#### DCPI 1468/2008

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1468 OF 2008

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| BETWEEN | FANG GUO QUAN and YU YAN WEI | Plaintiffs |
|  | and |  |
|  | CHOI MING SANG | 1st Defendant |
|  | WEISHENG BUS LIMITED | 2nd Defendant |
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##### Coram: Deputy District Judge Raymond Tsui in chambers (open to the public)

Date of Hearing: 24th April 2009

Date of Handing Down Decision: 4th June 2009

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###### DECISION

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1. This is an application of the 2nd Defendant who took out a summons (the “Summons”) dated and filed on 17th December 2008 for stay of proceedings on the ground of forum *non conveniens*. It is stated in the Summons that the proper forum should be the Court of Dongguan City of China (廣東省東莞市中級人民法院).
2. By the Summons, the 2nd Defendant tries to invoke the inherent jurisdiction of the court. But I am satisfied that section 48(5) of the District Court Ordinance, Cap. 336 confers on the court the power to stay any proceedings before it either on its own motion or on the application of any person.

*Background*

1. This action is brought by the Plaintiffs against the 1st and the 2nd Defendants for damages for personal injuries sustained by the Plaintiffs in a traffic accident in China.
2. The 1st Defendant was the driver of a coach (the “Coach”) of which the Plaintiffs were the passengers. The 2nd Defendant was a company carrying on the business of providing, *inter alia*, transportation services. It was the appointed agent of Gd Bonwell Champion Tours Co Ltd (“Gd Bonwell”) and was responsible for selling tickets to travellers for Gd Bonwell. Gd Bonwell was the party who took out insurance policies on the Coach for accidents that happened in China and in Hong Kong.
3. It is the case of the 2nd Defendant that the 1st Defendant was either hired by Gd Bonwell direct or an employee of a company incorporated in China by the name 廣東南順旅運有限公司 which contracted with Gd Bonwell to drive the Coach. Gd Bonwell is the owner of the Coach and has its main place of business in the PRC. There was, however, no evidence testifying the matters in this paragraph. But the Plaintiffs did not dispute these claims. I am prepared to proceed on the assumption that these matters are true.
4. I note that the 1st Defendant is a Hong Kong resident and both Gd Bonwell and the 2nd Defendant are companies incorporated in Hong Kong.
5. The Plaintiffs’ claim is that in or about mid July 2005, the Plaintiffs bought coach tickets at the 2nd Defendant’s office in Hong Kong to travel from Guangzhou to Hong Kong. The 1st Defendant was the employee and/or agent of the 2nd Defendant driving the Coach which the Plaintiffs were on board. At the time of the accident, the 1st Defendant was driving the Coach on the Guangzhou-Shenzhen Highway southbound. When the Coach cut into the first lane from the second lane, the Coach hit another vehicle in front of it driven by another driver by the name徐輝鵬, a Chinese national. As a result, the Plaintiffs, together with other passengers, sustained injuries.
6. After the accident, 17 passengers, including the Plaintiffs, were sent to the hospital. After treatment, the Plaintiffs then signed an application letter in which the following was recorded:

「… 現向交警部門申請不立案處理，所有費用均由我們自行負責，不需要責任方賠償，不需交警出具證明材料。」

1. I was informed by Mr Cheung, counsel for the 2nd Defendant, that the 2nd Defendant would not rely on the said application letter.
2. A Writ of Summons with Indorsement of Claim was issued by the Plaintiffs on 2nd July 2008. The Statement of Claim was served by registered post to the two Defendants on 17th September 2008. The 2nd Defendant acknowledged service of the Writ of Summons on 8th October 2008. As mentioned above, the 2nd Defendant took out the Summons on 17th December 2008. In support of and in opposition to the application, both the 2nd Defendant and the Plaintiffs had filed affirmations.
3. Mr Chen Weiping, a director of the 2nd Defendant, filed an affirmation for the 2nd Defendant. Exhibited to his affirmation is a Traffic Incident Confirmation (「交通事故認定書」) dated 12th August 2005 issued by the Traffic Police of the Police Bureau of Dongguan City. The said Confirmation states that upon investigation, it was found that the 1st Defendant did not comply with the safety rules and was responsible for the incident. In addition to the said Confirmation, exhibited to Mr Chen’s affirmation is a Statement on Journey of Large Vehicle (「大客車載客情況說明」). The said Statement states that eleven passengers, including the Plaintiffs, applied to waive the right to file claims for compensation. Another document exhibited to Mr Chen’s affirmation is a Technical Inspection Report of the Coach which was dated 7th August 2005 and issued by the relevant authority in China. The said Report covers the braking, lighting and wheeling systems of the Coach. The test result is graded as “Pass” in the said Report.
4. At a hearing on 22nd December 2008 before Registrar Poon, an application was made to the learned Registrar by the legal representative of the 2nd Defendant for filing an affirmation to exhibit expert evidence on the PRC law. The application was refused. The learned Registrar then gave directions on the filing of further affirmations by the parties. The orders (the “Order”) made by the learned Registrar included several directions one of which was that “[n]o further affirmation should be filed by any party without leave of the court”. The Summons was then adjourned for hearing before me today.
5. At the hearing before me, Mr Cheung applied for an adjournment so that the 2nd Defendant could file an affirmation to exhibit expert opinion on the PRC law.
6. Mr Cheung submitted that there were two insurance policies in respect of the Coach, one covering accidents occurring in Hong Kong and the other one covering accidents occurring in the PRC. Since the accident occurred in the PRC, the China insurance policy would be relied upon for compensation. The maximum amount of compensation that could be paid to the Plaintiffs under the China insurance policy would be RMB 100,000 for each of them. According to the PRC law, the insurance company would only compensate the Plaintiffs if the claim proceeded in the PRC. Mr Cheung also submitted that vicarious liability was now available in the PRC. He further pointed out that there was a trend in the PRC that the quantum of damages awarded was increasing. I note that these points were made in light of the judgement of Suffiad J in Kwok Yu Keung v 楊鵬璋 transliterated as Yeung Pang Cheung & Ors (HCPI No. 579/2004, 9th September 2005). I shall return to the judgement of Suffiad J later.
7. The application for filing expert evidence was opposed by Mr Lam, counsel for the Plaintiffs, who submitted that since the learned Registrar had refused the application of the 2nd Defendant to file affirmation on expert opinion on the PRC law, the proper avenue of the 2nd Defendant was appeal against the Order. Mr Cheung replied that the Order did leave the door open for re-application and that further affirmation would be allowed as long as the court granted leave.
8. In Jindal Exports Ltd v Waco Trading Co Ltd [2000] 2 HKC 46, a second affirmation was filed by the defendant without leave in opposition to the plaintiff’s application for summary judgement. The master refused the application and proceeded with the hearing of the summary judgement application. He refused to record both the application and the refusal in his notes of proceedings. He also dismissed the plaintiff’s application. The plaintiff appealed against the master’s decision. Deputy Judge Chu, as she then was, dealt with and refused the application by the defendant for leave to file further affirmation for the purpose of the appeal by the plaintiff. Her Ladyship commented at p.47I-48A:

“In my view, what the defendant should have done is to appeal against the Master’s refusal instead of taking out the present summons applying for leave to file the affirmation. An application which is similar to the present summons had been made to the Master and he had made a decision on it. It is procedurally wrong to renew that application instead of appealing against it. The fact that the Master had refused to note in his notes of proceedings the application for leave and the refusal is not a bar to an appeal.”

