Tjong Very Sumito and others *v* Chan Sing En and others
[2010] SGHC 344

Case Number	: Suit No 89 of 2010 (Registrar's Appeal No 234 of 2010 and Summons No 2961 of 2010)
Decision Date	: 22 November 2010
Tribunal/Court	: High Court
Coram	: Andrew Ang J
Counsel Name(s)	: Shannon Ong (Gabriel Law Corporation) for the plaintiffs; Nicholas Narayanan (Nicholas & Tan LLP) for the first defendant; Margaret Ling Weiwei and Aaron Lee (Allen & Gledhill LLP) for the fifth and sixth defendants.
Parties	: Tjong Very Sumito and others — Chan Sing En and others

Civil procedure – Costs – Security

22 November 2010 Judgment reserved.

Andrew Ang J:

Introduction

1 These were applications for security for costs against the plaintiffs. Having failed before the assistant registrar ("the AR"), the first defendant filed Registrar's Appeal No 234 of 2010 ("RA 234/2010") appealing against the AR's decision not to award security for costs. The fifth and sixth defendants also applied under Summons No 2961 of 2010 ("Sum 2961/2010") for security for costs against the plaintiffs. Both RA 234/2010 and Sum 2961/2010 were fixed to be heard together before me.

2 After hearing submissions from all the relevant parties on 29 September 2010, I gave a brief oral judgment on 12 October 2010 awarding security for costs against the plaintiffs, thus allowing the appeal in RA 234/2010 and the application in Sum 2961/2010.

3 On 15 October 2010, counsel for the plaintiffs wrote in requesting for further arguments. This was followed by a letter dated 18 October 2010 from counsel for the fifth and sixth defendants and another letter in reply the following day from counsel for the plaintiffs, who also sought clarification of my orders made on 12 October 2010. I heard parties' further arguments on 26 October 2010. Despite the strenuous arguments of counsel for the plaintiffs, I was not persuaded to alter my earlier decision granting security for costs against the plaintiffs.

4 As these proceedings concerned the interesting issue of whether a plaintiff can be ordinarily resident both within and out of the jurisdiction for the purpose of ordering security for costs against him (and if so, whether such security should be ordered) and in order to provide the clarification sought by the plaintiffs, I now render in writing the grounds for my judgment.

Background facts

5 The plaintiffs commenced Suit No 89 of 2010 ("the Suit") against the first to ninth defendants in February 2010. The tenth defendant Magnus Energy Group Ltd ("MEGL") and the eleventh

defendant Antig Investments Pte Ltd ("Antig") were added by way of an amendment to the statement of claim on 26 August 2010. Antig is a wholly-owned subsidiary of MEGL. The Suit related to a shares sale and purchase agreement dated 23 November 2004 ("the 1st S&PA") and two other share sale agreements dated 12 July 2007 ("the 2nd S&PA").

6 Under the 1st S&PA between the plaintiffs and Antig, the plaintiffs agreed to sell in aggregate 72% of the shares in an Indonesian company PT Deefu Chemical Indonesia ("PT Deefu") to Antig for US$18m ("the Sale Price"), which was to be paid by Antig in the form of cash and shares in MEGL. The 1st S&PA was subsequently varied by four supplemental agreements and a letter dated 31 May 2006 from Antig to the plaintiffs. The net effect of these variations to the payment terms of the 1st S&PA was that, of the Sale Price, US$6m was to be paid in cash to the first plaintiff and the remaining US$12m was to be paid to the second and fourth defendants in cash as well as shares in MEGL.

7 Under the 2nd S&PA, the following transactions were effected:

(a) The first plaintiff sold his 5% interest in another Indonesian company PT Batubaraselares Sapta (the remaining 95% of which is owned by PT Deefu) to the seventh defendant for US$336,000; and

(b) The first plaintiff sold his remaining 28% interest in PT Deefu to the eighth defendant for US$1.68m.

8 To date, pursuant to the 1st S&PA as modified, the plaintiffs have received directly the sum of approximately US$5.5m while the second and fourth defendants have received US$12m in total. The plaintiffs' claims in the Suit are made on the grounds of, *inter alia*:

(a) Fraudulent misrepresentation (as against the first and fifth defendants and MEGL) in that the former two defendants (acting as agents for MEGL) had fraudulently misrepresented to the first plaintiff that the Sale Price would be paid to the plaintiffs. In this regard, the first plaintiff alleged that he was not well-versed in English and that his understanding of the terms of the 1st S&PA was based on what the fifth defendant had told him;

(b) Unlawful means conspiracy in respect of the 1st S&PA as against the first to sixth defendants and/or MEGL for conspiring to cause the plaintiffs to enter into the 1st S&PA on the basis that the Sale Price would be paid to the first plaintiff; and

(c) Resulting trust and/or constructive trust and/or moneys had and received against the various defendants for moneys that they had wrongfully received in relation to the 1st and 2nd S&PAs.

