IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Han v. Cho,***
2008 BCSC 1229

Date: 20080911
Docket: L050150
Registry: Vancouver

Between:

Chul-Soo Han and Suk Hee Park and Jae Bok Yun

Plaintiffs

And

Soonam Cho also known as Jeong Eun Cho, also known as Jung Eun Cho, also known as Soon Yi Jung, also known as Cho Chong-Un, also known as Su-Nam Cho, also known as Bora Kang, Subi Park, also known as Subi Yu, Jioh Park, also known as Jioh Yu, also kown as Yang Hyun Park and Young Chan Shim

Defendants

Before: **The Honourable Madam Justice Dillon**

Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	F.G. Potts T. Goepel
Counsel for the Defendant Soonan Cho:	G.A. Phillips
Counsel for the Defendants/Applicants Subi Park and Jioh Park:	W.D. Holder
No appearance for Young Chan Shim:	
Dates and Place of Hearing:	April 24 and 29, 2008 Vancouver, B.C.

Introduction

[1] The defendants, Subi Park (Subi) and Jioh Park (Jioh), apply, pursuant to the inherent jurisdiction of this court, for an order that the plaintiffs be required to post security for costs in the amount of $137,298, pending the trial of this matter. The defendant, Soonam Cho (Cho) seeks an order for security for costs in the amount of $145,784. The plaintiffs oppose the application.

Background Facts

[2] The plaintiffs commenced an action against the defendants in January 2005. They claim fraud and conspiracy against Cho. They allege that Cho represented that she was a wealthy real estate investor who owned or controlled certain real estate properties that she was selling in Korea. Cho was prepared to sell her interests in these properties at a very favourable price for payment in cash. In reliance on these representations, the plaintiffs, Chul-Soo Han (Han) and Suk Hee Park (Park), agreed to purchase certain Korean properties and provided cash, bank drafts, and deposits to Cho, as directed, for the purchase of these properties. $1,160,000,000 KRW was paid to Cho in total, including $220,000,000 to an account in Subi's name. The plaintiff, Jae Bok Yun (Yun) also agreed to purchase certain properties and provided cashier's cheques to Cho at her direction in the amount of $900,000,000 KRW.

[3] The plaintiffs allege that Cho had no interest in the real estate properties and defrauded them of their money. Although it was not known to the plaintiffs at the time of their agreements to purchase, Cho has a long history of criminal convictions in Korea involving theft, fraud, and counterfeiting, among other things.

[4] The plaintiffs allege that Subi, Jioh, and Shim conspired with Cho to assist her in defrauding the plaintiffs and in removing and hiding the fraudulently obtained monies or aided and abetted Cho in her efforts. Subi and Jioh are Cho's daughters and are unemployed, with no visible source of income. Subi and Jioh operated bank accounts in their names for Cho, authorized Cho to remove monies from the accounts, knew that Cho opened accounts under alias names which were used to transfer the funds obtained from the plaintiffs. The plaintiffs allege that funds were smuggled out of Korea by Subi, Jioh and Cho, including $450,000 in travellers cheques. The plaintiffs allege that the defendant, Jioh, purchased a condominium in Vancouver at 1301-499 Broughton Street (the "property") for CA $1,375,000 in July 2004 and that Jioh attempted to tender the travellers cheques as payment. Canadian banks refused to honour the cheques when an explanation for the source of the funds was not provided. The defendant, Shim, assisted Jioh with purchase of the property and cashed the travellers cheques for a fee so that the monies could be used for the purchase of the property. The purchase was completed and the property is presently registered in the name of Jioh. The plaintiffs seek to trace the defrauded sums to this property.

[5] Yun swore an affidavit in support of the allegations contained in the amended statement of claim. His affidavit was corroborated by a Korean banker who swore that he knew Cho to be a real estate investor who sold high end apartments at discounted prices and that he witnessed a series of transactions between Cho and Yun that resulted in Yun transferring large sums of money to Cho for the purchase of certain real estate in Korea. He was later informed by Yun that the transfer never completed and that Cho could not be located.

[6] Han also swore an affidavit in support of the transactions described in the amended statement of claim, including bank statements indicating direct payments to Cho and Subi.

