DCPI561/2006

# **IN THE DISTRICT COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 561 OF 2006

BETWEEN

CHAN CHI LEUNG Plaintiff

and

HONG KONG AIR CARGO Defendant

TERMINALS LIMITED

Coram: Deputy District Judge Levy in Chambers

Date of Hearing: 11 August 2006

Date of Decision: 11 August 2006

D E C I S I O N

Introduction

1. This is an application by the defendant to set aside the interlocutory judgment obtained by the plaintiff on 12 May 2006 as a result of his failure to give notice of intention to defend. The plaintiff opposes the application.

The claim

1. By a general endorsement of writ dated 6 April 2006, the plaintiff claims against the defendant for damages for personal injury sustained in the course of his employment at the airport at Lantau Island, Hong Kong. The causes of action are negligence and breaches of statutory duty by the defendant, its servants or agents.

Circumstances leading to the default

1. From the evidence filed by the parties, it is common ground that before the issuance of the writ, the plaintiff’s solicitor sent a letter before action to the defendant’s solicitors, Messrs Deacons (“Deacons”) on 17 November 2005 and Deacons also replied thereto shortly afterwards.
2. As the negotiations between the parties were not fruitful, the plaintiff issued the writ on 6 April 2006. After the issuance of the writ, the plaintiff’s solicitors wrote to Deacons on 7 April 2006 and asked them if they have any instructions to accept service. Deacons replied, on 11 April 2006, and asked the plaintiff’s solicitors to serve the writ on the defendant direct. On 12 April 2006, the plaintiff’s solicitors wrote to Deacons and informed them that they would serve on the defendant and its insurers and also, in the same letter, enclosed a copy of the writ. On 13 April 2006, Deacons wrote to the defendant’s insurer and asked them to inform them once the defendant was served with the writ. The writ was indeed served on the defendant on or about 13 April 2006. However, the defendant did not take any steps to inform either the insurer or Deacons. As a result Deacons were not aware of the service of the writ until they received a letter from the plaintiff’s solicitors on 16 May 2006 informing them of this default judgment.
3. After Deacons’ requests for consent to set aside the default judgment was refused by the plaintiff’s solicitors, Deacons filed a Notice to Act on 16 May 2006, which was followed by the present summons, filed on 18 May 2006.
4. The events, as outlined above, leading to the default show that the judgment in question is a regular judgment. Indeed, the defendant does not seek to argue otherwise. This being a regular judgment case, the defendant is therefore required, according to the principle as laid down in the well known case of *Alpine Bulk Transport Co. v Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyd’s Reports 221, to show that it has a defence which has a reasonable prospect of success.

Merit or Defence

1. The plaintiff has not filed a statement of claim particularising the claim and the alleged negligence of and breaches of duty by the defendant. However, from the witness statements of Kung Chun-leung, an employee of the defendant, which statements were exhibited to the affirmation of Lee Shuk-ling, Linda, in support of the defendant’s application, the defendant admitted the occurrence of the accident.
2. According to the witness statement of Kung, on the date of the accident on 18 August 2004, he was responsible for driving a forklift truck, lifting a customer’s cargo for the purpose of putting them into a container. However, the plaintiff suddenly went in front of the forklift truck which he was driving and was struck. In response to the allegations by Kung, the plaintiff filed an affirmation disagreeing with Kung’s witness statement. According to the plaintiff’s affirmation, Kung was an inexperienced driver, and when the accident happened, Kung was in full view of the plaintiff.
3. The plaintiff said that Kung knew that he was there and Kung in fact was watching him from a distance of about 6 to 7 feet when the plaintiff was in the process of trying to squeeze a cargo into the container. When the plaintiff finished this task, he tried to get off from the container on to the platform in order to load the last piece of cargo into the container. However, as soon as the plaintiff landed on the platform, he was hit by the forklift truck driven by Kung.
4. The above is, by and large, the evidence of the parties. Miss Leung, for the defendant, submitted that this is a case where the evaluation of the credibility of the witnesses is crucial for the purpose of examining the merits of the defendant’s case. The court, she submitted, will not be possible therefore to form a provisional view but should exercise its discretion to set aside the judgment on the basis that the defendant had demonstrated sufficiently substantial merit to go to trial, citing the Hong Kong decision of Kwan J in the case of *El Vince Ltd v Wu Wen Sheng* [2001] 3 HKLRD 445 at 456.
5. Counsel for the plaintiff, Mr Wong, has no quarrel with the authorities submitted by and relied on by the defendant. He, however, seeks to argue that on the evidence filed by the parties, the defendant simply fails to meet the threshold test of showing a meritorious defence.

Discussion of the defence

1. The evidence so far disclosed by the principal witnesses of the respective parties, in my view, is in complete divergence. If the evidence of Kung for the defendant were to be accepted, the defendant would be able to show that the plaintiff, due to his sudden presence in front of the forklift truck driven by Kung, failed to take care of his own safety and thereby has caused or, alternatively, partly contributed to the accident. On the other hand, if the plaintiff’s evidence were to come up to proof, the plaintiff may very well be able to prove that Kung was negligent by having failed to keep a proper lookout and having failed to observe the presence of the plaintiff.
2. However, in a personal injury claim, where there is no criminal conviction in respect of the conduct of a defendant, his servants or agents, the court will not be able to determine the extent of the defendant’s liability unless all the circumstances of the case are being considered, including the conduct of a plaintiff and a defendant, his agents or servants, the physical setting of the accident scene, the system of work involved and the nature of the accident, and so forth, the category of the factors to be considered is simply not closed.
3. In this case I am of the firm view that this court cannot and should not form a provisional view as it is not possible to decide, on the evidence disclosed, whether the defendant can be said to be wholly liable for the plaintiff’s injuries. As it is not uncommon in a personal injuries case, the issue of contributory negligence can only be determined after the court has had an opportunity of considering all the circumstances of the case.
4. I do not, therefore, consider that the defendant has not established a real prospect of success that the plaintiff may be wholly or partly to blame for the accident. In considering if I ought to exercise my discretion to set aside the judgment, I am also required to take into account the conduct of the defendant leading to the default.
5. After having considered the evidence filed on behalf of the defendant, I am satisfied that the defendant has not deliberately failed to give a notice of intention to defend. I consider this is a case where justice cannot be denied to the defendant by depriving it of an opportunity to defend.

Conclusion

1. In the circumstances, I grant an order in terms of paragraph 1 and 2 of the defendant’s summons, dated 18 May 2006. As the defendant had conceded that the plaintiff should have the costs of this application, I also order that the defendant do have the costs of the application. I further order that the costs of the plaintiff should also include the costs of signing the default judgment as such costs are the costs arising from the defendant’s default. I will now hear the parties on the issue as to whether the plaintiff should be granted a certificate for counsel.

(Discussion)

1. I consider this is a case where it is fit to grant a certificate for counsel and I therefore grant such a certificate. Therefore, the order will be as follows:

(1) order in terms of paragraph 1 and 2 of the summons;

(2) the defendant do pay the plaintiff’s costs of the summons, including the costs of signing the default judgment, in any event, with certificate for counsel, to be taxed if not agreed.

(Katina Levy)

Deputy District Judge

Representation:

Mr Peter Wong, instructed by Messrs Rita Law & Co., for the Plaintiff

Miss Angela Leung of Messrs Deacons, for the Defendant