The AR's decision

9 On 27 May 2010, the AR dismissed the first defendant's application in Summons No 1720 of 2010 ("Sum 1720/2010") for security for costs, being of the view that the first plaintiff is ordinarily resident in Singapore. While he also held that the second and third plaintiffs are nominal plaintiffs, he was minded to apply the principle elucidated in *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2007) ("*White Book*") at para 23/3/10 that no order for security for costs will be made if there is a co-plaintiff resident within the jurisdiction. The first defendant filed RA 234/2010 against this decision.

The applications for security for costs

10 Security for costs may be ordered against a plaintiff under O 23 r 1 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) which provides as follows:

> **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;
>
> ...
>
> 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.

The court's jurisdiction to order security for costs against a plaintiff is founded on at least one of the four factual conditions listed in O 23 r 1(1)(*a*)–(*d*). Once one of those conditions is satisfied, the court may exercise its discretionary power to order the plaintiff to give security for the defendant's costs if it thinks it just to do so having regard to all the circumstances of the case. In this regard, factors commonly taken into account include whether the plaintiff's claim is *bona fide*, whether it has a reasonably good prospect of success, as well as whether the application for security was being used oppressively with a view to stifling a genuine claim (see, *eg*, *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 *per* Lord Denning MR at 626-627, cited with approval in *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1999] 1 SLR(R) 112 at [14]).

Ordinarily resident out of jurisdiction

Natural and ordinary meaning

11 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 *Regina v Barnet London Borough Council, Ex parte Nilish Shah* [1983] 2 AC 309 ("*Shah*"), 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 *Shah*, 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.

12 In arriving at its conclusions, the House of Lords in *Shah* relied to some extent on two tax cases reported in 1928 which sought to elucidate the natural and ordinary meaning of the words "ordinary residence", namely, *Levene v Commissioners of Inland Revenue* [1928] AC 217 and *Commissioners of Inland Revenue v Lysaght* [1928] AC 234. *Shah* itself was a judicial review case concerning educational grants to students "ordinarily resident" in the United Kingdom. While these authorities did not concern applications for security for costs, I concur with Lindsay J's view in *In re Little Olympian Each Ways Ltd* [1995] 1 WLR 560 ("*Little Olympian*") at 566 that "so far as concerns individuals the test applied in tax cases have without any awkwardness or consciousness of injustice been adopted for other more general purposes" and "one need not be especially shy in this area about adopting the conclusion of tax cases to cases outside tax".

Ordinarily resident in more than one jurisdiction

13 In his written submissions for the purposes of the 29 September 2010 hearing, counsel for the plaintiffs, Mr Shannon Ong, submitted (at para 16(ii)) that "[i]n fact a person can be ordinarily resident in more than one place", citing Kerr LJ's judgment in *Parkinson v Myer Wolff and Manley (a firm)* (23 April 1985, Court of Appeal, unreported). However, in his further arguments, Mr Ong contended that if a person is ordinarily resident within jurisdiction, that same person cannot be ordinarily resident in another jurisdiction. In support of that latter proposition, Mr Ong cited the Singapore High Court decision in *Wishing Star Ltd v Jurong Town Corp* [2004] 1 SLR(R) 1 ("*Wishing Star (HC)*") where Choo Han Teck J expressed the following view (at [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 jurisdiction as they can afford – but a house is not a home*** . ... [emphasis added]

Mr Ong also invited me to find further authority for that proposition in *Little Olympian* in Lindsay J's observations that (at 565–566):

> ... The addition of the adverb 'ordinarily' does add something of importance to the word 'resident.' It connotes a degree of continuity being required, a reference to the way in which things are usually or habitually ordered: see *Reg. v. Barnet London Borough Council, Ex parte Nilish Shah* [1983] 2 A.C. 309, 341. ***Whilst the added word might not have a corresponding effect in the case of an individual*** , as I see it it is more difficult for a corporation to be ordinarily resident in more than one place than it would be for it merely to be resident in more than one place. ***Moreover, the context of Ord. 23, r. 1(1)(*** **a** ***) 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. [emphasis added in bold italics]

