

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHCR 1

HC/S 1229 of 2016
HC/SUM 5302 of 2019

Between

Sun Electric Pte Ltd

... Plaintiff / Respondent

And

- (1) Sunseap Group Pte Ltd
- (2) Sunseap Energy Pte Ltd
- (3) Sunseap Leasing Pte Ltd

... Defendants / Applicants

HC/S 190 of 2018
HC/SUM 5303 of 2019

Between

Sun Electric Pte Ltd

... Plaintiff / Respondent

And

- (1) Sunseap Group Pte Ltd
- (2) Sunseap Energy Pte Ltd
- (3) Sunseap Leasing Pte Ltd

... Defendants / Applicants

JUDGMENT

[Civil Procedure – Costs – Security]

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Sun Electric Pte Ltd
v
Sunseap Group Pte Ltd and others and another suit

[2020] SGHCR 1

High Court — Suit No 1229 of 2016 (Summons No 5302 of 2019) and Suit No 190 of 2018 (Summons No 5303 of 2019)

Justin Yeo AR

11 December 2019

22 January 2020

Judgment reserved.

Justin Yeo AR:

1 This judgment concerns two applications for security for costs under s 388 of the Companies Act (Cap 50, 2006 Rev Ed). These applications are the latest in a long line of interlocutory applications and appeals taken out in two related patent suits, *ie* Suit No 1229 of 2016 (“Suit 1229”) and Suit No 190 of 2018 (“Suit 190”) (collectively, “the Suits”).

Background

2 Sun Electric Pte Ltd (“the Plaintiff”) is the registered proprietor of two Singapore patents relating to a method of determining power consumption (*ie* Singapore Patent Application No 10201405341Y, “the 341 Patent”) and a method of consolidating power injection and consumption in a power grid system (*ie* Singapore Patent Application No 10201406883U, “the 883 Patent”) (collectively, “the Patents”).

3 The Plaintiff brought the Suits against Sunseap Group Pte Ltd, Sunseap Energy Pte Ltd and Sunseap Leasing Pte Ltd (collectively, “the Defendants”), alleging that the Defendants had infringed several system claims (in the 341 Patent) and process claims (in the 883 Patent). Suit 1229 was filed on 18 November 2016, while Suit 190 was filed on 22 February 2018. It is undisputed that the Suits will be consolidated in due course. Presently, the Suits are fixed to be heard at a 12-day trial commencing end-July 2020.

4 The Defendants’ account of the matters leading up to the taking out of the present applications is outlined below. The Plaintiff has not generally taken issue with the chronology of these events.

5 In late August 2019, the Defendants discovered that Sun Electric Power Pte Ltd (“SEPPL”) had applied to be put under judicial management, by way of Originating Summons No 1060 of 2019 (“OS 1060”). SEPPL is a wholly-owned subsidiary of Sun Electric (Singapore) Pte Ltd (“SESPL”), which is in turn a 99.9%-owned subsidiary of the Plaintiff. In the Defendants’ view, placing SEPPL into judicial management would have a direct effect on the Plaintiff’s financial viability. In particular, if SEPPL is wound up, the Sun Electric Group may no longer be able to retail electricity to end-users.¹

6 In mid-September 2019, the Defendants became aware that an injunction was being sought against the Plaintiff in a separate suit brought by the Plaintiff and SEPPL against Menrva Solutions Pte Ltd (“Menrva”), *ie* Suit No 200 of 2016 (“Suit 200”). Upon inspection of the Suit 200 case file, the

¹ Defendant’s Written Submissions (dated 9 December 2019), at paragraph 29.

Defendants learnt that Menrva had filed an *ex parte* application on 27 August 2019, seeking a worldwide Mareva injunction against the Plaintiff, Dr Matthew Peloso (“Dr Peloso”, the Plaintiff’s representative, sole director and chief executive officer) and SEPPL. Menrva subsequently successfully joined a number of the Plaintiff’s other related entities (*ie*, SESPL, Sun Electric Energy Assets Pte Ltd (“SEEA”), a BVI entity known as Sun Electric Digital Stream Ltd (“SEDS”) and Dr Peloso) in Suit 200. Menrva also obtained an order for disclosure of those entities’ assets within and outside Singapore. Despite vigorous resistance, the High Court granted the injunction on 16 September 2019.

7 The Defendants further discovered Dr Peloso’s affidavit filed in OS 1060, in support of SEPPL being placed under judicial management. The affidavit revealed that money had been withdrawn from SEPPL’s bank account, in breach of an interim injunction ordered in a separate suit brought by RCMA Asia Pte Ltd against SEPPL, *ie*, Suit No 191 of 2018 (“Suit 191”). Amongst other things, more than \$1.5m was withdrawn from SEPPL’s bank account in August 2018, purportedly to enable SEPPL to pay the Plaintiff. Subsequently, another \$1.5m was withdrawn for the purposes of extending a loan to SEEAPL which “urgently required [the money] for the completion of certain rooftop projects with imminent deadlines”.² Dr Peloso affirmed on affidavit that in view of the injunction in Suit 191, the sums should not have been moved from SEPPL’s bank account.³ Committal proceedings have since been commenced

² Affidavit of Dr Matthew Peloso (dated 20 August 2019) filed in OS 1060, at paragraph 48(k).

³ Affidavit of Dr Matthew Peloso (dated 20 August 2019) filed in OS 1060, at paragraphs 48(h) and 48(k).

against Dr Peloso in Originating Summons No 1137 of 2019 for breaches of the injunction in Suit 191.

8 The Defendants also found out that the Plaintiff's controlling majority stake in SEEA would be sold as part of a "proposed investment". This was of particular concern to the Defendants because, other than SEPPL, SEEA was the only entity in the Sun Electric Group licensed to generate and export electricity to the national grid. Indeed, SEEA was the Sun Electric entity in all but one of the agreements produced by the Plaintiff in the Suits.

9 On 4 October 2019, the Defendants requested for security for costs from the Plaintiff. On 11 October 2019, the Plaintiff refused to provide security. The Defendants therefore filed Summonses No 5302 of 2019 ("SUM 5302") and 5303 of 2019 ("SUM 5303") on 24 October 2019.

The applications

10 SUM 5302 and SUM 5303 are the Defendants' applications for security for costs in Suit 1229 and Suit 190 respectively. The Defendants have sought security for costs of \$600,000 (in Suit 1229) and \$300,000 (in Suit 190), up to the end of trial, including closing submissions. They have also sought a stay until the security is provided, and for the Plaintiff's claims to be struck out without further order in the event that the Plaintiff fails to provide security.

11 The applications are brought pursuant to s 388(1) of the Companies Act, which provides as follows:

Where a corporation is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the

defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

12 In determining whether security for costs should be ordered under s 388(1) of the Companies Act, the court applies a two-stage test (*Creative Elegance (M) Sdn Bhd v Puay Kim Seng and anor* [1999] 1 SLR(R) 112 (“*Creative Elegance*”) at [13]). Plaintiff’s counsel Mr Chan Wenqiang (“Mr Chan”) and Defendants’ counsel Mr Nicholas Lauw (“Mr Lauw”) raised a multitude of arguments at each stage. I set out here the arguments raised and my decision on each of the stages.

