HCA 1887/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

HIGH COURT ACTION NO 1887 OF 2011

BETWEEN

E-GLOBAL LIMITED Plaintiff

and

TRENDA LIMITED 1st Defendant

ALVAN LIU & PARTNERS (a firm) 2nd Defendant

Before: Hon To J in Chambers (Open to Public)

Date of Hearing: 28 March 2012

Date of Decision: 4 May 2012

D E C I S I O N

Background

1. This is the 1st defendant's application for security for costs against the plaintiff pursuant to Order 23 of the Rules of the High Court and section 357 of the Companies Ordinance. The application arose under the following circumstances.

2. On 18 March 2011, the 1st defendant and plaintiff entered into a provisional agreement for the sale and purchase ("provisional agreement") of an office unit at Unit 1111 of Peninsula Centre in Kowloon ("Property") at a price of $18 million. Clause 2(a) and clause 2(b) of the provisional agreement provided respectively that the plaintiff shall pay an initial deposit of $0.5 million upon signing of the provisional agreement and a further deposit of $1.3 million upon signing the formal sale and purchase agreement ("formal agreement") on or before 7 April 2011. The balance of the purchase price in the sum of $16.2 million shall be paid upon completion on or before 13 October 2011. Clause 3 of the provisional agreement provided that the Property was to be sold to the plaintiff free from encumbrances. Messrs Siao, Wen and Leung ("SWL") acted for the plaintiff. Messrs Alvan Liu & Partners ("ALP"), the 2nd defendant herein, acted for the 1st defendant. The initial deposit was duly paid on 18 March 2011 upon signing the provisional agreement.

3. Then, disagreement arose as to whether a certain requisition raised by SWL had been properly answered by ALP. Notwithstanding the disagreement, the plaintiff sent a cheque through SWL in the amount of $1.3 million ("second payment") to ALP on 7 April 2011 under the cover of SWL's letter of the same date, stating:

> "As the terms of the formal Agreement for Sale and Purchase have not yet been fully agreed between our respective clients, the same cannot be signed yet and therefore the payment of the further deposit is not yet due.
>
> In order to show our client's sincerity to purchase the Property, we are instructed to send you herewith our cheque drawn in your favour for the sum of HK$1,300,000.00 in payment of the further deposit payable upon signing of the formal agreement for Sale and Purchase. Kindly note that the said cheque is sent to you subject to your firm's strict undertaking

> only to hold the same and release (where applicable) the same to your client pursuant to said Provisional Agreement."

4. The disagreement was never resolved. The parties did not sign the formal agreement. The sale and purchase of the Property was not completed. The plaintiff alleged that the 1st defendant was in breach of the provisional agreement and by a letter dated 13 October 2011 accepted the 1st defendant's repudiation of the provisional agreement. The 1st defendant refused to return the second payment received from the plaintiff. The plaintiff commenced proceedings against the 1st and 2nd defendants on 3 November 2011. On 30 November 2011, ALP paid $1.3 million into court. Thereupon, the plaintiff discontinued the action against ALP. On 29 December 2011, the 1st defendant applied for security for costs against the plaintiff. The 1st defendant counterclaims against the plaintiff a declaration that it is entitled to forfeit the initial deposit, the sum of $1.3 million paid into court, and damages, including loss on resale or diminution in value of the Property.

The legal principles applicable to an application for security for costs

5. The 1st defendant's application is based on section 357 of the Companies Ordinance, which reads:

> "Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

6. The principles governing section 357 are well-known. Counsel have no dispute that the burden is on the defendant to establish

by credible evidence that there is reason to believe that the plaintiff company will not (as opposed to may not) be able to pay the costs of the defendant if it is successful in its defence: see *Vigers Hong Kong Limited and Junsa Development Limited*, HCA 5173/1998 at paragraph 15 and *Hong Kong Civil Procedure 2012 Vol 1* at paragraph 23/3/14.

