HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)
2. Instructions in relation to the Mini-Trial
3. Trial bundle for Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court has a very good understanding of the background facts and accordingly, while arguments must of course be put into proper factual context, there is no need for long, time-consuming recitations of the background facts.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

(All names in the example below are fictional. The cryptocurrency and NFTs referred to below are also fictional. For the purpose of this exercise and the mini-trial, cryptocurrency and NFTs are to be regarded as personal property (chattels).)

1. Ms. Henrietta Harry ("**Henrietta**") is a 3rd year Philosophy student studying in Sydney, Australia. From 2019, she is also a well-known non-fungible token ("**NFT**") and cryptocurrency investor and YouTuber, having popularised a highly successful cryptocurrency called "*Henrietta Coin*". Henrietta has 100,000 Henrietta Coins in her online account, which (at USD 300 per Henrietta Coin at the material time) are valued at USD 30 million. Her YouTube Channel has 8 million subscribers across the world.

2. On 1 January 2021, Henrietta reported the loss of her laptop and phone to Police in Sydney. According to Henrietta, when she later used another laptop to login to her online account, she found that all of her 100,000 Henrietta Coins have been transferred without her knowledge to the account of Ms. Rowena Ronald ("**Rowena**"), an Engineering student she had met in 2019 when she was on exchange in Hong Kong.

3. In light of this, Henrietta instructed Hong Kong lawyers to apply for a *Mareva* and proprietary injunction against Rowena in Hong Kong. The injunction was granted *ex parte* on 15 January 2021 and not challenged at the *inter partes* stage.

4. On 1 February 2021, Rowena made an open offer to settle the action with Henrietta for USD 7.5 million, i.e. 25% of the amount Henrietta claims against her, on a without admission of liability basis. Henrietta did not accept this offer.

5. Rowena then filed her Defence on 1 March 2021. In her Defence, Rowena pleads that:-

5.1. When Henrietta and Rowena met in 2019, they became close friends because of their shared interest in NFT and cryptocurrencies. With Henrietta's strength in marketing and Rowena's strengths in programming and IT matters generally, they decided to team up to create "*Henrietta Coin*" together.

5.2. Rowena being a very shy person, she orally agreed to let Henrietta take all the credit for creating "*Henrietta Coin*" and represent herself as the creator of Henrietta Coin to the public. Rowena was content to hold on to the 200,000 Henrietta Coins she owns (i.e. twice the number of Henrietta Coins allocated to Henrietta) and to benefit from the rise in their value without attracting publicity.

5.3. However, in around October 2020, Henrietta came to the view that Henrietta Coin was overpriced, partly due to the fact that many of her YouTube followers began buying Henrietta Coin for higher and higher prices. Instead, the better investment would be NFTs, especially NFTs created by an artist known by the name "*MISSIE*", which are treasured amongst a small circle of technology enthusiasts but still unknown to the general public.

5.4. Rowena is an early collector of "*MISSIE*" NFTs and had a collection of 200 such NFTs (with a market price of around HKD 3 million in around October 2020). However, opposite to Henrietta's view, she considered that "*MISSIE*" NFTs were overpriced and the better investment would be in Henrietta Coin.

5.5. On 1 November 2020, Henrietta and Rowena orally agreed that Henrietta would transfer all of her 100,000 Henrietta Coins to Rowena in exchange for Rowena's transferring the entire collection of her 200 "*MISSIE*" NFTs to Henrietta. The transfers took place as planned on 15 November 2020. However, in December 2020, the market price for the "*MISSIE*" NFTs fell to HKD 500,000 (and has since remained at around HKD 500,000), while the price of Henrietta Coin continued to rise.

5.6. Henrietta's case against Rowena was therefore a fabrication, presumably due to the fact that Henrietta regretted the deal and wanted to have the 100,000 Henrietta Coins back.

6. In Henrietta's Reply dated 1 April 2021:-

6.1. Henrietta admitted that Henrietta Coin was developed jointly between her and Rowena, with Rowena responsible for the majority of the technical work. She also admitted there was an oral agreement that Henrietta would take credit as the creator of Henrietta Coin with Rowena staying unknown to the public.

6.2. However, she denies Rowena's allegation that there was ever an agreement for them to exchange "*MISSIE*" NFTs for Henrietta Coins. The alleged exchange agreement is instead a fabrication by Rowena to cover up for the fact that Rowena hacked into Henrietta's computer to steal Henrietta's 100,000 Henrietta Coins.

6.3. While she did take a favourable view of the future of "*MISSIE*" NFTs and did receive 200 such NFTs from Rowena, she had never agreed to exchange her Henrietta Coins for them. Rowena had decided to make a gift to Henrietta of the 200 "*MISSIE*" NFTs (which was worth around HKD 3 million at the time) as a token of her appreciation for Henrietta having publicised Henrietta Coin, which led to their enormous rise in value (benefiting Rowena as well as Henrietta). Henrietta still holds these NFTs.

7. On 1 May 2021, Rowena applied for security for costs against Henrietta. Henrietta opposes the application. Affirmations have been exchanged and the Practical Assessment is an oral argument before a Master taking place on 1 August 2021.