First Stage

13 At the first stage, the court considers whether there is “credible testimony” that there is “reason to believe” that the plaintiff company will be unable to pay the defendant’s costs should the defendant be successful in defending the trial (s 388(1) of the Companies Act; see also *Creative Elegance* at [13]). The defendant bears the legal burden of proof (see, eg, *StreetSine Singapore Pte Ltd v Singapore Institute of Surveyors and Valuers and ors* [2019] SGHCR 1 at [14]).

14 In considering whether there is “credible testimony” that there is “reason to believe” that the plaintiff will be unable to pay the defendant’s costs, the court will consider a range of factors. These include the plaintiff’s sources of funds, cash position, financing and credit facilities, assets and liabilities (*Frantonios Marine Services Pte Ltd v Kay Swee Tuan* [2008] 4 SLR(R) 224 (“*Frantonios*”) at [34]; see also *Bilia AB v Te Pte Ltd and others* [1999] SGHC 96 at [14]). For the avoidance of doubt, the court will consider neither non-legally binding offers nor possible sources of financial assistance from interested third parties

or based on goodwill (*Frantonios* at [34]). Concessions made by the plaintiff (or its representatives) in relation to the plaintiff's financial situation are also relevant (see, eg, *Elbow Holdings Pte Ltd v Marina Bay Sands Pte Ltd* [2014] SGHC 219, where the court took into consideration the plaintiff's managing director's concession that the plaintiff was in a dire financial situation).

15 The assessment of a plaintiff's ability to pay costs is prospective in nature. The relevant consideration is whether the plaintiff will be able to pay costs awarded against the plaintiff in the event that the defendant succeeds in defending the action. If the plaintiff is demonstrably unable to pay costs as at the time of the application for security, the onus will be on the plaintiff to show that the position would be different at the future time when an adverse costs order is made (*Uni-continental Holdings Ltd v Eurobond Adhesives Ltd* [1996] FSR 834 ("*Uni-continental Holdings*") at 837). The plaintiff may attempt to show, for instance, that he has the benefit of a contract that guarantees large forthcoming profits.

16 At the hearing, I expressed my preliminary view that – from the written submissions, affidavits as well as Mr Lauw's opening oral arguments – the Plaintiff appeared to be in a tight financial situation. Despite these indications and my invitation to be persuaded otherwise, Mr Chan was content to rely on his written submissions and had no additional matters to raise for the court's consideration *vis-à-vis* the first stage. Having considered the submissions and evidence proffered by both sides, I find that there is "credible testimony" that there is "reason to believe" that the Plaintiff will be unable to pay costs should the Defendant succeed in defending the Plaintiff's claims. This is for the following four reasons.

(a) First, the Plaintiff has no real assets. It is undisputed that the Plaintiff is a shell company and does not do any actual business. The only assets that the Plaintiff owns are the Patents. Should the Defendants succeed in their counterclaims to invalidate the Patents, the Plaintiff does not appear to have any other known assets of value to make good adverse cost orders.

(b) Second, based on Dr Peloso’s evidence in Suit 200, the Plaintiff appears to be in poor financial health. As affirmed by Dr Peloso on affidavit in Suit 200, he had stopped drawing a salary from the Sun Electric Group since January 2019, and had in fact been extending personal loans to the Plaintiff to cover the Plaintiff’s payroll and business expenses. While the Plaintiff claims to have a lifeline in the form of a proposed investment, Dr Peloso had explained in Suit 200 that this investment might be scuppered by the grant of a worldwide Mareva injunction. Dr Peloso further stated that the grant of a Mareva injunction may have “disastrous consequences on the continued business of the [Sun Electric Group] (and its survival as a going concern)”.⁴ Indeed, he went so far as to describe the Sun Electric Group as being “at a cliff-edge”.⁵ As it transpired, the court granted the Mareva injunction (see [6] above). There is therefore basis for Mr Lauw’s observation that the Plaintiff may have “completely fallen off the cliff”.

⁴ Affidavit of Dr Matthew Peloso (dated 2 September 2019) filed in Suit 200, at paragraph 68.

⁵ Affidavit of Dr Matthew Peloso (dated 2 September 2019) filed in Suit 200, at paragraph 68.

(c) Third, the fact that Dr Peloso had to resort to breaching an injunction in Suit 191 to secure funding for entities in the Sun Electric Group is further cause for concern (see [7] above). While explanations are now being given as to why the movement of funds was not in fact a breach of the injunction (on which I need make no determination), it remains significant that Dr Peloso had moved funds in a manner that – at least in his view at the material time – was in breach of a court-ordered injunction. This reflects a measure of financial difficulty on the part of the Sun Electric Group.

(d) Fourth, the Plaintiff has not satisfactorily demonstrated that it has any existing or forthcoming sources of income. Dr Peloso claimed that the Plaintiff receives licence fees from SEEA and SEPPL and has sub-licensing rights to certain patents held by SEDS. He further claimed that the Sun Electric Group derives revenue from contracts with JTC Corporation (generating an estimated “yearly revenue of around S\$850,000”⁶) and other entities, that there is a potential investor in the Sun Electric Group, and that the Plaintiff has completed the milestones required for a government grant of \$520,000. However, there is a dearth of detail on the alleged licensing agreements and how much income these will generate for the Plaintiff. In relation to the purported “yearly revenue” of \$850,000, on the Defendants’ evidence, the high capital outlay of the project would “definitely outstrip the amount of revenue

⁶ Affidavit of Dr Matthew Peloso (dated 8 November 2019) filed in SUM 5302 and 5303, at paragraph 19.

received” for at least the first eight years of the project.⁷ In this regard, the Plaintiff did not disclose the costs incurred for the Sun Electric Group’s projects, balance sheets or profit-and-lost statements, and Mr Chan was unable to provide any substantive explanation as to why these documents could not be produced. In addition, following the grant of the Mareva injunction, there is uncertainty concerning the viability of the potential investment (see [16(b)] above), and further concerns have also been raised as to whether the capital-intensive projects can in fact be completed without the investment.⁸ In relation to the government grant, there is insufficient information to conclude whether the grant, if so provided to the Plaintiff, would be sufficient in the light of the Plaintiff’s financial situation.

17 I therefore find that the condition in the first stage is satisfied.

Second Stage

18 Once the condition in the first stage is satisfied, the court’s discretion is invoked and the court will decide whether it should exercise its discretion to order security for costs against the plaintiff (*Creative Elegance* at [13]). The court will generally order the furnishing of security unless there are “special circumstances” to justify why it would be unjust to order security (see *Frantonios* at [61]).

⁷ Affidavit of Mr Phuan Ling Fong (dated 6 December 2019) filed in SUM 5302 and 5303, at paragraph 30.

