

HONG KONG / JUDGMENT

ATHANASIOS KONDYLLIS v. KIM'S YACHT CO LTD

COURT

District Court

DECIDED

24 October 2007

CASE / FILE NUMBER

DCEC918/2005

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bjbj DCEC 918/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION EMPLOYEES COMPENSATION CASE NO. 918 OF 2005

BETWEEN ATHANASIOS KONDYLLIS Applicant and KIM S YACHT COMPANY LIMITED
Respondent

Coram: His Hon Judge Leung in Chambers (open to public) Date of hearing: 24 October 2007 Date
of delivering and handing down decision : 24 October 2007 DECISION

INTRODUCTION

This is the Respondent's application for security for costs pursuant to O.23, r.1 of the Rules of the District Court, Cap.336. The ground is that the Applicant is ordinarily resident overseas. The Respondent asks for security for costs incurred and to be incurred until after trial. THE PRINCIPLES The following principles are not in dispute: It is not an inflexible rule that security will be ordered where the plaintiff is ordinarily resident overseas. Whether the security should be ordered and, if yes, in what amount, is a matter of the court's discretion having regard to all the circumstances of the case. THE APPLICANT'S ARGUMENTS There is no dispute that the Applicant is ordinarily resident overseas for the purpose of O.23. The Applicant's address reported is in Guangdong, the Mainland. The Applicant also does not argue that he has substantial assets within the jurisdiction which may be of sufficiently permanent nature and available for enforcement of any adverse costs order. The Applicant opposes the application on the following grounds: The Applicant has a genuine and strong prospect of success in this case. Effectively the risk of an adverse costs order is low. There was intentional delay on the part of the Respondent in taking out the application for security. In any event, the amount of security requested is excessive. Prospect of success of the Applicant's claim This is a claim for employees compensation pursuant to the Employees Compensation Ordinance, Cap.282. The Applicant

claims against the Respondent as his employer for injury arising in and out of the course of his employment in July 2003. According to the Respondent's Answers, there seems to be no dispute in respect of the occurrence of the accident. The alleged employment relationship however is in dispute. The Respondent's case is that the Applicant was never an employee of the Respondent but the Respondent's subsidiary company in the Mainland. The subsidiary company ceased its operation and the Applicant was made redundant at the end of 2002. Since then, the Applicant had become self-employed and was such at the time of the accident. To substantiate his claim, the Applicant has filed witness statement and documents. Numerous pieces of fact are pointed out which, if established, could amount to indicia of employment. In application like the present one, the court may take into account the merits of the plaintiff's claim. However this would suffice only if the plaintiff can clearly show that its claim has a high degree of probability of success at trial without going into the any detailed examination of the merits now: see Hong Kong Civil Procedure 2007 at 23/3/3. In the present case, the dispute in respect of the alleged employment relationship is essentially factual. In accordance with the principles in *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951, the trial judge would have to consider all the circumstances of the case to form an overall impression of the actual relationship between the parties at the material time. I cannot say at this stage whether the Applicant would clearly succeed in the claim. Accordingly it is not appropriate for me to place too much emphasis on this ground of opposition. Intentional delay The Applicant points out that the Respondent has been aware of the overseas resident status of the Applicant from the outset of these proceedings. This must be right. The Applicant criticises the Respondent for not making request for security until January 2007. This application was filed in July 2007, one week after the Applicant applied by letter to the court to fix the trial date. This is also true. By letter in the same month, the Respondent's solicitors informed the court that the Respondent is not ready to fix the trial date partly because of this pending application. The Respondent has before failed to comply with the court's directions in these proceedings and thus causing some delay. This too is true. The Applicant submits that it is unjust to order security in these circumstances and at this stage. Though application for security for costs may be taken out at any stage of the proceedings, the court has reiterated the importance of not deferring such an application until a stage where an order might cause prejudice to the plaintiff. This would happen if the application is taken out close to the trial: see *BBMB Finance (Hong Kong) Ltd v China Underwriters Life and General Insurance Co Ltd* [1991] 1 HKLR 619; *Senior Honor Ltd v Lee Ki Luk & Ors*, unrep, HCA 4043/2001, 14 November 2003. In this type of situations, an order for security may prejudice the proceeding of the trial already scheduled. Delay until the plaintiff wishes to set down for trial a case of some age may also suffice against an order for security: see *Anbest Electronic Ltd v CGU International Insurance PLC*, unrep, HCCL 82/2000, 22 December 2006 at paras.58-59 (which was upheld on appeal in *CACV 17/2007*, 25 April 2007). Therefore the defendant would need to provide the court with a reasonable explanation for the lateness of the application or the court may not exercise the direction in favour of an order. In the present case, while the application appears to be a tactical move upon the Applicant's application to fix the trial date, I take into account the fact that the Respondent was without legal representation until late June 2006. The request for security was made in January 2007 and the application, as said above, was taken out in July 2007. By now

the trial date is yet to be fixed. The kind of delay and prejudice which an order for security, if made, would entail to the Applicant falls far short of the real problems and extent as those faced with by the plaintiffs in the cases cited above. The Applicant also submits that had the application for security been taken out earlier, the Applicant might have considered settlement with the Respondent. In my view, this might or might not have been the case.

Conclusion

In the circumstances, this remains an appropriate case to order security. The question will then be that of the appropriate amount. Amount The Respondent asks for security in the amount of HK\$277,400. The Applicant says this is excessive. Reading the Respondent's skeleton bill of costs and the bills of incurred costs from the Respondent's solicitors to the Respondent, I agree with the Applicant in the following: The incurred costs are not exclusive to the preparation of the employees compensation proceedings but overlap with the possible common law claim. This is particularly obvious from the bill dated May 2006. The Respondent is ready to concede that. The future costs until the conclusion of trial projected is excessive in terms of the items charged, the number of hours of work as well as the number of fee-earning persons involved. The calculation contains inaccuracies, for instance, the inconsistent hourly rates charged by the same person. The Respondent was apparently not aware of this even as at today. The Respondent also concedes that. In my view, the amount of HK\$150,000 proposed by the Applicant is fair and realistic. I am minded to order security in such amount. I shall finalise the order after hearing parties on costs of this application since this forms part of the security requested. [Parties submit on costs. The court's attention is drawn to the fact that the Applicant offered security in the amount of HK\$150,000 by his solicitors letter dated 30 August 2007, such offer being open for acceptance in 7 days. The Respondent rejected the offer.] ORDER I make the following order: All proceedings be stayed until the Applicant provides security for costs up to the end of trial in the amount of HK\$150,000 by payment into court within 21 days from the date of this order. Costs of this application up to and including 6 September 2007 be to the Respondent, to be taxed, if not agreed. Costs of this application since 7 September 2007, including the costs of today's hearing, be to the Applicant, to be taxed, if not agreed. Simon Leung District Judge Representation: Miss R Yu of Messrs Boase, Cohen & Collins for the Applicant Mr W Wan of Messrs Ch 1udk O P Q R S T U V >*6D :i#z *\mT zo/< xC&1 ({m8 =J+> P0} W~7gb W~7g xC&1 ({m8 =J+> KZ1H :srR n*\U & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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