Apart from the facts summarised above, the evidential material to be used consists of the following affirmations:

1. Affirmation of Rowena Ronald
2. Affirmation of Henrietta Harry
3. 2nd Affirmation of Rowena Ronald

For this assessment, you should not refer to the materials for the Mini-Trial Assessment.

For the purpose of this application, you may refer to the following, all of which will be available to the Judge and your opponent in the hearing:

i. The Affirmations listed above.
ii. The following cases, copies of which are attached:
    a. **KJM Industries Ltd v JPM Resources (HK) Ltd** [2005] 4 HKC 100
    b. **Wing Hing Provision, Wine & Spirits Trading Ltd v Hanjin Shipping Co Ltd** [1998] 4 HKC 461
iii. Hong Kong Civil Procedure (the Hong Kong White Book) 2022

Evidential Material

HCA 1342/2021

Henrietta Harry v Rowena Ronald

Affirmation of Rowena Ronald

I, Rowena Ronald, of No.1, Avocado Road, Deep Water Bay, do solemnly, sincerely and truthfully affirm and say as follows:-

1. I am the Defendant in this action. I make this affirmation in support my summons of even date for security for costs against the Plaintiff in the sum of HKD 1.2 million up to exchange of witness statements.

2. Unless otherwise stated, the matters deposed to herein are true to the best of my knowledge information and belief. Insofar as the facts and matters stated below are not within my personal knowledge, they are based on the source(s) stated and are true to the best of my information and belief.

3. There is now produced and shown to me marked "**RR-1**", a schedule containing the breakdown of my estimated costs up to exchange of witness statements *[the Schedule is not amongst the materials, but you may assume that the Plaintiff has had a chance to read it and to make necessary comments on it in her affirmation]*.

4. I am advised and believe that the Plaintiff has no assets within the jurisdiction and is resident out of jurisdiction, in Australia.

5. I am further advised and believe that, in practice, if I succeed in defending the action and obtain a costs order against the Plaintiff, there will be difficulty of enforcement of such costs order against the Plaintiff in Australia. There is now produced and shown to me marked "**RR-2**", an expert report prepared by Messrs. Scarlett & Co. a firm of New South Wales solicitors practising in Sydney, Australia *[the Expert Report is not amongst the materials, but you may assume that the Plaintiff has had a chance to read it and to make necessary comments on it in her affirmation]*.

6. In the premises, I am advised and believe that it is just and fair for the Court to order security for costs against the Plaintiff and I humbly pray the Honourable Court to grant the Order sought.

1 May 2021

HCA 1342/2021

Henrietta Harry v Rowena Ronald

Affirmation of Henrietta Harry

I, Henrietta Harry, of No.7A, Mason Road, Sydney, do solemnly, sincerely and truthfully swear and say as follows:-

1. I am the Plaintiff in this action. I make this affirmation in opposition to the Defendant's application for security for costs dated 1 May 2021.

2. Unless otherwise stated, the matters deposed to herein are true to the best of my knowledge information and belief. Insofar as the facts and matters stated below are not within my personal knowledge, they are based on the source(s) stated and are true to the best of my information and belief.

3. I am advised and believe that I need not reply to each and every allegation made in the Defendant's Affirmation dated 1 May 2021. The fact that I do not reply to a specific allegation should not be taken as admission of the same.

4. I am advised and believe that the Defendant's application is an attempt to stifle my overwhelmingly strong claim against the Defendant. I would respectfully ask the Court to note that:-

    4.1. After I obtained a *Mareva* and proprietary injunction against the Defendant on *ex parte* on 15 January 2021, the Defendant did not seek to discharge, vary, or in any way challenge the injunction.

    4.2. In fact, on 1 February 2021, the Defendant made an open offer to settle the action for USD 7.5 million, i.e. 25% of the monetary value (USD 30 million) of my claim. This is an effective admission of the merits of my case against the Defendant. No rational person would give up USD 7.5 million in the face of what the Defendant says is an entirely fabricated claim.

    4.3. The Defendant's version of events pleaded in her Defence dated 1 March 2021 is unsupported by any documentary evidence and totally opposite to her stance taken earlier. It is obviously a complete fabrication.

5. Furthermore, an order for security in the sum of HKD 1.2 million will have the effect of stifling my claim:-

5.1. In Hong Kong dollar terms, I only have around HKD 300,000 worth of liquid assets in total. There is now produced and shown to me marked "**HH-1**", a copy of my bank statements of my only bank account. *[The bank statements are not amongst the materials, but you may assume that the Defendant has had a chance to read it and to make necessary comments on it in her affirmation].*

5.2. I am still a full-time student and my only source of income is advertising fees from my YouTube channel, which (in Hong Kong dollar terms) come to around HKD 50,000 per month.

5.3. I have asked my relatives and friends to help me fund my litigation against the Defendant. But given that my parents and extended family all live on social security, and none of my friends from my state-funded school and university have any income yet, they are unwilling to contribute anything to my litigation.

6. In the premises, if security is ordered, I will have no choice but to abandon my action against the Defendant – or else be effectively forced into accepting the Defendant's unjust offer. I humbly pray the Honourable Court to dismiss the Defendant's Summons.