⁸ Affidavit of Dr Matthew Peloso (dated 8 November 2019) filed in SUM 5302 and 5303, at paragraph 23, and Affidavit of Mr Phuan Ling Fong (dated 6 December 2019) filed in SUM 5302 and 5303, at paragraph 32.

19 I focus here on the five arguments raised by Mr Chan against the grant of security:

- (a) first, there is substantial overlap between the claim, defence and counterclaim (“the Overlap Argument”);
- (b) second, there has been a substantial delay by the Defendants in applying for security (“the Delay Argument”);
- (c) third, the applications seek to oppress the Plaintiff and stifle the Plaintiff’s claims (“the Oppression Argument”);
- (d) fourth, there is insufficient evidence to support the quantum of security claimed (“the Evidential Argument”); and
- (e) fifth, the quantum of security claimed is unreasonable and exorbitant (“the Quantum Argument”).

20 In the ensuing sections, I outline Mr Chan’s arguments followed by my analysis and decision on the issues raised. In summary, I find no “special circumstances” which persuade me against ordering security for costs. Indeed, justice would be served by the ordering of security, albeit at a lower quantum than that sought by the Defendants.

The Overlap Argument

21 Overlaps between the claim and the counterclaim (“Claim-Counterclaim Overlap”) or between the defence and the counterclaim (“Defence-Counterclaim Overlap”) are relevant factors for consideration in determining whether security for costs should be ordered. Where the overlaps are substantial, they weigh against the grant of security for costs. The relevant principles are addressed in a pair of Court of Appeal decisions, namely *SIC College of*

Business and Technology Pte Ltd v Yeo Poh Siah and others [2016] 2 SLR 118 (“*SIC College*”) and *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 (“*Jurong Town Corp*”).

22 In *SIC College*, the Court of Appeal dealt with issues relating to the Claim-Counterclaim Overlap. The Court of Appeal observed that it is “often inappropriate to award security for costs where the claim and counterclaim are co-extensive” (*SIC College* at [77]). This is because in such circumstances, a plaintiff who fails to furnish security will be prevented from pursuing the claim, while the defendant remains free to pursue the counterclaim notwithstanding that the claim and counterclaim overlap entirely. The plaintiff would find himself having to defend the counterclaim “in a somewhat hobbled matter, ... with one hand tied behind [its] back”, which is not “a just or attractive way to oblige a party to conduct [its] litigation” (*SIC College* at [82], quoting from *B J Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43 at 52-53). Furthermore, an “unfair result” may be occasioned if the plaintiff has succeeded in defending against the co-extensive counterclaim but remains unable to secure judgment on the claim (*SIC College* at [84], citing *Dumrul v Standard Chartered Bank* [2010] CLC 661 (“*Dumrul*”) at [18]).

23 In relation to the Defence-Counterclaim Overlap, the relevant case authority is *Jurong Town Corp*. Where the counterclaim is based entirely on the defence, the costs incurred in defending the action “could be regarded as costs necessary to prosecute the counterclaim”; in other words, no significant additional costs would be incurred by the defendant, whether or not the plaintiff’s claim is stayed (*Jurong Town Corp* at [19]). The granting of security in such circumstances would, in fact, “amount to indirectly aiding [the defendant] to pursue its counterclaim” (*Jurong Town Corp* at [19]). As such,

the existence and extent of overlaps between the defence and the counterclaim are relevant considerations in determining whether to order security.

Parties' arguments

24 Mr Chan contended that the Suits involve both types of overlaps. In relation to the Claim-Counterclaim Overlap, he highlighted two specific areas:

(a) First, in Suit 1229, there is a complete overlap between the infringement claim and the groundless threats counterclaim. The groundless threats counterclaim would necessitate litigating the validity of the Patents and the infringement of the asserted claims; these issues would overlap entirely with the infringement claim. Although there is no groundless threats counterclaim in Suit 190, the parties have agreed that the Suits will be formally consolidated. As such, a finding of infringement of the 883 Patent in Suit 190 will also go towards fulfilling certain defences raised in Suit 1229 (citing *Global Flood Defence Systems Ltd & Anor v Johan Van Den Noort Beheer BV & Ors* [2016] EWHC 1851 (Pat) at [36]).

(b) Second, there is substantial overlap in both Suits between the infringement claims and the counterclaims for declarations of invalidity of the Patents. The counterclaims for invalidity would necessitate the court's determination on the validity of the Patents, which is in turn a necessary component of the Plaintiff's infringement claim. Determining the validity of the Patents will also have a direct impact on whether the asserted claims have been infringed, given that both the determination of validity and infringement involve the central issue of patent

construction (citing *McGhan Medical UK Ltd v Nagor Ltd* [2002] FSR 9 at [10]).

25 In relation to the Defence-Counterclaim Overlap, Mr Chan contended that the Defendants' counterclaims for declarations of invalidity overlapped entirely with the defence of invalidity, while the counterclaim for groundless threats in Suit 1229 was premised upon the defences of invalidity and non-infringement. As such, on the authority of *Jurong Town Corp*, security for costs should not be granted.

26 Mr Lauw acknowledged that the Suits involved both types of overlaps. However, he contended that security should nonetheless be ordered, putting forward three points:

(a) First, the existence of overlaps does not constitute a bar to the ordering of security (citing *Jane Rebecca Ong v Pricewaterhousecoopers and others* [2009] 2 SLR(R) 796 at [7]–[10] and [27]). Much depends on the nature and extent of the overlaps. In the Suits, the counterclaims for declarations of invalidity do not overlap entirely with the infringement claim, because even if the issue of validity is resolved in the Plaintiff's favour, the Plaintiff must still prove the infringing acts. As for the groundless threats counterclaim, this counterclaim is made only in Suit 1229. Therefore, the overlap arising from the groundless threats counterclaim does not apply in Suit 190.

(b) Second, in several patent decisions in the UK and Australia, the courts did not concern themselves with the issue of overlap when deciding whether to order security for costs (citing *Platinum Controls Ltd v Aleris Recycling (Swansea) Ltd* (a decision of the Chancery

Division dated 27 June 2012), *Thomas (Arthur Edward) Ltd v Barcrest Ltd and another* [1995] RPC 138 (“*Barcrest*”), *Baygol Pty Ltd v Huntsman Chemical Co Australia Pty Ltd t/a RMAX* [2004] FCA 1248 (“*Baygol*”) and *Vitaly Evgenievich Pilkin v Sony Australia Ltd* [2018] FCA 1018). This suggests that a different approach ought to apply in patent cases. A possible reason is that in patent cases, counterclaims for revocation may be “no more than the procedural consequence” of a successful defence (citing *Baygol* at [28], which quoted *Farmitalia Carlo Erba SrL v Delta West Pty Ltd* (1994) 28 IPR 336 at [341]). Given that in Singapore a defendant is only permitted to challenge the validity of asserted claims (citing *Sunseap Group v Sun Electric Pte Ltd* [2019] 1 SLR 645 (“*Sunseap Group*”)), the corresponding revocation counterclaims ought to be regarded as defensive in nature and a “procedural consequence” of the defence. In the circumstances, the existence of overlaps in the Suits should not weigh against the grant of security.

