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

[2024] SGHCR 11

Originating Application No 435 of 2023 (Summons No 2238 of 2024)

Between

SBS Holdings, Inc

… *Claimant*

And

(1) Anant Kumar Choudary
(2) Vivek Shukla
(3) Pravin Chand Rai
(4) SBS Transpole Logistics Pte Ltd (in liquidation)

… *Defendants*

(1) A2S Logistics Pte Ltd
(2) Shalini Choudary

… *Non-parties*

GROUNDS OF DECISION

[Civil Procedure — Costs — Security]

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SBS Holdings, Inc
v
Anant Kumar Choudary and others
(A2S Logistics Pte Ltd and another, non-parties)

[2024] SGHCR 11

General Division of the High Court — Originating Application No 435 of 2023 (Summons No 2238 of 2024)
AR Perry Peh
13 September, 2 October 2024

11 October 2024

AR Perry Peh:

Introduction

1 HC/SUM 2238/2024 ("SUM 2238") was an application by the second non-party in HC/OA 435/2023 ("OA 435"), Ms Shalini Choudary ("Ms Choudary") for security for costs ("SFC") against the claimant in OA 435, SBS Holdings Inc ("SBS"), a company registered in Japan. Ms Choudary seeks SFC in respect of a trial in which SBS is claimant and she, her husband Mr Anant Kumar Choudary ("Mr Choudary") and A2S Logistics Pte Ltd ("A2S Singapore") are the defendants. The issue to be determined at trial is whether shares of A2S Singapore held by Ms Choudary (who is also the sole registered shareholder of the company) are in fact beneficially owned by Mr Choudary. The trial had arisen from enforcement proceedings taken out by SBS to enforce a judgment against Mr Choudary as well as other defendants, to which Ms

Choudary was not part. In those proceedings, SBS sought the sale and seizure of Ms Choudary's shares on the basis that they were beneficially owned by Mr Choudary.

2 As SBS is a company registered in Japan and thus "ordinarily resident out of the jurisdiction", it was undisputed that the court's discretion to order security for costs under O 9 r 12(1)(*a*) of the Rules of Court 2021 ("ROC 2021") had been enlivened. That being so, the only issue in dispute was whether it is just for the court to order SFC in Ms Choudary's favour, having regard to all the relevant circumstances of the case.

3 Having considered the arguments, I was satisfied that SFC should not be ordered. I was unpersuaded that Ms Choudary would face difficulty in recovering from SBS any costs ordered in her favour in the Trial, given SBS's strong financial standing (a point which Ms Choudary did not seriously dispute) and the extent to which SBS shared connections with Singapore through business operations via its wholly owned subsidiary SBS Logistics Pte Ltd ("SBS Logistics") which, when taken together, suggest that SBS would voluntarily pay any costs ordered in the trial. I was also satisfied that SBS's shares in SBS Logistics are assets of a fixed and permanent nature that adequately secured Ms Choudary for her costs of the trial. One other feature of this case which reinforced the conclusion that SFC should not be ordered is my view that, for the purposes of the trial, Ms Choudary cannot be characterised as a defendant "forced into litigation at the election of someone else against adverse costs consequences of that litigation" (see *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 ("*SIC College*") at [75]; *SW Trustees Pte Ltd (in compulsory liquidation) and another v Teodros Ashenafi Tesemma and others (Teodros Ashenafi Tesemma, third*

party) [2023] 5 SLR 1484 ("*SW Trustees*") at [20]). I therefore dismissed SUM 2238. These are my full reasons.

Background

4 In February 2019, Mr Choudary as well as other parties ("the Arbitration Claimants") commenced arbitration against SBS. The claims were dismissed, and the arbitral tribunal ordered the Arbitration Claimants to pay to SBS various sums ("the Award"). The Arbitration Claimants failed to comply with the terms of the Award. SBS then commenced OA 435 to enforce the award pursuant to s 19(1) of the International Arbitration Act 1994 read with O 48 r 6(1) of the ROC 2021 and in April 2023, obtained a judgment in the terms of the Award in HC/JUD 233/2023 ("JUD 233").[1]

5 As Mr Choudary (being one of the Arbitration Claimants and the defendants to JUD 233) failed to comply with JUD 233, SBS applied for an enforcement order in HC/EO 54/2023 ("EO 54") for among other things, the seizure and sale of all shares in A2S Singapore which records from the Accounting and Corporate Regulatory Authority show are registered in Ms Choudary's sole name ("the Shares"), to satisfy the judgment debt in JUD 233 ("the Judgment Debt").[2] In its supporting affidavit for EO 54, SBS stated that, Mr Choudary and Ms Choudary had been equal shareholders of A2S Singapore when it was incorporated, but on 27 December 2022, just 5 days before the Award was issued, Mr Choudary transferred his 50% shareholding to Ms Choudary, making the latter the sole shareholder of A2S Singapore.[3] As noted by the Assistant Registrar ("AR") who dealt with EO 54, SBS's case was that

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1 Respondent's written submissions at paras 8–11.

2 Respondent's written submissions at para 12.

3 2nd affidavit of Fujimaki Genta ("FG-2") at paras 25–26.

the Shares, despite being registered in Ms Choudary's sole name, are beneficially owned by Mr Choudary. The AR granted EO 54 for the seizure and sale of the Shares but directed that SBS serve the enforcement order on Ms Choudary so that she had notice of the enforcement order and could make her objections if she so wished.[4]

6 In September 2023, the Shares were seized by the Sheriff. In October 2023, Ms Choudary and A2S Singapore filed Notices of Objection. Pursuant to the Sheriff's directions, they filed their respective applications in HC/SUM 3460/2023 ("SUM 3460") and HC/SUM 3461/2024 ("SUM 3461") for the release of the Shares. The AR who heard SUM 3460 and SUM 3461 considered that there were serious disputes of fact among the parties on the issue of whether the Shares are beneficially owned by Mr Choudary and ordered that it be tried ("the Trial"), with SBS as the claimant to the Trial and Mr Choudary, Ms Choudary and A2S Singapore as the defendants (collectively, "the Trial Defendants").[5]

7 The parties subsequently attended a Registrar's Case Conference ("RCC") on 30 May 2024 and took directions from the court regarding the Trial, including directions for the filing of pleadings and lists of witnesses. SBS filed its Statement of Claim on 14 June 2024, and the Trial Defendants (including Ms Choudary) filed their respective Defences on 28 June 2024. Ms Choudary's solicitors made a request for SFC to SBS's solicitors on 10 July 2024, which the latter refused in a response on 15 July 2024.[6] At an RCC on 17 June 2024, the court gave further directions for the production of documents and requests

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4 Respondent's written submissions at para 13.

5 Respondent's written submissions at paras 15–19.

6 Respondent's written submissions at paras 24–25.

for further and better particulars. At this hearing, Ms Choudary sought, and obtained, permission to file an SFC application against SBS, which it did by taking out SUM 2238.

The parties' submissions

8 In considering whether SFC should be ordered, a two-stage framework is to be applied: (a) first, whether the court's discretion to order SFC under O 9 r 12(1) of the ROC 2021 has been *enlivened*; and (b) secondly, whether it is *just* to order SFC having regard to all the relevant circumstances (see *Cova Group Holdings Ltd v Advanced Submarine Networks Pte Ltd and another* [2023] SGHC 178 ("*Cova Group*") at [16]).

9 For the purposes of SUM 2238, SBS accepted that the court's discretion to order SFC under O 9 r 12(1)(*a*) had been enlivened since it was not in dispute that SBS, being a Japanese company, is ordinarily resident out of Singapore.[7] The parties' submissions therefore focused solely on whether it is just for SFC to be ordered, having regard to the circumstances of the case.

