Frantonios Marine Services Pte Ltd and Another v Kay Swee Tuan [2008] SGHC 91

Case Number : Suit 235/2006, RA 285/2007

Decision Date : 18 June 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Rasanathan s/o Sothynathan (Colin Ng & Partners LLP) for the plaintiffs; Chandran Mohan and Khoo Yuh Huey (Rajah & Tann LLP) for the defendant

Parties : Frantonios Marine Services Pte Ltd; Chew Tee Tu — Kay Swee Tuan

Civil Procedure – Costs – Security – Whether condition to grant security for costs satisfied – Relevant factors considered by court in exercising discretion to award security for costs – Policy behind security for costs – Section 388 Companies Act (Cap 50, 2006 Rev Ed)

18 June 2008

Chan Seng Onn J:

1 This was an appeal against the decision of the Senior Assistant Registrar, Ms Sharon Lim ("SAR"), ordering, *inter alia*, the 1st plaintiff to provide security of $100,000 in the form of a banker's guarantee for the defendant's costs of the action up to the commencement of the trial, failing which the 1st plaintiff's claim would be dismissed with costs paid by the 1st plaintiff to the defendant without further order.

2 Two main reasons were advanced by the 1st plaintiff at the appeal:

(a) There was no credible testimony to show or that gave reason to believe, that the 1st plaintiff was unable to pay costs if required; and

(b) Even if such evidence existed, the circumstances of the case were such that the court should not exercise its discretion to order security for costs in favour of the defendant.

The claim

3 The 1st plaintiff was a company incorporated in Singapore in 1982. Its main business was the provision of marine services, particularly, tank cleaning services for crude oil tankers, ship supply and repair work. The 2nd plaintiff was a director and shareholder of the 1st plaintiff together with Tan Keng Chye and Tan Keng Chuan ("K.C. Tan"). K.C. Tan is the husband of the 2nd plaintiff.

4 In September 2000, the 1st plaintiff was granted a long term loan of S$1,800,000 and trade finance facilities of US$500,000 (referred to collectively as "banking facilities") by Chang Hwa Commercial Bank Ltd. These banking facilities were secured by a legal mortgage over a property at 1A Bright Hill Crescent Singapore belonging to the 2nd plaintiff and K.C. Tan, as well as a joint and several guarantee signed by the 2nd plaintiff, K.C. Tan and Tan Wee Lin (the son of the 2nd plaintiff and K.C. Tan).

5 The defendant, an advocate and solicitor practising in Singapore, was a director of Marine and Environmental Services Pte Ltd ("MES"), a company engaged in, *inter alia*, the business of tank

cleaning. Enrique Tan was a shareholder and also a director of MES. The defendant and a company belonging to Enrique Tan had beneficial interests in Kotor Bina Sdn Bhd ("Kotor"), a company incorporated in Malaysia engaged in the business of waste and sludge disposal.

6 In early 2001, the defendant together with one Enrique Tan proposed to K.C. Tan, the then managing director of the 1st plaintiff, that they work together. The defendant also proposed that the two companies set up a cleaning base in Johore, Malaysia. K.C. Tan told the defendant to obtain the necessary approval from the Malaysian authorities first.

7 When the defendant called K.C. Tan in April 2001 to enquire how he was doing, K.C. Tan told her that he was experiencing business difficulties. The defendant then offered financial assistance, which K.C. accepted. A loan of $60,000 was given to the 1st plaintiff, which was used to pay the arrears of Central Provident Fund contributions of the 1st plaintiff's employees as well as wages and payments due to its workers and contractors. When the 1st plaintiff secured two tank cleaning jobs in June or July 2001 and needed some working capital, K.C. Tan requested for a further loan of $120,000, which was given to the 1st plaintiff.

8 When the defendant requested K.C. Tan for the repayment of the total loan of $180,000, K.C. Tan asked for more time. Eventually the defendant and Enrique Tan met with K.C. Tan and the 2nd plaintiff. According to the plaintiffs, it was agreed that a sum of interest of $80,000 would be charged and further that K.C. Tan was to work with them by sending all the 1st plaintiff's vessels to their sludge plant in Malaysia. An acknowledgement of loan dated 26 February 2002 for a purported sum of $260,000 to be repaid within 6 months was signed by K.C. Tan and the 2nd plaintiff. When the purported loan was not repaid, judgment in default was obtained against them on 25 September 2002.

9 The 2nd plaintiff averred that K.C. Tan and the 2nd plaintiff subsequently met the defendant and Enrique Tan. The parties agreed to work together in that the defendant and Enrique Tan would finance all of the 1st plaintiff's operations through MES and the 1st plaintiff would send all their vessels to the sludge plant in Malaysia. In return, Enrique Tan agreed not to enforce the judgment debt of $260,000, which would be repaid when the 1st plaintiff's business and income improved.

10 The defendant told K.C. Tan to hand over letters or other documents relating to claims against the plaintiffs and himself from their creditors for her to take care of. She would assume control of the finances and bank accounts of the 1st plaintiff but K.C. Tan could continue to run its business. K.C. Tan agreed to the arrangement as he felt he had no choice in view of the judgement debt against him and the 2nd plaintiff. In June 2003, the defendant became the sole signatory of the 1st plaintiff's bank accounts.