[7] The plaintiffs' allegations were further supported by an affidavit from Yeon Ho Jung (Jung) who worked for Cho as her personal assistant throughout the period of the alleged fraud. Jung swore that she was present for all of the transactions involving the plaintiffs and was advised by Cho about monies that she received. She described in detail how Cho worked her scheme and, in particular, how these transactions were conducted. Jung was not aware at the time that a fraud was being perpetrated and believed Cho to be a wealthy real estate investor. Jung had deposited monies into accounts in the name of Jioh and Subi upon instructions from Cho and overheard conversations between Cho and Jioh about the purchase of the property. Jung participated in document and other preparation for the fraudulent transfers. She attended at Cho's apartment on the date of completion of the transactions to find that Cho had fled. Jung stated that she later came to know that Cho did not own any apartments and that the sale of the apartments to the plaintiffs was a complete fraud.

[8] Although Cho denies the allegations in her statement of defence, she provided no affidavit in reply to the evidence of fraud provided by the plaintiffs in their supporting affidavits.

[9] In their statement of defence, Jioh, Subi, and Shim deny all of the allegations and say that the travellers cheques and monies used to purchase the property came from Cho. Jioh swore an affidavit on this application that she purchased the property for $1,375,000 with money received from her mother, Cho. She stated that she was

not aware how her mother obtained the funds and had no knowledge of any dealings between her mother and the plaintiffs. Subi also swore that she had no knowledge of how her mother came to have the monies to purchase the property.

[10] The plaintiffs all reside in Korea and have no registered interest in any real or personal property in British Columbia. Han is an airline pilot for Korean Airlines. Park, Han's wife, does not work outside the home. They live in rental accommodation in Korea and own no real estate. Han and Park allege that they were defrauded of all of their savings and assets by Cho and are incurring financial charges to pay off debt incurred to obtain the funds. Han and Park receive support from their daughters to maintain themselves. Yun is a retired businessman who lives in Korea in an apartment, which he owns. He also owns a rental apartment in Korea and receives a pension. A large part of his savings went to Cho as he had intended to sell his present apartment and move to the one purportedly sold by Cho. Korea is not a reciprocating state within the ***Court Order Enforcement Act***, R.S.B.C. 1996, c. 78.

[11] Cho is presently being held on an extradition warrant for extradition to Korea to face outstanding charges related to these matters. The whereabouts of Cho were unknown until recently, requiring her to be substitutionally served in this matter. According to affidavits filed by Jioh and Subi, they have been students in Canada since 2002, are not employed, and have no visible means of support other than their mother, Cho.

The Law on Security for Costs against an Individual

[12] British Columbia stands in a unique position among Canadian common law jurisdictions with respect to orders for security for costs against individuals. Unlike all other jurisdictions, there is no Rule of Court governing when an order should be made (Alberta *Rules of Court*, Reg. 390/1968, R. 593; Saskatchewan *Queen's Bench Rules*, R. 537-541; Manitoba *Court of Queens Bench Rules*, Reg. 533/88, R. 56.01; Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 56.01; New Brunswick *Rules of Court*, N.B. Reg. 82-73, R. 58.01; Nova Scotia *Civil Procedure Rules*, R. 45.01-45.04; Prince Edward Island *Rules of Civil Procedure*, R. 56.01; Newfoundland and Labrador *Rules of the Supreme Court*, S.N.L. 1986, c. 42, Sch. D, R. 21.01; *Federal Court Rules*, SOR 198-106, R. 416-417). Since 1976 when the old M.R. 981(a) and 981(b) were deleted from the Rules of Court, it has been established that the court retained inherent jurisdiction to order security for costs. This inherent jurisdiction was recognized in 1964, before the repeal of the marginal rules, in ***Launer v. Sommerfeld***, [1964] 45 D.L.R. (2d) 293. The court's inherent jurisdiction has been relied upon since to establish jurisdiction for making such orders.

[13] The seminal post-1976 decision of ***Shiell v. Coach House Hotel Ltd.*** 1982, 37 B.C.L.R. 254, 136 D.L.R. (3d) 470 (C.A.) (***Shiell***) dealt with the effect of deletion of the security for costs rule. Seaton J.A. said at pp. 258-259 that the deletion of the old rules did away with the former rigid practice of ordering security for costs in most cases if the plaintiff resided outside of the jurisdiction. The inherent jurisdiction left the court with the power to make particular orders in particular cases. Lambert J.A. stated at p. 264 that exercise of the discretionary jurisdiction does not require a particular outcome. Previous decisions are guidelines to be considered in the interests of uniformity and in response to perceptions of public policy. There is no longer the power to demand security for costs simply because the plaintiff resides outside of the jurisdiction and has no assets within it.

