IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 28

Originating Summons No 2 of 2023 (Summonses Nos 11, 589, 606 and 607 of 2023)

Between

(1) Navayo International AG
(2) MEHIB – Hungarian Export Credit Insurance Pte Ltd

… *Plaintiffs*

And

Ministry of Defence, Government of Indonesia

… *Defendant*

JUDGMENT

[Civil Procedure — Costs]

TABLE OF CONTENTS

Navayo International AG and another
v
Ministry of Defence, Government of Indonesia

[2024] SGHC(I) 28

Singapore International Commercial Court — Originating Summons 2 of 2023 (Summonses No 11, 589, 606 and 607 of 2023)
S Mohan J, Sir Jeremy Lionel Cooke IJ, Roger Giles IJ
10 September 2024

4 October 2024 Judgment reserved.

Roger Giles IJ (delivering the judgment of the court):

Introduction

1 Navayo International AG ("Navayo") and MEHIB – Hungarian Export Credit Insurance Pte Ltd ("MEHIB") (collectively, "the Plaintiffs") obtained leave to enforce an arbitral award made against the Ministry of Defence, Government of Indonesia ("the MOD") in a Singapore-seated arbitration. The award was for a total of US$16m (not including interest and costs), with US$10.2m to Navayo and US$5.8m to MEHIB.

2 The MOD applied:

(a) in HC/SUM 589/2023 ("SUM 589"), to set aside the enforcement order;

(b) in HC/SUM 606/2023 ("SUM 606"), for leave to file further affidavits in support of SUM 589;

(c) in HC/SUM 607/2023 ("SUM 607"), for sealing and redaction orders; and

(d) after the proceedings were transferred to the Singapore International Commercial Court ("the SICC"), in SIC/SUM 11/2023 ("SUM 11"), for a retrospective extension of time to file SUM 589.

3 We decided these applications in *Navayo International AG and another v Ministry of Defence, Government of Indonesia* [2024] 6 SLR 1 (the "Judgment"), issued on 22 April 2024. We dismissed SUM 11, and consequentially also dismissed SUM 589. We allowed SUM 606, but dismissed SUM 607. We ordered that the costs of all the applications be paid by the MOD to the Plaintiffs, but since the parties had not been heard on costs, we gave liberty to apply for a different or additional order as to costs. If the parties were unable to reach an agreement on costs, directions would be given for written submissions on costs.

4 No application for a different or additional order was made, and it remained that the MOD pays the Plaintiffs' costs of the applications. Agreement on costs was not reached. This is our determination of the costs of the applications.

Procedural matters

5 Some questions on procedure have arisen in relation to the submissions on costs. We explain them, and the course we have taken.

The exchange of submissions

6 By the end of May 2024, the MOD's solicitors had ceased to act for it. On 31 May 2024, they filed an application to discharge themselves, and on 11 June 2024 an order was made that they cease to act. On the basis that the MOD was a body corporate, it appeared that the prohibition on carrying on the proceedings otherwise than by a solicitor in O 5 r 6(2) of the Rules of Court (2014 Rev Ed) ("ROC 2014") then applied to it, and that because it was a foreign body corporate, this could not be alleviated by a grant of leave to enter an appearance pursuant to O 1 r 9(2) (see *Offshoreworks Global (L) Ltd v POSH Semco Pte Ltd* [2021] 1 SLR 27 ("*Offshoreworks*") at [22], [31] and [34]).

7 At the Court's direction, on 13 June 2024 the MOD was told of O 5 r 6(2) and that it should engage new counsel to make costs submissions on its behalf. The Notice of Appointment of Solicitor was to be filed and served within two weeks. That did not occur.

8 On 1 July 2024 directions were given that the Plaintiffs file and serve their costs submissions within two weeks; that on condition that the MOD engaged new Singapore solicitors, the MOD's reply costs submissions be filed and served within four weeks thereafter; and that the Plaintiffs be at liberty to file and serve reply costs submissions, if any, within one week thereafter.

9 The Plaintiffs filed and served their submissions on 15 July 2024. According to the MOD, it sent its costs submissions by email to the Registry and the Plaintiffs' solicitors on 9 August 2024, although neither the Registry nor the solicitors had a record of their receipt of any such email. The MOD asserted the sending, and provided a screenshot and copies of the email and submissions, in a later email of 19 August 2024.