1 June 2021

HCA 1342/2021

Henrietta Harry v Rowena Ronald

2nd Affirmation of Rowena Ronald

I, Rowena Ronald, of No.1, Avocado Road, Deep Water Bay, do solemnly, sincerely and truthfully affirm and say as follows:-

1. I am the Defendant in this action and make this affirmation in reply to the Affirmation of Henrietta Harry dated 1 June 2021 ("**Harry 1**").

2. Unless otherwise stated, the matters deposed to herein are true to the best of my knowledge information and belief. Insofar as the facts and matters stated below are not within my personal knowledge, they are based on the source(s) stated and are true to the best of my information and belief.

3. I am advised and believe that I need not reply to each and every allegation made in the Plaintiff's Affirmation dated 1 June 2021. The fact that I do not reply to a specific allegation should not be taken as admission of the same.

4. At paragraph 4 of Harry 1, the Plaintiff alleges that my open offer to settle the action for USD 7.5 million, being 25% of the monetary value of her claim, and the fact that I did not challenge the *ex parte* injunction against me, somehow show that her case is strong.

5. That allegation is entirely unfounded. The open offer was made at that stage for several reasons. First, I would like to resolve this matter by way of an amicable settlement, rather than spending millions on lawyers fighting each other and being dragged through the Courts. Secondly, unlike the self-obsessed Plaintiff, although I love investing it is more of a game for me, and I don't really care that much about money. Anyway, my remaining USD 22.5 million would be more than enough to live a very good life on – particularly given my gift for picking good investments. Third, I confess to a real degree of sympathy for the Plaintiff for having suffered such big losses out of her purchase from me of the "*MISSIE*" NFTs, which she badly misjudged the future value of.

6. Given my genuine reasons for making the settlement offer that I did, it is a clear distortion on the part of the Plaintiff to twist this gesture of goodwill into a supposed admission of the strength of her case.

7. For the avoidance of doubt, my right to apply for the discharge or variation of the *Mareva*/proprietary injunction against me is expressly reserved.

8. At paragraph 5 of Harry 1, the Plaintiff alleges that she could not put up the HKD 1.2 million due to impecuniosity. However, the picture she gave is plainly incomplete:-

   8.1. The Plaintiff has deliberately chosen to disclose her "*liquid*" assets. She is entirely silent on whether she owns any illiquid assets, such as real property.

   8.2. At the very least, by her own admission in pleadings, her assets include the 200 "*MISSIE*" NFTs that are worth around HKD 500,000 at the moment. Yet such assets were inexplicably omitted by the Plaintiff in her affirmation.

   8.3. Furthermore, the Plaintiff has a successful YouTube channel with 8 million subscribers around the world. On this YouTube channel, the Plaintiff not only derives a significant monthly income, but has also in the past raised very significant funds for charity.

   8.4. For example, in 2020 alone, she raised (in Hong Kong dollar terms) HKD 6 million for World Wildlife Fund for Nature by a series of videos entitled "*Cryptocurrency and the Survival of Pandas*". Yet curiously, the Plaintiff has made no attempt whatsoever to raise funds from her YouTube channel to fund her litigation against me.

   8.5. She has clearly made a deliberate choice to present an incomplete picture of her financial abilities (including ability to raise funds) and to paint a picture that she is impecunious, when she is clearly not.

   8.6. In any case, if the Court is of the view that the amount of security sought is unaffordable, it can consider ordering a lower amount of security instead.

9. In the premises, I humbly pray the Honourable Court to grant the Order sought.

2 July 2021

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12-point font, single spaced).

You may refer to the attached case authorities as you think appropriate. You do not need to attach them to the skeleton; the Judge will have a copy of the cases at the hearing. You may also refer to the White Book as you think appropriate.

Please note that for the purpose of this assessment, your arguments must be limited to the case authorities and the White Book only.

You must email your skeleton arguments in MS Word format to the Secretariat to the Higher Rights Assessment Board at info@hrab.org.hk by **no later than 3:00pm of the Wednesday prior to the day of the assessment**. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. If you submit your skeleton late, it may not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

1. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

2. No reply submissions will be conducted.

3. You should be prepared to deal with judicial interventions and questions in relation to your submissions.

4. You should be prepared to address the court on the issues of costs as a matter of principle.

KJM INDUSTRIES LTD v JPM RESOURCES (HK) LTD

COURT OF APPEAL
CIVIL APPEAL NO 144 OF 2005
YEUNG AND TANG JJA
13, 20 OCTOBER 2005

Civil Procedure – Security for costs – Payment into court – Court did not take into account payment into court – Amount paid in substantially more than security ordered – Whether correct to order security for costs – Burden on defendant to show plaintiff company unable to meet adverse costs order – Companies Ordinance (Cap 32) s 357

民事訴訟程序 – 訟費保證金 – 將款項繳存於法院 – 法院不參照繳存於法院的款項 – 繳存的款項比下令的保證金為多 – 頒發訟費保證金令是否正確 – 被告有責任證明原訴人公司未能履行逆權訟費令 – 《公司條例》(第 32 章)第 357 條

The plaintiff claimed against the defendant for goods sold and delivered. By the amended statement of claim, the plaintiff's claim was reduced to US$451,874.17. The defendant counterclaimed the sum of US$333,335.59, leaving a balance of US$118,534.58, which the defendant paid into court. The defendant subsequently applied for security for costs and the sum of HK$460,000 was ordered to be paid by the plaintiff into court. The plaintiff now appealed.