14 Despite Mr Ong's strenuous arguments to the contrary, to my mind, these judicial observations, so far as they relate to an *individual* plaintiff, are *obiter dicta*. Neither of these cases stands as irref3utable authority for the proposition recommended by Mr Ong that no individual plaintiff could be both ordinarily resident out of and within the jurisdiction. As pointed out by counsel for the fifth and sixth defendants, Ms Margaret Ling, the facts of both *Wishing Star (HC)* and *Little Olympian* did not concern individual plaintiffs, but plaintiff corporations. When the decision in *Wishing Star (HC)* refusing security for costs was upheld by the Court of Appeal in *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 ("*Wishing Star (CA)*"), the appellate court did not find it at all necessary to deal with the issue of dual ordinary residences, accepting instead as a fact that the plaintiff in that case, a company incorporated in Hong Kong but with a registered office in Singapore, was ordinarily resident out of jurisdiction. Indeed, the force of Choo J's observations in *Wishing Star (HC)* at [3] (quoted at [13] above) is diminished somewhat by his views at [4] that:

> ... 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*** . ... [emphasis added]

15 While at first glance Lindsay J seemed to have laid down the rule in *Little Olympian* ([12] *supra*) that under O 23 there can only be *one* ordinary residence, I pause to observe that the learned judge had not closed the door completely to the conceptual possibility that an individual plaintiff can have more than just one ordinary residence for the purposes of an order under O 23. First, in noting that the addition of the adverb "ordinarily" adds something of importance to the word "resident", connoting a degree of continuity and habit, Lindsay J opined in passing that "in the case of an individual" the added adverb might *not* have the effect that it would be more difficult to be ordinarily resident in more than one place, than to be merely resident in more than one place. Second, the learned judge conceded that there could be "exceptional circumstances" in which an individual plaintiff was ordinarily resident in more than one jurisdiction.

16 In contrast, in a case involving an individual plaintiff, *Leyvand v Barasch and others* (2000) The Times 23 March (Transcript) ("*Leyvand*"), Lightman J held (at [5]) that:

> 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 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]

In *Leyvand*, the claimant was an Israeli national who had his principal home in Israel; Lightman J held that he was ordinarily resident in Israel. The claimant in that case also had several real property assets in England: a home, an investment property and leases of offices he had used. While Lightman J held that the claimant had a substantial connection with England (being "plainly resident" there), the learned judge also held that it was unnecessary to decide whether he was *also ordinarily*

resident in England; if it were necessary to do so, the learned judge would have held that the claimant was *also* ordinarily resident in England (see *Leyvand* at [8]). Overall, having regard to the claimant's long residence ("whether or not ordinary residence") and substantial assets in and his long connection with England, Lightman J held (at [8]) that it would not be just to require him to provide security for costs.

17 In an Australian case also dealing with an individual plaintiff, *Logue v Hansen Technologies Ltd* [2003] FCA 81 ("*Logue*") at [24], Weinberg J accepted Lightman J's suggestion in *Leyvand* that it may also be possible for a person to have two ordinary residences, one within the jurisdiction and one outside; in such a case the court has power to order security for costs. In *Logue*, ordering security for costs against the plaintiff, Weinberg J held that on balance the plaintiff had not formed a "settled purpose" to remain in Australia and was thus not ordinarily resident in Australia: were it not for the litigation in that case, the plaintiff would probably have gone to some other place where the prospects of employment for someone with his background would be significantly greater, even though he had ostensibly strong family connections in Australia.

18 In another more recent Australian case, *Corbett v Nguyen and others* [2008] NSWSC 1265 ("*Corbett*"), White J expressed the view (at [11]) that "[a] person may be resident and ordinarily resident in more than one place at a time", and there is jurisdiction to order security for costs against a plaintiff who is ordinarily resident *in* Australia even though such jurisdiction to do so is on the basis that the person is *also* ordinarily resident *outside* Australia. While White J held (at [21]) that the plaintiff in *Corbett* was held to be ordinarily resident in Vietnam, he was equally of the opinion (at [22]) that it "does not follow that the plaintiff has ceased to be resident, or ordinarily resident, in New South Wales".

