DCPI000220/2001

|  |  |
| --- | --- |
|  | DCPI220/01 |

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 220 OF 2001

-----------------

|  |  |  |
| --- | --- | --- |
| BETWEEN |  |  |
|  | Chan Tsz-kit an infant suing by his mother and next friend Cheng Siu-kam, Monica | Plaintiff |
|  | and |  |
|  | China Airlines Limited | Defendant |

-----------------

Coram: H H Judge Carlson in Chambers

Date of Judgment: 26 February 2002

|  |  |
| --- | --- |
| Present: | Ms Cheuk of Messrs Szwina S K Pang & Co., assigned by the Legal Aid Department, for the Plaintiff |
|  | Mr Ronald Tang, of Stevenson, Wong & Co., for the Defendant |

-----------------

RULING

-----------------

1. The defendants, China Airlines Limited, apply under Order 12, Rule 8A of the Rules of the District Court for an order that the action be dismissed with costs by virtue of the plaintiff's failure to comply with a notice dated 28 August 2001, served by the defendants pursuant to Order 12, Rule 8A, to serve on them the writ in this action. The material parts of theorder are in these terms:

|  |  |  |
| --- | --- | --- |
|  | (1) | Any person named as a defendant in a writ which has not been served onhimmay serve on the plaintiff a notice requiring him within specified period not less than 14 days after service of the notice, either to serve the writ on the defendant or to discontinue the action as against him. |
|  | (2) | Where the plaintiff fails to comply with a notice under paragraph (1) within the time specified the court may on the application of the defendant by summons order the action to be dismissed or make such other order as it thinks fit. |

2. The matter comes about in this way: On 22 August 1999 a McDonnell-Douglas MD-11 aircraft, operated by the defendants, with some 300 passengers on board, crashed on landing at Hong Kong International Airport. The landing was attempted whilst a typhoon No. 8 signal was hoisted by the Hong Kong Weather Observatory. Regrettably there were fatalities and a number of passengers were injured. Both infant plaintiffs who were on board the aircraft are amongst those who had been injured, including an allegation that they have suffered psychiatric problems as a direct result of the crash.

3. This is a matter to which the Warsaw Convention is said to apply. It provides for a two year limitation period. It also sets limits to the quantum of damages that can be recoverable by passengers in the event of an incident such as this, unless it can be proved that the crash was caused by recklessness or intentionally.

4. The plaintiff's solicitors do not accept that a two year limitation period applies, but in the event that they might be mistaken as to that, they have taken out a generally endorsed writ against the defendants claiming damages for personal injury which, for the time being, they do not wish to serve. The writ was issued in July 2001, which under the provisions of Order 6, Rule 8 of the Rules of the District Court is valid for 12 months in the first instance but which is renewable with leave.

5. I shall say more about the plaintiff's reasons for not wishing to serve the writ in a moment, but it is more convenient to indicate the defendant's position first, they being the party who have made this application. Mr Ronald Tang, who appears for the defendants in this matter, as he does is all the claims 200 of them - that have been brought against the defendants arising from this incident, has told me that of those 200 all have been settled save for nine, including these two, which remain, Of those nine all the plaintiffs, save for these two, have at the very least served the writ and in some cases some have gone as far as serving their statement of claim and statement of damages. Mr Tang submits that there is simply no valid reason why the plaintiffs should not at the very least serve the writ and he prays in aid in particular the provisions of the personal Injury Practice Direction, paragraph 10.7 which is concerned with checklist review hearings. 10.7 is in these terms:

|  |  |
| --- | --- |
|  | "In the event of a plaintiff's solicitors failing to serve the writ and the checklist review notice as soon as practicable following the issue of the writ so as to give the defendants the full proper notice of the date of hearing of the checklist review, the plaintiff's solicitors will be required to justify such failure in order to avoid any order for costs wasted by any adjournment of the checklist review hearing." |

6. Mr Tang says that the conduct of personal injury litigation as envisaged by the Practice Direction is that once the pre-action protocol concerning letters before action has been adhered to, the writ should be served quickly after it has been issued and the court can then apply itself to managing the action to trial with dispatch and efficiency having regard to the exigencies of the particular case before it.