1. Subsequently, in Ip Yin Ping & Ors v Ip Anne [2003] 2 HKC 595, Deputy Judge Lam, as he then was, reviewed the relevant cases and came to the view that “it would be more appropriate to lodge an appeal against the decision of the master rather than making a fresh application”.
2. In Ip Yin Ping & Ors, there was a summons for security for costs. Directions were given by a master for filing of affirmations. The master also ordered that no further evidence to be filed without leave. The plaintiffs failed to file affirmation according to the directions. They took out a summons one day before the substantive hearing for filing affirmation out of time. The summons was heard together with the substantive hearing and was refused. The master then proceeded to hear the security for costs summons and also dismissed the same. The plaintiffs appealed against both decisions.
3. Our case is similar to Jindal Exports Ltd since there was no appeal against the decision of the learned Registrar. It is thus clear that, applying Jindal Exports Ltd, the 2nd Respondent should have lodged an appeal against the decision of the learned Registrar. I note that there was no specific order enjoining that there should not be any affirmation of expert evidence on the PRC law. But it does not change the fact that the same had been determined by the learned Registrar. In my view, the only way that the Order could be overturned is by way of an appeal.
4. I do not agree that the Order leaves the door open for re-application. The direction that further affirmation could be allowed with leave of the court does not alter the fact that the application for filing affirmation on expert evidence had been determined. Such direction was made to provide for some unforeseen situations which warranted the filing of affirmations, not as another avenue whereby the 2nd Defendant could attempt to revive an application which had been rejected.
5. In any event and assuming that Mr Cheung was right that the Order did allow the filing of further affirmation upon leave granted by the court, it was far too late for the 2nd Defendant to apply for leave to file the affirmation today. The Order was made on 22nd December 2008. The 2nd Defendant could have applied for leave to file the affirmation before the hearing today. Nothing was done by the 2nd Defendant during the interim. No explanation (as opposed to unsatisfactory explanation) was given as to why nothing was done during the interim. This is one of the factors that I should take into account in exercising my discretion. Although it is not determinative, it adversely affects the application.
6. I am also of the view that, as far as the argument that the insurance company would only compensate the victims who has obtained judgement from a PRC court is concerned so that expert evidence on the PRC law is necessary to explain the legal position, the same, if not irrelevant, carries little weight. How the Defendants satisfy the judgement is a matter of their own concern. Of course, I appreciate that probably all operators rely on insurance coverage in the event of being held liable for any accidents. Insurance, however, is just one of the ways whereby a judgement could be satisfied. The operators could in theory satisfy the judgement from their own resources without recourse to the insurance cover.
7. With or without the insurance cover, the Plaintiffs are still entitled to sue the Defendants. In this regard, I note that the issue of whether the Plaintiffs are entitled to sue the 2nd Defendant was not disputed by the parties. Mr Cheung cited Wong Wai Hing v Hui Wei Lee [2001] 1 HKLRD 736 for the proposition that the 2nd Defendant could be liable on the basis of vicarious liability as the 1st Defendant was driving the Coach on the 2nd Defendant’s business or for its purposes. Mr Lam cited Wong Mee Wan (Administratrix of the Estate of Ho Sui Yee Decd) v Kwan Kin Travel Services Ltd [1995] 3 HKC 505 for the principle that, as a supplier of service, the 2nd Defendant might still be liable for breach of its contractual obligation if the service was performed without the exercise of due care and skill on the part of the sub-contractor. On either one or both of these authorities, the 2nd Defendant could be held liable for the negligence of the 1st Defendant.
8. In addition to the above, a new Order 32 rule 16A was introduced by the Civil Justice Reform which took effect on 2nd April 2009. O32 r16A(4) provides that “[w]here the determination of the application is adjourned for the hearing of the summons, no further evidence may be adduced unless it appears to the Court that there are exceptional circumstances making it desirable that further evidence should be adduced.” Order 32 r16A(5) provides that “[p]aragraph (4) is subject to a direction given under paragraph (3).” Paragraph (3) refers to the directions given in a call-over hearing before a master. In our case, it means the Order given by the learned Registrar. Both parties have complied with the Order by filing their affirmations. The only part of the Order that is relevant is the part extracted and discussed above.
9. Mr Cheung submitted that the situation in the present case was exceptional in that no court had dealt with the situation where there were two insurance policies in respect of the same vehicle and where the applicable insurance policy could only be enforced by a judgement of a Chinese court. Mr Lam submitted that there was nothing exceptional in the present case and that the 2nd Defendant had had its opportunity in December 2008 to apply for filing an affirmation.
10. I am not convinced that there are exceptional circumstances in the present case. Time and again, the court has to deal with novel situation but that, *per se* and without more, does not render the situation exceptional. Even again assuming that Mr Cheung was right that the Order did allow the 2nd Defendant to file further affirmation with leave of the court, in the absence of exceptional circumstances, there is no basis for me to exercise the discretion under Order 32 rule 16A(4).
11. The application of the 2nd Defendant for an adjournment for filing an affirmation on expert evidence on the PRC law is refused.