10 SBS's counsel submitted that SFC should not be ordered, for the following reasons. First, SBS is a company listed on the Tokyo Stock Exchange with strong financial standing, and is *capable* of satisfying any adverse costs orders made against it in the Trial and further, there is no reason why SBS would risk its global reputation as well as interruption to its business operations in Singapore, conducted through SBS Logistics, by failing to comply with any such costs orders. Secondly, SBS has substantial assets within Singapore which Ms Choudary can eventually turn to in satisfaction of any costs orders obtained

7 Notes of Arguments, 3 September 2024, p 2 lines 14–16.

– these were SBS's shares in SBS Logistics, as well other assets, including the Judgment Debt and an arbitral award standing at the sum of JPY 2.5b and S$1m which SBS Logistics had obtained against two companies ("the ARB 114 Award"). Besides these assets, SBS also had substantial business operations and assets in other jurisdictions, such as India and Malaysia, with which Singapore enjoyed reciprocal regimes for the enforcement of judgments, and to that extent, Ms Choudary would not face difficulty in enforcing costs orders against SBS. Thirdly, SBS had a *bona fide* claim against the Trial Defendants, as the court's decision to grant EO 54 for the sale and seizure of the Shares meant that the court had found on a *prima facie* basis that the Shares are indeed beneficially owned by Mr Choudary. Fourthly, there had been significant delay on Ms Choudary's part in taking out SUM 2238 – from the time SUM 3460 and SUM 3461 were heard, the possibility of a trial would have been alive in Ms Choudary's mind, and so once directions regarding pleadings and lists of witnesses were given by the court at the RCC on 30 May 2024, Ms Choudary ought to have applied for SFC. Finally, and relatedly to the last point, SUM 2238 lacks *bona fides* because, since the information pertaining to SBS as well as SBS Logistics' finances are all a matter of public record of which Ms Choudary is aware, Ms Choudary clearly knew that SBS could satisfy any costs orders made in her favour, and yet she chose to apply for SFC, and this suggests that the application was brought for collateral purposes.

11 Ms Choudary's counsel submitted that the court should order SFC for the following reasons. First, SBS has no assets of a fixed and permanent nature within Singapore against which any adverse costs orders can be enforced: (a) the value of SBS's shares in SBS Logistics is uncertain, and indeed, there were doubts on this given that SBS Logistics had suffered a loss of S$644,780 for the financial year ("FY") ending 31 December 2022, that being the most recent FY

for which audited financial statements of SBS Logistics are available; (b) as for the Judgment Debt and the ARB 114 Award, counsel submitted that these were not assets which the court should have regard to in determining if Ms Choudary is adequately secured for her costs of the Trial, and requiring Ms Choudary to turn to the Judgment Debt and/or the ARB 114 Award in satisfaction of any costs orders she obtains in the Trial is effectively to substitute one paper order (the costs order) with another paper order (the judgment debt or the unsatisfied award). Thirdly, it is not open to SBS to rely on the availability of reciprocal regimes for enforcement of judgments as a reason for the court to *not* make an order for SFC where, in the first place, SBS had not identified what these assets are, and in any case, the mere availability of such reciprocal regimes for enforcement did not in and of itself preclude the court making an order for SFC. Fourthly, the supposedly strong financial standing of SBS is neither here nor there – the fact that there is nothing to indicate that SBS would eventually *refuse* to pay any adverse costs order is not a factor that should weigh in favour of the court *not* ordering SFC. Fifthly, and relatedly, SBS would not be prejudiced by a grant of SFC in Ms Choudary's favour since SBS's claim would not be stifled by it having to put up SFC, in view of SBS's financial standing and its stated willingness (through submissions in SUM 2238) to comply with any adverse costs orders made in the Trial. Finally, there was no delay on Ms Choudary's part in the taking out SUM 2238, and she was entitled to consider the pleadings and issues arising in the Trial and arrive at an estimate of her costs exposure, before applying for SFC.

The applicable principles

12 The law on SFC is grounded on the wider public policy of balancing access to the courts for certain high-risk categories of claimants against the need to ensure defendants get their costs if they prevail in the litigation (see *Tjong*

Very Sumito and others v Chan Sing En and others [2011] 4 SLR 580 ("*Tjong Very Sumito*") at [42]). In a case where the claimant is ordinarily resident out of Singapore, what an award of SFC seeks to do is to guard against the delay or expense that might arise where the defendant seeks to enforce its costs orders against the foreign claimant, by ensuring that there is a fund within the jurisdiction against which any costs orders obtained by the defendant against the claimant can be enforced without the risks, expenses and delay of foreign enforcement (see *Tjong Very Sumito* at [39]; *Ooi Ching Ling Shirley v Just Gems Inc* [2002] 2 SLR(R) 738 ("*Shirley Ooi*") at [19]; see also *Logue v Hansen Technologies Ltd* [2003] FCA 81 at [18]).

13 However, it is not an inflexible or rigid rule that a claimant ordinarily resident out of Singapore has to provide SFC, and the court has a complete discretion as to whether to order SFC, after considering all the relevant circumstances (see *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 (*"Wishing Star (CA)*") at [14]). However, where the circumstances are *evenly balanced*, it would ordinarily be just for SFC to be ordered against a foreign claimant (see *Wishing Star (CA)* at [14]).

14 The case law has identified the following factors as germane to the analysis of whether it is just for SFC to be ordered (see *Cova Group* ([8] above) at [18]):

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

(b) the claimant's financial standing;

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

(d) the relative strength of the parties' cases;

(e) whether the application for SFC has been taken out oppressively to stifle the claimant's action, or for tactical reasons, having regard to the timing at which the application is brought and whether there has been delay.

15 In *SW Trustees* ([3] above) (at [19]–[22]), the High Court explained that each of the factors above can be rationalised under the three key purposes underlying the provision of SFC:

(a) to protect the defendant, who cannot avoid being sued, by enabling him to recover costs from the plaintiff out of a fund within the jurisdiction in the event he prevails in the litigation – I refer to this as the "protective rationale";

(b) to ensure, within the limits of protecting the defendant, that the plaintiff's ability to pursue his claim is not stifled – I refer to this as the "access to justice" rationale since this ultimately relates to the need to ensure that the defendant should not be seeking SFC with the aim of "quell[ing] the plaintiff's quest for justice" (see *SW Trustees* at [21]); and

(c) to maintain a sense of fair play between the parties amidst the cut-and-thrust of civil litigation – I refer to this the "procedural fairness" rationale as it ultimately relates to the need to ensure that SFC is not deployed in a manner that occasions procedural unfairness to the other party in the litigation or in a manner which results in the applicant for SFC enjoying an unfair procedural advantage over the other (see *SW Trustees* at [22]).

16 In my respectful view, the protective rationale can be seen as the primary consideration underlying the analysis of whether it is just for SFC to be ordered. The circumstances which engage the protective rationale very much overlap with those that enliven the court's discretion to order SFC, such as the fact of the claimant's foreign residence (which enlivens discretion) and consequently, the likely absence of a fund within the jurisdiction against which costs can be enforced (which is a factor in favour of the court granting SFC). On the other hand, the access to justice and procedural fairness rationales come into play and operate as a check on the court's discretion, where the court is *prima facie* inclined to exercise this in the applicant's favour and order SFC, in view of the protective rationale. Therefore, factors going toward the access to justice and procedural fairness rationales have an impact on the weight which the earlier factors relating to the protective rationale bear in the analysis of whether it is just for SFC to be ordered (see, for example, *Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017 ("*Zhong Da Chemical*") at [13]). To illustrate, in the context of SFC sought under s 388 of the Companies Act 1967, even if the court is satisfied that it is necessary to protect the defendant from an impecunious corporate claimant likely unable to pay costs, the court may nevertheless exercise its discretion *against* granting SFC where it is satisfied that the company's claim is *bona fide* and has a reasonable prospect of success, and that the application for SFC had been taken out in bad faith (see, for example, *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2001] 3 SLR(R) 208 at [9] and [11]–[15]).