[14] The longstanding basic rule that has applied with respect to an order for security for costs against an individual is that a natural person can sue without giving security for costs in any but excepted cases. The rule flows from the principle that poverty is not a bar to access to the courts. This is the "true principle" referred to by Lambert J.A. in ***Shiell*** at p. 261. More recently, this basic principle has been enunciated as the right of citizens to have access to the courts, a fundamental theme of recent debate surrounding changes to the Rules of Court (***Fraser v. Houston*** (1997), 36 B.C.L.R. (3d) 118 at para. 11, [1997] B.C.J. No. 1537 (QL) (B.C.S.C.); ***Effective and Affordable Civil Justice***, Report of the Civil Justice Reform Working Group to the Justice Review Task Force, B.C. Justice Review, November 2006).

[15] Historically, the exceptions to the basic rule evolved in response to changing times. Around 1786, the courts began to order security for costs against a plaintiff residing outside of the jurisdiction (***Fitzgerald v. Whitmore*** (1786), 1 T.R. 362). Interestingly, this development arose because English subjects who sued in most foreign jurisdictions in Europe were required to give security for costs. An additional motivation was the court's

concern that an order for costs would not be enforceable in other jurisdictions. The exception from the rule in case of foreigners was legislatively adopted in 1885 in England and finds its place today in the various rules of court in other Canadian provinces.

[16] Another exception was concerned with practical unenforceability of recovery of costs. Nominal plaintiffs who were bankrupt or insolvent or who had assigned a debt and were suing on behalf of the assignee were required to give security for costs (***Perkins v. Adcock*** (1845), 14 M. & W. 808, ***Goatley v. Emmott*** (1854), 15 C.B. 291). The spirit underpinning these early cases, in which security for costs was awarded against nominal plaintiffs or those who took actions to shield themselves against potential orders for costs, was encapsulated in the legislative provisions requiring limited companies to post security for costs if the assets of the company were insufficient to pay costs. Limited companies created a potential mechanism to bring actions without being personally liable for costs. Legislative provisions such as our current section 236 of the ***Business Corporations Act***, S.B.C. 2002, c. 57 are intended to discourage the practice of bringing actions in the name of another, impecunious person by requiring security for costs.

[17] An additional exception to the basic principle arose in response to the prospect of a plaintiff being "unfindable" in the event that an order for costs against him were made. An order for security for costs against a plaintiff could be made where there was evidence suggesting that a false description of residence or a false name had been given to the court or generally used (***Fraser v. Palmer*** (1883), 3 Y. & C. Ex. 279, ***Swanzy v. Swanzy*** (1858), 4 K. & J. 237).

[18] An exception was also made concerning persons subject to special statutory privilege such as foreign ambassadors. It was early established that servants of ambassadors must give security for costs (***Goodwin v. Archer*** (1727), 2 P. Wms. 451; ***Adderley v. Smith*** (1763), 1 Dick. 355), although ambassadors themselves were exempt when in England, out of respect for the foreign sovereign (***Montellano (Duke) v. Cristin*** (1816), 5 M. & S. 503). However, if a foreign sovereign brought a lawsuit in England while residing elsewhere, security for costs was ordered as the foreign sovereign was considered to have attorned to the jurisdiction (***Brazil (Emperor) v. Robinson*** (1837), 6 Ad. & El. 801; ***Greece (King of) v. Wright*** (1837), 6 Dowl. 12).

[19] Since 1976, the traditional categorical common law approach to orders for security for costs has not been revived. Rather, as stated by Lambert J.A. in ***Shiell***, there is broad discretion. While the court in ***Shiell*** made clear that the traditional categories were not to be revived, it was unclear what the new analytical framework should be for determining whether orders for security for costs should be made against individuals. Comparison began to be made to the established framework that existed with respect to corporate plaintiffs under s. 229 (later s. 205) of the ***Company Act*** (now s. 236 of the ***Business Corporations Act***).