(c) Third, having had sight of the Plaintiff’s submissions, the Defendants are prepared to discontinue the counterclaims should the Plaintiff’s claims be struck out due to an inability to furnish security. This will ensure that there will be no injustice or unfairness arising from purported overlaps in the claim, the defence and the counterclaim.

Analysis and Decision

27 I find that there are substantial overlaps in the claim, the defence and the counterclaim, for the reasons highlighted by Mr Chan (see [24]–[25] above). In particular, the groundless threats counterclaim overlaps entirely with the infringement claim and the defence against infringement. In relation to the

counterclaims for revocation and declarations of invalidity, while there is no complete overlap, there is certainly significant overlap with the claims and defences raised in the Suits.

28 In relation to Mr Lauw’s attempt to distinguish patent and non-patent cases in the context of the Overlap Argument (see [26(b)] above), I am unable to see a principled reason for drawing such a distinction. I recognise that in patent actions, it is common to find claims, defences and counterclaims that overlap with each other. I also recognise that a counterclaim for revocation is often a logical corollary of a defence of invalidity. As the Court of Appeal has observed, “[c]ertainly, where a patent has been found to be invalid, the High Court should exercise its power to remove it from the register” (*Sunseap Group* at [67]). To this end, a counterclaim for revocation can indeed be seen as a “procedural consequence” of a successful invalidity defence. However, the mere fact that these overlaps may occur frequently in patent cases does not in itself suggest that the weight given to such overlaps should differ. This is particularly so because the concerns engendered by entire or substantial overlaps (see [22] and [23] above) continue to apply regardless of whether the case is a patent case. While Mr Lauw has cited two UK decisions and two Australian decisions where security was ordered notwithstanding the overlaps, none of those decisions expressly dealt with the concerns raised at [22] and [23] above. This may have been for a variety of reasons, including the possibility that arguments on overlap were not raised in court. It is therefore not possible to conclude solely on the authority of these four cases that the issue of overlap ceases to be a relevant consideration in patent cases, or that overlaps should be accorded less weight where patent actions are concerned.

29 The Defendants’ willingness to discontinue the counterclaims in the event that the Plaintiff’s claims are struck out for failure to furnish security is, however, a game changer in the context of the Overlap Argument. This would entirely circumscribe the concerns raised at [22] and [23] above. In observing that the existence of an overlap is an important factor weighing against the ordering of security, the Court of Appeal in *SIC College* also observed that the potential prejudice caused to a plaintiff “may be offset by the possibility that there may be no continuing litigation at all” (*SIC College* at [83]). In *Dumrul*, the UK High Court was prepared to order security if the defendant would commit to withdrawing its counterclaim in the event that the plaintiff failed to furnish the requisite security. Likewise, in *Siva Industries and Holdings Ltd v Foreguard Shipping I Singapore Pte Ltd* [2017] SGHCR 5, the court ordered security for costs on the condition that the defendant provides a written undertaking to discontinue its counterclaim should the plaintiff’s claim be struck out for failure to provide security.

30 Given Mr Lauw’s confirmation at the hearing that the Defendants are prepared to provide such a written undertaking, the issue of overlap ceases to be a factor weighing against the ordering of security for costs. I do, however, observe that costs may have been saved had the Defendants made this position clear from the outset. Ideally, such indications should be provided at the time when the request for security is made. This would narrow the issues in dispute or possibly obviate the need for an application altogether.

The Delay Argument

31 I next consider the Delay Argument. The delay in applying for security for costs is a factor to be considered in determining whether the court should exercise its discretion to order security. The Court of Appeal explained in *SIC*

College that the weight to be given to any such delay “may depend on the reasons for the delay, the length of the delay, and, crucially, the prejudice caused by the delay” (*SIC College* at [79]). The Court of Appeal further observed that a good explanation for the delay is required where the defendant was well aware of the plaintiff’s impecuniosity from an early stage of the proceedings but applied for security only at a late stage, after the plaintiff had expended much of its limited resources preparing for a trial (*SIC College* at [79]).

32 Underlying this position is the court’s concern that the later an application for security for costs is made, the greater the likelihood that it will cause substantial disruption or distraction in the conduct of the plaintiff’s case and, if the plaintiff is unable to provide security, the greater the costs that would have been wasted (see, eg, *Axent Holdings Pty Ltd v Compusign Australia Pty Ltd (No 2)* [2017] FCA 1102 (“*Axent Holdings*”) at [62]). In addition, the later an application for security is made, the more a plaintiff would have spent on the proceedings, and the smaller the opportunity for the plaintiff to have a real choice between whether to furnish security and proceed or not do so and give up (see, eg, *Aleksander v Zsolt Adam and Others* [2015] EWHC 1582 (Ch) (“*Aleksander*”) at [36] and *Optaglio Ltd v Tethal and Another* [2019] 1 Costs LR 41 (“*Optaglio*”) at [14]–[15]).

Parties’ arguments

33 Mr Chan contended that the Defendants’ delay in the Suits was substantial, given that the requests for security were made almost three years after the commencement of Suit 1229, and about one year eight months after the commencement of Suit 190. He pointed out that such a delay was even more egregious than in *Jurong Town Corp* (where the delay was almost seven months) and *SIC College* (where the delay was more a year). He submitted that

the Plaintiff had already expended substantial time and resources in preparing for the trial of the Suits, and that to order security at this stage would severely prejudice the Plaintiff.

34 Mr Lauw argued that there was no delay on the part of the Defendants, given that they had only recently discovered the Plaintiff's financial difficulties (see [5]–[7] above).

Analysis and Decision

35 I agree with Mr Chan that a substantial amount of time has lapsed since the commencement of the Suits. However, in determining whether that period of delay should weigh against the grant of security, it is important to consider the time at which the Defendants became aware (or should reasonably have become aware) of the matters justifying a grant of security.

36 The present case is not one in which the Defendants were aware from an early stage of the Plaintiff's financial difficulties. Based on the submissions and material shown to me, the Defendants appear to have known of the Plaintiff's financial difficulties starting from late August 2019, and only became aware of the serious issues in Suit 200 in mid-September 2019 (see [5]–[7] above). They requested for security by early October 2019 and brought these applications shortly thereafter. There is neither evidence nor argument that the Defendants were aware of these circumstances earlier, or that they should reasonably have become aware of them. In my view, the Defendants have acted with due expedition once they discovered the developments that justified a grant of security. As such, I find that there is no operative delay on the Defendants' part that should weigh against the ordering of security for costs.

The Oppression, Evidential and Quantum Arguments

37 I turn finally to the Oppression, Evidential and Quantum Arguments. As these arguments overlapped significantly, I will consider them together.