10 However, the MOD had not engaged new Singapore solicitors, and its submissions were under the hand of First Air Marshall Muhammad Idris, Head of Legal Bureau in the MOD. In the MOD's submissions it was said that the MOD could not engage new Singapore solicitors "due to time constraints and associated expenses",[1] with the explanation that the procurement process for legal consultant services under prevailing Indonesian laws required four months "which is beyond the given timeframe".[2] The MOD asked that it be allowed to file and serve the submissions without representation by Singapore solicitors.

11 In a letter dated 22 August 2024 (the "Plaintiffs' Letter"), the Plaintiffs submitted that the Court should disregard the MOD's costs submissions. The parties were advised that this would be decided together with our substantive costs determination, and the Plaintiffs were directed to file and serve their reply submissions. This they did on 10 September 2024.

The questions

12 In the Plaintiffs' Letter, one basis advanced by the Plaintiffs for disregarding the MOD's costs submissions was that the MOD had not engaged new Singapore solicitors.[3] There were two limbs to the submission:

(a) First, that the filing and service of the costs submissions was on the condition imposed by the Court that the MOD engaged new Singapore solicitors, but this had not been done.[4]

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1 Defendant's Reply Costs Submission dated 9 August 2024 at para 2(c).

2 Defendant's Reply Costs Submission dated 9 August 2024 at para 2(c).

3 Plaintiffs' Letter to Court dated 22 August 2024 at para 13.

4 Plaintiffs' Letter to Court dated 22 August 2024 at para 9.

(b) Second, that if the MOD intended to be self-represented, under O 64 r 3 of the ROC 2014 it was necessary that it file a notice of intention to act in person, which it had not done, and it was not sufficient for the MOD to merely state its intention to be self-represented in an email to the Registry.[5]

We observe, at this juncture, that implicit in the second limb to this submission is an assumption that the MOD *could* be self-represented in the first place: the Plaintiffs did not argue that the MOD could make its costs submissions *only* through Singapore solicitors.

13 It was said also that the MOD's explanation that engaging new solicitors would take four months should not be accepted, since the former solicitors appeared to have been engaged and able to file SUM 589, SUM 606 and SUM 607 in less than three months, and the MOD had been aware from at least 31 May 2024 that it needed to appoint new Singapore solicitors.

14 In the Plaintiffs' Letter, the other basis cited for disregarding the MOD's costs submissions was that they were out of time. The Plaintiffs submitted that the MOD's assertion that its costs submissions had been provided *via* email on 9 August 2024 should be rejected, and that their provision on 19 August 2024 was outside the four weeks stipulated in the Court's directions (which ended on 12 August 2024). To this was added that under the ROC 2014, the filing of a document was required to be by the Court's electronic filing service, that the provision of the costs submissions by email (whether on 9 August 2024 or

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5 Plaintiffs' Letter to Court dated 22 August 2024 at para 11.

19 August 2024) was thereby not in compliance with the ROC 2014, and that for that reason there had been and still was failure to comply with the directions.

The course we have taken

15 If the MOD can carry on the proceedings unrepresented, we would not reject its costs submissions because they were not filed electronically: they were received (at the least on 19 August 2024), albeit by email, and the filing could be regularised. On the limited information we have, we do not feel able to make the serious finding, contrary to the MOD's assertion, that the costs submissions were in fact not sent by email on 9 August 2024, and would instead prefer to attribute their non-receipt by the Registry and the Plaintiffs to an unknown email malfunction. On the same assumption that the MOD can carry on the proceedings unrepresented, the condition that the MOD engage new Singapore solicitors would be unwarranted and open to be set aside, and we would be prepared to have regard to its costs submissions as submissions duly provided.

16 The MOD's representation is another matter. Although the Plaintiffs have not taken the point, in our view the larger question is whether it is correct that the MOD as a department of the Indonesian government is a body corporate as referred to in O 5 r 6(2) of the ROC 2014, unable to provide its costs submissions as part of carrying on the proceedings otherwise than by a solicitor; and this without the availability of a grant of leave by the Court pursuant to O 1 r 9(2) of the ROC 2014. A discretion to receive the costs submissions in the interests of justice can be envisaged, but we are conscious that in *Offshoreworks* there was no suggestion of a discretion beyond that given by O 1 r 9(2).