11 After the defendant took over the management and control of the 1st plaintiff's finances and bank accounts, K.C. Tan continued to canvass for business which began to improve.

12 In early 2004, when K.C. Tan and the 2nd plaintiff received claims from UOB Ltd as well as the 1st plaintiff's contractors, they requested the defendant to make the necessary payments as she had full control of the 1st plaintiff's bank accounts. The plaintiffs alleged that the defendant failed to do so and informed K.C. Tan that the payments from the 1st plaintiff's customers had not been received yet. The defendant similarly refused to effect payments to Chang Hwa Bank as well as to other

creditors of the 1st plaintiff. Consequently, their property at 1A Bright Hill Crescent Singapore was re-possessed and sold off by Chang Hwa Bank in 2005. The Pandan Loop office which belonged to the 1st plaintiff was also re-possessed by its mortgagees, UOB Ltd, in October 2004 and sold off, leaving an outstanding sum of $183,005.19 still due and owing to UOB Ltd as at 1 August 2005.

13 In May 2004, K.C. Tan was made a bankrupt arising from a sum of about $13,000 due to one Gopi Bala.

14 In October and November 2004, the defendant closed the 1st plaintiff's accounts with RHB Bank Berhad and Standard Chartered Bank.

15 The plaintiffs claimed that the defendant wrongfully withdrew a total sum of $2,526,546.77 between 1 January 2004 and 31 October 2004 from the 1st plaintiff's bank account with RHB Bank Berhad. In addition, the defendant also wrongfully withdrew a total sum of S$438,606.95 from the 1st plaintiff's bank account with Standard Chartered Bank between 1 June 2004 and 24 November 2004.

16 In addition, the plaintiffs alleged that the defendant failed to act in a proper manner as the solicitor for the plaintiffs which resulted in Chang Hwa Bank obtaining judgment against the plaintiffs and Tan Wee Lin in Suit No. 641/2005/A for a sum of $1,126,865, interest of $249,329.60 and costs.

17 The plaintiffs further alleged that in consequence of (a) the defendant's mismanagement of the 1st plaintiff; (b) her misappropriation of the 1st plaintiff's monies; and (c) her negligence as a solicitor, the 1st plaintiff had to cease operations and suffered loss and damage, which the plaintiffs particularised at paragraphs 26 and 27 of their statement of claim. By depleting the 1st plaintiff's finances, the defendant had allegedly caused loss, expenses and damage arising from, *inter alia*, the forced sale by the banks of the mortgaged properties owned by the plaintiffs in order to discharge the outstanding secured loans made by the banks to the 1st plaintiff.

18 The plaintiffs further claimed against the defendant for an account of all monies withdrawn from the 1st plaintiff's bank accounts and an order to pay the 1st plaintiff all monies due and payable to the 1st plaintiff as monies had and received by the defendant or, in the alternative, damages for conversion.

19 Although not pleaded, counsel for the plaintiffs submitted that the defendant had also acted in breach of her fiduciary duties by acting as the plaintiffs' solicitor whilst having an interest in the 1st plaintiff and in the companies in which the 1st plaintiff was having business dealings with. The defendant was therefore liable for damages and loss occasioned by her breach of fiduciary duty.

The defence

20 The defendant averred in her defence that a friendly interest free loan of $260,000 was given by Enrique Tan to the 2nd plaintiff and K.C. Tan at their request. It was to be repaid within 3 months from 26 February 2002. After the 4 cheques of S$65,000 issued by K.C. Tan for the repayment of the loan were dishonoured upon presentation for payment, Enrique Tan instructed the defendant, in her capacity as his solicitor, to file a claim. Judgment in default of appearance for S$260,000 was obtained against the 2nd plaintiff and K.C. Tan.

21 At the request of the 2nd plaintiff and K.C. Tan, and upon K.C. Tan's proposal that the 1st plaintiff would engage the waste disposal services of Kotor, Enrique Tan agreed not to enforce the judgment for the time being. When the 1st plaintiff still did not engage the services of Kotor by 25 January 2003, Enrique Tan instructed the defendant to request K.C. Tan to make monthly payments of the said judgment debt owing to Enrique Tan in the sum of $30,000 per month.

22 In April 2003, K.C. Tan requested for more time to repay but Enrique Tan refused to accede to his request. K.C. Tan then approached the defendant, in her capacity as director of MES, to propose that the 1st plaintiff collaborate with MES in exchange for further extension of time to repay the debt. Specifically, the 1st plaintiff would procure and handle the tank cleaning jobs but MES would manage the jobs. The profits would be shared between the 1st plaintiff and MES. K.C. Tan said that he would repay the debt from the 1st plaintiff's share of the profits from the collaboration. MES and Enrique Tan agreed to the arrangement.