7. However, section 357 does not contemplate proof that the plaintiff is actually impecunious and will not be able to pay the defendant. The section only requires some credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence. In the New Zealand case of *Concorde Enterprises Limited v Anthony Motors (Hutt) Limited (No.2)* [1977] 1 NZLR 516 at 518 line 50, Quilliam J construed section 467 of the New Zealand statute which is similar to section 357 of the Companies Ordinance as follows:

> "The wording of section 467 requires consideration. It is to be observed that the legislature has departed from the more familiar phraseology, namely, "if it appears to the Court", or, "if the Court is satisfied", or the like. Indeed, the expression used is "if it appears by credible testimony that there is reason to believe". I think this form of expression is of some significance and the reason for it is not difficult to find. There can be no doubt that the onus under the section rests upon the applicant, that is, the defendant. By the very nature of the application, however, the defendant cannot be expected to produce anything very conclusive in the way of proof. It has no access at this stage to the plaintiff's books of account or other records, and can do no more than point to the surrounding circumstances. In the majority of cases it is found that the plaintiff is in liquidation or receivership which has an obvious significance of its own. But this is not always the case, and it is not the case here. I think that what the statute contemplates is that there should be credible (that is believable) evidence of surrounding circumstances from which it may reasonably be inferred that the company will be unable to pay the costs. This does not, of course, amount to proof that the company will, in fact, be unable to pay

them. The way in which the equivalent section in the English legislation is to be construed was summarised by Lawton LJ in *Sir Lindsay Parkinson & Co Ltd v Triplan Limited* [1973] QB 609, [1973] 2 All ER 273 in this way:

> "I agree with Lord Denning MR that the effect of section 447 is that once it is established by credible evidence that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence, the court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straitjacket by considerations of burden of proof. It is a discretion which the court will exercise having regard to all the circumstances of the case."

8. I agree with the construction of the learned judge. It must be appreciated that by the very nature of the application and the relationship between the parties, the defendant cannot be expected to produce conclusive evidence of the plaintiff's lack of means. It has no access to the plaintiff's books of account or other evidence. Nor is it desirable to mount a comprehensive discovery process for the purpose of making such an application. It is therefore sufficient for the defendant to point to the surrounding circumstances or adduce some credible evidence in support of his belief that the plaintiff will be unable to pay the defendant's costs. It is then up to the plaintiff to adduce such evidence as he thinks fit to demonstrate his means or to contradict the defendant's evidence. The court shall decide whether a reasonable person with ordinary experience of daily life would consider the plaintiff unable to pay such costs. The threshold is just one of adducing credible evidence for the belief and falls short of proof of lack of means to pay.

9. Once this threshold is met, the court has a complete discretion whether or not to order security: see *Wing Hing Provision*,

Wine & Spirits Trading Co Ltd v Hanjin Shipping Co Ltd [1998] 4 HKC 461. In that case, Godfrey JA adopted the principles governing the exercise of this discretion as set out by Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 at 539-540. The principles are as follows:

(1) the court has complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances;

(2) the possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security;

(3) the court must carry out a balancing exercise. On the one hand, it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and the defendant finds himself unable to recover costs from the plaintiff in due course;

(4) in considering all the circumstances, the court will have regard to the plaintiff company's prospect of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure;

(5) the court may order any amount up to the full amount claimed by way of security, provided that it is more than

a simply nominal sum; it is not bound to order a substantial amount; and

(6) before refusing to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence. The court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested parties. It is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation.

10. Besides the above principles, another set of principles which applies particularly to security for costs against the plaintiff against whom the defendant has made a counterclaim also evolved. These principles have been conveniently summarised by Yam J in *Ai Zhong and Metrofond Ltd* [2010] HKLRD 213 at 221 as follows:

(1) The court has discretion in all applications for security for costs, and it is not a question of merely considering whether the claim and counterclaim arise out of the same issue of fact but a question of "what is fair and just in all the circumstances". (*Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307, *per* Dillon LJ.)