[20] There was never a basic rule conferring immunity from any liability to give security for costs in the case of a limited company (***Kropp v. Swaneset Bay Golf Course Ltd.*** (1997), 29 B.C.L.R. (3d) 252, 7 C.P.C. (4th) 209 at para. 16 (***Kropp***)). The ability to order security for costs against a plaintiff corporation where it appears that the corporation will be unable to pay costs if the defendant is successful in his defence dates back to English company legislation in 1862 (***Kropp*** at para. 14). The approach taken in applying this legislative provision had developed by the 1990s into a basic threshold test: once the defendant demonstrated that the corporate plaintiff would be unable to pay costs, security for costs would generally be ordered unless the plaintiff could show that it had assets of a real and substantial character, or that the defendant had no arguable case (***Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.*** (1993), 76 B.C.L.R. (2d) 231, 25 B.C.A.C. 95 (***Fat Mel's***), ***Kropp***). This threshold test is completely at odds with the traditional common law approach to orders for security for costs against individual plaintiffs in which the ability of an individual plaintiff to pay costs was not considered to be a legitimate consideration in the determination whether security for costs should be ordered (see ***Pearson v. Naydler***, [1977] 3 All E.R. 531 at 535, ***Kropp*** at para. 16).

[21] The courts have always drawn a distinction between individual plaintiffs and corporate plaintiffs (***Fat Mel's*** at para. 27; ***Kropp*** at para. 16; ***Kropp v. Swaneset Bay Golf Course Ltd.*** (1995), 17 B.C.L.R. (3d) 45 at para.10, [1995] B.C.J. No. 2769 (QL) (B.C.S.C.), rev'd on other grounds in ***Kropp*** (***Kropp BCSC***); ***Glenn Darrell Gray v. Powerassist Technologies Inc. and David John Allan Stevenson et al***, 2001 BCSC 1208, 10 C.P.C. (5th) 148 (***Gray***); ***Lawrence et al v. Sandilands et al***, 2003 BCSC 211, [2003] B.C.J. No. 343 (QL); ***Wong v. Huang et al***, 2004 BCSC 848, [2004] B.C.J. No. 1302 (QL); ***Dong v. Au***, 2007 BCCA 37, 25 B.C.A.C. 185 (***Dong***); ***Bronson v. Hewitt***, 2007 BCSC 1751, 53 C.P.C. (6th) 165 (***Bronson #1***); ***Bronson v. Hewitt***, 2007 BCSC 1864, [2007] B.C.J.

No. 2738 (QL); ***Kau v. Triffo***, 2007 BCSC 1851, 53 C.P.C. (6th) 180 (***Kao***); ***Extra Gift Exchange Inc. v. Accurate Effective Bailiffs Ltd.***, 2008 BCSC 440, [2008] B.C.J. No. 634 (QL) (***Extra Gift Exchange***)). In the case of a natural plaintiff, the court has taken care to specify that the inherent jurisdiction to order security for costs should be exercised cautiously, sparingly, and under very special circumstances (***Tordoff v. Can. Life Assur. Co.*** (1985), 64 B.C.L.R. 46 at p. 50, [1985] B.C.J. No. 2800 (QL) (***Tordoff***); ***Falso v. De Stefanis***, [1992] B.C.J. No. 337 (QL); ***Fraser v. Houston***, *supra*, at paras. 5 and 10; ***Gray*** at para. 20, ***Wong v. Huang***, *supra*, at para. 32). In ***Fraser v. Houston***, supra, at para. 11, the court said that orders should not be made except in egregious circumstances amounting to an abuse of the court's jurisdiction. Certainly, the fact that an individual plaintiff resides outside the jurisdiction, has no assets in it, or is impecunious, is normally not sufficient to attract an order (***Shiell*** at para.18; ***Falso v. De Stefanis***, *supra*; ***Fraser v. Houston*** at para. 12; ***Kropp BCSC*** at para. 10; ***Gray*** at para. 20; ***Wong v. Huang***, *supra*, at para. 34; ***Sebastian et al v. Golden Capital Securities Limited et al***, 2006 BCSC 361 at para. 3; ***Bronson #1***, at para. 30; ***Kao*** at para. 18).

[22] Notwithstanding this strong line of authority distinguishing individual from corporate plaintiffs, the difference has been blurred in some cases (***J.D.L. v. C.L.L.***, [1999] B.C.J. No. 803 (QL); ***Lawrence v. Sandilands***, *supra*; ***Gill v. Pacific Newspaper Group Inc.***, 2006 BCSC 650, 28 C.P.C. (6th) 370 (***Gill***)). The lack of distinction was noted by the learned authors B.M. McLachlin & J.P. Taylor, ***British Columbia Practice***, Vol. 2, 2nd ed. (Markham: LexisNexis, 2005) at 57-27.2, as quoted in ***Gill*** at para. 8. These cases appear to apply the corporate threshold test to individual plaintiffs.