23 In May 2003, the defendant alleged that it was further agreed orally between the 1st plaintiff and MES ("Agreement") that:

(a) The 1st plaintiff would procure tank-cleaning jobs and handle the operations;

(b) MES would provide funds required to finance the said tank cleaning jobs as an advance to the 1st plaintiff and provide administrative, accounting and management functions to the 1st plaintiff for the tank cleaning jobs;

(c) The profits of the tank cleaning jobs would be shared equally between the 1st plaintiff and MES;

(d) The profits of the 1st plaintiff would initially be used to pay off the following:

(1) the debt of S$260,000 owing to Enrique Tan;

(2) the debts incurred by the 1st plaintiff prior to 1 May 2003; and

(3) the credit card debts of the 2nd plaintiff, K.C. Tan and Tan Wee Lin, which were incurred for the purpose of the 1st plaintiff's business;

(e) New bank accounts in the name of the 1st plaintiff would be opened to facilitate the payment of expenses and receipt of payments of the tank cleaning jobs;

(f) The said bank accounts would be operated singly by the defendant in her capacity as representative of MES; and

(g) The defendant would have the authority to pay monies out of the bank accounts to pay for the expenses of the tank cleaning jobs, repay MES for the advances made by MES to the 1st plaintiff, and for the purposes set out in (d) above.

24 On 30 May 2003, the 1st plaintiff's board of directors, consisting of K.C. Tan and the 2nd plaintiff, passed resolutions for, *inter alia*, an account to be opened with RHB Bank Berhad ("RHB") and

the appointment of the defendant, in her capacity as director of MES, as the sole signatory of the RHB account, which was subsequently opened on 4 June 2003. On 11 November 2003, the 1st plaintiff's board of directors consisting of the 2nd plaintiff, K.C. Tan and Tan Wee Lin, passed resolutions to appoint the defendant, in her capacity as director of MES, as adviser to the 1st plaintiff; confer authority on the defendant to negotiate with Chang Hwa Bank on behalf of the 1st plaintiff regarding additional banking facilities; and to appoint the defendant again as the sole signatory. On 12 November 2003, Chang Hwa Bank granted trade finance facilities up to S$300,000 to the 1st plaintiff. From January 2004, the defendant in her capacity as director of MES, became the sole signatory of the 1st plaintiff's Chang Hwa Bank account. Similarly, the 1st plaintiff's board of directors also passed resolutions authorising a factoring account and a receivables purchase facility to be established with Standard Chartered Bank Ltd ("SCB") for the purpose of receiving deposits of receivables and with the defendant as the sole signatory of this account. The SCB account was opened on 25 May 2004.

25 As agreed between the 1st plaintiff (represented by K.C. Tan) and MES (represented by the defendant), the defendant in her capacity as director of MES, kept all the cheques, bank statements, payment vouchers and all documents relating to the RHB account and the SCB account from the date the said accounts were opened.

26 In accordance with the Agreement, the defendant paid monies to the creditors of the 1st plaintiff, either through K.C. Tan or to the creditors directly, when there were profits due to the 1st plaintiff. The defendant averred that all the monies in the RHB and SCB accounts were legitimately withdrawn for the purpose of paying the expenses of the tank cleaning jobs under the Agreement and/or repaying MES for advances made to the 1st plaintiff to finance the tank cleaning jobs and to comply with the terms of the Agreement. The defendant denied that she was in breach of her duty and responsibilities as solicitor for the plaintiffs in respect of the claim for payments made by Chang Hwa Bank. She further denied that she had mismanaged or misappropriated the 1st plaintiff's monies. The defendant averred that she, in her capacity as director of MES, was managing the 1st plaintiff's bank accounts pursuant to the Agreement and had acted in accordance with the Agreement at all material times. Accordingly, the defendant disputed that the plaintiffs were entitled to any of the reliefs claimed.

Present financial position of the plaintiffs

27 Counsel for the plaintiffs asserted that to date the plaintiffs were able to stave off liquidation and bankruptcy proceedings by paying the 1st plaintiff's debts through instalments and progress payments, and with monies from the pockets of the 2nd plaintiff and K.C. Tan. The plaintiffs and K.C. Tan did not intend to allow the 1st plaintiff to go into liquidation as it had a viable business of cleaning of oil tankers and other related activities. According to counsel for the plaintiffs, K.C. Tan, presently a bankrupt, was operating the 1st plaintiff's business through the auspices of other companies who had the capital to finance its operations. Although the 1st plaintiff had a serious cash flow problem, nevertheless it had tremendous goodwill. On this basis, counsel submitted that the 1st plaintiff was able to meet its debts and that was a strong ground to show that the provision in s 388 of the Companies Act 50 was not satisfied. Accordingly, the SAR's order should be set aside for this reason alone as the court's discretion to order security for costs had not been invoked. I disagreed.

Section 388 of the Companies Act

28 Section 388 of the Companies Act (Cap 50, 2006 Rev Ed) provides as follows:

> **Security for costs**
>
> **388.** —(1) Where a corporation is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation 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 stay all proceedings until the security is given.

