IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 194 OF 2001

|  |  |  |
| --- | --- | --- |
| BETWEEN | 陳紅紀 | Plaintiff |
|  | and |  |
|  | Chui Kwok Choi | Defendant |

Coram: H H Judge Carlson in Chambers

Date of Hearing: 3 December 2001

Date of Ruling: 3 December 2001

Present: 原告人出席，並無律師代表

Miss Corina Kwan, of Ip Kwan & Co., for the Defendant

R U L I N G

1. This is an application under Order 23 of the District Court Ordinance for security for costs. The application is made on behalf of the Defendant.
2. The ground of the application is that the Plaintiff is resident out of the jurisdiction, and there can be no doubt about that. He is a resident of Mainland China. That is where he resides and he accepts that. That has the effect of triggering the court’s power to make such an order, but it of course retains the discretion as to whether to do so or not.
3. It is clear from the cases that in these circumstances, it is the usual practice to make such an order because that happens to be the right order to make, but the fact is that the court does have the discretion to say yes or no having regard to the particular circumstances of the case before it.
4. If I were to make an order, the almost certain outcome would be that the Plaintiff here would simply not be able to meet the requirements of an order for security for costs and that would in fact bring an end to the action and I bear that very much in mind.
5. It is clear that in the majority of cases such as this, the actual merits of the action itself would not be a significant factor. Normally, the court would not concern itself with such matters at this early stage where it would not have heard any live evidence, it would not have had the benefit of hearing and seeing the witnesses examined and cross-examined. But as is clear from the speech of Lord Browne-Wilkinson in Porzelack v Porzelack, where the facts or where the merits appear on first examination to be either favouring a plaintiff or favouring a defendant, the court may well weigh those merits in the scales, and I take the view that this is perhaps one of those rare cases where I am entitled to have regard to the merits.
6. I have looked at the affirmation which is filed on behalf of the Defendant here and it really does seem to me that this is one of those cases where it is highly likely at the end of the day - although I am not making any sort of final pronouncement on the merits - that the Plaintiff will be found to have been the complete author of his own misfortune, and that is particularly unfortunate in a case where he was so severely injured, but that is how the matter strikes me at first blush. It is a case of him attempting to cross a road where, quite clearly, no sensible person would have attempted to do so. Therefore, I am prepared in this case to have regard to that factor in my assessment of the application for security of costs.
7. And so here, I have a Plaintiff who is clearly resident out of the jurisdiction, and secondly, the merits. I also bear in mind the fact that if I were to go on and make an order, the action would effectively go. So I have got to have regard to all of those factors.
8. But it seems to me that the justice of the situation is that I should award security for costs here. I do not think it would be right to let the action go on without security. The very likely outcome is that the Defendants would succeed. They would have expended a great deal of money in successfully defending an action and they would have absolutely no hope of recovering those costs. So, I will make the order that is asked for.
9. As to quantum, Miss Kwan has put the matter fairly moderately at $105,000, but I think I ought to trim that somewhat, bearing in mind that she can come again with a further application if the need arises. And so there will be an order for security of costs in the sum of $85,000.
10. The Plaintiff must bring that into court within three months of today, pending which the action will be stayed, and I think that is all I ought to say.
11. I had originally thought that I should then also add onto that that if the money was not in court, the action should be struck out, but I think the better course is to say that the action will be stayed and no doubt any further application can be made by Miss Kwan after the expiry of three months to include, no doubt, an application to have the action struck out.
12. The costs of today will be costs in the cause.

(Submission re summons of witnesses)

1. Let me just give me some further advice:

You are entitled to appeal against this ruling. Now, to assist you, you should know that you would need leave to appeal from me to do that. I can either give you leave to appeal or I can refuse you leave to appeal. If I were to give you leave to appeal, then you could go to the Court of Appeal and set your appeal down and they will hear it. If I refuse you leave to appeal, then you can renew your application for leave to appeal before a single Justice of the Court of Appeal.

(Application for leave to appeal)

1. So you say that my decision today was wrong, that I have exercised by discretion wrongly for the reasons that you were advancing in the course of the argument just now.

(Submission by Plaintiff)

1. I will refuse you leave to appeal and so you are now able to go on and deal with this matter, if you wish to, by applying to the Court of Appeal. That is the end of the matter in this court for the time being. The matter now moves to the Court of Appeal is that is what you wish to do.

Ian Carlson

District Court Judge

I/we certify that to the best of my/our ability and skill, the foregoing is a true transcript of the audio recording of the above proceedings.

...............................................

Liz Shore

6 December 2001