The issues for decision

17 The issue to be decided in SUM 2238 is whether it is just to order SFC, having regard to the following circumstances highlighted by the parties' submissions:

(a) SBS's financial standing;

(b) the assets identified by SBS – namely, its shares in SBS Logistics, as well as the Judgment Debt and the ARB 114 Award;

(c) the *bona fides* or merits of SBS's claim in the Trial;

(d) the timing at which Ms Choudary had taken out the SFC application in SUM 2238;

(e) Ms Choudary's decision to take out SUM 2238, despite what she knew, or ought to have known, about SBS's financial position and its ability to pay costs; and

(f) that ordering SFC in Ms Choudary's favour will not stifle SBS's claim in the Trial given SBS's ability to provide SFC.

18 I considered the circumstances raised in the parties' submissions and their bearing on the question of whether SFC is to be granted in terms of the following five broad issues:

(a) Whether SBS's financial standing is relevant to the question of whether SFC should be ordered, and if so, how? This raises two questions:

(i) Whether SBS's financial standing, which showed its ability to pay Ms Choudary's costs for the Trial, is a factor in favour of the court *not ordering* SFC?

(ii) Whether SBS's ability to furnish SFC if ordered to do so – by virtue of its financial standing – is a factor in favour of the court *ordering* SFC?

(b) Whether Ms Choudary enjoyed ease of enforcement within the jurisdiction of adverse costs orders that she might come to obtain against SBS in the Trial, having regard to the assets identified by SBS.

(c) The relative strength of the parties' cases, and specifically, the merits of SBS's claim in the Trial.

(d) Whether Ms Choudary had been guilty of delay in taking out SUM 2238, and if so, whether SUM 2238 was taken out for tactical reasons.

(e) Whether Ms Choudary had taken out SUM 2238 for collateral purposes, given what she knew or ought to have known about SBS's financial position and its ability to pay costs.

The relevance of SBS's financial standing

19 I do not think that SBS's relatively strong financial standing, and consequently, its *ability* to (a) furnish SFC if ordered in SUM 2238 and (b) pay costs if ordered in the Trial, is in dispute.[8] SBS is a company listed on the Tokyo stock exchange and based on the publicly available documents about its financial information, its finances are sound,[9] and Ms Choudary did not contend otherwise; her main complaint is that SBS does not have meaningful assets in Singapore to satisfy any costs orders she might come to obtain in the Trial.[10]

20 As mentioned earlier, SBS's strong financial standing is relevant in connection with two issues: (a) first, whether it weighs in favour of the court

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8 Applicant's written submissions at para 38.

9 Respondent's written submissions at paras 43–44.

10 4th affidavit of Shalini Choudary ("SC-4") at paras 14–15.

not ordering SFC as it demonstrates SBS's ability to pay Ms Choudary's costs for the Trial; and (b) secondly, whether it weighs in favour of the court *ordering* SFC as it demonstrates SBS's ability to furnish SFC if ordered. I consider each of these issues in turn.

Whether SBS's financial standing weighs in favour of the court not ordering SFC

21 In its submissions that a foreign claimant's financial standing is relevant to the issue of whether SFC should be ordered, SBS's counsel relied on *Wishing Star Ltd v Jurong Town Corp* [2004] 1 SLR(R) 1 ("*Wishing Star (HC)*") (at [6]),[11] where the High Court, in upholding the decision of an AR to not order SFC, made the following observations:

> … The plaintiffs are, after all, a reputable Hong Kong company with business interests in Singapore and there was no reason to suppose that a company like that would not pay its costs if ordered to do so. Any petulant refusal to pay costs at the end of trial may be too high a price for a viable commercial company because the ensuing loss of reputation on that account would probably be far more severe than paying the costs.

22 Reading the above extract with the remainder of the paragraph in which it was found, in my view, I do not think the issue before the court in *Wishing Star (HC)* was that of the plaintiffs' financial means *per se*; those observations had been made in response to a submission by counsel, which implied that the plaintiffs in that case were not honest and hence unlikely to voluntarily comply with any costs orders made, and so for that reason the court ought to order SFC. The Court of Appeal differed from the High Court on this point, and considered the actual intention or willingness of the plaintiffs to pay costs to be a neutral factor in the analysis, as there was no objective evidence which showed a lack

[11] Respondent's written submissions at paras 42–43.

of intention by the foreign claimant to pay costs, though it ultimately agreed with the High Court's decision that SFC should not be ordered (see *Wishing Star (CA)* ([13] above) at [22]).

23 What the court is ultimately concerned with at this stage of the analysis is whether it is just for SFC to be ordered, having regard to the circumstances of the case. I do not think there is a fixed list of circumstances which the court should be limited to; all that the court must be satisfied of is that any such circumstance cited as a reason for or against the provision of SFC ultimately relates to one of the threefold rationales underlying the court's discretion as to whether SFC should be ordered (see [15]–[16] above), and thus is a relevant consideration. I therefore did not think that the absence of case law or decided authority in which a foreign claimant's financial standing had been regarded as a factor weighing in favour of the court not ordering SFC, is necessarily an impediment to SBS's counsel making good the argument. The significance of SBS's financial standing in the analysis of whether SFC should be ordered is ultimately determined with reference to, and in the context of, the present case.

24 The court must ultimately take a common-sense approach and look to the realities of the case in determining if the defendant would face difficulties in recovering its costs from the claimant (see, on a related point, *Hoogland Hendricus Antonius v Gino L Lin and another* [2008] HKCU 826 ("*Hoogland*") at [21]). That is why the law affords to the court a discretion to decide whether or not to order SFC, even where that discretion has been enlivened based on criteria prescribed in legislation. In the context of a claimant ordinarily resident out of jurisdiction, the difficulty in costs recovery lies in the fact that such a claimant can readily and easily uproot itself from the jurisdiction (in which the legal proceedings are conducted and in which any adverse costs orders are made) and move itself and its assets to the location of its ordinary residence

(see, for example, *Tjong Very Sumito* ([12] above) at [60]). Therefore, a relevant consideration in the court's exercise of discretion must be the difficulty of any such attempt by the claimant, which can be measured by reference to the extent of connections which the foreign claimant shares with the jurisdiction. The greater the extent of these connections, the more difficult it would be for the claimant to uproot itself at whim to avoid the consequences of costs orders made against it, and furthermore, assuming that the claimant has the requisite financial means, the claimant who is presumably keen to avoid disruption to its affairs within the jurisdiction is likely to pay costs voluntarily in the event it is ordered to do so. This renders the protective rationale less relevant and weighs in favour of the court not ordering SFC.

25 In this case, I find that there are significant connections between SBS and Singapore through its wholly owned subsidiary, SBS Logistics. SBS Logistics was incorporated in August 2015 (nearly 9 years ago) and is the vehicle through which SBS's business operations in Singapore are conducted.[12] Although, as Ms Choudary's counsel pointed out, the latest available audited financial statements did show that SBS Logistics incurred higher losses of $644,780 for the FY ending 31 December 2022, as compared to the losses of $433,933 incurred in the previous FY,[13] this should be viewed in the context of its overall revenue of $14,753,031 and its gross profit of $2,604,894 for FY 2022.[14] Overall, there was nothing before me to suggest that SBS Logistics is ceasing to continue operating as a going concern or is likely to do so, and Ms Choudary did not take the position that SBS Logistics is ceasing or intending to cease its business operations in Singapore. In the event SBS fails to comply with

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12 5th affidavit of Fujimaki Genta ("FG-5") at paras 13–14.