29 The Court of Appeal in *Creative Elegance (M) Sdn Bhd v Puay Kim Seng & Anor* [1999] 1 SLR 600 ("*Creative Elegance*") at [13] said that:

> … under s 388 the condition is as follows: if it appears by credible testimony that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendant if successful in his defence.

30 Once that condition was satisfied, the Court of Appeal held that the making of an order for security for costs under s 388 was a matter of discretion and in exercising its discretion the court would have regard to all the relevant circumstances and would have to consider whether it would be just to make the order. The strength or weakness of the plaintiff's claim was relevant. Whether or not the plaintiff had a bona fide case with a reasonable prospect of success was a factor to be taken into consideration. However, the Court of Appeal made clear that it was not the law that once the plaintiff had shown that he had a bona fide claim with a reasonable prospect of success or that he was likely to succeed in the sense that he had a high probability of success, that it followed as a matter of course that the court would not make an order for security for costs.

31 Another significant factor to be considered in my view would be the legislative and public policy behind s 388: (see [52] and [66] below). Whether or not there was clear prima facie evidence that the inability of the plaintiff to pay the costs was occasioned by the defendant's breach would also be another relevant circumstance that the court would take into consideration in determining whether in exercise of its discretion, security for costs should be made or refused.

32 It must be emphasised that the above enumeration of some relevant considerations is not intended to be exhaustive. Once the court is satisfied that the condition in s 388 has been met, the court then has to examine all the relevant circumstances and weigh all the relevant factors before coming to the conclusion whether it is just that an order for security for costs under s 388 should or should not be granted.

Condition in s 388 satisfied

33 In my judgment, s 388 did not require that there must be a winding up application against the 1st plaintiff before it could be applicable. The fact that the 1st plaintiff might be fortunate to have generous benefactors who would be prepared to provide funding or rescue the 1st plaintiff financially from time to time (but who were not legally bound to discharge the company's debts and obligations as and when they fell due), did not mean that the 1st plaintiff was therefore able to pay the legal costs of the defendant if the defendant were to be successful in her defence of the 1st plaintiff's

claim. If there was a need to rely on 3rd party benefactors to pay the 1st defendant's operational expenses and debts and to meet the potential legal costs of the defendant in the event of an unsuccessful claim by the 1st plaintiff, that would indicate that the 1st plaintiff did not itself have the financial resources to pay the costs of defendant, and accordingly the condition in s 388 would be satisfied.

34 In considering whether credible evidence existed to give reason for the court to believe that the plaintiff corporation would be able to pay the defendant's costs, the court would generally include in its consideration the cash position and the financing and credit facilities available to the plaintiff corporation, its assets and liabilities (both current and long term), including any enforceable legal debts or obligations owing by third parties to the plaintiff corporation but not some non-legally binding offers or avenues of financial assistance to the plaintiff corporation from interested third parties or based on some kind of goodwill.

35 I agreed with counsel for the defendant that the plaintiffs thus far failed to adduce any credible evidence that the 1st plaintiff had the assets and financial resources to pay the defendant's costs. The 1st plaintiff was no longer carrying on business and did not appear to have any sources of income. It was akin to a shell company. Even for relatively small sums the plaintiffs were ordered previously to pay, they appeared to be giving excuses to delay paying those costs to the defendant, and the defendants had to keep making repeated requests to them to pay up. The numerous claims against the 1st plaintiff with potential liability running into more than $1 million would also not give much confidence to the defendant (and also to the court) in the 1st plaintiff's ability to meet the defendant's costs. A company asset search on the 1st plaintiff dated 28 June 2007 showed that the 1st plaintiff did not have any property under its name. Indeed, there was a real danger that the defendant could potentially be left with a cost order that was unenforceable since the 1st plaintiff was now basically a shell company laden with debts and facing claims of significant amounts against it. As was correctly noted by the SAR, the plaintiffs had not refuted the suggestion that the 1st plaintiff would be unable to meet an order for costs in the event that its claim was dismissed.

36 Based on the credible evidence before me, I had reason to believe that the1st plaintiff was not able to pay the costs of the defendant if successful in her defence. Accordingly, s 388 could be invoked by the defendant as I found that the condition in s 388 was satisfied on the facts of this case.

Exercise of the court's discretion

37 I turn now to examine the various factors which ought to be considered in exercise of my discretion whether or not to order security for costs against the 1st plaintiff under s 388.

38 Counsel for the plaintiffs submitted that in the event the court believed that the 1st plaintiff's was not able to pay the defendant's costs, the court should nevertheless not exercise its discretion to order security for costs because:

(a) the 1st plaintiff's claim was bona fide;

(b) it had a reasonably good prospect of success (without an elaborate or detailed investigation of the evidence);

(c) it was not disputed that the defendant had sole control of the monies of the 1st plaintiff and there were major discrepancies in the accounting of these monies;

(d) the application for security was being used oppressively. On this point, counsel referred me to *Aquila Design [GRP Products] Ltd v Cornhill Insurance plc* [1988] BCLC 134 where the court said:

> It is necessary for the court, in looking at the whole matter, to take into account the burden on the plaintiff (a limited company in liquidation) of having to provide security, with the result that it may have to abandon the action altogether in consequences of impecuniosity and inability to provide the amount ordered by the court. In such cases there is therefore a danger of oppression as a consequence of making an order for security.