Held, allowing the appeal:

(1) If a defendant admitted so much of the claim as would be equal to the amount for which security would have been ordered, the court might refuse him security, for he could secure himself by paying the admitted amount into court. A payment into court, or an open offer, was a matter which the court could take into account. It went to show that there was substance in the claim and that it would not be right to deprive the plaintiff of it by insisting on security for costs. *Hogan v Hogan (No 2)* [1924] 2 IR 14 and *Parkinson (Sir Lindsay) & Co Ltd v Triplan* [1973] 1 QB 609 applied (at 102C-G).

(2) The judge had not given sufficient weight to the payment-in and the fact that the plaintiff's unanswerable claim of US$118,534.58 paid into court was substantially more than the security for costs of HK$460,000 ordered, this was not a case where security for costs should have been ordered (at 102H-103A, H).

(3) The applicant was required to show that a company would be unable, and not might be unable, to meet its debts when an order for costs was made against it. The wrong test had been applied and therefore the appeal should be allowed. *Re Unisoft Group Ltd (No 2)* [1993] BCLC 532 applied (at 103B-D).

Cases referred to

Alco International Ltd v Akai Electronic Co Ltd [2000] 3 HKC 724 (CFI)
Hogan v Hogan (No 2) [1924] 2 IR 14

A *Parkinson (Sir Lindsay) & Co Ltd v Triplan* [1973] 1 QB 609, [1973] 2 All ER 273, [1973] 2 WLR 632 (CA)
Unisoft Group Ltd (No 2), Re [1993] BCLC 532

Legislation referred to
B Companies Ordinance (Cap 32) s 357

Other source referred to
Hong Kong Civil Procedure 2004 para 23/3/3

[*Editorial note*: for the court's discretion to order security for costs, see
C *Halsbury's Laws of Hong Kong* Vol 5(1) Civil Procedure (2003 Reissue), [90.0498].]

Appeal
This was an appeal against the decision of Deputy Judge Gill whereby he ordered security for costs in the sum of HK$460,000 to be paid by the plaintiff
D despite an amount of US$118,534.58 was paid into court by the defendant. The facts appear sufficiently in the following judgment.

Edward Chan SC and CY Li (Fred Kan & Co) for the appellant/plaintiff.
Warren Chan SC and Adrian Bell (Robertsons) for the respondent/defendant.

E

Tang JA: 1. The plaintiff claimed against the defendant for goods sold and delivered. Initially, the claim was for US$602,027.39. However on the date the writ was issued, the defendant paid the plaintiff US$150,153.22. So the claim in the amended statement of claim was
F reduced to US$451,874.17. The defendant, by amended defence and counterclaim, has claimed damages, particulars of which have been given and they amounted to US$333,335.59, leaving a balance of US$118,534.58.

2. On 3 February 2005, the defendant paid the sum of US$118,534.58 into court.

G 3. On 27 October 2004, the defendant issued a summons for security for costs under s 357 of the Companies Ordinance (Cap 32).

4. At that time, the security sought was HK$294,080 to cover the costs up to and including discovery. That application was refused by the master.

5. On 31 January 2005, the defendant appealed and sought security to
H cover costs up to and including exchange of witness statements.

6. Deputy Judge Gill, on 18 April 2005, ordered HK$460,000 to be paid into court as security for such costs.

7. The plaintiff appealed to us. The appeal was heard on 13 October 2005. We have allowed the appeal and this is the reasons for our
I judgment.

8. [J1] In addition to the counterclaim for damages in respect of which particulars have been given which totalled US$333,339.59. The defendant

also counterclaimed under paras 19, 20 and 21 of the amended defence and counterclaim for damages for loss to the defendant's goodwill and reputation. No particulars have been given for the damages sought under these paragraphs. Mr Warren Chan SC, who appeared for the defendant in the appeal, accepted that such counterclaims could be disregarded for the purpose of this appeal. We agree. Even assuming that such counterclaims are maintainable, having regard to their nature and the lack of particulars, we believe it is right for the purpose of the appeal to proceed on the basis that the defendant's counterclaim is limited to the amount of US$333,339.59 only. In other words, the defendant has no defence to the balance of the claim of US$118,534.58.

9. In *Sir Lindsay Parkinson & Co Ltd v Triplan* [1973] 1 QB 609 as 627 Lord Denning MR said:

> ... I am quite clear that a payment into court, or an open offer, is a matter which the court can take into account. It goes to show that there is substance in the claim: and that it would not be right to deprive the company of it by insisting on security for costs.

Lord Denning also referred to the case of *Hogan v Hogan (No 2)* [1924] 2 IR 14, which has been cited in the *Hong Kong Civil Procedure 2004* at 23/3/3 p 395 for this proposition:

> Again, if a defendant admits so much of the claim as would be equal to the amount for which security would have been ordered, the court may refuse him security, for he can secure himself by paying the admitted amount into court.

That was also the view of Lord Justice Cairns in *Parkinson & Co* where he regarded an open offer as being equivalent to payment into court and regarded at least part of that sum as security for the costs of the defendant.