13 Applicant's written submissions at para 34.

14 FG-5 at p 80.

any costs orders made or fails to satisfy any judgment made in Ms Choudary's favour in the Trial, its shares in SBS Logistics, being SBS's assets, would be the subject of enforcement proceedings. The connections arising from SBS Logistics are significant because the divestment of SBS's interests in SBS Logistics can have wider implications in terms of SBS's corporate strategy and business structure as a whole, especially since SBS Logistics is the vehicle through which SBS carries out its business operations in Singapore. The quantum of costs which SBS is likely to be ordered to pay in the Trial (measured with reference to the amount of SFC sought in SUM 2238), when compared with the potential expense SBS would likely to incur if it were to divest its business interests in SBS Logistics entirely in order to remove any connection between itself and the jurisdiction, suggests that the latter is quite unlikely. For this reason, the connections arising from SBS Logistics are significant. Having regard to this, as well as SBS's financial standing and means, I agreed with the submission by SBS's counsel that SBS is likely to voluntarily pay any costs ordered against it in the Trial, and accordingly, I was not persuaded that Ms Choudary would face difficulties in recovering from SBS any costs ordered in her favour in the Trial. I should emphasise that this is a distinct point from the availability of SBS's assets in Singapore for the enforcement of adverse costs orders (see [34] below), and the point here is simply that SBS is likely to voluntarily pay such costs, given it likely has the financial means to do so, and the extent of the connections which it shares with Singapore as a jurisdiction.

Whether SBS's ability to furnish SFC weighs in favour of the court ordering SFC

26 Based on the decided case law, where the claimant is of poor financial standing, that tends to weigh in favour of the court *not ordering* SFC because the claimant's impecuniosity, coupled with its prospects of success against the

defendant or the *bona fides* of its claim, renders the grant of SFC oppressive to the claimant and quells its access to justice (see *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and another* [1999] 1 SLR(R) 112 ("*Creative Elegance*") at [22]–[23]). Therefore, a claimant's financial standing has been viewed as relevant in connection with the access to justice rationale, and it allows the court to assess if extending the protection of SFC to the defendant would be oppressive to the claimant.

27 The question here is whether the *converse* is true – that is, the court should be inclined to order SFC where the claimant is of strong financial standing and has the means to furnish SFC, because its claim would not be stifled by an order for SFC. I was not persuaded that this is correct.

28 From first principles, the claimant's ability to furnish SFC does not speak to the protective rationale, which is concerned with whether the defendant has to be protected against costs consequences of the litigation commenced by the claimant. Therefore, it cannot, as a standalone factor, weigh in favour of the court ordering SFC. Instead, the claimant's ability to furnish SFC is a consideration which goes towards the access to justice rationale because it speaks to whether an order for SFC would be oppressive to the claimant and stifle its claim (see *SW Trustees* ([3] above) at [21]). As I suggested earlier, the access to justice rationale operates as a check on the court's discretion, where the court is *prima facie* inclined to exercise this in favour of the defendant/applicant for SFC, in view of the protective rationale. Thus, where the access to justice rationale is engaged, the court is disinclined to order SFC where it might have been persuaded otherwise. Where it is not engaged, that either operates as a neutral factor in the analysis or serves to reinforce the court's decision to order SFC, if the protective rationale has been engaged in the first place. Therefore, the fact that the access to justice rationale is not engaged in a

particular case does not, as a standalone consideration, justify the court ordering SFC in the defendant's favour.

29 As explained, I was not persuaded that Ms Choudary would face difficulties in recovering costs from SBS in the event she succeeds in the Trial (see [25] above). As I will later explain, I was also satisfied that Ms Choudary is adequately secured for any such costs by virtue of SBS's shares in SBS Logistics (see [40] below). In other words, I find that the protective rationale is not engaged in this case *vis-à-vis* Ms Choudary, and this is not a case where the circumstances are "evenly balanced" (see *Wishing Star (CA)* ([13] above) at [14]), and so SFC should not be ordered. Therefore, the issue of SBS's ability to furnish SFC (and more broadly, the access to justice rationale) does not come into play at all. I therefore did not consider SBS's ability to furnish SFC as a relevant factor in the assessment of whether SFC should be ordered. On the other hand, if I had found the protective rationale to be engaged *vis-à-vis* Ms Choudary, the fact that SBS has the requisite means to furnish SFC would go towards reinforcing the conclusion that SFC should be ordered, because ordering SFC would not have quelled SBS's access to justice.

Ease of enforcement of costs orders

30 Based on case law, the following two factors are relevant in the assessment of whether the defendant/applicant of SFC enjoys ease of enforcement of costs orders against the claimant, in the event it succeeds at trial:

(a) whether there exists a mechanism for the reciprocal enforcement of judgments in the jurisdiction in which the claimant is ordinarily resident (see, for example, *Creative Elegance* at [22]); and

(b) whether the claimant has assets of a fixed and permanent nature within the jurisdiction which are suitable for satisfying a possible order of costs made against it (see *Tjong Very Sumito* ([12] above) at [58]–[60]).

31 However, the availability of a mechanism for reciprocal enforcement or the presence of substantial assets within the jurisdiction, are not in and of themselves conclusive (see, for example, Jeffrey Pinsler, *Singapore Court Practice (Rules of Court 2021)* (LexisNexis, 2023) at para 9.12.5A)), and the court ultimately looks to the facts of each case to determine if they demonstrate likely ease of enforcement of costs orders and thereby warrant the court *not* ordering SFC. For example, in *Shirley Ooi* ([12] above) (at [25]), although the non-resident party against whom SFC was ordered had been the joint owner of a residential property in Singapore, the court held that SFC should still be ordered because, given the previous conduct of that party, it is likely that she would delay and/or place obstacles in the way of the execution of the judgment against her. Where reciprocal enforcement is available in certain foreign jurisdictions but there is no material before the court to suggest that the foreign claimant holds assets within these jurisdictions against which costs can be satisfied, the availability of reciprocal enforcement would in and of itself be neither here nor there. If the defendant can go further to demonstrate that the enforcement processes and procedures in the jurisdiction where reciprocal enforcement is sought would be lengthy and therefore significantly delay the defendant's satisfaction of its costs, then SFC may still be ordered (see *Cova Group* ([8] above) at [22]; *Zhong Da Chemical* ([16] above) at [19]).

32 In arguments, the parties had differing views on who bore the burden of proof of demonstrating that a defendant/applicant for SFC enjoyed ease of

enforcement of costs orders.[15] In my view, it is on the foreign claimant to persuade the court that the defendant would not face difficulties, expense or delay in enforcing any costs orders obtained. The question of ease of enforcement relates back to the point of whether the protective rationale is engaged, and since it is the claimant who seeks to persuade the court that it should not order SFC – in spite of the fact of its foreign residence enlivening its discretion, and the presumable absence of a fund within the jurisdiction which thereby engages the protective rationale – correspondingly, the legal burden of demonstrating ease of enforcement ought also to lie on the claimant. That is not to say, however, that it will suffice for the defendant to simply make unsubstantiated assertions that the circumstances identified by the claimant do *not* show ease of enforcement. Even though the legal burden is on the claimant to make good its contention that the defendant enjoys ease of enforcement, in an adversarial system like ours, whether that burden is discharged would depend on the circumstances cited by the defendant in rebuttal (see generally, *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [75]–[76] and [78]). The defendant must therefore point to some circumstances of the case to *disprove* the claimant's contention that it enjoys ease of enforcement. This is consistent with the approach taken in the decided cases (see generally *Transpac Investments Ltd v TIH Ltd* [2024] SGHC(I) 12 ("*Transpac Investments*") at [13]; *De Bry v Fitzgerald and another* [1990] 1 WLR 552 ("*De Bry*") at 560). In particular, in *De Bry* (at 560), where the issue was whether SFC was to be ordered against a plaintiff ordinarily resident out of the jurisdiction, Staughton LJ held:

> … The argument was on the part of the plaintiff that there was no need to order security because he owned an asset of considerable value which would remain within the jurisdiction …. If one is to consider the burden of proof on such a point, it

[15] Notes of Arguments, 13 September 2024, p 11, lines 13–14; p 21, lines 24–26.

