#### DCPI 833 / 2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES NO. 833 OF 2006

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| BETWEEN | LAU SHUN FU (劉順扶) | 1st Plaintiff |
|  | LAU KA FU (劉家扶) | 2nd Plaintiff |
|  | and |  |
|  | LAU WAI PING (劉威平) | Defendant |

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##### Coram: His Honour Judge Thomas Au in Chambers

##### (open to public)

Date of Hearing: 12 October 2007

Date of Handing Down Decision: 12 October 2007

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### DECISION

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1. This is the hearing of the Defendant’s application under Order 23 rule 1 of the Rules of District Court for security for costs in the sum of HK$180,000 up to the end of trial.
2. The basis of the Defendant’s application is that the Plaintiffs are effectively foreign plaintiffs ordinarily resident in Australia, and that they have no substantial assets in Hong Kong. As a result, there is a real risk that if the Defendant succeeds in his defence at trial, he would not be able to recover his costs against the Plaintiffs.
3. The Plaintiffs do not dispute that they ordinarily reside outside Hong Kong. By way of their skeleton submissions, they also now accept that they do not have any substantial property in Hong Kong for the purpose of enforcement of the Defendant’s costs.
4. At the hearing, the Plaintiffs now raise two grounds of opposition. First, they say they have a strong claim against the Defendant and thus the Court should not order security for costs against them. Secondly and in any event, given that there is a reciprocal enforcement of judgment arrangement between Hong Kong and Australia, the Court should not exercise its discretion to order security.
5. The Plaintiff also disputes the quantum of the security sought, if it should be ordered.

Applicable principles

1. Under O 23 r 1, where the plaintiff is ordinarily resident outside of Hong Kong, the Court has a wide discretion to order security for costs against him if it is satisfied that in all the circumstances it is just to do so.
2. In exercising the discretion, the Court should not order security for costs merely on the basis that of a foreign plaintiff. Before the Court should consider whether or not to order security for costs, the defendant must also show that there is a real risk that if she succeeds in the action, she would not be able to recover her costs against the foreign plaintiff. The defendant would usually show this by proving that the plaintiff has no substantial assets, whether real or personal, which are of a permanent nature within the jurisdiction available for enforcement of costs order purposes. See generally: Hong Kong Civil Procedure 2007, para 23/3/3, pp 414-415; *Lauria v Le Salon Orient (Hong Kong) Ltd* [1996] 2 HKLR 37; *Re Greater Beijing Region Expressways Ltd (No 3)* [2000] 2 HKLRD 776.
3. In exercising the discretion, the Court may take into account of the merits of the plaintiff’s claim. If, without going into any detailed examination of the merits, the plaintiff can clearly show that its claim has a high degree of probability of success at trial, the Court generally will not order security for costs: Hong Kong Civil Procedure 2007, para 23/3/3, p 415, and the cases cited therein.
4. The existence of a reciprocal enforcement agreement between Hong Kong and the jurisdiction in which the foreign plaintiff is situated is a factor that the Court can take into consideration in deciding whether it is just to order security. However, it is only but just one factor for consideration, and by no means the predominant factor. See: *Tagliani v Lee Wai Ying Elvis*, (unrep., HCPI 878/2003, 12 September 2005, Deputy High Court Judge Muttrie) at para 15.

The issues

1. Given the Plaintiffs’ concessions set out in paragraph 3 above, there is thus a *prima facie* case for the grant of security for costs against them. In the premises, the real issues that need to be determined for the present application are thus:
2. Whether the Plaintiffs’ claim against the Defendant has a high degree of probability of success.
3. Whether the fact that there is reciprocal enforcement agreement between Hong Kong and Australia should make it unjust to order security on the present circumstances.
4. If not, the appropriate quantum of the security of costs that should be ordered.

Whether the Plaintiffs’ claim against the Defendant has a high degree of probability of success

The Plaintiffs’ claim

1. The 1st Plaintiff and the 2nd Plaintiff are father and son. They claim against the Defendant for damages for their personal injuries suffered as a result of the Defendant’s alleged assault on them on 3 June 2003 (“the Date”) at a restaurant known as Mei Mei Court Restaurant (“the Restaurant”).
2. The 1st Plaintiff and the Defendant are in fact shareholders of the Restaurant together with a number of other shareholders.
3. It is common ground that before the Date, the 1st Plaintiff and the Defendant had had frequent quarrels and arguments on the management of the Restaurant.
4. It is the Plaintiffs’ case that on the Date, when the parties again were having a heated quarrel at the Restaurant, the Defendant summoned a group of 8 to 10 people to the Restaurant which ended up in fight amongst them. During the fight, the Defendant allegedly assaulted the 1st and 2nd Plaintiffs, as a result of which they respectively suffered various injuries.
5. They now claim damages against the Defendant for his assault on them. Damages have however not been quantified.

The defence

1. The Defendant does not deny that there was a fight on the Date at the Restaurant after a heated quarrel between the parties.
2. However, he says that he had never summoned anyone to start the fight as alleged. He also said that he only exchanged some punches with the Plaintiff by way of self-defence. But most importantly, it is the Defendant’s case that the injuries that the Plaintiffs had suffered were not caused by any of his actions. They came a result of attacks made by some other unknown customers at the Restaurant when they were accidentally hit by the Plaintiffs during the fight. These customers then retaliated by hitting the Plaintiffs in return.