(2) Application for security for cost should be refused if it will prevent the plaintiff from pursuing its claim but in the course of defending the counterclaim all the same matters would be canvassed as would be canvassed if the plaintiff were to pursue its claim. (*Goal Setting Consulting Co Ltd v Unigraphics Solutions Asia/Pacific Inc* (unrep, HCA 994/2003, [2005] HKEC 20), citing *BJ Crabtree (Insulation) Ltd v GPT Communications Systems* (1993) 59 BLR 43.)

(3) Application should also be refused when the cost incurred by the defendant for the purposes of the defence might equally and perhaps preferably be regarded as costs necessary to prosecute the counterclaim. (*Goal Setting Consulting Co Ltd*, citing *Crabtree (Insulation) Ltd*.)

(4) The existence of a counterclaim arising out of the same matters as that in the plaintiff's claim *per se* does not affect the court's ability to order security for costs against the plaintiff. (*Wing Hing Investments Ltd v Lee Hoi Wing* (unreported, CACV378/2005, [2006] HKEC 378).)

(5) It is pertinent to ask whether in the particular case the counterclaim is a cross-action or operates as a defence, that is to say merely operates as a defence. (*Hutchison Telephone (UK) Ltd*, per Dillon LJ)

(6) In determining the question in (5), the most important factor to consider is whether "the claim by the plaintiffs

and the cross-claim by the defendants – raise essentially the same issues and are going to be fully litigated anyway so far as one can tell". (*BJ Crabtree (Insulation) Ltd*, per Bingham LJ at p 54.)

(7) In determining the question in (5), the marked discrepancy in size between the amount claimed in the action and the very much greater amount claimed by the cross-claim is also a relevant factor. (*Hutchison Telephone (UK) Ltd*, per Dillon LJ.)

(8) A defendant should not be required to give security for costs if he is only defending himself from the plaintiff's claim. (*Hutchison Telephone (UK) Ltd*, per Bingham LJ.)

(9) When both the plaintiff and defendant can be viewed as attackers, the treatment of both parties in security for costs should be the same. (*Samuel J Cohl Co v Eastern Mediterranean Maritime Ltd (The Silver Fir)* [1980] 1 Lloyd's Rep 371, cited with approval by Ma J in *Brand Farrar Buxbaum LLP v Samuel-Rozenbaum Diamond Ltd* [2003] 1 HKLRD 600.)

The theme underlying these principles is that if the claim and counterclaim or cross-claim raise essentially the same issues which will have to be fully litigated anyway, then it will be unfair and unjust to order security for costs against the plaintiff. To order security in such circumstance will prevent the plaintiff from pursuing his claim for not being able to raise the security when he will still have to litigate the same issues in defending the counterclaim.

The factual basis of the 1st defendant's application

11. The 1st defendant relies on the following facts in support of its belief that the plaintiff will not be able to pay its costs if successful in defending the action:

(1) the plaintiff is a one dollar shelf company;

(2) the plaintiff does not appear to have an actual registered office and does not appear to carry on any business;

(3) the plaintiff does not have any other business apart from engaging in transactions in the property market; and

(4) the plaintiff does not have substantial assets or income.

Mr Pun, counsel for the 1st defendant, submits that the threshold is a very low one and the 1st defendant has crossed that threshold.

The plaintiff is a one dollar shelf company

12. There is no dispute that the plaintiff was a shelf company incorporated on 2 March 2010 and that it has a paid up capital of $1 only. This fact is relied on heavily by the 1st defendant as evidence in support of its belief that the plaintiff will be unable to pay the 1st defendant's costs. This fact, by itself, is by no means a reliable indicator. The assets held by the plaintiff, the business being carried on and its business potential are more useful indicators. That a company has a small paid up capital only is by itself insufficient to trigger the court's jurisdiction to order security: see *Success Wise Ltd v Dynamic (BVI) Ltd* [2006] 1 HKC 149.