> seems to me … that it is first for the defendants to show that the plaintiff is resident abroad …; secondly, *for the plaintiff to show that he has an asset here which will remain here; and thirdly, for the defendant to show, if he can, that the asset is worthless or not worth sufficient to cover the costs.*
>
> [emphasis added]

33 With the above in mind, I turn to consider the assets identified by SBS, which come under two categories: (a) first, SBS's shares in SBS Logistics; and (b) secondly, the Judgment Debt and the ARB 114 Award.

SBS's shares in SBS Logistics

34 In connection with the shares in SBS Logistics, Ms Choudary's counsel made two arguments as to why they do not constitute adequate security. The first argument attacks the *value* of these shares as assets – they are of uncertain value as they are not publicly traded and SBS has also not given an estimate of the market value of these shares, especially given the losses which SBS had suffered in the most recent FY for which audited financial statements are available (see [25] above). The second argument deals with the *nature* of these shares as assets – that they are not of a fixed and permanent nature and can be sold by SBS at any time, and hence do not constitute property against which an adverse costs order can be satisfied within the jurisdiction.

35 I deal first with the second argument as it raises the anterior question of whether these shares can even be considered as assets relevant to the court's discretion of whether to order SFC. In *Tjong Very Sumito* ([12] above) (at [57]), the Court of Appeal endorsed the observations of the court below that SFC will not be ordered against a person resident out of jurisdiction where it has substantial property, whether real or personal, within the jurisdiction, where such property is of a fixed and permanent nature that can certainly be available for costs. The rationale behind the requirement that the assets be of a fixed and

permanent nature is that these be assets *available* for the defendant's enforcement of costs, in the event the defendant succeeds at trial. As to what constitutes assets of a fixed and permanent nature, no general rule can be laid down based on the type or nature of the property, and the court ultimately takes a "common sense point of view" in determining if the assets is one which can be available for costs (see *Hoogland* ([24] above) at [21]). Therefore, in *Transpac Investments*, the court found the shares held by the claimant-company in a listed company on the Singapore Exchange (which was also the defendant seeking SFC) to not constitute such property because they could be sold by the claimant at any time. In *Hoogland*, the court considered residential property purchased by the plaintiff for investment purposes to not constitute such assets as the plaintiff had never resided in these properties, and it was also relatively easy for them to be sold off.

36 In this case, I was satisfied that SBS's shares in SBS Logistics are assets of a fixed and permanent nature that can be available for Ms Choudary's costs in the event she prevails at the Trial. My reasons on this point overlap with the earlier reasons I had cited for concluding that SBS has substantial connections with Singapore – that SBS Logistics is a wholly owned subsidiary of SBS and is the vehicle through which SBS carries on business in Singapore (see [25] above). Taking a common-sense approach, I think it is quite unlikely that SBS would go through the expense of divesting its business interests in SBS Logistics (and consequently impact its business operations in Singapore) in order to prevent Ms Choudary from enforcing costs orders against those shares, especially since the quantum of costs that it might be ordered to pay (which, based on the SFC sought, comes in the region of $170,000), is far short of the revenue and profit which the business operations of SBS Logistics has generated for SBS, based on the financial statements for FY 2022 (see [25] above). In

these circumstances, I was satisfied that the shares in SBS Logistics are assets of a fixed and permanent nature available for Ms Choudary to enforce any costs orders that she might come to obtain in the Trial.

37 I now deal with the first argument, which pertains to the value of these shares. As I mentioned at the outset, the burden of proof is on SBS to show Ms Choudary's likely ease of enforcement of costs orders, but Ms Choudary must also point to some circumstances of this case to rebut that contention. Accordingly, on this point, SBS must first adduce evidence of the value of its shares in SBS Logistics to show that they constitute adequate security for Ms Choudary's costs, and once that is done, it is for Ms Choudary to demonstrate that these shares are of insufficient value to cover her likely costs exposure in the Trial.

38 On the valuation of its shares in SBS Logistics, SBS relied on the audited financial statements of SBS Logistics for the FY ending 31 December 2022, which shows that SBS Logistics has *net* assets of around $6.244m.[16] At the hearing before me, SBS's counsel explained that the financial statements for the FY ending 31 December 2022 is the most recent set of audited financial statements available for SBS. I accept that what had been put before me is ultimately the *historical* financial position of SBS Logistics (as at FY 2022) which might well differ from its *present* financial position. However, Ms Choudary did not contend that SBS Logistics' *present* financial situation has so materially changed that the audited financial statements for FY 2022 ceases to be representative of SBS Logistics' *present* financial situation. I therefore proceeded on the basis that the SBS Logistics' financial position as at FY 2022 is sufficiently representative of its *present* financial position. Of course, the *net*

16 FG-5 at p 81.

assets of SBS Logistics does not necessarily correspond with the *value* of its shares, which is ultimately an exercise at valuation that takes into account factors other than net asset value alone, depending on the valuation methodology taken. However, given the stated value of SBS's assets on a net asset value basis, and coupled with the quantum of costs which SBS might be ordered to pay Ms Choudary (based on the quantum of SFC sought by the latter), I think it is more likely than not that the value of the shares in SBS Logistics will adequately cover any costs order that Ms Choudary might come to obtain against SBS in the Trial. For these reasons, although SBS did not specifically adduce evidence of the value of its shares in SBS Logistics, I was satisfied that they are sufficient to constitute adequate security for Ms Choudary's costs in the Trial.

39 SBS having done so, it is for Ms Choudary to show that SBS's shares in SBS Logistics are inadequate as security. On this, Ms Choudary makes two points – first, that these shares are shares in a private company and so there is no estimate of their value even if the entire block of shares were sold; and secondly, SBS had suffered more significant financial losses for FY 2022, as compared to the previous FY, and this apparently worsening financial position of SBS Logistics necessarily affects the value of SBS's shares. I was not persuaded by both submissions. As for the first submission, I have explained earlier that the evidence adduced by SBS persuaded me that the value of SBS's shares is more likely than not to adequately cover Ms Choudary's likely costs exposure in the Trial. For present purposes, the relevant inquiry is not the value of these shares *per se*, but what the likely value of these shares are and whether they are sufficient to secure Ms Choudary's costs for the Trial. As for the second submission, as a matter of logic, it cannot be contended otherwise that a company's financial position will ultimately have an impact on the value of its

shares, but the relevant question here is whether the losses suffered by SBS Logistics in FY 2022 can point to its shares decreasing in value to such an extent that they become insufficient to secure Ms Choudary's likely costs exposure in the Trial; I was not persuaded that this is the case, given that these losses stand at S$644,780, while SBS Logistics' net assets stand at around $6.244m.

40 For the reasons above, I was satisfied that SBS's shares in SBS Logistics are assets of a fixed and permanent nature against which any costs order that Ms Choudary might come to obtain in the Trial can be adequately satisfied. This suggests Ms Choudary's likely ease of enforcing costs orders against SBS and is a factor in favour of the court *not* ordering SFC.

The Judgment Debt and the ARB 114 Award

41 In support of submissions that Ms Choudary is adequately secured for her costs of the Trial, SBS also relies on (a) the Judgment Debt and (b) the ARB 114 Award (see [5] and [10] above), both of which SBS argued constitute assets within the jurisdiction which Ms Choudhary can turn to in satisfying those costs.

42 SBS submitted that Ms Choudary can enforce any adverse costs order obtained in the Trial by attaching the debt thereunder to the Judgment Debt. Notably, SBS did not make this same argument in connection with the ARB 114 Award, and in my view, correctly so and for obvious reasons – SBS Logistics (and *not* SBS) is the award creditor of the ARB 114 Award, and the debt in the ARB 114 Award is owed to SBS Logistics and *not* SBS; SBS cannot identify the ARB 114 Award in and of itself as an asset for the purposes of persuading the court to not order SFC against it. If anything, the ARB 114 Award might be relevant in connection with the financial position of SBS Logistics and the value of its shares, but I need not deal with that proper since I have already found that

the shares in SBS Logistics, by reference to the audited financial statements for FY 2022, constitute adequate security for Ms Choudary's costs of the Trial. As such, the only issue that remains to be decided is whether SBS can rely on the Judgment Debt as an asset which secures Ms Choudary for her costs.