Parties' arguments

38 Mr Chan contended that the Defendants' applications for security were used as instruments of oppression to stifle the Plaintiff's claims, for three reasons:

(a) First, the timing of the applications was tactical and designed to frustrate the Plaintiff's preparation for trial. The applications, if granted, would also make it impossible for the parties to meet the scheduled trial dates commencing end-July 2020. The court ought to take this "tactical explanation" into account, as it militates against the ordering of security (*Axent Holdings* at [59]).

(b) Second, the requested quantum of \$900,000 for both Suits was exorbitant and intended to oppress the Plaintiff. Such a high quantum of security would affect the Plaintiff's operations, requiring a diversion of funds from the Plaintiff's capital-intensive projects. In this regard, Dr Peloso stated on affidavit that the Plaintiff would not be able to provide \$900,000 in security and, if ordered to do so, would be forced to abandon its claims. Furthermore, the Defendants' initial request for security was in the sum of \$400,000 for both Suits; this has been increased to \$900,000, which further demonstrates the Defendants' intention to oppress the Plaintiff.

(c) Third, the request for \$900,000 in security was completely unsubstantiated. The applications appear to be part of the Defendants’ strategy to bog the Plaintiff down in needless satellite litigation and to delay the expeditious trial of the Suits.

39 The second and third points above overlapped with the Evidential Argument. Mr Chan contended that the Defendants’ failure to adduce evidence to support the request for \$900,000 was, in itself, sufficient reason for dismissing the applications for security. He cited two Hong Kong decisions in this regard:

(a) First, an unreported Hong Kong decision, *Dr Pete Fashions Co Ltd v C & C Textiles Corp* [1996] HKCU 602 (“*Dr Pete Fashions*”) (cited in *Singapore Civil Procedure 2018* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2018) at paragraph 23/3/36). In *Dr Pete Fashions* at [13], the court held that if the defendant fails to place material before the court to enable the court to come to a view on the quantum to be ordered as security, “no amount can be ordered notwithstanding that a right for security has been established”.

(b) Second, a decision of the Hong Kong Court of First Instance, *Hero Rich International Ltd v Benefun International Holdings Ltd and others* [2009] HKCFI 1045 (“*Hero Rich*”). In this case, the court held that defendant’s counsel “must provide a realistic estimate of the time and costs likely to be incurred in each stage of the proceedings which must bear some logical correlation to the complexity of the case and the issues involved” (*Hero Rich* at [38]).

40 The Quantum Argument is closely related to the Oppression and Evidential Arguments. Mr Chan contended that the quantum of security sought was exorbitant, citing five points:

(a) First, the Defendants have conducted their defence in an “extravagant manner”, *inter alia* by advancing a large number of prior art to challenge the validity of the Patents (*ie* 22 pieces of prior art in Suit 1229 and 18 pieces of prior art in Suit 190), and a large number of prior art combinations (*ie* 157 distinct combinations in total).⁹ The number of prior art and combinations cited is excessive when compared to the invalidity challenges brought in other patent suits, such as: *ASM Technology Singapore Pte Ltd v Towa Corp* [2018] 1 SLR 211 (three pieces of prior art); *Lee Tat Cheng v Maka GPS Technologies Pte Ltd* [2018] 3 SLR 1334 (five pieces of prior art); *Rohm and Haas Electronic Materials CMP Holdings, Inc (formerly known as Rodel Holdings, Inc) v NexPlanar Corp and another* [2018] 5 SLR 180 (eight pieces of prior art and three combinations); and *Dien Ghin Electronic (S) Pte Ltd v Khek Tai Ting (trading as Soon Heng Digitax)* [2011] 3 SLR 227 (four pieces of prior art and two combinations).

(b) Second, the amount of security sought is excessive and unjustifiable when compared to the *Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore* set out in Appendix G of the Supreme Court Practice Directions (“*Costs Guidelines*”). Based on Part III(A)(i) of the *Costs Guidelines*, the estimated costs for a 12-

⁹ Affidavit of Dr Matthew Peloso (dated 8 November 2019) filed in SUM 5302 and 5303, at paragraphs 48 to 51.

day trial involving intellectual property law would range from \$204,000 to \$306,000, which is far lower than the \$900,000 claimed.

(c) Third, the security sought is excessive and unjustifiable when compared to taxation precedents in patent cases. Legal costs in the region of \$600,000 have generally been allowed only in matters involving highly specialised and/or novel points of law, with multiple factual and/or expert witnesses (citing *Trans Eurokars Pte Ltd v Koh Wee Meng* [2015] SGHCR 6 (“*Trans Eurokars*”) at [25] and *Lin Jian Wei and anor v Lim Eng Hock Peter* [2011] 3 SLR 1052). For example:

(i) In *Trek Technology (Singapore) Pte Ltd v FE Global Electronics Pte Ltd and others and other suits* [2005] 3 SLR(R) 389 (“*Trek Technology*”), an 18-day trial involving three consolidated actions, nine factual witnesses and three expert witnesses was taxed (in Bill of Costs No 195 of 2006) at \$668,000. *Trek Technology* was believed to be the “longest and most intensive patent litigation in Singapore”, involving complex subject matter, 40 pieces of prior art and numerous novel issues of law (see *Trans Eurokars* at [25(a)]).

(ii) In *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd and another (First Currency Choice Pte Ltd, third party)* [2007] 1 SLR(R) 1021 (“*Main-Line*”), an 18-day trial involving 32 pieces of prior art, 14 factual witnesses and two expert witnesses was taxed (in Bill of Costs No 34 of 2008) at \$600,000.

(d) Fourth, any security ordered should be confined to the Defendants’ future costs (citing *Optaglio* at [24], where the UK High

Court restricted the security ordered to “costs that had yet to be incurred at the date when the application was issued”).

(e) Fifth, given that Suit 190 has yet to proceed to formal discovery and the Defendants have not disclosed the number of witnesses to be called at trial, it is premature and speculative to grant any security up to the end of trial for Suit 190. If security is to be ordered for Suit 190, it should be limited to the completion of discovery.

41 Mr Lauw raised five main responses to the Oppression, Evidential and Quantum Arguments:

(a) First, while the Defendants had initially requested a lower sum of security, they had done so in the hope that the Plaintiff would agree as a matter of compromise. The Defendants had specifically reserved their rights to apply for a higher figure if the Plaintiff was not agreeable to the request. Furthermore, there were material developments after the initial request was made. In particular, the parties had occasion to attend before the trial Judge in relation to registrars’ appeals. The Judge had cautioned Plaintiff’s counsel to be “very mindful” that the Judge would be “open to considering indemnity costs hereafter” should it transpire that the Plaintiff had chosen to “proceed with the matter without being aware whether [it] can satisfy the essential features in the patent claims”.¹⁰ The request for \$900,000 was premised on the likelihood that indemnity costs would be ordered.

¹⁰ Transcript of hearing of HC/RA 290, 291, 292 and 293 of 2019 (16 October 2019), at p 18 lines 8–14.