17 We do not think that, unaided by submissions either for or against the inability of the MOD to make its costs submissions otherwise than through a

solicitor (including their discretionary reception), and when the point has not been taken by the Plaintiffs, we should give a definitive decision on the point. If the MOD can be self-represented, it must file a notice of intention to act in person, and it has not done so. Either because it cannot be self-represented or because, if it can, it has not taken that important step, the MOD's costs submissions should not be received for filing. But the course we have taken is nonetheless to have regard to the MOD's costs submissions, and to explain why, if they were received for filing as submissions which the MOD could make otherwise than through a solicitor, they would not assist the MOD in our costs determination.

The parties' cases

The Plaintiffs' arguments

18 The proceedings began in the High Court as the Plaintiffs' application for leave to enforce the award made against the MOD, and SUM 589, SUM 606 and SUM 607 were filed in the High Court. The proceedings were subsequently transferred to the SICC, and SUM 11 was filed after the transfer. At the time of the transfer, it was ordered that O 110 r 46 of the ROC 2014 should apply to the assessment of post-transfer costs.

19 The Plaintiffs claim a total of $250,887.70, comprising $50,000 for pre-transfer costs; $192,865.18 for post-transfer costs; and $8,022.52 for disbursements.[6]

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6 Plaintiffs' Costs Submissions dated 15 July 2024 at para 6.

Pre-transfer costs

20 The costs regime under O 59 of the ROC 2014 applies. The successful party is entitled to reasonable costs, but costs are assessed having regard to Appendix G of the Supreme Court Practice Directions 2013 ("Appendix G") which provide the generally accepted level of costs for a particular type of case.[7] This is only a guide, and the Court may depart from it or apply an uplift if the circumstances of the case so warrant.

21 The Plaintiffs take the range in Appendix G for a complex or lengthy application fixed for a special hearing, which is $9000–$22,000.[8] They submit that there were three separate applications (SUM 589, SUM 606 and SUM 607) with different subject-matters, and so the costs need to be "extended proportionately" when contested at the same hearing.[9] They say that prior to the transfer, the MOD had filed a total of five supporting affidavits, totalling 1098 pages;[10] that they (the Plaintiffs) filed a combined affidavit in reply of 364 pages;[11] that the work in the review of the MOD's evidence and the reply to it was substantial;[12] and that the claimed amount of $50,000 is under $66,000 which should form the upper end of the scale for the three applications.[13] They support this amount by pointing to the $42,000 awarded in *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter*

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7 Plaintiffs' Costs Submissions dated 15 July 2024 at para 10(a).

8 Plaintiffs' Costs Submissions dated 15 July 2024 at para 14.

9 Plaintiffs' Costs Submissions dated 15 July 2024 at para 14.

10 Plaintiffs' Costs Submissions dated 15 July 2024 at para 15.

11 Plaintiffs' Costs Submissions dated 15 July 2024 at para 16.

12 Plaintiffs' Costs Submissions dated 15 July 2024 at para 16.

13 Plaintiffs' Costs Submissions dated 15 July 2024 at para 17(c).

[2023] 4 SLR 77 ("*Lao Holding*") for the pre-transfer costs for two applications, and the $50,000 awarded in *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 ("*Deutsche Telekom*") for a main application and two related interlocutory applications.[14]

Post-transfer costs

22 The costs regime under O 110 r 46 of the ROC 2014 applies, under which the unsuccessful party is to pay the reasonable costs of the application or proceedings to the successful party.[15] As explained by the Court of Appeal in *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 ("*Senda*") at [51]–[55], the main consideration underlying the SICC costs regime is that a successful litigant should not be unfairly out of pocket for prosecuting its claim in a sensible manner;[16] the starting point is the costs actually incurred by the successful party, which must then be considered for their reasonableness and proportionality having in mind the factors in para 52 of the SICC Practice Directions (effective 2 June 2021) (the reasonableness of the conduct of the parties; the amount or value of the claim; the complexity or difficulty of the subject matter; the skill, expertise, and specialised knowledge involved; the novelty of any questions raised; and the time and effort expended).[17] Once the successful party has provided appropriate evidence of its actual costs in support of the claimed costs being reasonable, the unsuccessful party has the evidential burden of showing that the claimed costs are not reasonable (*Senda* at [75]).