10. This is what the judge said of the payment-in in para 15 of his judgment:

> As to the payment into court; this is a strategy often deployed by a litigant looking to cut his losses to avoid the expense, inconvenience and uncertainty of result in proceeding to trial. It is in effect a pragmatic approach which should not be taken as indicating a weakness in the case of the party paying in. I decline to treat it as such.

We do not believe that the judge has given sufficient weight to the payment-in. The payment into court in this case was of a substantial sum of money and not, for example, merely a payment into court to get rid of a nuisance claim. Nor do we think that the learned judge has given sufficient weight to the fact that, as rightly accepted by Mr Warren Chan, the defendant only has a defence to US$333,339.59. In other words, on the pleadings, the plaintiff has an unanswerable claim to payment of US$118,534.58. That amount has been paid into court. That is

substantially more than the security of HK$460,000 which was ordered by the judge.

11. Furthermore, this is an application based on s 357 of the Companies Ordinance, which requires the applicant to show that a company would be unable, and not may be unable, to meet its debts when an order for costs was made against it. This is what Sir Donald Nicholls VC said in *Re Unisoft Group Ltd (No 2)* [1993] BCLC 532 at 534:

> The phrase 'the company will be unable to pay' is preceded by the words 'if it appears by credible testimony that there is reason to believe'. I do not think this latter phrase has the effect of watering down the words which follow. The court, on the basis of credible testimony, must have 'reason to believe', that is, to accept, 'that the company will be unable to pay'. If this were not so, and the test is not whether the court, on the basis of credible testimony, believes the company will be unable to pay, then it is difficult to identify what is the proper approach and what is the test being prescribed by the statute. ...

However, in para 7 of the judgment, the judge applied the wrong test when he said:

> It seems to me, as I find, that there is credible testimony before me that indicates the plaintiff may well not be able to meet an adverse costs order; thus section 357 of the Companies Ordinance comes into play.

12. For the foregoing reasons, we are of the opinion that we are entitled to exercise our discretion in the matter.

13. Now the defendant relies on the fact that the plaintiff has been running at a loss and that but for the support of the shareholders, it could not be said to be a going concern. The judge has referred to the fact that each shareholder has given an undertaking in writing to give continuous financial support to the plaintiff so that they can meet in full the liabilities and the financial obligations of the plaintiff as they fall due. It seems the judge accepted that the shareholders have the financial resources to honour commitment. However, the shareholders have refused to enter into a process which binds them directly to the defendant should there be an adverse costs order.

14. As we have said, the judge concluded that there was credible testimony before him which indicated that the plaintiff might not be able to meet an adverse costs order. It is unnecessary for us to form a view on the matter because we are prepared to proceed on the basis that a case has been made out under s 357. But even so, having regard to the payment-in, we do not believe this is a case where security for costs should have been ordered.

15. Having regard to our conclusion, it is unnecessary for us to deal with the interesting arguments advanced on behalf of the plaintiff by Mr Edward Chan SC on equitable set-off. It is his argument that in any event there is no defence to the plaintiff's claim such that it would not be

right to order security for costs in respect of the plaintiff's claim. In relation to that he has referred us to *Alco International Ltd v Akai Electronic Co Ltd* [2000] 3 HKC 724, where Suffiad J, on facts not dissimilar to the present one, has held there was no equitable set-off. Mr Warren Chan SC has submitted that having regard to the nature of the application we cannot proceed on the basis that all evidence relevant to the question of equitable set-off is before the court. Since we have not heard full arguments on the matter, and it is unnecessary for our decision, we express no view.

16. For the above reasons, we allowed the appeal and made an order of costs below as well as before us, in favour of the plaintiff. We also ordered that the security paid in the action as well as the security for the costs of this appeal be repaid to the plaintiff.

Reported by Kennis Tai

WING HING PROVISION, WINE & SPIRITS TRADING CO LTD v HANJIN SHIPPING CO LTD

COURT OF APPEAL
CIVIL APPEAL NO 245 OF 1998
GODFREY AND LEONG JJA
7 OCTOBER 1998

Civil Procedure – Security for costs – Application by defendant under s 357 of Companies Ordinance (Cap 32) – Plaintiff ceased trading – Whether exercise of judge's discretion vitiated by wrongfully referring to nature of plaintiff's case – Whether judge had gone into merits of case – Whether judge erred in finding plaintiff's case would be stifled if order made – No reason to interfere with exercise of discretion where judge had balanced all relevant factors

民事訴訟程序－訟費保證金－被告人根據《公司條例》(第 32 章) 第 357 條作出申請－原告人停止營業－法官行使的酌情權會否因為錯誤地提述原告人案件的性質而變得無效－法官有否考慮案情的是非曲直－法官的裁斷謂若作出命令會扼殺原告人的案件是否錯誤－當法官已衡量所有有關因素，沒有理由干預其酌情權的行使

The respondent/plaintiff brought the action against the defendant for breach of contract. The appellant/defendant applied for security for cost under s 357 of the Companies Ordinance (Cap 32) at a very late stage upon discovery of plaintiff's lack of funds. The plaintiff had ceased trading some years ago, it had no money of its own and it owed to its solicitors some US$400,000 on account of costs. The judge examined the principles in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 in considering whether to order security for costs and refused the defendant's application. The defendant appealed on the grounds that the judge's exercise of his discretion had been vitiated because he had (i) wrongfully made reference to the plaintiff's case as 'a strong case for misrepresentation'; and (ii) erred in finding that the plaintiff's case would be stifled if an order for security for costs had been made against it.