(b) Second, security should be given for sums that the Defendants are out of pocket for, and not just for sums to be incurred moving forward. For example, in *Procon (Great Britain) Ltd v Provincial Building Co Ltd and anor* [1984] 1 WLR 557, the UK Court of Appeal held that the estimate of costs should be based upon the amount for which the applicants were already out of pocket.

(c) Third, the Plaintiff cannot argue on the one hand that it has ongoing streams of revenue from projects, investments and grants (see [16(d)] above), while arguing on the other that the ordering of security would force the Plaintiff to abandon its claims.

(d) Fourth, there is no established practice in Singapore to provide a detailed breakdown of actual or estimated costs in relation to an application for security for costs. While there are case authorities from Hong Kong (see [39] above), these reflect the practice in a different jurisdiction.

(e) Fifth, the request for \$600,000 in Suit 1229 is reasonable because there will be much more work to be done in relation to the consolidation of the Suits, the affidavits of evidence-in-chief, trial and closing submissions. In relation to Suit 190, while some of the documents that may be relevant have already been disclosed in Suit 1229, there is still further discovery to come.

42 After hearing arguments (and, in particular, the arguments at [39] and [41(d)] above), I ordered that the Defendants provide a breakdown of costs for the quantum of security claimed and subsequently permitted the Plaintiff one round of response. Without such a breakdown, both the Plaintiff and the court

had very little basis to understand how the Defendants arrived the figure of \$600,000 (for Suit 1229) and \$300,000 (for Suit 190). While Mr Lauw has argued that there is no established practice in Singapore for an applicant to provide a detailed breakdown of the quantum sought, I note from the cases cited to me that an “estimated bill of costs” was furnished and considered in *Frantonios* (see [70]). In any event, it would certainly be good practice for applicants to provide a detailed breakdown, or at least some material to substantiate the quantum sought. This practice would also be in line with the spirit of various costs-related initiatives introduced in the Supreme Court, such as costs scheduling for civil appeals, trials and originating summonses involving cross-examination (see paragraph 99A of the Supreme Court Practice Directions).

43 On 16 December 2019, Defendants’ counsel provided a breakdown of the Defendants’ estimated costs, emphasising that these are “only to justify the amount of security for costs sought against the Plaintiff in the Suits ... [and] are not intended to be a reflection of the actual costs incurred by the Defendants in the Suits”.¹¹ The breakdown provided costs estimates on both the indemnity and standard bases, and also included annexes summarising the work done at various stages in the Suits (*eg* pleadings, interlocutory matters, pre-trial conferences, discovery and interrogatories, *etc*). Based on these estimates, Defendants’ counsel submitted that the estimated costs in Suit 1229 ranged from \$678,600 to \$813,600 (on an indemnity basis) and from \$484,600 to \$569,600 (on a standard basis). In relation to Suit 190, the ranges were from \$320,400 to

¹¹ Letter from Defendants’ counsel (dated 16 December 2019), at paragraph 1.

\$375,400 (on an indemnity basis) and from \$247,400 to \$277,400 (on a standard basis).

44 For reasons explained at [49(a)] below, I am of the view that the quantum for security should be assessed on the standard basis. I therefore set out only the Defendants' estimated costs on a standard basis.

(a) In relation to Suit 1229:

Description	Estimated costs
Work done in relation to pleadings (including numerous rounds of amendments, excluding further and better particulars applications where costs have been awarded)	\$20,000
Work done in respect of discovery (excluding specific discovery applications where costs have been awarded)	\$35,000
Work done for HC/SUM 2488/2018 being the Defendants' application for bifurcation and consolidation (costs order: costs in the cause)	\$6,000
Work to be done in respect of affidavits of evidence in chief (assuming 2-4 factual witnesses and 1 expert witness)	\$60,000 to \$80,000
Work to be done during trial (based on 60% of 12 days, as computed under the <i>Costs Guidelines</i> with a daily tariff of \$30,000)	\$183,600
Work to be done after trial (including closing submissions)	\$60,000

Description	Estimated costs
Work done or to be done in relation to other items, being correspondence between parties and court, attendance at pre-trial conference	\$15,000 to \$20,000
Disbursements – General (excluding interlocutory applications where costs have been awarded, including up to filing of closing submissions)	\$15,000 to \$20,000
Disbursements – Expert	\$100,000 to \$150,000
Total estimated costs in Suit 1229	\$484,600 to \$569,600

(b) In relation to Suit 190:

Description	Estimated costs
Work done in relation to pleadings (including numerous rounds of amendments, excluding further and better particulars applications where costs have been awarded)	\$20,000
Work to be done in respect of discovery	\$20,000
Work to be done in respect of affidavits of evidence in chief (assuming 2-4 factual witnesses and 1 expert witness)	\$25,000 to \$35,000
Work to be done during trial (based on 40% of 12 days, as computed under the <i>Costs Guidelines</i> with a daily tariff of \$30,000)	\$122,400
Work to be done after trial (including closing submissions)	\$15,000

Description	Estimated costs
Work done or to be done in relation to other items, being correspondence between parties and court, attendance at pre-trial conference	\$15,000 to \$20,000
Disbursements – General (excluding interlocutory applications where costs have been awarded, including up to filing of closing submissions)	\$10,000 to \$15,000
Disbursements – Expert	\$20,000 to \$30,000
Total estimated costs in Suit 190	\$247,400 to \$277,400

45 Plaintiff’s counsel responded on 30 December 2019, contending that the costs claimed were unreasonable and grossly inflated. In addition to buttressing the points raised previously (see [38]–[40] above), the further points raised were as follows:

- (a) First, the Defendants were claiming the maximum of the range in the *Costs Guidelines* for party-and-party costs for 12-day trials involving intellectual property law (*ie* \$306,000, based on the maximum “Daily Tariff” of \$30,000 and the computation mechanism provided in Part III(A)(i) of the *Costs Guidelines*), with a 60:40 allocation between Suit 1229 and Suit 190. Given that the Defendants have not adduced evidence to justify the maximum “Daily Tariff”, the appropriate measure ought to be the lowest end of the scale, *ie* a “Daily Tariff” of \$20,000.

(b) Second, the figure as computed under Part III(A)(i) of the *Costs Guidelines* ought to cover the entirety of costs for the Suits (citing *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 100 (“*Seraya*”), where the court relied on Part III(A)(i) of the *Costs Guidelines* as the starting point to determine the standard costs to be awarded; the court increased the costs awarded by a 2.5 factor in view of the complexity of arguments and the claim amount). The sums claimed for work done in relation to aspects such as pleadings and discovery are subsumed within the figure computed under Part III(A)(i) of the *Costs Guidelines*, rather than separately claimed. To this end, the Defendants’ addition of the figures found in Part III(A)(ii) of the *Costs Guidelines* (relating to costs for matters settled before judgment) is erroneous and intended to inflate the security claimed.