19 On balance, therefore, I am of the view that the Court is *not* precluded from finding that, for the purposes of ordering security for costs under O 23, an individual plaintiff is ordinarily resident out of, as well as within, the jurisdiction. Provided that the court finds that an individual plaintiff is ordinarily resident out of the jurisdiction, it is seised of jurisdiction to exercise its discretion to order security for costs against such a plaintiff, even though the plaintiff may also be ordinarily resident within the jurisdiction. Such an interpretation of O 23 would preserve the court's discretion to order security if it is just in all the circumstances to do so.

20 In *Wishing Star (CA* ([14] *supra*), the Court of Appeal preferred to reserve to the courts a wide discretion, holding that (at [14]):

> It is settled law that it is not an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. The court has a ***complete discretion*** in the matter: see *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534. It seems to us that under r 1(1)(*a*), *once the pre-condition, namely, being* ***'ordinarily resident out of the jurisdiction', is satisfied, the court will consider all the circumstances to determine whether it is just that security should be ordered*** . There is no presumption in favour of, or against, a grant. ***The ultimate decision is in the discretion of the court, after balancing the competing factors*** . No objective criteria can ever be laid down as to the weight any particular factor should be accorded. It would depend on the fact situation. Where the court is of the view that the circumstances are evenly balanced it would ordinarily be just to order security against a foreign plaintiff. [emphasis added in bold italics]

21 On the present facts, the objective evidence indicates that the plaintiffs are ordinarily resident in Indonesia as they appear to have adopted Indonesia voluntarily as a place of residence with a substantial degree of settled purpose, *ie*, for residential and business purposes. First, they own

immovable property in Indonesia, consistently providing their Indonesian addresses in various documents pertaining to the Suit, including (a) the Deed of Incorporation of PT Deefu dated 12 December 2000, and (b) the 1st S&PA and the supplemental agreements thereto, dated between 2004 and 2006. The first plaintiff averred in an affidavit dated 28 April 2010 (at para 8) that the first defendant had procured the insertion of his Indonesian address in these documents and Mr Ong submitted that the first plaintiff could not read those documents as the latter is not well versed in English. Despite his averments to the contrary, I had doubts that as an experienced businessman he would have failed to at least have the documents explained to him, or that he would have failed to recognise that his Indonesian address was used on those documents. In any event, these explanations could not account for the use of his Indonesian address in other documents. For instance, both the first and third plaintiffs provided their Indonesian addresses when they registered themselves as directors of Venus International Productions Pte Ltd ("Venus Productions"), a company incorporated in Singapore. It bears noting that under sub-ss 173(2) and (6) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), a person is required to provide his "usual residential address" when he is registered as a director of a company. Moreover, in the writ of summons in Suit No 348 of 2008 against Antig ("the Antig Suit") (filed on 20 May 2008), and affidavits filed in relation thereto in July and August 2008, the plaintiffs also used their Indonesian addresses. These addresses are registered against their Indonesian identification documents. The first plaintiff also stated (in an affidavit dated 19 August 2010 at para 11) that he had provided an Indonesian address in the aforementioned documents as a "means of identification and for contact purposes". If he did not hold himself out as being ordinarily resident in Indonesia, there would scarcely have been any need to provide an Indonesian address for "contact purposes" in these relatively recent documents, particularly in the light of his averments in the same affidavit that he can be found at a Singapore address, *viz*, 19 Cairnhill Circle, #17-05 The Light Cairnhill ("The Light") (at para 7), and that he had set up a home in Singapore since 1995 (at para 6(i)).

22 Second, it is common ground that the first plaintiff has various businesses in Indonesia.

23 Third, by way of contrast, it is undisputed that none of the plaintiffs owns real property in Singapore, whereas the first plaintiff's wife and one of his daughters own a property at 8 Cairnhill Circle, #06-12 Cairnhill Crest, in Singapore (see first plaintiff's affidavit dated 28 April 2010 at para 7(v)).

24 Therefore, in my view, the pre-condition for the exercise of my discretion to order security for costs against the plaintiffs under O 23 r 1(1)(*a*) has been satisfied.

25 However, it does not follow that the first plaintiff could not also be found to be ordinarily resident in Singapore. While it was not strictly necessary for me to make any finding on whether the first plaintiff is also ordinarily resident in Singapore, having applied my mind to the objective evidence raised by Mr Ong as to the first plaintiff's substantial connections to Singapore, I came to the conclusion that he is also ordinarily resident in Singapore. First, it is clear that he has strong family ties here. His wife and three of his children are Singapore Permanent Residents, while one of his children is a Singapore citizen.