43 A judgment debt is an attachable debt and therefore an asset against which enforcement process may be levied (see *Singapore Civil Procedure 2021* vol I (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 49/1/27). However, I do not think it constitutes an asset of a fixed and permanent nature which the court can have regard to in determining if the defendant/applicant for SFC is adequately secured for its costs. The availability of assets within the jurisdiction is meant to demonstrate the *ease* with which a defendant can enforce adverse costs orders against the claimant in the event it succeeds in the litigation and thereby persuade the court that SFC is unnecessary. However, this notion is fundamentally at odds with a judgment debt, which key characteristic is the uncertain prospect of recovery as it turns either on whether the judgment debtor is willing to voluntarily comply with the judgment debt or the outcome of enforcement proceedings commenced pursuant to that judgment debt. I note that in *Michael Wilson & Partners Ltd v Nicholls (No 6)* [2022] ACTCA 41 (at [107(e)]), an authority cited by Ms Choudary's counsel, the court held, as a general proposition of law, that a judgment debt is *not* a fixed and permanent asset available to satisfy costs that the applicant for SFC might come to obtain, for the same reasons I have canvassed.

44 I accept, of course, that a judgment debt owed to the claimant allows a successful defendant in the trial to turn, not only to the claimant itself, but also other persons owing debts the claimant, for the purposes of satisfying any costs order obtained against the claimant. In that sense, it does leave the claimant in a better position in that he now has a wider range of debtors against whom the

adverse costs order can be enforced, and those other persons might have the financial wherewithal or have such assets that can be used to satisfy outstanding costs. However, these additional avenues of recourse are as good as nothing given the necessarily uncertain prospect of recovery under the judgment debt. For these reasons, I do not think that a claimant can rely on a judgment debt owed to it and enforceable within the jurisdiction as a fixed or permanent asset to persuade the court to not grant SFC. I therefore considered the Judgment Debt to be entirely irrelevant in the analysis of whether SFC should be ordered in this case.

The assets in other jurisdictions

45 In submissions, SBS argued that it has substantial assets in other jurisdictions, including jurisdictions which have in place reciprocal regimes for the enforcement of judgments, and since Ms Choudary can turn to those assets, she is adequately secured for her costs. I had two difficulties with this submission and did not regard it as relevant to the question of whether SFC should be ordered in this case. First, case law regards it as significant where a foreign claimant is *ordinarily resident* in a jurisdiction that enjoys reciprocity with Singapore in relation to the enforcement of judgments (see *Cova Group* ([8] above) at [22]; *Creative Elegance* ([26] above) at [22]; Adrian Zuckerman ed, *Zuckerman on Civil Procedure: Principles of Practice* (4th Ed, 2021, Sweet & Maxwell) at para 10.322). It is ordinary residence, and not presence of assets, in the jurisdiction with which Singapore enjoys a reciprocal regime for enforcement, that is the relevant consideration. The mere fact that assets are located in jurisdictions in which Singapore enjoys a reciprocal enforcement regime is neither here nor there because, absent a situation where the claimant is also ordinarily resident in that jurisdiction, there is no *certainty* that the asset can necessarily be used for the satisfaction of costs, which is what the court

must find if it is to be satisfied that the defendant enjoys ease of enforcement of costs orders in that jurisdiction.

46 Secondly, assuming for the sake of argument that the presence of assets in other jurisdictions with which Singapore enjoys a reciprocal enforcement regime is indeed relevant to the assessment of whether SFC should be ordered, I did not find this factor engaged at all on the facts. The assets in other jurisdictions which SBS had identified comprise: (a) its business operations in various other jurisdictions; and (b) assets which are the enforcement proceedings which it has commenced pursuant to the Award, and in particular, an application which been brought to seize a property held in the sole name of Ms Choudary in Canadian enforcement proceedings. As for the business operations, SBS's counsel brought me through SBS's corporate web page which identified the addresses of the various properties at which SBS had its business operations outside of Japan. However, nothing on the face of those web pages indicated whether SBS also owned those properties and the extent of any such ownership. I therefore do not think it could be contended, on the face of what had been put before the court, that those properties were owned by SBS and available as assets for enforcement. As for the enforcement proceedings commenced in other jurisdictions, unless those proceedings have been successful and SBS has laid its hands on specific assets, I do not think those proceedings, or its likely outcome, can even be relevant to whether SBS is adequately secured for costs.

Relative strength of the parties' cases

47 The strength of the parties' respective cases is a relevant circumstance for the court in deciding whether to order SFC (see *SW Trustees* ([3] above) at [34]). In this assessment, the court should not be required to perform an

elaborate or detailed investigation of the evidence, and any contention about reasonable prospects or high probability of success should be one that is apparent on the face of the evidence or the pleadings (see *SW Trustees* at [35]). However, I did not find the strength of the parties' cases to be a relevant consideration in exercising my discretion on whether SFC should be ordered. Let me explain.

48 I accept, as SBS's counsel emphasised during submissions, that the court had, by granting EO 54 for the seizure and sale of the shares, found at least on a *prima facie* basis that the Shares were beneficially owned by Mr Choudary so that they could be the subject of enforcement.[17] Order 22 r 2(2)(*a*) of the ROC 2021 states that an enforcement order for seizure and sale of property, if granted by the court, authorises the Sheriff to "seize and sell all property *belonging to the enforcement respondent*" [emphasis added]. Having regard to O 47 r 6(1) of the Rules of Court (2014 Rev Ed), in a case where the property that is the subject of seizure and sale under O 22 takes the form of shares, for the purposes of O 22 r 2(2)(*a*), property "belong[s]" to the enforcement respondent where it is legally or beneficially owned by the enforcement respondent. On the point of beneficial ownership of the Shares, SBS's supporting affidavit for EO 54 raised two main points: (a) first, that Mr Choudary had transferred his 50% shareholding to Ms Choudary in order to dissipate his assets and frustrate SBS's enforcement of the Award; and (b) secondly, notwithstanding Ms Choudary's 50% shareholding in A2S Singapore prior to the transfer, she merely holds those shares on trust for Mr Choudary, as she was never involved in the management of A2S Singapore's business. As such, Mr Choudary is the beneficial owner of the Shares.[18] I accept that the

17 Respondent's written submissions at para 65.

18 FG-2 at paras 26–28.

court, by granting EO 54 for the sale and seizure of the Shares, was satisfied on the basis of the evidence adduced by SBS that the Shares are beneficially owned by Mr Choudary.

49 In her supporting affidavit for SUM 3460 (that is, the application for the release of the Shares), Ms Choudary put forward her account as to why she came to be the owner of the Shares. She explained that A2S Singapore is part of a group of companies under the name "A2S Logistics" which had been founded by her.[19] A2S Singapore had been incorporated with Mr Choudary and her as equal shareholders, with the intention of expanding A2S Logistics' business to Singapore, but prior to the time due for actual payment to contribute to the paid-up capital of A2S Singapore, a decision was made to change A2S Singapore's business model, and Mr Choudary therefore did not pay for his portion of the shareholding in A2S Singapore, and it was intended that Mr Choudary would soon transfer his 50% shareholding to Ms Choudary.[20] It was then agreed on 2 March 2022 that Mr Choudary would transfer his 50% shareholding to Ms Choudary for nominal payment, but the transfer was only executed on 27 December 2022, in time for the end of the FY ending 31 December 2022, because Mr Choudary's father (*ie*, her father-in-law) had been in ill-health since March 2022 and so she saw no urgency for the transfer to be completed immediately following the agreement between her and Mr Choudary.[21] Eventually, the court hearing SUM 3460 held that Ms Choudary's case raised serious disputes of fact which cannot be resolved on affidavit evidence alone,

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19 3rd affidavit of Shalini Choudary ("SC-3") at para 17.