The Forum Conveniens Principles

1. The principles relating to *forum conveniens* stated by the House of Lords in Spiliada Maritime Corp v Consulex Ltd, The Spiliada [1996] AC 460 were summarized by the Hong Kong Court of Appeal in The Adhiguna Meranti (owners of cargo) v The Adhiguna Harapan (owners of ships) [1988] HKLR 904. A summary of the three-stage test was propounded in The Lanka Muditha [1991] 1 HKLR 741, 744B-D:

“(I) Is it shown that Hong Kong is not only not the natural and appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong …

(II) If the answer to (I) is yes, will a trial at the other forum deprive the plaintiff of any legitimate personal or juridical advantages. The evidential burden here lies on the plaintiff.

(III) If the answer to (II) is yes, a court has to balance the advantages of (I) against the disadvantages of (II) … Deprivation of one or more personal or juridical advantages will not necessarily be fatal to the applicant provided that the court is satisfied that notwithstanding such loss substantial justice will be done in the available appropriate forum … Proof of this … rests upon the applicant for the stay.”

1. This three-stage test was also applied by the Court of Appeal in Esquel Enterprises Ltd v Anr and TAL Apparel Ltd & Anr [2006] 2 HKLRD 363, 368J-369D.

Stage I

1. Is Hong Kong the natural and appropriate forum? The burden is on the applicant, i.e. the 2nd Defendant, to show that Hong Kong is not only not the natural forum but also the PRC court is clearly or distinctly more appropriate than Hong Kong court (The Adhiguna Meranti, p. 907G).
2. As could be gathered from the Statement of Claim, the claim of the Plaintiffs are based on both contract and tort.
3. As far as the contractual claim is concerned, there was no evidence before the court as to the terms of the contract of carriage. Various implied terms are pleaded in the Statement of Claim whereby the 2nd Defendant was obliged to, *inter alia*, take reasonable precaution to ensure the safety of the Plaintiffs. No choice of law or jurisdiction clause is pleaded.
4. The Policy Schedule to the Hong Kong insurance policy and the China insurance policy were exhibited. They were silent as to the jurisdiction and the choice of law. In my view, the insurance policies are in any event irrelevant as they would only govern the relationship between the owner of the Coach and the insurance company but not between the parties to the contract of carriage.
5. Insofar as the claim is based on tort, the jurisdiction in which the tort has been committed is *prima facie* the natural forum for the determination of the dispute (The Albaforth [1982] 2 Lloyd’s Rep 91, 94). But that is only one of the factors that would be considered by the court. Ma CJHC pointed out in The Peng Yan [2009] 1 HKLRD 144, 156:

“28. It is therefore important when applying *The Albaforth* principle in the context of *forum non conveniens* applications, to examine just how close a connection there really exists with any given *forum*. In some cases, the place of the commission of the tort may be decisive; in others, perhaps not weighty at all. The underlying principle to be firmly borne in mind is the basic test in *The Spiliada The Adhiguna Meranti*. The place of the commission of the tort may in some cases be quite fortuitous and may provide no more than a convenient starting point or *prima facie* position. The court is required to look into more substantial factors in the application of the basic test…”