26 Second, I also accepted the first plaintiff's evidence that he has spent a considerable amount of time here in Singapore since 2007. In 2007 and 2008, he was in Singapore for a total of at least 250 days and 133 days respectively. On 29 July 2008, he obtained an employment pass from the Ministry of Manpower and was granted a multiple-journey visa. As such, it is not apparent from his passport how many days he was in Singapore from that time, although he stated (at para 6(iii) of his 19 August 2010 affidavit) that he was in Singapore for at least more than half a year in each of the years 2008 and 2009. When he is in Singapore, he lives with his family at their rented premises at The

Light (see [21] above). This should be contrasted with the facts in *Logue* ([17] *supra*); the fact that while in Australia the applicant lived with his mother and step-father rather than with his partner (from whom he was estranged) and children diminished the weight normally accorded to the fact that he has a partner and children in Australia (see *Logue* at [36]).

27 Third, he has business interests here in Singapore, being the director and/or shareholder of two companies incorporated here, namely, Venus Productions (see [21] above) and Master Lube Singapore Pte Ltd ("Master Lube").

Rationale for ordering security for costs against foreign-resident plaintiff

28 Mr Ong further submitted in further arguments that even if a plaintiff can be held to be ordinarily resident both within and out of jurisdiction for the purposes of an order for security for costs against him, the rationale behind ordering such security indicates that in such a case no order for security should be made. He pointed to Quain J's dicta in *Raeburn v Andrews* (1874) LR 9 QB 118 ("*Raeburn v* Andrews") at 121 that:

> The reason that a plaintiff resident abroad was compelled to give security for costs was because he was not in reach of our law to have process served on him, in the event of the defendant obtaining a judgment.

However, I note that immediately after stating that reason, Quain J held (at 121) that "[t]hat reason having now *ceased*, the old rule is abolished". Both Blackburn and Archibald JJ (at 120 and 121 respectively) agreed that that reason for ordering security for costs against a plaintiff resident abroad (in so far as Scotland was concerned) had ceased as a result of the enactment of the Judgments Extension Act 1868 which made judgments of the superior courts of England, Scotland and Ireland mutually registrable and enforceable on the production of a certificate of the court where the judgment was obtained. In *Wilson Vehicle Distributions Ltd v The Colt Car Co Ltd* [1984] BCLC 93, Bingham J observed (at 94) that prior to that enactment:

> ... Security was ordered because of the ***difficulty and delay of enforcing orders for costs in foreign jurisdictions*** and for this purpose England, Ireland and Scotland were independent jurisdictions and accordingly foreign to each other. [emphasis added].

29 Mr Ong also referred me to Millett J's observations in *DSQ Property Co Ltd v Lotus Cars Ltd* [1987] 1 WLR 127 ("*DSQ Property*") at 131:

> In my view the true ratio of *Raeburn v. Andrews* proceeds upon the straightforward principle that irrelevant circumstances should be ignored, and that plaintiffs in similar circumstances should be similarly treated. Where the plaintiff is an individual, with or without means, his residence in Scotland or Northern Ireland is irrelevant. ***He is resident within the reach of our process, and security should not be ordered against him any more than it would be ordered against an individual plaintiff resident in England. In my view that is still the law*** . [emphasis added]

30 It is important to set Millett J's words in context. The learned judge was dealing with an application for security for costs against an insolvent plaintiff company incorporated in Northern Ireland. As the relevant companies legislation (*in pari materia* with s 388(1) of our Companies Act permitting applications for security for costs against plaintiff companies) applied only within Great Britain (thus excluding Northern Ireland from its reach), the defendants there had to apply for security for costs under the Rules of the Supreme Court ("RSC") Ord 23 r 1(1) (identical to our O 23 r 1(1)). There was no doubt in *DSQ Property* that the plaintiff company was incorporated in Northern Ireland,

ie, outside England and Wales, outside the jurisdiction for the purposes of an RSC Ord 23 application. The question was whether the holding in *Raeburn v Andrews* ([28] *supra*) that as a result of the Judgments Extension Act 1868 an individual plaintiff resident in Scotland was not required to provide security for costs applied to the facts in *DSQ Property* to preclude an order for security for costs against the plaintiff there. In Millett J's judgment *Raeburn v Andrews* had no such effect; it had no application to a plaintiff which was an insolvent company with limited liability (see *DSQ Property* at 131).

