to hold that he had jurisdiction to order security for costs against the appellants under O 23 r 1(1)(*a*) of the ROC.

Exercise of discretion under O 23 r 1(1) of the ROC

Factors considered by the Judge

56 We now turn to the final issue of whether the Judge had correctly exercised his discretion under O 23 r 1(1) of the ROC. This exercise required him to consider what was just having regard to all the circumstances of the case.

57 The Judge recognised (at [37] of the Judgment) that where a plaintiff has been found to be ordinarily resident within jurisdiction (in addition to being ordinarily resident out of it), it will be very rare that security for costs will be ordered against that person. The Judge referred to *Leyvand* (at [5]), *Logue* (at [24]) and *Corbett* (at [11]) for this proposition. Having found that Sumito was ordinarily resident in Singapore as well as in Indonesia, the Judge also found (at [38] of the Judgment) that he lacked property of a fixed and permanent nature in Singapore that could be available for satisfaction of costs. It is not in dispute that Sumito does not own any real property in Singapore,

and while he holds shares in two Singapore companies, the Judge regarded those shareholdings as of doubtful value. He also stated (at [39] of the Judgment) that the second and third appellants did not provide evidence relating to their assets in Singapore which could be used to satisfy any costs order in the defendants' favour: from this he inferred that they did not possess any such assets. Based on *Singapore Civil Procedure* at para 23/3/11 (and, presumably, the cases cited therein), the Judge found that the appellants did not have such fixed and permanent property as would be certainly available for costs. The Judge regarded this circumstance as a reason in favour of ordering security for costs against them. The Judge, having noted (at [45] of the Judgment) that both sides' cases in the main action were evenly balanced, did not think that the merits of the case should play a part in his consideration. The Judge also found (at [46] of the Judgment) that beyond a bare assertion, the appellants provided no evidence that the application for security was meant to stifle their claim.

58 At this appeal, the appellants have not sufficiently addressed the Judge's main reason for exercising his discretion, which is that they lack fixed assets in Singapore suitable for satisfying a possible order of costs against them. All they could say in relation to this was that the Judge should not have taken this factor into consideration as Sumito has businesses in Singapore. [note: 40] No explanation was offered to show how this assertion was relevant. The principle laid down in *Leyvand* (at [5]) that a plaintiff ordinarily resident in jurisdiction would rarely have security ordered against him must be viewed together with what Lightman J stated at [8] of the same case:

> The Claimant has a substantial connection with this country. He is plainly resident here: it is unnecessary to decide whether he is also ordinarily resident here. If it were necessary to do so, I would hold that he was. Having regard to his long residence (whether or not ordinary residence) his long connection and *substantial assets* here, I have no doubt that the Master was right in holding that it is not just to require him to provide security for costs. *This view is doubly reinforced by the offer (which I accept) of an undertaking not to complete the sale of his home prior to the likely date of judgment at the trial of this action without prior permission of the Court*. … [emphasis added]

59 In *Corbett*, where the plaintiff was found to be ordinarily resident in Vietnam as well as in New South Wales, Australia, the court took into account, *inter alia*, the fact that he owned a house in Sydney where his family lived and which was worth A$400,000 more than the mortgage debt in refusing to make an order for security for costs against him (see *Corbett* at [30]). In contrast, in *Logue*, the applicant owned no assets of any real value in Australia and also chose not to provide the court with any evidence regarding his current financial position (see *Logue* at [55]). Security for costs was ordered against him. It seems to us that the appellants' position closely resembles that of the applicant in *Logue* in that they own no fixed or even substantial property in Singapore and/or have not provided evidence that they own any such usable assets to the court (see [57] above).

60 The position taken by the appellants would appear to be simply this: as they are ordinarily resident in Singapore (leaving aside any question of being concurrently ordinarily resident elsewhere), no security for costs should in any event be awarded against them. [note: 41] However, contrary to this rather absolute argument, it seems to us that there is some sense in saying that while a plaintiff who is ordinarily resident both within and out of jurisdiction deserves substantial recognition of his or her connection with the jurisdiction (see [51] above), the consideration given to him or her will not be as great as that accorded to a plaintiff who is *only* ordinarily resident within jurisdiction (unless the latter person falls under O 23 rr 1(1)(*b*)–(*d*) of the ROC). The first respondent submitted in his Case: [note: 42]

> … In the situation where a person is **only** ordinarily resident within jurisdiction, security is found

> in the fact that it is assumed that the person's life and assets are only within jurisdiction and they will be reached by process of the court. However, in the situation where a person is **both** ordinarily resident within jurisdiction and out of jurisdiction (particularly in a case such as this where that person has no fixed or permanent assets within jurisdiction) there is no security in the fact that that person has residence within jurisdiction, because that person can quickly and easily move his assets and himself out of jurisdiction (to the location of his other ordinary residence). … [emphasis in original]

We see some merit in this contention. As the appellants have not shown that they own any meaningful assets within jurisdiction which the respondents could look to for the purposes of satisfying any costs order which they may eventually obtain, and the Judge's decision being made in exercise of his discretion under O 23 r 1(1) (see [21] above), we are unable to see any legitimate basis to interfere with it.

New argument based on undue delay

61 We now turn to a new argument raised by the appellants which was not raised below, namely that the application for security for costs by the second and third respondents was made so late that most of the costs of discovery had already been incurred. As stated in *Shirley Ooi* at [20], such a late application may be refused unless there is a satisfactory explanation for the delay. A similar view was also expressed in *Corbett* at [45], with the qualification that "the significance of the delay is reduced by the absence of relevant prejudice", although it will remain "one factor to be taken into account in the balancing exercise of determining the justice or injustice of making an order for security".