(c) Third, it is speculative for the Defendants to provide costs estimates on the assumption that all 12 days of trial will be utilised. The Defendants have yet to commit to the number of witnesses that they intend to call. Having regard to the commonality of parties and pleaded infringements, similarity of subject matter, and on the basis that each party will call two to four factual witnesses and one expert witness, “only 6 days of trial at most will be required for the entirety of the Suits”.¹²

46 In the light of the above, Plaintiff’s counsel submitted that the quantum of security ordered should be premised on a standard basis for a 6-day trial, with

¹² Letter from Plaintiff’s counsel (dated 30 December 2019), at paragraph 17.

a “Daily Tariff” of \$20,000. Based on the computation mechanism provided in Part III(A)(i) of the *Costs Guidelines*, this amount would be about \$116,000. Assuming a 60:40 ratio between the Suits, this would be \$69,600 for Suit 1229 and \$46,400 for Suit 190. Plaintiff’s counsel also proceed to analyse the actual quantum of security to be awarded, which I have summarised in the table below (omitting the detailed breakdown):

Description	Suit 1229	Suit 190
Section 1 Costs (Including \$3,000 being awarded for HC/SUM 2488 in Suit 1229)	\$63,000 to \$73,000	\$36,000 to \$45,000
Section 3 Disbursements – General	\$6,000 to \$10,000	\$4,000 to \$6,500
Section 3 Disbursements – Expert	\$12,000 to \$18,000	\$8,000 to \$12,000
Total Costs	\$81,000 to \$101,000	\$48,000 to \$63,500

47 Defendants’ counsel wrote to the court on 3 January 2020, contending that Plaintiff’s counsel had made certain misleading and erroneous arguments:

(a) First, the interpretation at [45(b)] above went against the wording of the *Costs Guidelines*. A “Daily Tariff” cannot be intended to incorporate costs incurred before trial. Furthermore, if the figure computed under Part III(A)(i) of the *Costs Guidelines* was truly intended to represent the entirety of party-and-party costs for the whole suit, there would no longer be a need for taxation of bills of costs.

(b) Second, there is no limit to the number of prior art and combinations that a defendant can rely upon in patent litigation. This

should not be a factor indicating any extravagance on the part of the Defendants. Indeed, if the patent in issue lacks novelty or inventiveness, one would expect that there would be a larger number of relevant prior art and combinations. This is precisely the situation in the present case, since the Defendants are essentially being accused of infringing the Patents “by using an Excel spreadsheet”.¹³

(c) Third, the Plaintiff had never previously objected to both Suits being fixed for 12 days of trial, and had never suggested that a 6-day trial would be sufficient. The sudden halving of the number of trial days is “nothing but a hollow and desperate attempt by the Plaintiff to reduce the amount of security to be quantified by the Court”.¹⁴

Analysis and Decision

48 Before turning to the facts at hand, I make five observations.

(a) First, the *Costs Guidelines* provide a general indication of the quantum and methodology of party-and-party costs awards in the Supreme Court, taking into account past awards made, internal practices and general feedback (see Part I of the *Costs Guidelines* at paragraph 2). In the context of a security for costs application, the *Costs Guidelines* provide an excellent guide for estimating the likely quantum of “Section 1 costs” (*ie* costs for work done in the matter, except for taxation of costs: see O 59 r 24(1)(a) of the Rules of Court (Cap 322, R 5, Rev Ed

¹³ Letter from Defendants’ counsel (dated 3 January 2020), at paragraph 5(1).

¹⁴ Letter from Defendants’ counsel (dated 3 January 2020), at paragraph 6.

2014)). Of course, costs ultimately remain at the discretion of the court (see paragraph 99B(2) of the Supreme Court Practice Directions, and Part I of the *Costs Guidelines* at paragraph 3); as such, departure from the guideline figures may be warranted where, for instance, the matters at hand are particularly complex.

(b) Second, while I recognise that in *Seraya* the court was addressing a situation where an offer to settle was made, the approach taken *vis-à-vis* Part III(A)(i) of the *Costs Guidelines* appears to be of general application. The figures computed under Part III(A)(i) of the *Costs Guidelines* ought to be taken as a guide for assessing the entirety of party-and party costs for the suit, save that the figures do not include (i) costs awarded for summonses or on appeals therefrom, and (ii) costs which have been ordered to be in the cause. To avoid doubt, in view of the structure of the *Costs Guidelines*, the costs prescribed in Part III(A)(ii) should *not* be cumulatively added to the costs in Part III(A)(i). Instead, as stated in a note in Part III(A)(i), the interaction between Part III(A)(i) and Part III(A)(ii) occurs where the figures calculated pursuant to Part III(A)(i) “are lower than those provided for matters in respect of which settlement has been reached” (which is not the situation in the present case).

(c) Third, in addition to the *Costs Guidelines*, it is useful to have regard to precedent cases when determining the quantum of security to be awarded. Two types of precedents are particularly relevant, *ie*, precedents on security for costs and taxation precedents. In the present applications, two taxation precedents were cited to me, *ie*, *Trek Technology* and *Main-Line*. These cases pre-dated the issuance of the

Costs Guidelines. However, they remain useful comparators for consideration in these applications, given that they are patent cases involving substantial numbers of prior art.

(d) Fourth, if a defendant is of the view that a higher quantum of security is warranted in view of the particular complexity or novelty of the case at hand, it is incumbent upon the defendant to justify this when seeking security for costs. The mere fact that a case is a patent case does not mean, in and of itself, that the case is particularly complicated or technical. As observed by the UK High Court, it is a “popular misconception that patent actions are all complicated” and that “all [patent] cases are complex and involve profound technical issues” (*Unicontinental Holdings* at 841, *per* Laddie J). While the number of prior art or combinations cited may be a factor for consideration, these numbers may not be determinative one way or another. For example, depending on the circumstances of the case, a large number of prior art or combinations may indicate (i) the complexity of the case and the expert issues involved, (ii) the lack of novelty or inventiveness of the patent in question, (iii) a party’s intention to throw the proverbial kitchen sink, *etc.* As such, proper justification and explanation must be provided if a defendant wishes to rely on the number of prior art or combinations to justify a higher quantum of costs.

(e) Fifth, in determining the quantum of security to be ordered, the court may take into consideration Section 3 costs (*ie* disbursements made or likely to be made in the suit) given that these are costs which can subsequently be claimed in a bill of costs (see O 59 r 24(1)(c) of the Rules of Court). In the present case, there was neither any dispute over

whether Section 3 costs should be taken into consideration, nor any dispute over whether there should be disbursements for experts. Instead, both parties provided their estimates for such disbursements. While it is not uncommon for disbursements to be substantial particularly where experts are involved, it is incumbent on a party seeking security for such disbursements to provide some basis for the quantum sought.

49 I turn now to the facts of the present case. Having considered the various issues and arguments raised, my views are as follows:

(a) First, it is not appropriate to assess the quantum of security on an indemnity basis, solely on the basis of the matters raised at [41(a)] above. The learned Judge had stated that he would be “open” to ordering indemnity costs depending on how the litigation pans out; he did not make a conclusive decision that he would be ordering indemnity costs in due course.