(e) it was patently obvious that the 1st plaintiff's want of means had been brought about by the defendant and to order it to pay security for costs which it could ill afford would deny it access to the court and compromise its right to justice.

39 In my judgment, the fact that the plaintiffs themselves believed that they had a bona fide claim must be a given. If they did not believe that they had a bona fide claim, then they should not even bring the suit at all if the allegations against the defendant were simply trumped up and the claims were entirely fictitious or frivolous.

40 Based on the fact that the defendant did have sole control of the bank accounts of the 1st plaintiff for a certain period of time and the fact that the plaintiffs had procured an expert report of Eltici Financial Advisory Services Pte Ltd dated 15 November 2007 ("Eltici's Report") to show that there was prima facie evidence of major discrepancies in the defendant's accounting of the funds in the defendant's control, which included, *inter alia*, unaccounted withdrawals, amounts withdrawn exceeding that acknowledged by the payee and cash payments made which were unrelated to the 1st plaintiff's business, I was prepared to accept the position that the plaintiffs' claim was not a trumped up claim. It had some basis and was therefore bona fide.

41 However, whether or not the plaintiffs' claim would have a reasonably good chance of succeeding was quite a different matter.

42 In the present case, the defendant disputed that she had misappropriated the monies as alleged by the 1st plaintiff. She explained why she did not misappropriate the monies. She engaged the services of M/s Tan Cheng Lin & Co to prepare an expert report dated 22 January 2008 in reply to the Eltici's Report. The defendant's expert addressed the various comments and conclusions in the Eltici's Report and showed why those comments and conclusions were unwarranted and/or incorrect.

43 In my view, the facts were highly contentious. Without a trial, it would be difficult to ascertain the truth of the allegations and counter allegations (many of which were oral in nature) and the veracity of the expert reports, and to determine what if any amounts had been unlawfully withdrawn or misappropriated by the defendant as alleged. I was not able to determine one way or another, or even form any preliminary views on who had the better prospect of success or what were the prospects of success (or for that matter, what were the reasonable prospects of success) of either party based on the limited materials before me.

44 It was also not obvious to me that the 1st plaintiff's present dire financial situation was wrongfully brought about by the defendant's misappropriation as contended by the plaintiffs. If this

was clearly demonstrated to be the case, then I would regard that as an important factor in favour of the 1st plaintiff not to order security. However, the defendant had strenuously denied any misappropriation of the monies. She had explained her version of the events concerning the uses to which the monies withdrawn had been applied. It was not practicable at the interlocutory stage of this hearing for security for costs, to examine such evidence with a fine tooth comb to enable a reasonably confident view to be formed one way or another, as to whether or not misappropriation had taken place.

45 What was clear to me was that the 1st plaintiff was already in financial difficulties even before the defendant was involved with the 1st plaintiff. The 1st plaintiff appeared to me to have remained in debt throughout even after the defendant became the sole signatory of the 1st plaintiff's bank accounts. Whether the 1st plaintiff would have got out of those financial difficulties and would have been able to provide security for costs for the present action but for the alleged misappropriation by the defendant of the 1st plaintiff's funds was something that remained a big unresolved question because it was not obvious to me on a cursory examination of the limited evidence whether any misappropriation took place, and if so, the magnitude of the sums involved. I therefore could make no conclusion that the 1st plaintiff's want of means to pursue the claim was indeed brought about by the wrongful conduct of the defendant. As such, this factor could not reasonably be considered to any significant degree when I weighed the various relevant factors in the balance.

46 As Lord Justice Potter said at [33] in *Kufaan Publishing Limited v Al-Warrak Publishing Limited* (2000) WL 491488 in relation to a security for costs application pursuant to s 726(1) of the Companies Act 1985 in England (equivalent of s 388(1) of the Companies Act in Singapore):

> It is equally clear that in the course of the balancing exercise, the court will not have regard to the merits of the action in the sense of the claimant company's prospects of success unless there appears to be a high degree of probability in one direction or the other.

47 Another factor would be the complexity of the claim and the defence which would affect the quantum of legal cost. If a case were complex, it would likely lead to more pre-trial preparation work and getting up, more trial days and hence, a much higher quantum of legal cost for the defendant to bear in order to defend the claim. The higher the quantum of potential unrecoverable legal cost for the defendant, the more weight should be given to this factor because the impecunious plaintiff corporation would then be subjecting the defendant to a much higher financial risk of non-recovery of substantial legal costs. For instance, a potential legal cost of only $3,000 would be very different from a potential legal cost of $300,000. If potential costs were only $3,000, perhaps the court would not even be minded to order any security for costs.