13. However, a small paid up capital is the hallmark of a company of no substance. The operation of such a company is usually

financed by its shareholders or directors, who intend to hide behind the company veil to insulate themselves from liabilities arising from the activities of the company, particularly activities of a speculative nature. That inference may be readily drawn, if the company is formed for the purpose of purchasing one property of substantial value financed by loans from its directors or shareholders. And if that company becomes involved in litigation, it may also be inferred that it will be unable to pay the opponent's costs. On the facts, the plaintiff is not a company formed for the purpose of a single property transaction: see paragraphs 17-22 below.

No actual registered office and no signs of carrying on any business

14. According to its business registration application, the plaintiff carries on a property investment business at its registered office at Unit 1311 of Peninsula Square ("Unit 1311").

15. The 1st defendant engaged Verity Consulting Limited ("Verity"), a private investigator, to conduct an investigation at Unit 1311. Unit 1311 was not a property owned by the plaintiff. Verity reported that the signboards at the ground floor and 13th floor of Peninsula Square showed that Unit 1311 was occupied by United Giant International Limited ("United Giant"). The unit was about 400 to 500 square feet. Behind the reception desk were the names of two companies, namely United Giant and Pro Legacy Sporting Goods Limited ("Pro Legacy"). The investigator made two pretext visits to the unit and was informed by two different female staff that the plaintiff did not operate from that unit. The security guard on the ground floor also confirmed the same. Mr Pun

submits that the plaintiff does not appear to have an actual registered office or to be carrying on any business at its registered office.

16. The plaintiff does not dispute the finding of Verity but explains that its business is primarily focused on property investment which is conducted primarily on paper and as such it is reasonable to share its registered office address with other business activities conducted by its sole shareholder, Wendy Lo ("Lo"). The plaintiff has not adduced any evidence of its sole shareholder's connection with United Giant and Pro Legacy. I am a little surprised that the staff of those supposedly connected companies could have no idea of the plaintiff if all the three companies are owned by Lo. Be that as it may, if what Lo said is true, in view of the small size and nature of the plaintiff's property investment business, it is probably more cost effective not to maintain a full office. The lack of a registered office and a regular business office is some circumstances which supports the 1st defendant's belief that the plaintiff will not be able to pay its costs. But, the question is whether on the totality of the evidence that belief is reasonable.

The business activities of the plaintiff

17. The plaintiff was incorporated on 2 March 2010. Prior to the transaction involved in this litigation, it had made two purchases and one sale of property. At present it is holding one property.

18. On 16 April 2010, the plaintiff purchased Unit 10 of Wing On Plaza ("first property") at a price of $13.5 million. The first property was sold in excess of $15.5 million on 11 September 2010 making a

net profit of about $1.85 million. It paid profits tax of $198,000 on 28 January 2011.

19. On 28 February 2011, the plaintiff purchased Unit 5 of Wing On Plaza ("second property") for a consideration of $25.8 million. It was financed by a mortgage loan of $10 million advanced by the Hongkong and Shanghai Banking Corporation Limited ("HSBC") with the balance paid from the profits from the sale of the first property and a director's loan. Lo said that the second property was intended for long term investment and was rented to New Shanghai Investments Ltd ("New Shanghai") at a monthly rental of $61,200 for a term of two years from 1 March 2011.

20. The 1st defendant caused Verity to make an investigation regarding the tenancy of the second property. According to Verity, its investigator visited the second property on 12 March 2012 at 1049 hours. He could not find the name of New Shanghai in the directories on the ground floor and fifth floor. But he found a letter from PCCW addressed to New Shanghai placed on the floor near the entrance of the second property. He found the second property was furnished but there was no staff inside. He made pretext enquiries with the adjacent units and was informed that the neighbouring tenants either thought the second property was vacant or knew nothing about New Shanghai. He made enquiry with the security guard at the lobby and reported the following:

> "Pretext enquiries were then made with a security guard, which revealed that the Subject moved in there two to three years ago. Investigation ceased."