31 To my mind, Millett J's observations (quoted in [29] above) do not apply to the present facts. First, *DSQ Property* in fact concerned an insolvent company incorporated in Northern Ireland, not an individual plaintiff. Thus, the learned judge's comments with regard to an individual plaintiff are strictly *obiter*. Whatever his views were as regards the "true ratio" of *Raeburn v Andrews*, he was equally of the view that that case did not apply to the facts before him. Second, it is also clear that his comments did not pertain to the factual scenario of an individual plaintiff being ordinarily resident in more than one jurisdiction. In that passage quoted at [29] above, Millett J was comparing one plaintiff resident in Scotland or Northern Ireland with another plaintiff resident in England; both were resident within the jurisdiction and equally within the reach of the English courts. He had clearly not applied his mind to the possibility of an individual plaintiff being ordinarily resident both within and out of the jurisdiction; and he would have had little reason to so apply his mind since there was no dispute that the plaintiff he was concerned with in that case was obviously only resident in one jurisdiction.

32 Furthermore, Millett J was not prepared to hold that the rule laid down in *Raeburn v Andrews* has "survived as an inflexible rule of practice after the introduction of the present Rules of the Supreme Court in 1964"; rather, he was of the view that in fact, RSC Ord 23 which was introduced under statutory authority had "*significantly changed* the previous practice", conferring on the Court a "*general discretion* to order security in the prescribed cases 'if, having regard to all the circumstances of the case, the court thinks it just to do so'" [emphasis added] (see *DSQ Property* at 132–133). Therefore, security is no longer ordered against a foreign resident as a matter of course. This proposition was declared to be "settled law" by the Court of Appeal in *Wishing Star (CA)* at [14] (see [20] above).

33 If the court has *no* discretion to order security against a plaintiff resident within the jurisdiction on the basis that he was amenable to the process of the court, then surely on that reasoning *every* plaintiff who is resident *out of* the jurisdiction should be made to provide security since such a plaintiff would *not* be amenable to the process of the court. Yet, it is settled law that no such inflexible rule is applied rigidly to every plaintiff ordinarily resident abroad. In my view, amenability to the process of the court in Singapore should not be the "be all and end all" of the decision whether or not to order security for costs.

34 In *Ooi Ching Ling Shirley v Just Gems Inc* [2002] 2 SLR(R) 738, the Court of Appeal stated the rationale for ordering security for costs against a plaintiff ordinarily resident abroad in the following terms (at [27]):

> ... 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 [*ie*, the respondent] could be left with a costs order which would be unenforceable or only enforceable with great difficulty and expense, plus delay.

The rationale stated in this manner does not, in my view, preclude a plaintiff who has been found to

be ordinarily resident out of the jurisdiction from being ordered to furnish security, simply because he has also been found to be ordinarily resident within the jurisdiction. The fact of his ordinary residence within the jurisdiction does not say anything about the ease of enforcement of a costs order against him, particularly where he has also been found to be ordinarily resident abroad. In the case of an individual plaintiff ordinarily resident *only* within the jurisdiction, I agree that the court would have no jurisdiction under O 23 to order security for costs against him; the defendant would have to take him as he is. Additionally, where the plaintiff is a natural person, public policy leans much more towards encouraging access to the courts (see *Ong Jane Rebecca v Pricewaterhousecoopers* [2009] 2 SLR(R) 796 ("*Ong Jane Rebecca*") at [30]). However, even if the plaintiff is ordinarily resident within the jurisdiction, where he is also ordinarily resident *out of* the jurisdiction, there is still the attendant risk that the defendant may be left with a costs order which would be "unenforceable or only enforceable with great difficulty and expense, plus delay", for example, if he has no substantial assets in Singapore and retreats to the other ordinary residence outside the jurisdiction. Therefore, in a case where a plaintiff has dual ordinary residences, the court should retain its unfettered discretion to consider whether, in *all* the circumstances of the case including of course the fact that the plaintiff is also ordinarily resident within the jurisdiction, it is *just* to order security for costs against the plaintiff. In this regard, I echo Lightman J's words in *Leyvand* ([16] *supra*) (at [6]): "the simple and single criterion for ordering security is what is just in the circumstances of the particular case".