7. Mr Tang submits that it is not just for his clients, who are having to face nine identical actions, to be put in a position of having to deal with these two plaintiff's who have as yet not served their writs and who are therefore not amenable to inter parte procedures, save for an application such as this one. He accepts that it may be going too far to expect the court to dismiss the action in terms of the summons, but he would seek an order that the writ be served forthwith.

8. On behalf of the plaintiffs Ms Cheuk submits that this is no ordinary personal injury action. A writ has been issued within two years to protect the plaintiffs in case the Warsaw Convention's two year limitation period applies. The whole conduct of the plaintiffs' case will be dependent on the publication of the Civil Aviation Department's report into the accident. That report has been prepared in draft. It remains to be finalised. It is not certain when that will be and then inthe Chief Executive will be approached to have the final report released.

9. Based on the report of the investigation, which is of a most thorough kind, the plaintiffs will know whether other parties may need to be added as defendants and what further causes of actions and allegations may need to be made. This means that the writ may need to be amended in a number of respects. If the report is not available by July this year, then an application may need to be made to extend the validity of the writ. The plaintiffs say the rules permit them not to serve the writ and indeed to apply to extend its validity without service. And so in these unusual circumstances concerning the crash of a commercial aircraft, they should be allowed to withhold service until the report is available and until they have put their case in proper order before service. It would be undesirable, less impressive and more expensive to have to apply for leave to make amendments after service.

10. Mr Tang's reply to that is that these considerations may well be valid in relation to not serving the statement of claim and to adjourning the checklist review hearing until after the report is available, which has happened in some of the other actions but it can be no answer to a requirement that a generally endorsed writ should now be served.

11. In my view, the plaintiffs' reasons for not serving the writ are perfectly valid. Where the rules allow for this course to be taken I can find no compelling reasons to oblige service. Whilst I can understand that other parties in a similar situation have felt able to serve the writ, and in some cases to serve a statement of claim and a statement of damages, that of itself would not be a reason to obliged these plaintiff's to follow suit. The ethos of the Practice Direction is for a party to get on with these things after the pre-action protocol has been complied with and a writ should be served quickly following its issue. But every case is different. I can quite understand why in litigation of this sort - and this is not, after all, a daily occur3nce - the plaintiffs want to ensure that they sue all the parties that should be joined at the outset and what the appropriate cause or causes of action are pleaded in the general endorsement. This is a perfectly proper way of proceeding and, accordingly, the summons must be dismissed, I would have thought with costs but I will hear the parties on that in a moment.

12. The next potential hurdle for the plaintiffs will be in July when they may be required to apply to extend the validity of the writ. This must be justified in accordance with the considerations set out in Order 6, Rule 8 which apply to such applications. Today's ruling is not to be taken as an indication of the prospect of success or otherwise of such an application if it needs to be made.

(Discussion re costs)

13. The costs will follow the event.

14. There will be Legal Aid taxation of the plaintiffs' costs.

|  |  |
| --- | --- |
|  | Signed |
|  | Ian Carlson |
|  | District Court Judge |

Representation:

Ms Cheuk of Messrs Szwina S K Pang & Co., assigned by the Legal Aid Department, for the Plaintiff

Mr Ronald Tang, of Stevenson, Wong & Co., for the Defendant

|  |  |
| --- | --- |
|  | I/we certify that to the best of my/our ability and skill, the forgoing is a true transcript of the audio recording of the above proceedings. |
|  | .......................... |
|  | Alison L McCormick |
|  | Date: 1 March 2002 |

Representation:

Ms Cheuk of Messrs Szwina S K Pang & Co., assigned by the Legal Aid Department, for the Plaintiff

Mr Ronald Tang, of Stevenson, Wong & Co., for the Defendant