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14 Plaintiffs' Costs Submissions dated 15 July 2024 at para 12.

15 Plaintiffs' Costs Submissions dated 15 July 2024 at para 7.

16 Plaintiffs' Costs Submissions dated 15 July 2024 at para 8.

17 Plaintiffs' Costs Submissions dated 15 July 2024 at para 9.

23 The Plaintiffs have provided a detailed breakdown of their post-transfer costs, with descriptions of the work done and the time spent by members of its team of counsel and their charging rates.[18] They submit that the MOD filed a large number of further affidavits as well as the affidavits in SUM 606 which were initially sealed and later unsealed;[19] that there was the "additional dimension" of the unsealing of those affidavits and making of further submissions in the applications;[20] that a large number of legal authorities were cited, particularly in relation to the significant issues involving s 14 of the State Immunity Act 1979 (2020 Rev Ed);[21] and that, consequently, the hearing of the applications extended over two days, plus further submissions made in writing.[22]

24 The reasonableness of the costs, the Plaintiffs submit, is evident from their being in line with their estimate in the Plaintiffs' Proposed Case Management Plan,[23] but more particularly from their being much less than the MOD's own statement of its incurred costs as at 23 May 2023 at more than $1,900,000 and its then estimate of its overall costs at more than $2,500,000.[24] They bolster their submission by reference to the post-transfer costs ordered in cases which they say involved similar applications, namely, *Lao Holdings* ($180,000) and *Deutsche Telekom* ($330,000).[25]

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18 Plaintiffs' Costs Submissions dated 15 July 2024 at paras 18–19 and Annex A.

19 Plaintiffs' Costs Submissions dated 15 July 2024 at para 21(a).

20 Plaintiffs' Costs Submissions dated 15 July 2024 at para 22.

21 Plaintiffs' Costs Submissions dated 15 July 2024 at para 21(b).

22 Plaintiffs' Costs Submissions dated 15 July 2024 at para 21(c).

23 Plaintiffs' Costs Submissions dated 15 July 2024 at para 24.

24 Plaintiffs' Costs Submissions dated 15 July 2024 at para 25.

25 Plaintiffs' Costs Submissions dated 15 July 2024 at para 12.

Disbursements

25 The Plaintiffs have listed their disbursements, which principally consist of court filing fees, printing and bundling costs, translation fees, hearing transcription fees and a minor amount for document delivery.[26]

The MOD's arguments

26 The MOD's submissions contain a primary submission and a fallback submission.

Costs should be limited to disbursements

27 The primary submission is that costs should be limited to court fees, described as "all fees incurred by the Plaintiff [*sic*] for the Court and received by the Court …"; however, it is added that the MOD "only agrees with the Plaintiff's [*sic*] claim of $8,022.52 in reasonable disbursements for the Applications", and we take that to encompass all disbursements. It is said, without elaboration, that the MOD "justifies this limitation by referencing the proven Part A Fraud, as noted by the [SICC] in Paragraphs 73 and 209 of the SICC Judgment".[27]

Costs of $40,000

28 The fallback submission is that the costs award should be $40,000, comprising pre-transfer costs of $13,000 and post-transfer costs of $27,000 as "reasonable and fair litigation costs as regulated in O 110 r 46 of the ROC 2014

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26 Plaintiffs' Costs Submissions dated 15 July 2024 at para 27.

27 Defendant's Reply Costs Submissions dated 9 August 2024 at para 2(e).

and Appendix G of the Supreme Court Practice Directions 2013".[28] It is said that the pre-transfer period was only approximately 1.5 months and "did not enter into the substance of the case proceedings", with an explanation to the effect that the $13,000 represented reasonable costs.[29] As to the post-transfer costs, it is said that the MOD "determines this lower limit for all three [*sic*] applications by referring to Appendix G, considering it a sensible and reasonable cost".[30] The submission then refers "in this regard" – it seems referring to both the pre-transfer costs and the post-transfer costs – to ranges of costs for various applications in Appendix G and a breakdown of the times said to have been taken during the hearing for each of SUM 607, SUM 589 and SUM 11.[31] The derivation of the $13,000 and/or the $27,000 from these ranges and times, however, is not made clear.