35 Having found that the plaintiffs are ordinarily resident out of the jurisdiction and dealt with the purported impediments to the exercise of my discretion under O 23 r 1(1), I turn now to considering whether it is just in all the circumstances of the case to order security for costs against the plaintiffs. At this juncture I note that there is no need for me to make any finding under O 23 r 1(1)(*b*) on whether the second and third plaintiffs are nominal plaintiffs who will be unable to pay the costs of the defendants if ordered to do so as I may exercise my discretion under r 1(1)(*a*).

Just in all the circumstances to order security for costs

36 In *Wishing Star (CA)* ([14] *supra*), the Court of Appeal held (at [14]) that where the circumstances are "evenly balanced" it would "ordinarily be just" to order security against a foreign plaintiff, citing with approval the following comments by Browne-Wilkinson VC in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 ("*Porzelack*") at 423:

> Under R.S.C., Ord 23, r 1(1)(*a*) it seems to be that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer.

Assets in Singapore

37 This general position should be balanced against Lightman J's perspicacious observations in *Leyvand* that (at [5]):

> ... the connection of the claimant with this country is of course relevant to the exercise of discretion, and ***the closer the connection, the greater the relevance*** . If the claimant has an established home and is resident here, security may ***rarely*** **be required;** ***if the claimant has an established home and is ordinarily resident here an order for security may even more rarely be ordered*** . [emphasis added]

As I have noted at [25] to [27] above, the first plaintiff has close connections with Singapore. He has

an established home here at The Light where he lives with his family whenever he is here. He also owns shares in two companies incorporated in Singapore, *viz*, Venus Productions and Master Lube, and is also a director of Venus Productions.

38 However, he does not own any substantial property of a fixed and permanent nature. Security will not usually be required from a person permanently residing out of the jurisdiction if he has substantial property, whether real or personal, within it, but the property should be of a fixed and permanent nature, which can certainly be available for costs (see *White Book* at para 23/3/11). It is beyond dispute that the first plaintiff does not own any fixed property in Singapore. While his wife and daughter own property here, they are not parties to this action and it is not their assets against which the defendants are able to enforce any costs order in their favour. Moreover, doubts have been raised as to the value of the shares that the first plaintiff owns in Venus Productions and Master Lube.

39 I note also that the second and third plaintiffs have not provided a shred of evidence as to their assets in Singapore. Therefore, it does not appear that the plaintiffs own any assets of substance in Singapore against which costs orders in the defendants' favour can be enforced.

Relative strengths of parties' cases

40 Apart from the existence of fixed and permanent assets within the jurisdiction, other pertinent factors to consider include whether the plaintiff's claim is *bona fide*, has a reasonably good prospect of success, and whether the application for security was being used oppressively with a view to stifling a genuine claim (see [10] above).

41 The assessment of the plaintiff's likelihood of success should not entail a detailed examination of the merits of the plaintiff's case. In *Porzelack* ([36] *supra*), in response to parties' seeking to investigate in considerable detail the likelihood or otherwise of success in the action, Browne-Wilkinson VC expressed the view (at 423) that:

> I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.

I agree.

42 At first blush that one principal ground of the plaintiffs' claim is *non est factum* does not inspire confidence that the first plaintiff will succeed. It would be reasonable for one to entertain doubts as to a seasoned businessman's claim that he had signed several sale and purchase agreements for shares without ascertaining the true consequences and effect of those agreements. The plaintiffs had commenced the Antig Suit (see [21] above) in May 2008 against Antig to restrain Antig from effecting payment of US$3.7m (which, under the 1st S&PA was due for payment in June 2008) to any party other than the plaintiffs. I note that even though the court proceedings in the Antig Suit were ultimately stayed in favour of arbitration by the Court of Appeal on 2 February 2009, the plaintiffs did not commence any arbitration proceedings against Antig. If the plaintiffs had a strong case against Antig, I would have expected them to proceed to arbitration post haste. Instead, the plaintiffs filed the present Suit on 8 February 2010, slightly more than a year after the Court of Appeal had stayed the Antig Suit in favour of arbitration, claiming that, *inter alia*, that sum of US$3.7m – part of the US$12m that had been wrongfully paid out to the second and fourth defendants – had been received by the second defendant in November 2007.

43 However, the defence that the plaintiffs owed the second and fourth defendants money for which reason part of the sale proceeds of the 1st S&PA were directed to be paid to them is equally implausible. To date, the defendants have not produced credible documentary evidence supporting their claims of such debts owed to them by the plaintiffs.