No detailed assessment of merits at interlocutory hearing

48 In my view, it would be most appropriate for the trial judge to decide on the merits of this case. The facts were fairly complex and forensic accounting and tracing of the withdrawal transactions would likely be involved. The purpose of each of the withdrawals from the 1st plaintiff's bank accounts by the defendant would have to be scrutinised. Not all the relevant evidence was before me, and the credibility of some factual matters could not be assessed based on the affidavits and expert reports alone. The possible criminal nature of the alleged misappropriation would also call for a more careful examination of the evidence and the circumstances surrounding each transaction at the trial. In particular, the flow of the money withdrawn from the 1st plaintiff's bank accounts must be traced from the bank statements, invoices, receipts and other documents evidencing the legitimate or illegitimate

purpose of each disputed withdrawal to the final beneficial recipient of each sum of money withdrawn. The court would need to closely examine why the beneficial recipient was given the money. No doubt it would be a very tedious process if the real nature of each withdrawal transaction was to be ascertained.

49 I did not think that it would be a profitable exercise for me at this interlocutory application for security for costs to examine closely the two conflicting expert reports including the affidavit evidence and to embark on a detailed examination of the merits of the case. Unless the evidence was so plainly, clearly and overwhelmingly in favour of the plaintiffs, and unless I could readily discern from the available evidence before me that the plaintiffs would have a high degree of probability of succeeding in their claim against the defendant, then that factor could properly be weighed in the balance. Clearly, this was very far from being such a case.

50 What Browne-Wilkinson VC said in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 at 423 would be most pertinent and would also be applicable in my view to applications made under s 388 of the Companies Act for security for costs:

> First there have been attempts to go into the likelihood of the plaintiff winning the case or the defendant winning the case, presumably following the note in *The Supreme Court Practice* 1985, p. 384, under rubric 23/1-3/2, which says: "A major matter for consideration is the likelihood of the plaintiff succeeding." This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.
>
> Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

51 Purchas LJ in *Trident International Freight Services v Manchester Ship Canal* Co (1990) BCLC 263 also pointed out that:

> Interlocutory proceedings should not be allowed to develop into full-scale but prematurely litigated trials. If and in so far as the respective merits of the competing parties play a part, it should only be on an a priori basis in the clearest possible cases, where it can be shown that on any basis there is a high probability of success or failure accordingly.

Policy considerations

52 In evaluating the various factors influencing the exercise of the court's discretion whether or not to order security for costs under s 388 of the Companies Act, another relevant and significant factor which should not be omitted from the analysis are the policy considerations behind the enactment of s 388 of the Companies Act.

53 Where the condition in s 388 is satisfied (*ie*, that the impecunious plaintiff corporation is unable

to pay the costs of the successful defendant), it normally follows that the corporation's own costs of pursuing the claim must be financed by the directors, shareholders or other interested parties (collectively called "interested parties"). If these interested parties believe that the plaintiff corporation has a viable or meritorious cause of action and they wish to shoulder the risk of that litigation, then it is only fair that they should not only provide funds for the corporation's legal fees and associated expenses for the litigation, but they should also, if so ordered by the court, provide funds to enable the plaintiff corporation to provide security for costs of the defendant in the event the plaintiff corporation's action fails, since there is no real possibility that the plaintiff corporation itself will be able to satisfy the defendant's costs. The interested parties' evaluation of risk should not be allowed to proceed on the basis that if the plaintiff corporation were to succeed, the interested parties stand to gain (albeit indirectly) but if the action is lost, the interested parties can simply walk away leaving the defendant saddled with unpaid costs that the plaintiff corporation will not be able to pay anyway. These interested parties are essentially hiding behind the impecunious plaintiff corporation, only financing the plaintiff's side of the litigation costs but ignoring the plight of the defendant, who would not be able to reach the interested parties to satisfy its unpaid legal costs. That in my view would be hard to justify in principle and would not be fair. Interested parties not prepared to provide the funds to meet the security for costs orders, generally ought not to be allowed to finance and launch litigation using the impecunious plaintiff corporation as a shield.

54 The appropriate balance between the right of access to the courts of an impecunious plaintiff corporation (where external financing would in any event be needed to gain access to the courts unless there is counsel willing to act pro bono for the plaintiff corporation) and a successful defendant's right to be reimbursed for his legal costs is certainly not an easy one to determine. But with s 388, the legislature has made clear where that balance ought to be struck. The legislature has deemed it fit, in the absence of any special circumstances, to resolve it by allowing the defendant to apply for security of costs so that a successful defendant's right to have his costs paid will not be left totally unaddressed. The availability of security for costs under s 388 also helps to deter interested parties from trying their luck by fielding unmeritorious or dubious claims using the impecunious corporation as a shield which may then saddle the defendant who ultimately emerges victorious with unpaid costs.

55 It therefore appears to me that where impecunious plaintiff corporations are concerned, the policy behind s 388 leans more in favour of protecting the defendant against an unsatisfied costs order. I think I would be remiss not to take such public and legislative policy considerations into account, when exercising my discretion under s 388 whether or not to order security for costs.