Held, dismissing the appeal:

(1) The judge's use of the words 'a strong case for misrepresentation' did not vitiate the exercise of the judge's discretion. The judge did not make the remark in the context of a case of misrepresentation. He might have in mind that the defendant might be held estopped from claiming the extra charges from the plaintiff, being the subject of the dispute. The judge had not gone into the merits of the case. It was sufficient that the plaintiff had shown a reasonable case for its complaint against the defendant and the judge was satisfied that the plaintiff had a good prospect of success. Dicta of Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 followed (at 463H/I-465E, 467C/D-F).

(2) The chances of the plaintiff to raise money to support its action was extremely remote. There was enough evidence to justify the judge's conclusion

that an order for security, backed by stay of proceedings on default, would stifle the plaintiff's claim. The judge had considered all the circumstances, balancing all the relevant factors, and could not be said to have exercised his discretion in a way that the court should interfere. *MV Yorke Motors v Edwards* [1982] 1 All ER 1024 considered (at 466F-H, 467H-I).

Cases referred to

Keary Developments Ltd v Tarmac Construction Ltd & Anor [1995] 3 All ER 534

MV Yorke Motors v Edwards [1982] 1 All ER 1024, [1982] 1 WLR 444

Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263

[*Editorial note*: as to security for costs generally see *Halsbury's Laws of Hong Kong* Vol 5, Civil Procedure [90.0469] et seq.]

Interlocutory appeal

This was an appeal by the defendant against the decision of Deputy Judge ZE Li dated 30 September 1998 whereby he refused an application made by the defendant for security for costs against the plaintiff. The facts appear sufficiently in the following judgment.

Paul Shieh (Sinclair Roche & Temperley) for the appellant.

Respondent, represented by the Director of the Company, Yip Chun Nam.

Godfrey JA: *Introduction*

This is an appeal from an order of Judge ZE Li (sitting as a Deputy Judge of the Court of First Instance) made on 30 September 1998, whereby he refused an application made by the defendant in the action, Hanjin Shipping Co Ltd (Hanjin) for security for costs against the plaintiff, Wing Hing Provision, Wine & Spirits Trading Co Ltd (Wing Hing). Hanjin is represented before us today by Mr Shieh of counsel. Wing Hing is represented by one Mr Yip Chun Nam, a director of the company, pursuant to an order of the court made, ex parte, on 4 July 1998 giving leave for Mr Yip to represent Wing Hing in the proceedings. Hanjin now appeals against the judge's dismissal of its application.

The facts

The facts giving rise to the dispute between the parties may briefly be summarised as follows.

Wing Hing was a company trading, among other things, in beer. It entered into contracts with Hanjin for the carriage of containers of beer. But differences arose between the parties as to the proper rate of freight to be charged by Hanjin to Wing Hing. As one would expect, the charge for freight had been agreed between the parties. But it appears that in the two transactions which gave rise to the dispute between the parties, Hanjin (at

any rate, according to Wing Hing) sought to levy an extra charge, for terminal handling charges. In summary, Wing Hing says that it had been asked to pay extra charges to Hanjin which it had not agreed and so refused to pay, and that, in those circumstances, Hanjin was in breach of its contract with Wing Hing in failing to deliver up the goods the subject of these transactions, as a result of which Wing Hing has suffered heavy losses. Hanjin says that the extra charges which it sought to levy in relation to the disputed transactions were in fact agreed with Wing Hing, and, in any case were charges which it was compelled to make by reasons of certain provisions of United States Federal Law reflecting mandatory requirements of the United States Federal Marine Commission.

Whatever the merits of the case may be, it *is* clear that Hanjin refused to deliver up the goods to Wing Hing unless the charges it demanded were met; that Wing Hing refused to pay those charges; and that as a result Wing Hing suffered the losses to which I have referred. Wing Hing's claim in the action is for damages totalling nearly HK$3m.

The application for security for costs

The application for security for costs made by Hanjin was made under s 357 of the Companies Ordinance (Cap 32). The ground on which the application was made is that Wing Hing would be unable to meet any order for costs made against it if it were unsuccessful in its claim. There seems to be little doubt that that is so. Wing Hing ceased trading in 1996, having suffered serious losses by then. It has no money.

The action is listed for five days commencing on 12 October 1998. It is now already 7 October 1998. The application for security for costs is therefore made very late but, for my part, I would attach no blame to Hanjin in that connection. It was not until comparatively recently that Hanjin became aware of Wing Hing's lack of funds. It became so aware when it learned of the order made on 4 July 1998 by which, as I have said, leave was granted for Mr Yip to represent Wing Hing in the proceedings. The reason for this was that Wing Hing's solicitors, Messrs Herbert Smith, had not been put in funds to continue to represent Wing Hing. Indeed the evidence shows that Herbert Smith were, and still are, owed some US$400,000 on account of costs.