44 On the same day that the plaintiffs filed the present Suit, they obtained an *ex parte Mareva* injunction against the first to ninth defendants. On 17 March 2010, Steven Chong JC set aside the *Mareva* injunction primarily on the basis of the delay on the plaintiffs' part in applying for the injunction: see Chong JC's oral judgment in Suit No 89 of 2010 (Summonses Nos 852, 869, 888 and 923 of 2010) dated 17 March 2010. He was also of the view that the shareholders' circular adduced by the second and fourth defendants to explain the payment of part of the purchase price to them was (at [11]):

> ... intended to create at least a misleading if not a false impression that the 2nd and 4th Defendants were entitled to receive part of the purchase price under the [1st S&PA] because the Plaintiffs were indebted to them. This is one of the troubling features in this case.

Before Chong JC, counsel for the first defendant accepted that the statement in the shareholders' circular was incorrect. Chong JC's concerns as to the merits of the defendants' case were reinforced by the fact that the fifth defendant had produced a Credit Agreement ostensibly to support the existence of the debt owed by the plaintiffs, which agreement in his opinion raised more doubts about the purported debt than supported it. Thus, even though Chong JC was satisfied that the plaintiffs had a good arguable case when he granted the *Mareva* injunction, he noted in his 17 March 2010 oral judgment (at [17]) that there were "troubling features on both sides of the dispute" and numerous issues in both the plaintiffs' claim and the defence in the Suit that remained unresolved.

45 I agree with Chong JC's view that there were doubts as to both the plaintiffs' claim and the defence. In such a situation where the circumstances are so evenly balanced, the plaintiffs' lack of substantial assets in Singapore would ordinarily make it just to order security for costs against them, provided that such an order would not oppressively stifle their claim.

Oppressiveness of application for security for costs

46 Before the court refuses to order security on the ground that it would unfairly stifle any claim, it has to be satisfied that the plaintiff concerned does not have the ability to provide the security (see *Ong Jane Rebecca* ([34] *supra*) at [33]). The onus is on the plaintiff to show that he does not have the ability to provide security, and that this inability would unfairly stifle his claim. While it was submitted on the plaintiffs' behalf that asking for security for costs was just an attempt to stifle their claim, they have not given any credible evidence to back that bare assertion. Indeed, at the hearing of further arguments, Mr Ong conceded that while his clients had the ability to provide the security ordered here in favour of the first, fifth and sixth defendants, his concern was that if all the other defendants applied similarly for security for costs, the total amount of security to be provided in such event would result in their claim being stifled. I take on board that likelihood. Should it transpire that the other defendants similarly apply for security for costs against the plaintiffs, I direct that their applications be fixed before me. Each application should be considered separately, and the likelihood of stifling of the plaintiffs' claims should be assessed separately in each application.

Conclusion

47 Overall, I find that it is just in all the circumstances of the case that the plaintiffs should

provide some security. Moreover, I note that the amount of security awarded is in the complete discretion of the court, which will fix such sum as it thinks just, having regard to all the circumstances of the case (see, *eg*, *Sumio Sakata v Fuminori Paul Naruse* [2004] SGHC 102 at [7]). While counsel for the fifth and sixth defendants have given indications of the amount of work that has been done to date in respect of the Suit, they have not provided indications of the costs incurred by their clients for the work done thus far.

48 Therefore, I order as follows:

(a) In relation to Sum 2961/2010, the application is allowed. The plaintiffs' claims against the fifth and sixth defendants in the Suit are stayed without further order until the plaintiffs provide security for the costs of the fifth and sixth defendants in the Suit, for up to and including the date ordered by the Court for the plaintiffs and defendants to file their Lists of Documents in this Suit, by paying into court, or providing a banker's guarantee in favour of the fifth and sixth defendants (to the reasonable satisfaction of the fifth and sixth defendants) in the amount of $40,000, such security to be provided within seven days from the date of this judgment; and

(b) In relation to RA 234/2010, the appeal is allowed. The plaintiffs' claims against the first defendant are stayed until the plaintiffs provide security for the costs of the first defendant in the Suit, for up to and including the date ordered by the court for the plaintiffs and defendants to file their Lists of Documents in this Suit, by paying into court, or providing a banker's guarantee in favour of the first defendant (to the reasonable satisfaction of the first defendant) in the amount of $35,000, such security to be provided within seven days from the date of this judgment.

49 At the hearing on 12 October 2010, costs were fixed at $3,750 in favour of the fifth and sixth defendants, and at $1,800 in favour of the first defendant. The costs orders shall remain unchanged.