56 As Megarry VC had said in *Pearson & Anor v Naydler & Ors* [1977] 3 All ER 531 ("*Pearson*"):

> In the case of a limited company, there is no basic rule conferring immunity from any liability to give security for costs. **The basic rule is the opposite**; s 447 applies to all limited companies, and subjects them all to the liability to give security for costs. **The whole concept of the section is contrary to the rule developed by the cases that poverty is not to be made a bar to bringing an action.** There is nothing in the statutory language (the substance of which goes back at least as far as the Companies Act 1862, s 69) to indicate that there are any exceptions to what is laid down as a broad and general rule for all limited companies. Nor is it surprising that there should be such a rule.
>
> I come back to the words of s 447. It seems plain enough that the inability of the plaintiff company to pay the defendants' costs is a matter which not only opens the jurisdiction but also provides a **substantial factor** in the decision whether to exercise it. It is inherent in the whole concept of the section that the court is to have power to do what the company is likely to find

difficulty in doing, namely, to order the company to provide security for the costs which ex hypothesis it is likely to be unable to pay. At the same time, the court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company. As against that, the court must not show such a reluctance to order security for costs that this becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company. **Litigation in which the defendant will be seriously out-of-pocket even if the action fails is not to be encouraged.** While I fully accept that there is no burden of proof one way or the other, I think that **the court ought not to be unduly reluctant to exercise its power to order security for costs in cases that fall squarely within the section.** (Emphasis mine.)

57 I recognise that security for costs is only a provisional remedy and does not provide full protection as the court usually tends to make fairly conservative estimates of future costs of the litigation. Nevertheless, the provisional remedy to safeguard the defendant's costs does go some way to ameliorate the otherwise unenviable position of the defendant of being subject to having no recourse whatsoever against these interested third parties, who may have financed the impecunious corporation's litigation knowing that the plaintiff corporation will never be able to meet the defendant's costs if its claim is dismissed, and hence, they can also be said to have intentionally exposed the defendant to the risk of unpaid costs.

58 The following observations of the Court of Appeal in *Ho Wing On Christopher and Others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR 817 ("*ECRC Land*") at [71] – [72] on the approach the court should take in relation impecunious companies being made to provide security for costs are most enlightening:

> 71 In addition, we feel that the court's approach to the principle expressed in *Al Fayed* must be sufficiently nuanced to discern between *different categories of impecunious claimants*. The balance between a claimant's right of access to the courts and a successful defendant's right to be reimbursed his legal costs needs to be struck *differently* depending on the type of claimant involved. The distinction that needs to be drawn between differing categories of claimants is illustrated by the principles governing security for costs. Whilst it is trite law that poverty is no bar to a litigant who is a *natural person* (*Cowell v Taylor* (1885) 31 Ch D 34 at 38), s 388(1) of the CA subjects all *companies* to the potential liability to furnish security for costs where "there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence". As Megarry VC stated in *Pearson v Naydler* [1977] 1 WLR 899 at 905, the rationale for this distinction between natural persons and companies is as follows:
>
> > *A man may bring into being as many limited companies as he wishes*, with the privilege of limited liability; and section 447 [the equivalent of our s 388] provides some protection for the community against *litigious abuses by artificial persons manipulated by natural persons*. One should be as slow to whittle away this protection as one should be to whittle away a natural person's right to litigate despite poverty. [emphasis added]
>
> 72 In our view, the law on security for costs is express recognition that impecunious companies do not have an unfettered freedom to commence legal actions against defendants who cannot be compensated in costs if they win. **When one is dealing with a company rather than a natural person, public policy is in favour of *limiting*, rather than encouraging, uninhibited access to the courts.** This is *a fortiori* where the company in question is already in insolvent liquidation. In such cases, **the high likelihood that a successful defendant's costs will be unrecoverable requires the law to give greater protection to the defendant rather**

than the claimant company. (Emphasis mine.)

59 Although *ECRC Land* is in respect of a company in liquidation, nevertheless the above general observations of the Court of Appeal in my view remain appropriate and relevant to impecunious corporations, which are not in liquidation but whose litigation is being financed by interested third parties, whoever they may be. Those observations are consonant with and do reflect the policy considerations which parliament has seen fit to embed within s 388.

60 The New Zealand Court of Appeal in *National Bank of New Zealand Ltd v Donald Export Trading Ltd* [1980] 1 NZLR 97 also explained the legislative policy in New Zealand with regards to provision of security for costs by companies that appear to be impecunious:

> Accordingly, he says, Donald Export should be permitted to proceed to trial without being hampered by the need for security for costs. However for reasons stated in the passages which we have cited from the judgments of Moffitt J in the *Pacific Acceptance* case and of Megarry V-C in *Pearson v Naydler*, this submission overlooks **the obvious policy of the legislation to allow security to be given in circumstances where the company appears to be in no position to provide it from its own resources.** (Emphasis mine.)

61 I am of the view that as a matter of policy and principle, once the condition is fulfilled, the court ought to apply s 388 unless there are special circumstances to justify why it is not just to order security to be provided. I do not accept the plaintiff's submission that it is the law that security for costs should not be allowed unless it is shown by the defendant that the defendant has a high probability of success in defending the suit filed by the plaintiff. Neither *Trident* ([51] above) nor *Creative Elegance* ([29] above) is authority for this proposition.