62 However, an important preliminary question arises for consideration in relation to this new point: should this appellate court, in the circumstances of this case, allow this new point to be canvassed? The test for allowing such a new argument was enunciated by this court in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 at [15] as follows:

> The classic statement of principle is, of course, that of Lord Herschell in the House of Lords decision of *The Owners of the Ship "Tasmania" and the Owners of the Freight v Smith and others, The Owners of the Ship "City of Corinth"* (*The "Tasmania"*) (1890) 15 App Cas 223, as follows (at 225):
>
> > My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
> >
> > *It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box*.
>
> [emphasis in original]

63 In the circumstances of this case, the new argument proposed by the appellants would turn almost entirely on questions of fact, namely whether most of the costs of the discovery process have

been incurred already (which is disputed by the respondents) and whether the respondents have any adequate explanation for the delay. The respondents rightly pointed out that they have not been given a chance to provide such an explanation. The facts relating to the discovery process and the costs incurred therein are not in evidence before this court, although the appellants have somewhat blithely submitted that the facts support their position. [note: 43] The appellants have also not applied for leave to adduce such material as fresh evidence. In the circumstances, we do not think it just to allow the appellants to raise this new point as the second and third respondents will be very much prejudiced thereby.

64 We wish to add in passing that even if this court was minded to consider this argument, and even if the five-month lapse of time between the commencement of the main action and the filing of the application for security by the second and third respondents on 28 June 2010 constituted a delay, it has not been shown that the appellants would have been much prejudiced, if at all, by that delay. Here, we have noted that the second and third respondents had made a request to the appellants as early as 19 April 2010 (three months after the main action commenced) asking them to voluntarily provide security for costs, failing which the necessary application would be made to the court. [note: 44] On 25 April 2010, the appellants replied, refusing the request and stating their intention to resist such an application. [note: 45] Given the fact that this request was made and brought to the appellants' attention at an early stage, they cannot now seriously claim that they were prejudiced by any delay on the part of the second and third respondents in making the application.

Conclusion

65 In the result, we would dismiss this appeal with costs and the usual consequential orders.

[note: 1] Note of Arguments for SUM 1720/2010/H, Core Bundle Vol II ("ACB II"), p 55.

[note: 2] 1st Defendant's written submissions for RA 234/2010/D, Record of Appeal Volume III Part B ("ROA(3B)") p 669 at para 3.

[note: 3] *Ibid*, p 670 at para 4.

[note: 4] *Ibid*, p 671 at para 8.

[note: 5] *Ibid*, p 670 at para 5.

[note: 6] *Ibid*, at para 6.

[note: 7] *Ibid*, pp 670–671 at para 7.

[note: 8] 5th and 6th Defendants' written submissions for SUM 2961/2010/E, ROA(3B) p 730 at para 43.

[note: 9] *Ibid*, p 744 at paras 74-89.

[note: 10] *Ibid*, p 735 at paras 52-73.

[note: 11] Plaintiffs' written submissions for RA 234/2010/D and SUM 2961/2010/E, ROA(3B) p 763 at

para 16.

[note: 12] *Ibid*, p 766 at paras 24–27.

[note: 13] *Ibid*, p 767 at para 29.

[note: 14] *Ibid*, p 765 at para 18.

[note: 15] *Ibid*, p 766 at para 20.

[note: 16] *Ibid*, p 767 at para 30.

[note: 17] *Ibid*, p 770 at para 53.

[note: 18] *Ibid*, p 767 at paras 31-52.

[note: 19] Judgment of Andrew Ang J, Core Bundle Vol I ("ACB I") p 13.

[note: 20] Appellants' Case ("AC") p 21 at para 35.

[note: 21] AC pp 21–22 at para 37.

[note: 22] AC p 39 at para 77.

[note: 23] AC pp 41-42 at para 86.

[note: 24] AC p 41 at para 85.

[note: 25] AC p 50 at para 107.

[note: 26] AC p 54 at paras 117-118.

[note: 27] AC p 55 at paras 120-122.

[note: 28] 2nd and 3rd Respondents' Case ("2&3RC") p 19 at para 33.

[note: 29] Tjong Very Sumito's Affidavit dated 19 August 2010, ACB II p 62 at para 11.

[note: 30] AC pp 41–42 at para 86.

[note: 31] AC p 21 at para 36.

[note: 32] AC p 21 at para 35.

[note: 33] 1st Respondent's Case ("1RC") pp 24–25 at para 57.

[note: 34] *Ibid*. and 2&3RC p 16 para 28.

[note: 35] 2&3RC p 36 at para 67(3).

[note: 36] AC p 28 at para 52.

[note: 37] AC p 47 at paras 98–99.

[note: 38] Tjong Very Sumito's Affidavit dated 19 August 2010, ACB II pp 61–62 at para 11.

[note: 39] AC pp 48-49 at para 103.

[note: 40] AC p 52 para 111.

[note: 41] AC p 30 at para 56 and p 54 at para 118.

[note: 42] 1RC p 18 at para 42.

[note: 43] AC p 55 at para 121.

[note: 44] Letter from Allen & Gledhill to Gabriel Law Corporation dated 19 April 2010, ROA(3B) p 479.

[note: 45] Letter from Gabriel Law Corporation to Allen & Gledhill dated 25 April 2010, ROA(3B) p 480.