1. One of the matters that I should take into consideration is the choice of law. In Boys v Chaplin [1971] AC 356, the respondent was injured in a traffic accident in Malta which was caused by the negligence of the appellant. Both the appellant and the respondent were normally resident in England. At the time of the accident, they were serving in H.M. Armed Forces stationed in Malta. The House of Lord ruled that as both parties were only temporarily present in Malta, English law should apply.
2. The case Boys v Chaplin was applied in Kwok Yu Keung. The plaintiff in Kwok Yu Keung sued the defendants for personal injuries sustained by him in a traffic accident which occurred in Guangdong Province of China. At the time of the accident, the plaintiff was one of the passengers on board the coach driven by the 1st defendant who was a Hong Kong resident and was in the employ of the 2nd and the 3rd defendants. The coach was registered under the name of the 2nd defendant and the coach service was provided by the 3rd defendant. Both the 2nd and the 3rd defendants were companies incorporated in Hong Kong.
3. The 2nd and the 3rd defendants applied for stay of proceedings on the ground of *forum non conveniens* in favour of proceedings in China. The application was refused.
4. In determining that the proper law to be applied should be Hong Kong Law, Suffiad J observed as follows:

“15. Indeed effect was given to such by the House of Lords in their decision in *Boys v Chaplin* [1971] AC 356, where the plaintiff and defendant were both English nationals involved in a road collision in Malta. Maltese law differed from English law in that under Maltese law, the plaintiff could only recover pecuniary loss, not compensation for pain and suffering as in English law. The House of Lords concluded that as both parties were English and were only temporarily present in Malta, English law should apply as the system of law much more closely connected with the relationship between the parties.

16. In coming to such a decision, it can at once be seen that the general rule that the wrong be doubly actionable, both in England and the place where the tort was committed, can be displaced on evidence that in all the circumstances English law has the most significant relationship with the occurrence and the parties.

…

23. In conclusion on the choice of laws, I take account that the parties are either Hong Kong residents or companies incorporated in Hong Kong, secondly, although the accident happened in China, the parties were only there temporarily. Thirdly, in the absence of any agreement that PRC law was the applicable law for the contract of carriage, those factors would be sufficient to displace the general rule that the *lox loci delicti* should be the governing law in the matter under dispute and that Hong Kong law should apply. The decision is arrived at notwithstanding the submission by the defendants that the concept of vicarious liability as it is understood in Hong Kong law has no application in PRC laws. It is no different from the decision in *Boys v Chaplin* where under Maltese law only pecuniary loss can be entertained whereas under English law the plaintiff can claim damages for pain suffering and loss of amenities.”

1. The facts of the present case are strikingly similar to those of Kwok Yu Keung, particularly when there is no evidence on the PRC law. I am satisfied that the law applicable in the present case should be the Hong Kong law. In coming to this conclusion, I have considered that all the parties are Hong Kong residents or companies incorporated in Hong Kong, that they and their agents were in China only temporarily and that there was no agreement (or no evidence of any agreement) that the PRC law was the applicable law. It is obvious from the judgement of Suffiad J that these factors alone would be sufficient for the court to conclude that the applicable law should be Hong Kong law.
2. Even assuming that the PRC law were to be taken as the law applicable, the fact that Hong Kong courts have regularly applied foreign law with the help of experts would render this consideration less important in the overall weighing exercise.
3. Besides the choice of law, I have to consider the logistics issues. As already noted, all the parties to the present action are Hong Kong residents or companies incorporated in Hong Kong. I note that there may be civilian witnesses and witnesses from the Chinese authorities in the PRC but there is no suggestion that it would be difficult for these witnesses to come to Hong Kong or that the relevant authorities were unwilling to offer help. It was noted by Deputy Judge To in Xu Yi Hong v Chen Ming Han & Ors (HCA No. 1109/2005, 3rd October 2006) that “[t]he large number of PRC litigants in our courts these days shows that travelling to Hong Kong or obtaining two way permits to come to Hong Kong is no longer a consideration against Hong Kong as a *forum conveniens*.” I respectfully agree with the learned Deputy Judge.
4. Considering all the above, I am satisfied that the 2nd Defendant has failed to discharge its burden required at Stage I of the test.