The judgment below

The judge, as I have said, refused the application of Hanjin for security for costs. A judge has a complete discretion in such a matter. This court will be reluctant to interfere with the exercise of the judge's discretion, as Mr Shieh, for Hanjin, very properly recognised at an early stage of the argument. The judge, in his judgment, set out an abstract of the relevant principles, which had been summarised in the judgment of Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995]

3 All ER 534 at 539-540. As I understand it, Mr Shieh raises no objection to the judge's summary of the principles and I shall therefore set them out in the same terms as did the judge:

1. The court has a 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 prospects 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.
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.

The judge went through these principles 'as a sort of checklist'. First, he assessed the prospects of the plaintiff's claim. He rightly referred to this as 'necessarily a rather superficial exercise'. He then performed that exercise, using words to which Mr Shieh has taken objection and which, he says, vitiate the judge's exercise of his discretion on this aspect of the case. The judge says this:

> It appeared to me that the Defendant must have done some wrong to the Plaintiff. The parties had contracted on the same lower freight rates previously. If the Plaintiff cannot succeed on breach of contract to deliver it must surely have a strong case for misrepresentation on freight rates which affected the Plaintiffs' budget and re-sale calculations. So, without going into the details of the merits, I thought the Plaintiff's claim should have good prospects.

Mr Shieh fastens in particular on the reference made by the judge to the plaintiff's 'strong case for misrepresentation'. This does seem to me to be a less than wholly accurate way of summarising what the case of Wing Hing really is. The case of Wing Hing really is that, having entered into a number of transactions at agreed freight rates lower in total than those

A sought to be charged for the transactions which gave rise to the dispute, Hanjin have not demonstrated an entitlement to the higher freight rate which they later sought to charge for those transactions. That is not, as it seems to me, a case of misrepresentation, giving rise to an action for damages because the person to whom the misrepresentation is made is B induced to enter into the contract by virtue of that misrepresentation. But I do not think that is what the judge really meant. It may be that what he had in mind was that Hanjin might be held estopped from claiming the higher rates of freight by reason of its previous conduct. But, as it seems to me, the judge's actual conclusion, that Wing Hing's case 'should have C good prospects' cannot be faulted. Of course, the court does not, on an application for security for costs, go into the respective merits or demerits of the case, certainly not in detail. It is enough that Wing Hing had shown a reasonable case for its complaint against Hanjin.

I do not, for my part, think that the judge's use of the words 'a strong D case for misrepresentation', although they do seem to me to be an inaccurate description of Wing Hing's case, vitiates the exercise of the discretion. Since that was the first point taken by Mr Shieh and I do not think it is a point of any substance, I would not be prepared to upset the judge's decision on that ground.

E The second point taken by Mr Shieh is that the judge erred in finding as he did that Wing Hing's case would be stifled if an order for security for costs which had been made against it. Mr Shieh points out quite rightly that it is not enough, in this connection, for Wing Hing to show that it has no money. That is indeed simply a condition precedent to an application F for security for costs, as Nourse LJ pointed out in *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 263 when he said (at p 266):

> It would be pointless to insist on the company putting in evidence in order effectively to admit that which the defendant effectively asserts.

G But that does not cover the whole ground. There are two separate questions to be considered. The first question is whether the condition for the application of s 357 is satisfied, and there is no doubt that it is. The second question is whether Wing Hing will be prevented from pursuing its litigation if an order for security is made against it. This is a wider question. H Mr Shieh says that on this question evidence from the defendant is needed, and there is no such evidence. All that Wing Hing has demonstrated is that it has not any money of its own. It has not demonstrated, says Mr Shieh, that no one else would be prepared to put up money to assist Wing Hing to pursue its case.

I The judge said, in this connection, that he was 'certain that an order for security backed by stay of proceedings on default would stifle the plaintiff's claim'. He relied on the fact that 'the present regional and local economic crisis' made it difficult for the company to borrow (no doubt he meant

from third parties at arm's length) and that is indeed plainly so. Irrespective of the present regional and local economic crisis, nobody is going to lend money to a company which has ceased to do business some years ago, and which has no money of its own, simply in order to prosecute, an action with chances which cannot be considered certain.

Then, Mr Yip had referred the judge to the liability of Wing Hing to Messrs Herbert Smith. There is no doubt about that either, but this merely shows that the company has no money, which has already been established. Lastly, the judge said:

> The Plaintiff being a family business, if the shareholders, directors and backers were able to put up money, they would have used the money to retain professional lawyers to act for the Plaintiff instead of obtaining leave on 4th July, 1998 for the Plaintiff to act through one of its directors. The court in granting such leave on 4th July, 1998 must have also considered that the Plaintiff could not raise funds from other sources to retain its legal team.

I have felt some difficulty about this passage in the judgment because it does not seem to me that the court in making its order ex parte on 4 July 1998 'must' have considered that the plaintiff could not raise funds from other sources to retain its legal team. There does not seem to have been any such evidence before the registrar who granted that leave. It may be that it would be appropriate, if such an application is made, for the registrar to make an inquiry into such matters. But such an inquiry never seems to have been made and it does not seem right to speculate upon the matter.