It is difficult to understand what Verity meant. The "Subject", meaning New Shanghai, even according to the plaintiff's case could not have moved in two to three years before March 2012. On that evidence, probably the security guard was mistaken as to the time when New Shanghai moved in, but did confirm that New Shanghai had moved in. The evidence supports the plaintiff's case that it rented the second property to New Shanghai. Any doubts as to the existence of the tenancy which may be raised by the absence of New Shanghai's signboard outside the office, or on the directories on the ground floor and fifth floor is dispelled by the evidence of the letter from PCCW and the security guard.

21. The 1st defendant's purpose of the investigation is to dispute the plaintiff's rental income as a means to challenge its ability to pay the defendant's costs. Lo produced a copy of the plaintiff's tenancy agreement with New Shanghai, duly stamped on 4 March 2011, a copy receipt for agency fee in respect of the letting of the second property dated 3 March 2011 and copies of bank statements from the plaintiff's bank account with HSBC for the months of December 2011 to February 2012 showing payment of rental by New Shanghai. The authenticity of those documents is not in dispute. They are incontrovertible and credible evidence showing that the tenancy is genuine and the plaintiff received rental income from the second property. The genuineness of the tenancy is also verified by Verity's finding of a letter from PCCW addressed to New Shanghai left outside the second property and the enquiry with the security guard. It is perhaps strange that the signboard of New Shanghai was not to be found outside the second property or in the directories on the ground floor and fifth floor. But on the totality of the evidence, I am

satisfied that the tenancy is genuine and the plaintiff receives rental income from the second property.

22. The plaintiff adduced no evidence of any other business activities. Thus, during this span of two years, the plaintiff made three purchases, including the aborted purchase which formed the subject matter of this litigation, one sale and one rental agreement. This is the sum total of all its business transactions during the two years of its inception. There were few transactions, but the plaintiff is not dormant. It is now holding the second property which is a property of substantial value rented out to New Shanghai. The plaintiff's business is property investment. Property holding is a passive investment. Investment in real property in Hong Kong involves a substantial sum of money. That the plaintiff only made three property transactions in the span of two years is explicable in view of the nature of its business and its small scale operation. No inference that it will be unable to pay its debts or the 1st defendant's costs could reasonably be drawn.

Whether there is reason to believe that the plaintiff will be unable to pay the costs of the 1st defendant

23. Lo said that the plaintiff is well in a position to pay the 1st defendant's costs for three reasons. Firstly, the plaintiff is holding the second property which is of substantial value. Secondly, the mortgage loan secured against the second property only accounts for a small portion of the value of the property. The plaintiff is receiving stable rental income which is more than enough to pay the mortgage interest. Thirdly, substantial amounts of the plaintiff's funds are being held by the 1st defendant and the court, ie the deposit of $0.5 million held by

the 1st defendant and the payment into court of $1.3 million by the 2nd defendant.

24. Mr Poon, counsel for the plaintiff, argues that the plaintiff is not a nominal company and has substantial asset. It made a profit of $1.85 million upon the sale of the first property and is holding the second property generating monthly income of $61,200. Though the purchase of the second property was substantially financed with a mortgage loan of $10 million from HSBC and a director's loan from Lo, the plaintiff has an equity in the second property represented by the profit from the sale of the first property and the equity is building up with each receipt of the monthly rent. As the facility letter dated 18 January 2012 from HSBC shows, the outstanding mortgage loan as at 15 January 2012 is $9,584,000, the mortgage interest charged is at the rate of 1% per annum above Hong Kong Interbank Offered Rate which is about $10,000 per month and monthly principal repayment is $41,600. The rental income net of mortgage interest and principal repayment is about $10,000 per month. As the bank statement of the plaintiff's account with HSBC shows, it has accumulated about $123,000 as at 29 February 2012.

25. The 1st defendant caused a valuation to be made of the second property. According to S H Ng & Co Ltd Real Estate Consultant ("SHN"), the market value of the second property as at 26 January 2012 with immediate vacant possession was $24.3 million and subject to the tenancy agreement was $23 million. According to the valuation report prepared by the plaintiff's valuers, Centaline Surveyors Limited ("Centaline"), dated 26 January 2012, the second property was valued at $26.6 million. Mr Pun criticised Centaline's valuation as unreliable for

its lack of supporting comparable data. SHN's valuation appears to be more professional and is supported by comparables. But, this is not the occasion for determining the valuation of the second property. In any event, the difference is not substantial.