62 Norse LJ in *Trident* indicated that he preferred the minority view of Cairns LJ in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273:

> …my own provisional preference is for the minority view of Cairns L.J., who thought that security ought to be ordered under s 726(1) unless there are special circumstances which justify its refusal.

63 Hence, the overriding policy consideration in a security for costs application pursuant to s 388(1) of the Companies Act is the plaintiff corporation's ability to pay the costs of the defendant in the event the plaintiff fails in its claim. As was noted by *ECRC Land* ([58] above), "the high likelihood that a successful defendant's costs will be unrecoverable requires the law to give greater protection to the defendant rather than the claimant company." On the facts of this case, the past behaviour of the plaintiffs in refusing to comply with a number of cost orders makes it even more compelling for the 1st plaintiff to be ordered to provide security for the defendant's costs. Despite the apparent lack of assets, I noted that the plaintiffs could apparently muster other third party resources to:

(a) pay only those costs orders that would result in their proceedings being stayed;

(b) engage a forensic accountant to prepare an interim report for the interlocutory application;

(c) pay the charges to retrieve their bank statements;

(d) pay their own counsel and other court charges to continue with the litigation to the end, including the appeals.

64 But when it came to providing security for the costs of the defendant, the plaintiffs immediately contend that the order of security would stifle their claim. I had my doubts. The 1st plaintiff did not show that the interested third parties (financing the 1st plaintiff's claim) were unable financially to provide the needed security for costs of $100,000 to enable the 1st plaintiff to continue with the litigation.

65 The ability of the 1st plaintiff to comply with the security of costs order made under s 388 when the 1st plaintiff is itself unable to provide the security, must obviously depend on the willingness of the interested parties to contribute financially to the 1st plaintiff so that it can provide the necessary security for costs. Since these third parties appear to me to be willing only to finance the 1st plaintiff's claim but they are against providing any security for the defendant's costs, it seems to me on the whole that it would be more unjust to saddle the defendant with unpaid costs were the defendant to succeed in defending the plaintiffs' claim, than to order security, where the interested parties, if they are quite sure of the 1st plaintiff's claim, should provide the necessary security for costs on behalf of the impecunious 1st plaintiff, if the interested parties still wished to continue to finance the 1st plaintiff's claim.

66 As observed by Lord Justice Potter at [33] in *Kufaan Publishing Limited v Al-Warrak Publishing Limited* (2000) WL 491488:

> ….it is inherent in the balancing exercise referred to that the court will frequently decide to grant security despite the fact that there is a likelihood that by doing so a just claim will be stifled, in the sense that the company's impecuniosity will render it unable to fulfil the order for security made. That is because the court decides that, in all the circumstances, justice dictates that it is the defendant whose interests predominantly require protection, an approach which is plainly within the contemplation of section 726(1) [equivalent of s 388 of the Companies Act].

Orders made

67 Having found that the condition in s 388 of the Companies Act was satisfied, and after a careful consideration of all the relevant factors and circumstances including the policy considerations behind s 388, I concluded that it would be just in all the circumstances to exercise my discretion to order security for costs against the 1st plaintiff on the facts of this case. I did not find any clear evidence of any special or extenuating circumstance or factor in favour of the 1st plaintiff to exercise my discretion not to order security.

68 Since counsel for the plaintiffs had impressed strenuously on me that this was almost an open and shut case and that there was clear misappropriation by the defendant as she had admitted to being the sole signatory of the 1st plaintiff's bank accounts, and as I was in no position to form any view based on the limited material placed before me for consideration, I decided that perhaps it might be fairer to break the provision of security into two parts, so that the plaintiffs, if they were minded to apply for summary judgment under Order 14 of the Rules of Court (Cap 322, R5, 2006 Rev Ed), would have an opportunity to do so by ordering at the first stage, a much more manageable sum for security for costs to allow them to proceed first to an Order 14 hearing.

69 In the circumstances, I allowed the matter to proceed to an Order 14 hearing conditional upon the 1st plaintiff providing limited security for costs for the Order 14 hearing of $5,000 or, in the

alternative, an undertaking of Colin Ng & Partners for the same amount, and in default of filing the Order 14 application within 8 weeks, the security was to remain at $100,000 as per the order of the SAR. If the Order 14 was proceeded with and unconditional leave to defend was granted to the defendant, then security for costs of $100,000 was to be provided up to the commencement of the trial as ordered by the SAR. Should judgment be given at the Order 14 hearing, then that would have quickly ended the matter. With this two stage provision of security for costs, it could not then be said that the $100,000 security was an obstacle blocking the 1st plaintiff from having an opportunity for its allegedly clear cut claim to be heard in a summary way.

70 As for the assessment of the quantum to be provided as security for costs should the matter go for a full trial on the merits, provision of security of a sum of $100,000 was certainly not extravagant and in my view, would in fact be quite reasonable as could be seen from the estimated bill of costs from counsel for the defendant, who had itemised the work done and to be done up to the commencement of the trial.