(b) Second, the Suits (which will be consolidated) should be approached collectively as a 12-day intellectual property trial. In relation to the “Daily Tariff”, I note that the Defendants have not expressly demonstrated that the issues raised in the Suits are particularly complex. However, it is apparent from perusal of the detailed annexes furnished by Defendants’ counsel that there were numerous amendments to the pleadings and provision of further and better particulars (not pursuant to court orders), that parties have attended at 32 pre-trial conferences as at mid-November 2019 (of which 18 were joint pre-trial conferences for both Suits), and that discovery in Suit 1229 has been voluminous (exceeding 10,000 pages) with more discovery to come in Suit 190. As such, it would be reasonable to apply a “Daily Tariff” in the middle of

the range for intellectual property trials, *ie* \$25,000. Had the Defendants satisfactorily demonstrated that the Suits would be particularly complex, the figure might well have been higher. Based on these indicators, as well as a 60:40 division between Suit 1229 and Suit 190, the guideline Section 1 costs (excluding costs awarded for summonses or on appeals therefrom and costs which have been ordered to be in the cause) are \$153,000 for Suit 1229 and \$102,000 for Suit 190.

(c) Third, it is not appropriate to limit the quantum of security to future costs. In *Optaglio*, there was extreme lateness in the application for security – the application was brought a mere four weeks before trial in a matter that had commenced about six years ago. Also, the defendants’ lawyers in that case had apparently become aware of the situation warranting an order for security about two months before the application was actually made. In contrast, in the present case, the Defendants had acted with due expedition (see [36] above).

(d) Fourth, I am prepared to order security for costs up to the end of trial for both Suits, given that the Suits will be consolidated. While there may be some overlaps in discovery and evidence, the guideline figure for a 12-day intellectual property trial would still provide a reasonable estimate in the light of [48(b)] above.

(e) Fifth, in relation to the Defendants’ application for bifurcation and consolidation, *ie* Summons No 2488 of 2018 (“SUM 2488”), the trial Judge heard the application and ordered that costs be in the cause. The Defendants and the Plaintiff have estimated the costs of SUM 2488 to be \$6,000 and \$3,000 respectively. For the purposes of ordering

security for costs, \$5,000 would be a reasonable estimate of costs for SUM 2488.

(f) Sixth, in relation to disbursements, the parties are not very far apart in their estimates of reasonable general disbursements. However, they have very different estimates of disbursements for experts (see [44] *contra* [46] above). Having considered Defendants' counsel's detailed annexes and in particular the numerous court attendances as well as voluminous discovery, I consider that the lower ranges of the Defendants' estimates are reasonable, if not conservative. However, in relation to disbursements for experts, the Defendants have not provided any explanation on the nature and extent of expert evidence to be adduced, whether the experts are based in Singapore or overseas, *etc.* As such, there is insufficient justification for claiming a six-figure sum in total for both Suits. In the absence of proper justification, I would rely on the upper ranges of the Plaintiff's estimates for experts' disbursements.

50 In the light of the above, I order that security for Suit 1229 and Suit 190 be furnished in the sums of \$191,000 and \$124,000 respectively, totalling a sum of \$315,000 for the Suits. The breakdown is provided in the following table.

Description	Suit 1229	Suit 190
Section 1 Costs		
Section 1 Costs (excluding costs awarded for summonses or appeals therefrom and costs which have been ordered to be in the cause)	\$153,000	\$102,000

Description	Suit 1229	Suit 190
<i>* Based on 60:40 division between Suit 1229 and Suit 190.</i>		
SUM 2488 (costs in the cause)	\$5,000	N.A.
Section 3 Costs		
Disbursements – General (excluding applications where costs have been awarded, up to filing of closing submissions)	\$15,000	\$10,000
Disbursements – Expert	\$18,000	\$12,000
Total security awarded	\$191,000	\$124,000

Whether proceedings should be stayed pending provision of security

51 Mr Chan argued that in the event that security for costs is awarded, the proceedings should *not* be stayed pending the provision of security. He submitted that it would be in the interest of the parties that the timetable for trial preparation should not be interrupted, pointing to *Barcrest* at [3.8] as an example where the court did not order a stay. He submitted that given that the trial of the Suits is fixed to commence late-July 2020, the parties should still proceed to formally consolidate the Suits, conduct discovery in Suit 190, and prepare affidavits of evidence in chief as well as expert reports.

52 In *Barcrest*, the court had also observed that it was in the interest of all parties that preparation of the case be left uninterrupted “provided that the provision of security is handled expeditiously” (at [3.8]). In the present case, given the various findings made throughout this judgment, it is uncertain whether the Plaintiff will be able to provide security with sufficient expedition.

In the circumstances, I am minded to order a stay. I will also order timelines to facilitate progress of this matter towards trial should the Plaintiff be able and willing to provide security. In this regard, I order that the Plaintiff furnish security within 21 days of this order. If the Plaintiff is able to furnish security within the 21 days, the Suits should still be able to proceed to trial as presently fixed. If, however, the Plaintiff is unable to furnish security within the 21 days, the matter shall remain stayed, with the Defendants having liberty to apply to strike out the Plaintiff's claims for failure to furnish security.

Whether an unless order should be made

53 The final substantive prayer sought in the applications is for the Plaintiff's claims in the Suits to be struck out without further order in the event that the Plaintiff fails to furnish security.

54 It is well established that an unless order, particularly one resulting in a striking out of a plaintiff's claim without further order, will not be given as a matter of course but as a last resort (see, eg, *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [45]–[46]). Specifically in the context of security for costs applications, the UK Court of Appeal has observed that an order for large sums of security “should not be made subject to the ‘unless’ sanction until a real opportunity has been given to the claimant to find the money” (*Radu v Houston and Another* [2007] 5 Costs LR 671 at [18]).

55 I therefore dismiss the Defendants' prayer for an unless order.

Conclusion

56 In view of the foregoing, I make the following orders:

- (a) The Plaintiff shall, within 21 days from the date of this judgment, furnish security in the sum of \$191,000 (in Suit 1229) and \$124,000 (in Suit 190) as security for the Defendants' costs up to the end of trial (including closing submissions), on the condition that the Defendants provide an undertaking in writing within 14 days from the date of this judgment to discontinue their counterclaims against the Plaintiff if the Plaintiff's claims are struck out for failure to furnish security.
- (b) The security shall be furnished by way of a banker's guarantee issued by a Singapore bank or by way of an undertaking in writing by the Plaintiff's solicitors.
- (c) All further proceedings in the Suits shall be stayed until the Plaintiff furnishes the requisite security, save for (i) the furnishing of security; (ii) the bringing of an appeal against this judgment; and (iii) an application for the Plaintiff's claims to be struck out for failure to furnish security.

57 I will hear parties on costs.

Justin Yeo
Assistant Registrar

Mr Chan Wenqiang, Mr Alvin Lim and Mr Alvin Tan
(Ravindran Associates LLP) for the Plaintiff;

Mr Nicholas Lauw and Ms Leow Jiamin
(Rajah & Tann Singapore LLP) for the Defendants.