26. Mr Pun, however, argues that the second property suffered a depreciation of $2.8 million which wiped out all the profits made from the sale of the first property and the rental income from the second property hitherto received. He submits that the second property is now a negative asset and a liability to the plaintiff and the 1st defendant has plainly crossed the threshold.

27. Even accepting SHN's valuation, the profit and loss approach Mr Pun adopted in assessing the plaintiff's means to pay costs is grossly flawed. The plaintiff is in the business of property investment. The acquisition of the second property had been heavily financed by Lo to the magnitude of $14 million. By any assessment, the second property is valued well over $20 million and is receiving monthly income of $61,200. Lo vowed that she will not allow the plaintiff to default on any payment of costs to the 1st defendant because that will lead to winding up of the plaintiff and forced sale of the second property. A forced sale will result in catastrophic loss in value of the second property which will gravely prejudice her as the largest unsecured creditor of the plaintiff. I have no doubt about that. Lo would be out of her mind to allow that to happen. The outstanding loan owing to HSBC is only $9.5 million. Accepting SHN's valuation of the second property subject to tenancy to be $23 million, there is still plenty of equity for the plaintiff to raise additional loan to meet the 1st defendant's costs as well as the plaintiff's

own costs. It is totally out of reality to suggest, as Mr Pun does, that Lo will have to cause the plaintiff to liquidate all its assets to pay the 1st defendant's costs which in all likelihood will be but a small fraction of the value of the second property.

28. As for Lo's assertion that the second property is generating stable income, the majority of that income is being applied to pay the mortgage interest and principal repayment. Anyway, the principal repayment will build up the plaintiff's equity in the second property and improve its ability to secure a loan to pay costs. As for the two sums held by the 1st defendant and paid into court, I think Lo's argument is seriously flawed. If the plaintiff is required to pay the 1st defendant's costs, it must of necessity follow that those sums are to be forfeited to the 1st defendant and could not be used by the plaintiff to pay the 1st defendant's costs.

29. In conclusion, I am satisfied that the plaintiff was not formed for a single transaction but is genuinely carrying on a property investment business holding a property of substantial value which is generating substantial rental income sufficient to pay the mortgage interest and principal repayment. Despite the mortgage, it has sufficient equity in the second property to secure a loan to pay its and the 1st defendant's costs. It will not be in the best interest of Lo as its sole shareholder and major unsecured creditor to allow the plaintiff to be wound up for failing to pay the 1st defendant's costs. Looked at with realism, I am not satisfied that the 1st defendant has proven by credible testimony that there is reason to believe that the plaintiff will be unable to pay the costs of the 1st defendant if successful in its defence. The 1st defendant has quite failed to cross the threshold.

Whether the 1st defendant's counterclaim arose out of the same matter as the plaintiff's claim

30. Assuming that I reached a contrary conclusion, I now consider the impact of the 1st defendant's counterclaim on my discretion to order security.

31. The plaintiff's case is that as the formal agreement was not agreed and signed, it is entitled to the return of the deposit and the second payment which was made subject to ALP's undertaking only to hold the same and release the same to the 1st defendant pursuant to the provisional agreement. The 1st defendant argues that the second payment is further deposit or part payment under the formal agreement. It seeks a declaration that it is entitled to forfeit the two sums and counterclaims for damages. At the hearing, Mr Pun undertakes not to pursue the claim for damages if the plaintiff's claim is dismissed, but maintains the counterclaim for the declaration and forfeiture of the two sums. Thus, despite the undertaking, the plaintiff's claim and the 1st defendant's counterclaim have to be determined. It is plain that the plaintiff's claim and the 1st defendant's counterclaim both touch upon the same transaction, ie the provisional agreement. The claim is the mirror image of the counterclaim. They involve the same issues. The issues will have to be litigated even if the plaintiff's claim is dismissed by default for failing to pay security.