In the end, then, one is thrown back on common sense. The chances of a company which has ceased to trade finding a backer even within 'the family' to put up money to support the company's action is remote in the extreme. It may well happen that, even though a man has no capital of his own, he may have friends, he may have business associates, he may have relatives all of whom can help him in his hour of need: see *MV Yorke Motors v Edwards* [1982] 1 All ER 1024, at 1028, where Lord Diplock approves the remarks of Brandon LJ in the Court of Appeal to that effect.

But in the present case, I think there was enough, even though only just enough, to justify the judge in coming to his conclusion that an order for security backed by stay of proceedings on default would stifle Wing Hing's claim. And since Wing Hing's impecuniosity is based on what it says is the wrong done to it by Hanjin, this seems to me to be a proper case in which the judge could properly have concluded that the justice of the case told against an order for security for costs, especially at this late stage, when most of the costs of the action have been, or certainly ought to have been, incurred. There are some cases in which the probability that a claim will be stifled may be properly inferred without direct evidence, as is pointed out in *Trident International Freight Services Ltd v Manchester Ship Canal Co*, above. This is, in my judgment, such a case, and the judge did not fall into error in so concluding.

The result

I would therefore uphold the judge's exercise of his discretion, even he made some errors on the way to his conclusion. Even if those errors were sufficiently serious to warrant us in looking at the matter afresh for ourselves, I would myself conclude that this is not a proper case, at this stage in these proceedings, to order security for costs against Wing Hing.

Conclusion

For these reasons, I would dismiss this appeal, but not without an expression of gratitude to Mr Shieh for the able and competent way in which he presented to us the case for Hanjin.

Leong JA: I agree. On the first point taken that the Deputy Judge took an erroneous view on the merits of the case, the judge in stating his judgment that there was 'a strong case for misrepresentation on freight rate' was not really stating that the plaintiff had a case based on misrepresentation. He was saying no more than that the lower freight rate would affect the plaintiff's budget which would necessarily go to the damage suffered by the plaintiff as a result of non-delivery. The plaintiff's case on breach of contract is not without merits. The Deputy Judge had not gone into the merits of the case. As may be seen clearly from the relevant passage in his judgment, he had fully in mind that merits of the case is only one of the factors for consideration. The judge could not be said to have erred in his consideration of this matter.

On the second point that the Deputy Judge's conclusion that an order for security would stifle the plaintiff's action was wrong, there was evidence which he accepted that the plaintiff owed its former solicitors Herbert Smith $400,000 in legal costs which the plaintiff was not able to pay and as a result the papers were held as a lien by the solicitors. There was also evidence that the plaintiff suffered accumulated losses in excess of $2m and balance in the company's account was only a few hundred dollars and the plaintiff had ceased business. The Deputy Judge was entitled to conclude on such evidence that in the present economic crisis in Hong Kong, it would not be possible for the plaintiff to borrow from financial institutions and with such financial background, the judge was entitled to conclude the plaintiff would not be able to raise money from other sources. The Deputy Judge had followed the guiding principles in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534. He had considered all the circumstances balancing all the relevant factors and cannot be said to have exercised his discretion in a way that this court should interfere. I would dismiss the appeal.

Reported by Wendy WY Lee

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that for the mini-trial conducted at the assessment, only one witness for each party will actually be physically present for examination purposes.

The Issues at Trial

This is the trial of Henrietta's claim against Rowena for misappropriation of her Henrietta Coins.

Parties agree that the three issues at trial are:-

(A) Did Henrietta in fact make an oral offer to Rowena to the effect that her 100,000 Henrietta Coins be exchanged for Rowena's collection of 200 "*MISSIE*" NFTs?

(B) Did Rowena accept that offer?

(C) If the answers to (A) and (B) are "*yes*", did parties intend these oral representations to create a legally binding contract?

Witnesses

The witnesses for the two parties are described below.

You will be informed which two witnesses will appear at the mini-trial on the day of the assessment itself when you arrive and register.

Plaintiff's witness

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Henrietta Harry, the Plaintiff

2. Fiona Lovegood, a friend of Henrietta

Defendant's witness

The following witnesses will appear at trial to give oral evidence on behalf of the Defendant:

1. Rowena Ronald, the Defendant

2. Bonnie Molly, a mutual friend of Henrietta and Rowena

You can assume:

i. the witnesses will give evidence at trial in the order listed above.

ii. the witnesses who will not appear "live" at the mini-trial will have given/will give evidence in terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Further, you can assume that the Judge/Assessor's finding on the interim application does not affect the evidence available for the purpose of the trial.

However, for the avoidance of doubt, you may make use of the instructions and the Affirmations in the interim application for the purpose of this exercise.

DURING the Mini-Trial

You will be required to:

- make an opening speech (max 5 minutes)

- examine in chief (max 10 minutes) the witness who will give "live" oral evidence at trial on behalf of your client. You should conduct a full examination-in-chief of the witness on the basis that his/her statement does not stand as evidence in chief

- cross-examine (max 15 minutes) the opponent's witness who is attending the trial to give "live" oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness's statement does not stand as evidence in chief.

- deal with any intervention made by the advocate representing the opposing party

- make any interventions, as you think appropriate, to the questioning of the witnesses by the advocate representing the opposing party

- deal with any judicial interventions and questions as and when they arise