[23] The matter was further confused by the statement of Chiasson J.A. in ***Dong*** wherein, after commenting favourably at para. 8 on the statement from ***Shiell*** that security for costs will not be ordered against an individual simply because he or she does not reside or have assets in the jurisdiction, went on to say at para. 9:

> The Chambers judge also referred to ***Kropp v. Swaneset Bay Golf Course Ltd.*** (1997), 29 B.C.L.R. (3d) 252, a decision of this Court. Although the case dealt specifically with the ability of a corporate plaintiff to continue with litigation if security for costs were ordered and the principles that apply to the exercise of the discretionary power to order security for costs under the then s. 229 of the ***Company Act***, the approach overall is instructive and applicable generally to a consideration of an application for security for costs.

[24] It is possible to read ***Dong*** as eliminating any distinction between the analysis that applied for security for costs against corporate plaintiffs and individual plaintiffs. This reading of ***Dong*** was argued before me and before the court in ***Bronson #1***. This court accepted that the Court of Appeal drew no distinction between the principles that apply where the plaintiff is a corporation and those that apply where the plaintiff is an individual in ***Toporowski v. Keast***, 2007 BCSC 1941 at para. 11, [2007] B.C.J. No. 2893 (QL) (***Toporowski***). However, the court in that case did not undertake a thorough review of the law.

[25] In ***Bronson #1***, Goepel J. outlined the history of orders for security for costs against both corporations and individuals. He noted that the histories are very different, and then undertook to answer the question of whether the Court's comments in ***Dong*** should be read as changing the long-standing distinction that has existed between corporate and individual plaintiffs. Goepel J. concluded that ***Dong*** should not be read as doing so, and that, with respect to orders for security for costs against individuals, the order should only be made in egregious circumstances. Goepel J. reconsidered his decision in light of ***Toporowski*** and declined to change his conclusion, reasoning that ***Toporowski*** had not considered the long line of authorities establishing a distinction between corporate and individual plaintiffs. In ***Extra Gift Exchange***, Sinclair Prowse J. stated that the Bronson cases dispelled any possible confusion created by the comments in ***Dong***.

[26] I agree with the conclusion in ***Bronson #1*** and ***Extra Gift Exchange***. If one reads the statement in ***Dong*** and looks to the principles from ***Kropp*** at para. 17 that were cited approvingly there, there is nothing inconsistent with continuing the distinction. ***Kropp*** referred to the complete discretion of the court and said that the possibility that a company might be deterred from pursuing its claim is not sufficient reason for not ordering security, without more. This does not address individual claims specifically and does not, I conclude, detract from the general principle that facilitates individual access to the courts in any event of impecuniosity. The Court went on to say that exercise of the discretion involves a balancing of injustices: the possibility of stifling a legitimate claim versus the use of impecuniosity as a means of pressure on a defendant. Balancing of injustice is always a factor in the

exercise of judicial discretion. Most cases involving individual claimants have found consideration of the strength of the merits of the claim or defence to be a valid consideration (***Tordoff*** at p. 52). Other principles cited in ***Kropp*** such as the ability to order lesser security than the full amount and consideration of delay in making an application do not detract from the fundamental distinction.

[27] The onus is on the applicant to establish that he or she will be unable to recover costs (***Bronson #1*** at para. 45). The fact that the plaintiff resides outside the jurisdiction, has no assets within the jurisdiction, or is impecunious, is not sufficient in itself. The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances. Such special circumstances could arise if an impecunious plaintiff also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance.

Application here

[28] The defendants have established that the plaintiffs reside outside the jurisdiction, in a non-reciprocating state. They have not established that the plaintiffs are impecunious or that they would be unlikely to pay costs if judgment were sought in Korea. The plaintiffs allege that their financial circumstances have been seriously affected by the fraud of Cho. Their case against Cho is strong, as evidenced by the affidavit evidence that Cho did not refute. Neither Subi nor Jioh is a purchaser for value of the property and neither appears to have any defence to the plaintiffs' claim. They did not challenge the affidavit evidence of the plaintiffs as to the financial transactions of Cho or the placement of funds in particular accounts. The justice of this situation does not compel me to order security for costs. There are no special or extraordinary circumstances that move this court to do so.

[29] The applications are dismissed with costs to the plaintiffs.

"Dillon J."

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The Honourable Madam Justice Dillon