32. Mr Pun, quoting *Wing Hing Investments Limited and Lee Hoi Wing*, argues that the fact that both the claim and counterclaim arise out of the same matter does not affect the court's ability to order security. He relies on *Brand Farrar Buxbaum LLP v Samuel-Rozenbaum Diamond*

Ltd and Samuel-Rozenbaum HK Ltd (No 2) and submits that the real question is who in substance is the real attacker. I have no quarrel with these propositions.

33. Mr Pun then relying on *Brand Farrar Buxbaum* argues that if the property in question was originally in the possession of one party but subsequently its ownership was challenged by another party, the latter would be the attacker and carried the onus of proving entitlement. *Brand Farrar Buxbaum* was a case of an interpleader. The bailiff seized property in the possession of a third party. When the third party made a claim for the seized property, the bailiff issued an interpleader summons. Ma J, as he then was, held that: (1) the fact that a person is named as claimant is not determinative whether he is to be treated as a plaintiff in security for costs proceedings; (2) the court must look at the substance to determine who is the attacker and who is the defender in the action; (3) if the relevant property has been taken by the bailiff when in the judgment debtor's possession, and a third party then claims that property, it will be appropriate to regard the third party as the plaintiff (the attacker); (4) conversely, where the relevant property is in the possession of the third party claimant at the time of seizure, and the judgment creditor then claims that property, the judgment creditor may well be regarded as the plaintiff (the attacker); and (5) the relevant time for the inquiry of who was in possession is the time of seizure by the bailiff. Mr Pun argues by analogy that the $1.3 million under the second payment was in the possession of the 1st defendant before the plaintiff issued the writ against ALP alleging breach of trust. With a view to saving costs and focussing on the real issues, the 1st defendant instructed ALP to pay the $1.3 million into court pending determination of the dispute between

the plaintiff and the 1st defendant. Hence, Mr Pun argues that in claiming the money the plaintiff is the real attacker and an order for security against the plaintiff is appropriate.

34. In my view, given the terms under which the second payment was made, it is arguable that ALP who was in possession of the sum of $1.3 million should not have paid it over to the 1st defendant and that when it paid the sum into court, it was in the same position as a third party. Both the plaintiff and 1st defendant are claiming the sum paid into court. In my view, both of them are attackers. There is no reason to treat one differently from the other as regards the question of security. In my view, the present case falls within propositions (2), (3), (6) and (9) in paragraph 10 above.

35. Assuming that the 1st defendant was successful in crossing the threshold and it becomes necessary for me to exercise my discretion under section 357, I would exercise it against the grant of security. It is not necessary for me to investigate the merit of the claim and counterclaim. Though there is nothing to suggest that the plaintiff will be deterred from pursuing its claim by an order security, the balance of injustice is heavily in favour of refusing than granting the security for the following reasons. It is likely that Lo will cause additional loan to be raised than to allow the plaintiff to be wound up for failing to pay costs. The chance of the 1st defendant being left with an empty costs order is very slim. The 1st defendant has a counterclaim against the plaintiff. Both the claim and counterclaim arise out of the same matters and raise essentially the same issues and are going to be fully litigated anyway.

In substance, both the plaintiff and the 1st defendant are attackers. There is no reason to treat the plaintiff differently from the 1st defendant.

Conclusion

36. For the above reasons, I find that the 1st defendant has failed to prove by credible testimony that there is reason to believe that the plaintiff will be unable to pay its costs. Even if it has succeeded in proving that, for reasons as given above I would still exercise my discretion against the grant of security.

37. The 1st defendant's application is therefore dismissed with an order *nisi* that the 1st defendant shall pay the plaintiff's costs of this application with certificate for counsel. Such costs are to be taxed, if not agreed.

(Anthony To)
Judge of the Court of First Instance
High Court

Mr Poon Siu Bunn, instructed by Siao, Wen & Leung, for the plaintiff

Mr Kevin KH Pun, instructed by Alvan Liu & Partners, for the 1st defendant