Stage II

1. Given my decision above, it is not necessary for me to deal with Stage II. But since counsel had argued matters relating to this Stage (though in the context of application of filing expert evidence), I shall briefly deal with the matters.
2. The absence of vicarious liability in PRC law is obviously a matter that has to be taken into account. In this regard, Suffiad J commented in Kwok Yu Keung:

“34. A further matter that I take into account is the fact that it is the defendants’ stance that the concept of vicarious liability (as it is known in Hong Kong law) has no application in the PRC court under its laws. Therefore if he had to bring his case in the PRC court, that would also deprive the plaintiff of a juridical advantage of being able to claim in the Hong Kong court against the employers of the 1st defendant on the basis of vicarious liability for the negligence of the 1st defendant.

1. Mr Cheung’s submission that the law in the PRC had changed and that vicarious liability was now available in the court of the PRC was not supported by any evidence. I believe this issue of vicarious liability was one of the matters that would have been dealt with by the 2nd Defendant’s proposed expert evidence on the PRC law. The effect of this change is that the Plaintiffs could sue the employer or the principal of the 1st Defendant who may not have any contractual relationship with the Plaintiffs. In our case, it means that the Plaintiffs could sue the 2nd Defendant who is the principal of the 1st Defendant in the PRC when in fact that is what they are doing in the Hong Kong proceedings. Thus, assuming that Mr Cheung was right about the vicarious liability in the PRC, it would mean one less juridical disadvantage to the Plaintiffs if the case proceeds in the PRC. In other words, the Plaintiffs would not be deprived of the juridical advantage that they could now enjoy in Hong Kong when the case is brought in the PRC. However, this aspect of the juridical advantage is only one of the considerations that the court would take into account. I do not see this single consideration could tip the balance in favour of the 2nd Defendant in a significant way.
2. In my view what is far more important is the quantum of damages recoverable. In this regard, Suffiad J said in Kwok Yu Keung that:

“33. As for the stage (b) test, it is common grounds between the parties that damages assessed by the Hong Kong court will be substantially more than damages assessed by the PRC court. However, in this connection it should be noted that the damages assessed by Hong Kong courts are compensatory in nature. Viewed from that angle, it must follow that if damages assessed by the PRC courts are substantially less, then it must mean that such damages assessed by a PRC court is inadequate to properly compensate the plaintiff and therefore deprive him of a personal advantage if he had to bring his case in the PRC court.”