20 SC-3 at para 53.

21 SC-3 at paras 60–63.

and therefore directed that the issue concerning the beneficial ownership of the shares in A2S Singapore to be tried.[22]

50 In my view, the merits of the parties' respective cases are not relevant to the analysis of whether SFC should be ordered. The reason why the court hearing SUM 3460 had directed that the issue concerning the beneficial ownership of the Shares be tried is precisely because it found a material dispute of fact between the parties *vis-à-vis* that issue. In other words, the court was not persuaded, on the affidavit evidence alone, that SBS's case or Ms Choudary's prevailed over the other. The merits of the parties' cases is always a relevant circumstance in deciding whether to order SFC (see *SW Trustees* at [34]), but in a case like the present, where the court had *refused* to make a determination on affidavit evidence alone in respect of the issue that is the subject of the trial for which SFC is sought, and directed that the issue be tried on the basis of a material dispute of fact, it would be quite inconsistent for the court to subsequently have regard to the merits of either party's case in deciding whether it is just for SFC to be ordered in the context of that trial. For the avoidance of doubt, I make no comment either way about the parties' respective cases regarding the circumstances in which Mr Choudary had transferred his 50% shareholding to Ms Choudary, as well as the circumstances in which Ms Choudary came to be a 50% shareholder of A2S Singapore, which are issues to be dealt with at the Trial.

Delay

51 As the Court of Appeal explained in *SIC College* ([3] above) (at [79]), the weight to be given to the effect of delay on an application for SFC may

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22 SC-4 at p 26.

depend on the reasons for the delay, the length of the delay and crucially, the prejudice caused by the delay. As the High Court explained in *SW Trustees* ([3] above) (at [55] and [58]), the crux of the matter is the point in which an applicant for SFC can properly ascertain its likely costs exposure, which marks the point at which the SFC application ought to be taken out; further, in ascertaining whether there is delay, the court should also be sensitive to the different types of costs (*eg*, pre-trial, trial and post-trial) that can only come to be meaningfully assessed at different stages of the proceedings and it is inappropriate for the court to make a *global* finding of delay for every category of costs, unless that is truly borne out by the facts.

52 I reiterate the procedural history to put the time at which SUM 2238 is taken out in context – on 3 May 2024, the court directed, as part of its decision for SUM 3460, that the issue of the beneficial ownership of the Shares be tried; on 30 May 2024, the parties took directions at an RCC regarding the Trial, and timelines were given for the filing of pleadings and lists of witnesses; Ms Choudary (as well as the other defendants in the Trial) filed her Defence on 28 June 2024; on 10 July 2024, Ms Choudary's solicitors wrote to SBS's solicitors to request for SFC, to which SBS's solicitors responded with their objections; and on 17 July 2024, Ms Choudary's solicitors sought permission from the court for Ms Choudary to file an SFC application, and pursuant to the court's grant of permission, SUM 2238 was filed on 30 July 2024.

53 As I mentioned earlier, SBS's counsel submitted that the latest point of time in which Ms Choudary ought to have filed SUM 2238 is the time of the RCC on 30 May 2024 where the court gave directions pertaining to pleadings and lists of witnesses, and having failed to do so, Ms Choudary is guilty of delay.

54 I disagreed with this submission. As Ms Choudary's counsel had argued, she was entitled to consider SBS's pleadings, as well as her own pleadings, as well as further matters like the parties' list of witnesses, before deciding whether to make any application for SFC at all. In assessing delay, the crux of the matter is when the applicant for SFC can properly ascertain its likely costs exposure (see *SW Trustees* at [55]). Following from this, a defendant can only be expected to apply for SFC when it comes to possess the relevant information on which it may assess its likely costs exposure for the stage of proceeding for which SFC is sought (see *Xiang Da Marine Pte Ltd (in creditors' voluntary liquidation) and another v Zhang Xianming and others* [2023] SGHCR 15 at [77]). In my view, any such proper assessment could only be done after Ms Choudary's own pleadings were finalised, and needless to say, after SBS's Statement of Claim was filed, so that she could have a sense of the scope of issues disputed at the Trial and the evidence required. The request for SFC was taken out some two weeks after Ms Choudary's Defence was filed by way of correspondence to solicitors, and permission was sought from the court another week later to take out a formal application. In this context, I do not think there is any delay on Ms Choudary's part in seeking pre-trial SFC, and *a fortiori*, trial SFC under SUM 2238. Given my finding that there was no delay in the taking out of SUM 2238, it follows that this factor is entirely irrelevant to the assessment of whether SFC should be ordered.

55 SBS's counsel stressed that Ms Choudary knew from day one – *ie*, when SUM 3460 was filed – that in the event a trial was directed by the court on the issue of the beneficial ownership of the Shares, that she would be litigating against a foreign claimant who is ordinarily resident out of Singapore. The issue of SFC ought to have been alive in Ms Choudary's mind from then, and so once directions were given at the RCC on 30 May 2024, SFC ought to have been

sought. However, as the High Court explained in *SW Trustees* (at [64]), the SFC regime is ultimately aimed at protecting an applicant from litigation costs that it cannot avoid, and not to put the applicant on edge to take constant action to protect itself; it is not the law that an applicant, upon inkling that it would be engaged in litigation with a party and for which it might be left out of pocket for costs eventually, must apply for SFC or risk its entitlement to SFC entirely forfeited. The fact that Ms Choudary knew from the outset that she might come to be engaged in litigation with a party, against whom the court might be prepared to order SFC, is neither here nor there in the assessment of delay, which ultimately turns on which the point in which she could have properly assessed her costs exposure for the part of proceeding for which SFC is sought. SUM 2238 was, in my view, taken out in a timely manner following the point where Ms Choudary came to be able to properly make such an assessment.

Whether the application had been taken out for collateral purposes

56 I now come to the submission by SBS's counsel that Ms Choudary's application for SFC lacks *bona fides*. I accept that Ms Choudary knew, or ought to have known, information pertaining to SBS's financial standing as well as the value of SBS's shares in SBS Logistics. These are matters of public record and furthermore, SBS is not a stranger to Ms Choudary – SBS was involved in arbitration proceedings against her husband (Mr Choudary), and SBS Logistics was also involved in arbitration proceedings against entities in which Mr Choudary was director (*ie*, the proceedings giving rise to the ARB 114 Award).[23] Even if this had been unknown to Ms Choudary, upon being made a party to the Trial, she could have checked on the profile of SBS and SBS Logistics, which a reasonable person in her shoes would have done in order to assess whether

[23] Respondent's written submissions at para 52.

SBS is a party worthy of any adverse costs orders that she might come to obtain in the Trial.

57 Notwithstanding that, and notwithstanding my earlier conclusion that (a) Ms Choudary would likely not face difficulties in recovering costs from SBS and (b) the shares in SBS Logistics constitute adequate security for Ms Choudary's costs, I do not think any bad faith or lack of *bona fides* can be inferred on Ms Choudary's part by virtue of her taking out SUM 2238. Given that SBS is ordinarily resident out of Singapore, Ms Choudary cannot be faulted for taking the view that she is entitled to SFC and that the court might decide to exercise its discretion order SFC in her favour. Furthermore, given that SFC is sought at a relatively early stage of the proceedings, and since this is a case where the parties appear to be in common ground that an order for SFC would *not* stifle SBS's claim, I do not think it is tenable to say that SUM 2238 had been taken out by Ms Choudary to procure for herself a procedural advantage over SBS in the Trial. Accordingly, this is not a factor relevant to the analysis of whether SFC should be ordered.