29 The MOD's response is by proposing these alternative amounts; it does not address the reasons given by the Plaintiffs for their claimed amounts or question the post-transfer actual costs as described in the Plaintiffs' breakdown.

Our decision

The MOD's submission that costs be limited to disbursements

30 The MOD's reference to "the proven Part A Fraud" is based on [209] of the Judgment where, in the course of considering the MOD's prospects of success in SUM 589, we stated that:

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28 Defendant's Reply Costs Submissions dated 9 August 2024 at para 2(f).

29 Defendant's Reply Costs Submissions dated 9 August 2024 at para 2(f)(1).

30 Defendant's Reply Costs Submissions dated 9 August 2024 at para 2(f)(2).

31 Defendant's Reply Costs Submissions dated 9 August 2024 at para 2(g).

> Going first to the procurement, execution, and performance of the Navayo Agreement, we accept that on the face of the materials presented to us, the MOD has shown a well arguable case of fraud in those respects; when we refer to performance of the Navayo Agreement, we include the obtaining of the COPs.
> …

31 In our judgment, the MOD's reliance on this for its costs submission is misconceived. To begin with, we did not find a *proven* case of fraud but merely an *arguable case* of fraud; but more to the point, the arguable case of fraud in the respects mentioned was not the true question in the prospects of success of SUM 589, and did not bring success to the MOD in the applications.

32 As we went on to explain in the Judgment at [210]–[213], fraud in the procurement, execution and performance of the Navayo Agreement would be a matter going to the MOD's defence against the claims in the arbitration, but it was not the question in SUM 589, which was one pertaining to the prospects of success in setting aside the enforcement order on the ground that the enforcement of the award would be contrary to the public policy of Singapore. Thus, we said at [213] of the Judgment that:

> … there must be such a connection between the fraud or corruption and the making of the arbitral award that, should the successful party seek to enforce that award in Singapore, the Singaporean conscience would be shocked if its enforcement were permitted. Whether the connection is sufficient or insufficient will depend on the particular facts of each case, but more to the point, it is in our view not enough for the MOD to show an arguable case of fraud in the procurement, execution, and performance of the Navayo Agreement. That was – or should have been – a matter for the Arbitration (and specifically, raised as a defence of the claims advanced in the Arbitration). But plainly, it was not.

33 We went on to enquire into the MOD's allegations of fraud in the conduct of the arbitration, more specifically, why a case of fraud in the procurement, execution and performance of the Navayo Agreement was not

mounted successfully (or at all) by the MOD (see Judgment at [214]). We concluded that the MOD had very little chance of success in SUM 589 because we considered that there was inadequate evidence to attribute the inadequacy of the MOD's defence in the arbitration to a fraudulent conspiracy in its conduct (see Judgment at [218]), and that enforcing an award obtained in such circumstances would not shock the conscience and be regarded as contrary to Singapore's public policy (see Judgment at [227]).

34 The MOD's submission is the blunt contention that the Plaintiffs should receive only their disbursements because there was fraud in the procurement, execution, and performance of the Navayo Agreement: that that fraud in and of itself disentitles the Plaintiffs to anything more. If there was that fraud – and we repeat that our acceptance was not of *proven* fraud but of an *arguable case* of fraud on the face of the material then before us – that was a matter for the arbitration. We were not persuaded of fraud in *obtaining the award*, as a matter going to offence to the public policy of Singapore in the event of the award's enforcement. In our judgment, there is no warrant for the Plaintiffs to be penalised in the costs of the applications for their conduct in the matters that should have been the subject of the arbitration, and our acceptance of an arguable case of fraud in the procurement, execution, and performance of the Navayo Agreement is no reason to restrict the Plaintiffs' costs of the applications to their disbursements.