1. Mr Cheung submitted that there was a trend in the PRC court that the quantum of damages was on the rise. There was no such evidence before the court. Again, I believe this would have been one of the subject matters of the proposed expert evidence on Chinese law. Even if there was such evidence, that would not help the case of the 2nd Defendant as the compensation that could be awarded to the Plaintiffs was restricted to RMB 100,000 for each person. The quantum of damages claimed by the first-named Plaintiff and the second-named Plaintiff in the present proceedings are respectively roughly HK$250,000 and HK$500,000. The Plaintiffs may or may not be able to prove that they are entitled to be awarded these amounts as compensation in the Hong Kong court. For the purpose of the present application, however, the important point is they would be deprived of the opportunity of being allowed these amounts of compensation if they were to proceed with their claims against the Defendants in the PRC. In my view, such a personal advantage is important and failure to overcome this issue would be fatal to the application of the 2nd Defendant.
2. Would the availability of vicarious liability in the PRC increase the quantum as more parties would be held liable? I do not think so. On this note, I refer to the extract from the judgement of Suffiad J cited above in which His Lordship commented that both parties before him agreed that damages assessed by the Hong Kong court would be substantially larger than those assessed by the court in the PRC. Both counsel appearing before me did not suggest anything to the contrary. Although Mr Cheung submitted that more damages would now be awarded by the PRC court, he did not specify the particulars or point out whether there were any changes to the rules regarding assessment of damages by the PRC court.
3. Thus, the availability of vicarious liability would only have the potential benefit of joining more parties who would be held liable for the loss suffered by a plaintiff. Admittedly, the position of a plaintiff would be better because he now stands a better chance to have the judgement satisfied as more parties would be found liable. But it does not solve the far more important problem that the damages awarded by the PRC court would be inadequate to properly compensate a plaintiff.
4. To this extent, filing of affirmation on expert evidence on the PRC law would not help the case of the 2nd Defendant as it had not been pointed out in Mr Cheung’s submission whether there had been changes to the rules regarding assessment of damages in the PRC. This is also one of the reasons why the application of the 2nd Defendant’s for filing of an affirmation on expert evidence on the PRC law is refused.
5. Mr Cheung suggested that a large chunk of legal costs could be saved if the trial takes place in China. There is no evidence on the cost comparison between proceedings in the PRC and Hong Kong. It is perhaps well accepted that litigation in Hong Kong is an expensive exercise. The court, however, is in the dark as to the likely costs that would be incurred and the rules on costs in the PRC legal proceedings.
6. Mr Cheung further suggested that if the trial takes place in Hong Kong, PRC law experts would be required to testify on issues relating to choice of law, liability and assessment of damages. This suggestion, however, is premised on the assumption that the PRC law is the law applicable. Since I have ruled that the applicable law is Hong Kong law, Mr Cheung’s argument is rendered invalid by my ruling. Even if his argument applies, he still faces the obstacle that there is no evidence on the cost comparison as mentioned above.
7. As far as enforcement of the judgement to be obtained by the Plaintiffs is concerned, in the absence of evidence suggesting otherwise, I believe, *prima facie*, it must be easier for the Plaintiffs to enforce the judgement against the 1st and the 2nd Defendants in Hong Kong. I was informed by counsel that the “Arrangement on Reciprocal Enforcement of Judgements in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region pursuant to Choice of Courts Agreement between Parties Concerned” was yet to be put into effect. But it seems to me that the Arrangement would only apply to a judgement given pursuant to a choice of mainland court agreement. I do not think there is any such agreement in this case. Thus, even if the Arrangement were in place, it does not apply to our case.
8. Mr Cheung also submitted that the Plaintiffs had failed to join Gd Bonwell as a party and Gd Bonwell would play an important role in the contribution to the eventual award of damages. I believe Mr Cheung was trying to argue that such a fact would give more “PRC connection” to the PRC court. It is not, however, unusual that a plaintiff would choose carefully which defendants to sue if there are more than one defendant who would be held responsible, sometime for the obvious reason that a particular defendant is more likely to be able to satisfy the judgement. The Plaintiffs in our case could choose the parties they want to sue for their own reasons. If the 1st and the 2nd Defendants think that they are entitled to any contribution from Gd Bonwell, they could issue third party proceedings against Gd Bonwell. Until then, Gd Bonwell is not a party to the present proceedings and its potential liability to contribute carries little weight in the weighing exercise, if any at all. The same applies to the driver (徐輝鵬) of the other vehicle involved in the accident.
9. Of course, if the 2nd Defendant were to apply for joining Gd Bonwell and徐輝鵬 as third parties, they would run the risk of being treated as submitting to the jurisdiction of the Hong Kong court. But still, this does not detract from the fact that the Plaintiffs are entitled to choose the defendants they want. It should be appreciated that at the same time, by leaving out Gd Bonwell and徐輝鵬, the Plaintiffs also run the risk of the judgement not being satisfied upon enforcement against the 1st and the 2nd Defendants who may not have sufficient financial means.
10. If I were to rule on the Stage II test, bearing in mind that the burden of proof is on the Plaintiffs, I would rule in favour of the Plaintiffs.

Conclusion

1. Bearing the above in mind, I am satisfied that the 2nd Defendant has failed in its application for stay of proceedings.
2. The orders I shall make are as follows:
3. the Summons is dismissed;
4. there shall be a cost order *nisi* that costs of the Summons be to the Plaintiffs to be taxed if not agreed, with certificate for counsel;
5. the cost order shall become *absolute* in 14 days.

# (Raymond Tsui)

Deputy District Judge

Representation:

Mr. Allen Lam instructed by Messrs S. H. Chan & Co. for the Plaintiffs.

Attendance of the 1st Defendant is dispensed with.

Mr. Jeremy Cheung instructed by Messrs Reimer & Partners for the 2nd Defendant.