Ms Choudary is not an 'involuntary' defendant

58 To summarise, I was of the view that SFC should not be ordered in this case. As I was unpersuaded that Ms Choudary would face difficulty in recovering from SBS any costs ordered in the Trial, and further, since SBS's shares in SBS Logistics provide adequate security for Ms Choudary's costs, the protective rationale is plainly not engaged. That being so, the other considerations under the access to justice and procedural fairness rationales are necessarily not engaged. Therefore, my decision on the other factors raised in the parties' submissions – namely, the strength of the parties' cases and whether

SUM 2238 had been taken out with delay and/or with a collateral purpose – did not have any bearing in my exercise of discretion to *not* order SFC.

59 Before I conclude, I make some brief observations about a further factor which I think reinforces the conclusion that I have reached – that is, the fact that Ms Choudary is not in the position of an ordinary defendant "who is forced into litigation at the election of someone else" (see *SIC College* ([3] above) at [21]). As I will explain, this has some significance in the balance of justice and whether the court should order SFC.

60 In every case, a defendant in litigation bears the risk of failing to recover from the losing party its legal costs in the event it succeeds in the same, despite having expended costs in defending the claim. This allocation of risk appears justified because the claimant, as the party commencing litigation, *also* bears the risk of paying its own legal costs as well as those of the defendant, if it eventually fails in its substantive claim (see generally, *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2023] 4 SLR 77 at [38]). This suggests that the norm in civil procedure is for the claimant and defendant to equally bear the risk of litigation costs, and the SFC regime is a departure from that norm in that the *party sued* (*ie*, the defendant) is protected against that risk by enjoying security for the costs it might come to recover, at a juncture when the merits of the parties' cases have not yet been tested, and when it is still uncertain whether it might prevail over the claimant at trial. This departure is however justified because a party *sued* (*ie*, the defendant) cannot have a choice over whom it is sued by (see *SW Trustees* ([3] above) at [20]), including the financial means of the party suing him or other characteristics of that party which can in turn heighten the risk of litigation costs which it already bears, beyond the default risk allocation between itself and the claimant. In these circumstances, the defendant is entitled

to invoke the SFC regime to protect itself, subject to the provision of SFC being a just outcome.

61 In my view, the manner in which the Trial had come about suggests that a departure from this norm and the default allocation of the risks of litigation costs between the claimant and the defendant will not be a just outcome. It is important to appreciate that the Trial had come about because of proceedings taken out by Ms Choudary to object to the Sheriff's sale of seizure of the Shares. Ms Choudary was therefore not dragged into litigation by SBS. The Trial had come about because of Ms Choudary's decision to contest SBS's seizure and sale of the Shares in connection with proceedings in OA 435 that, in the first place, did not involve her and to which she was also not a party. I accept, of course, that there are some limits to what I have posited because this is to some extent a chicken-and-egg problem because Ms Choudary would not have made the decision to contest SBS's seizure and sale of the Shares, if SBS did not first commence enforcement proceedings in connection with the Shares which are legally owned by her. However, the material point here – and which distinguishes Ms Choudary from a party who is "forced into litigation" at the election of another – is that Ms Choudary had full knowledge of the party which she would eventually be up against in the litigation, and the decision to contest the sale and seizure of the Shares was also made with the benefit of that knowledge. This is quite unlike an ordinary defendant who *must* contest proceedings taken out against him (or risk having judgment entered against him summarily) regardless of whatever views it might have about the opposing party in the litigation including whether that party is worthy of costs eventually.

62 The circumstances in which the Trial had come about therefore has a bearing on the extent to which the protective rationale applies in the case, and whether it would be just to order SBS to provide SFC to Ms Choudary. For the

avoidance of doubt, I did not regard this as a standalone factor which justified me not ordering SFC in Ms Choudary's favour, though I note that case law shows that the court can have regard to the circumstances in which a defendant came to be sued by a claimant, in deciding whether SFC should be ordered (see *Omar Ali bin Mohd and others v Syed Jafaralsadeg bin Abdulkadir Alhadad and others* [1995] 2 SLR(R) 407 at [36]). For present purposes, I only considered this as reinforcing my earlier conclusion that this is a case in which it is *not* just for SFC to be ordered, having regard to the reasons I have summarised earlier (see [58] above).

Conclusion

63 For the reasons above, I dismissed SUM 2238.

64 For completeness, I consider the appropriate quantum of SFC to be awarded, if I were wrong that on the issue of Ms Choudary's entitlement to SFC. Ms Choudary sought a sum of $170,000 as SFC up to and including trial.[24] The quantum sought in Ms Choudary's first request to SBS's solicitors had been $100,000 but was increased to $170,000 because the parties were subsequently directed to set aside a total of 8 days for the Trial, as opposed to the previous assumption of a 3-day trial. SBS attacked this sum as excessive and unjustified. Working backwards using the costs scales in the Guidelines for Party-and-Party Costs Awards Appendix G to the Supreme Court Practice Directions 2021 ("Appendix G"), SBS pointed out that the SFC sought by Ms Choudary is close to the highest end of the costs scale of the relevant tariffs applicable to "Commercial" and "Equity and trusts" claims. SBS further argued that the increase in the number of days of trial had been a result of Ms Choudary's

[24] Applicant's written submissions at para 43.

decision to call two additional witnesses, as well as her decision to give evidence through an interpreter, despite her previously affirmed affidavits all being written in English. SBS also pointed out that in SUM 3460 (Ms Choudary's application to resist the sale and seizure of the Shares), Ms Choudary's counsel had submitted that SBS should only be awarded costs of $3,000 (all in), despite the number of hearings and affidavits filed in connection with SUM 3460, which suggests that the quantum of SFC now asked for is unreasonable.

65 Given that the central issue at the Trial is whether Mr Choudary is the beneficial owner of the Shares, the relevant tariffs for "equity and trusts" claims in Appendix G is an appropriate starting point for assessing the appropriate quantum of SFC. Despite there being only a single issue on which the outcome of the Trial turns, the parties' pleadings raise a few distinct factual disputes, the main ones being whether it was Ms Choudary or Mr Choudary who had founded, owned or managed A2S Logistics, and the reasons for which Mr Choudary had transferred his 50% shareholding in A2S Singapore to Ms Choudary. In the alternative, SBS pleads that Mr Choudary is at least a beneficial owner of the 50% shares in A2S Singapore which he had transferred to Ms Choudary and/or that the transfer should be set aside pursuant to s 438(2) of the Insolvency, Restructuring and Dissolution Act 2018.

66 Having regard to the factual issues raised, and also since the parties' pleadings do not appear to reveal any legal issues which are particularly complicated, I am of the view that the appropriate tariff for the assessment of SFC should be somewhere in the 40% percentile of each of the costs scales. For pre-trial costs, Appendix G prescribes a range of $25,000–$90,000. Adopting the methodology described, I consider a sum of $46,000 (that being 0.8 x ($25,000+$32,500)) appropriate. For trial costs, Appendix G prescribes a daily

tariff of between $6,000–$16,000. I consider a sum of $8,800 (that being 0.8 x ($6,000+$5,000)) appropriate, which yields a total figure of $88,000 for a 10-day trial. As such, if I had found that Ms Choudary was entitled to SFC, I would have fixed the quantum as $134,000.

67 I should also add that I did not agree with SBS's submissions that the quantum sought by Ms Choudary can be attacked as being excessive by reference to her decision to call two additional witnesses as well as her decision to give evidence through an interpreter. The appropriate quantum of SFC is determined by reference to the applicant/defendant's likely costs exposure in the trial. At this interlocutory stage and in the assessment of the appropriate quantum of SFC, the court does not scrutinise whether those procedural steps which a party says he intends to take is in fact justified, because that can ultimately only be determined where the action comes to be decided on the merits. I also did not think that the level of costs which Ms Choudary had sought in the context of SUM 3460 can be relied by the court in making an assessment as to the quantum of SFC appropriate for the Trial; those costs were specific to the legal context of SUM 3460 and the court cannot extrapolate from that basis for the purposes of the Trial.

68 In closing, I record my appreciation to both Ms Choudary's and SBS's counsel for their submissions and assistance.

Perry Peh
Assistant Registrar

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