Pre-transfer costs

35 The nub of the MOD's submission is that the pre-transfer costs were for work which "did not enter into the substance of the case proceedings".[32] It is

[32] Defendant's Reply Costs Submissions dated 9 August 2024 at para 2(f)(1).

correct that a greater volume of material in the MOD's case came after the transfer of the proceedings to the SICC, and that the work preceded the filing of SUM 11 and the preparation for and conduct of the hearing of the applications. But it was nonetheless not insubstantial, and should bring reasonable costs according to the work done and with regard to Appendix G. We do not think the MOD's proposed limitation of $13,000 appropriately reflects the work done.

36 That said, the Plaintiffs' proposal of a discounted figure from a total of the upper limits of the Appendix G range for each of SUM 589, SUM 606 and SUM 607 has difficulties. While SUM 589 would attract the range for a complex or lengthy application fixed for a special hearing, each of SUM 606 and SUM 607 was of less length or complexity. Further, the Plaintiffs' approach fails to take into account the fact that the range prescribed in Appendix G refers to the costs of an application *as a whole*, as opposed to merely a *part* of the application where, as in the present case, a distinction is drawn between pre- and post-transfer costs. The pre-transfer work, while not insubstantial, did not dispose of the applications in their entirety. In our view, an appropriate application of the guidance in Appendix G is to take an amount in the mid-range for SUM 589 and at the lower end of the range for each of SUM 606 and SUM 607, and doing so, we arrive at a total amount of $33,000 for pre-transfer costs.

Post-transfer costs

37 The MOD's submission takes Appendix G as a guide to the appropriate post-transfer costs. This is also misconceived.

38 As explained by the Court of Appeal in *Senda* (at [46]–[47]), regard to Appendix G for an objective level of costs for the particular type of case aids

the policy of access to justice. But as the court further explained (at [51]), the SICC costs regime under O 110 r 46 of the ROC 2014 is based on a different rationale of ensuring that a successful litigant should not be unfairly out of pocket, subject to reasonableness and proportionality. The difference between these two paradigms was elucidated by the court as follows (at [52]):

> … given the subjective starting point from which costs are assessed under O 110 r 46, this test of reasonableness will be directed at the costs that had in fact been incurred in the particular case, and not at what an appropriate level of costs to be incurred might be in a generic sense for a type of case similar to the one at hand. This is self-evidently different from the tests of reasonableness applied in the context of O 59 …

39 While regard to Appendix G as a consideration may not be excluded in arriving at costs under the SICC costs regime, the focus is on the successful litigant's actual costs as shown by the litigant and the factors in the SICC Practice Directions, and it is difficult to envisage a case in which a party's actual costs otherwise considered to be reasonable and proportionate should be modified by reference to Appendix G. It is thus wrong in principle to take Appendix G as the guide to post-transfer costs, and in the present case we do not think that the ranges of costs there should carry any weight in our determination of the post-transfer costs.

40 The MOD has not attempted to show, by addressing the work done, time taken or charging rates in the Plaintiffs' breakdown of their actual costs, that the costs claimed by the Plaintiffs are unreasonable. The significantly higher costs incurred by the MOD may in part be explained by its greater work in the provision of many more affidavits in the applications, but even allowing for that, comparison with those costs supports the reasonableness of the Plaintiffs' costs. We do not for ourselves see occasion to regard them as unreasonable, and given

the amount at stake and the legal and factual complexity of the applications, we do not consider them disproportionate.

41 We have considered whether the arguable case of fraud, as an issue in the applications which was found adversely to the Plaintiffs, should bring any reduction in the recoverable costs. We do not regard it as a discrete issue warranting separate costs consideration – it was part of the MOD's case on which it failed in the result. In our view, therefore, the post-transfer costs should be the claimed amount of $192,865.18.

Disbursements

42 There is no occasion to decline the amount claimed by the Plaintiffs for disbursements, which in any event the MOD appears to accept. We thus grant disbursements of $8,022.52.

Conclusion

43 For the reasons explained above, we accept the amounts claimed by the Plaintiffs, save for a limited reduction to the pre-transfer costs. We thus determine the costs of the applications to be paid by the MOD to the Plaintiffs at $233,887.70.

S Mohan
Judge of the High Court

Sir Jeremy Lionel Cooke
International Judge

Roger Giles
International Judge

Mahesh Rai s/o Vedprakash Rai, Yong Wei Jun Jonathan and Melissa Ng Li Ling (Drew & Napier LLC) for the first and second plaintiffs;
The defendant unrepresented;