The criminal prosecution against the Defendant for the alleged assault

1. The Plaintiffs reported the assault to the police. The Defendant was prosecuted. He did not himself give evidence at trial. After trial, the magistrate found the Defendant not guilty of one of the offences of assault occasioning bodily harm on the basis that the 1st Plaintiff had coached his wife (being the prosecution’s 4th witness) on how to give evidence by telling her the evidence that had already been adduced by other witnesses at the trial.
2. However, the Defendant was convicted for the other two offences of respectively common assault and assault occasioning bodily harm on the Plaintiffs at first instance at the Tuen Mun Magistracy in April 2004.
3. The conviction was later quashed on appeal by Deputy High Court Judge Fung (as he then was) in October 2004. The principal grounds of setting aside the conviction are that the trial magistrate has failed to properly consider (a) the significant inconsistencies in the prosecution’s evidence in identifying that the complained assault was inflicted on the Plaintiffs by the Defendant, and (b) the apparent exaggeration of evidence by the prosecution’s witnesses, including the 2nd Plaintiff’s evidence concerning his injury.

A high degree of probability of success?

1. Given the defence, the dispute is essentially a matter of factual contentions that need to be decided at trial. With the evidence before me (which effectively is the respective witness statements of the parties), at this interlocutory stage, I cannot say on this alone that it is clear that the Plaintiffs are very likely to succeed at trial.
2. My view is even further fortified by the fact that the Defendant’s conviction was quashed on the grounds as set out above.
3. In the circumstances, the Plaintiffs have failed to satisfy me that their claim fairs a high degree of probability to succeed for the purpose of refusing the grant of security for costs against them.

Reciprocal enforcement agreement between Hong Kong and Australia

1. As I mentioned above, the existence of a reciprocal enforcement agreement between Hong Kong and Australia is only but one of the factors that I should take into consideration in the exercise of my discretion.
2. Although this is one of the factors that the Court would take into consideration, as observed by Lord Denning MR in *Aeronave S.p.A. v Westland Charters Ltd* [1971] 1 WLR 1445 at 1449B-C, if a defendant succeeds and gets an order for his costs, it is generally not right that he should have to go to a foreign country to enforce the order. This is equally true even if there exists a reciprocal enforcement agreement between the suit jurisdiction and the foreign country. See also: *Kohn v Rinson & Stafford (Brod) Ltd* [1948] 1 KB 327.
3. As such, unless it can be demonstrated to me why the existence of a reciprocal enforcement agreement in the present case should outweighs the outer factors in favour of granting security, I do not accept that I should refuse security on this basis alone.
4. The Plaintiffs have not shown any reasons why this should be the case.
5. In the circumstances, I do not see any valid grounds for not granting security for costs in the present case.

Should security for costs be granted

1. For the above reasons, I regard this an appropriate case where security for costs should be granted.

Quantum

1. In the draft skeleton bill, the Defendant says he would incur costs, including Counsel’s fee, in the estimate sum of HK$238,716 up to the end of a 3 days trial. Giving 1/3 discount to this, he is now claiming HK$180,000 as security.
2. Mr Tse for the Plaintiffs submits that given that there are only 3 factual witnesses (whose witness statements are in any event rather short), and the usual practice that no oral medical expert evidence is likely to be allowed, the estimated length of the prospective trial should be 2 days instead of 3. Further, he says the estimated time spent set out in the estimated bill of costs is in any event generally exaggerated although he could not point to any specific examples. He however does not take issue as to the hourly rate charged by the fee earner, Mr Lee, and the refresher and hour rate charged by counsel as set out in the bill.
3. Mr Tse submits that the appropriate quantum should be HK$80,000.
4. The amount of security awarded is in the discretion of the court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not the practice to order security on a full indemnity basis. Further, the estimate of the quantum is not an exact science and the Court should not engage in any detailed examination of the bill at this stage and for the purpose of security for costs.
5. Although I accept that an estimate of 3 days trial is not inappropriate, I am of the view that the sum of HK$180,000 is too high. Having regard to all the circumstances of the present case, including the fact that the extent of the disputes between the parties is rather narrow, and that the preparation for the case and trial should not be complicated and should not involve any substantial time spent on the evidence, documentary or otherwise, I am of the view that a security for costs in the sum of HK$100,000 should be more of an appropriate and just figure.

Conclusion

1. For the above reasons, I order that within 21 days from today (the time frame being agreed by the parties), the Plaintiffs do pay into Court the sum of HK$100,000 as security for the Defendant’s costs in the action uptill the end of trial.
2. I further order that costs of the application be to the Defendant and to be grossly assessed.

[Arguments on the quantum of costs followed]

# (Thomas Au)

District Court Judge

Mr. Matthew TSE of Messrs Yip, Tse & Tang for 1st & 2nd Plaintiffs.

Mr. LEE Hung Sang, Jacky of Messrs Johnnie Yam, Jacky Lee & Co.,

for Defendant.