CACV 551/2018

[2019] HKCA 1408

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

Civil appeal no 551 of 2018

(on appeal from HCA NO 428 of 2018)

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###### BETWEEN

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| LEUNG CHUNG LAN LORRAINE | | | Plaintiff |
| and | | |  |
| HANG SENG BANK LIMITED | | | Defendant |
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Before: Hon Kwan VP and Yuen JA in Court

Dates of Written Submissions: 1 and 30 August 2019, 10 September 2019

Date of Judgment: 16 December 2019

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| J U D G M E N T |

Hon Kwan VP (giving the Judgment of the Court):

1. There are before us two applications. The first is a summons issued by Hang Seng Bank Ltd, the defendant and respondent in these appeal proceedings, to strike out the plaintiff’s notice of appeal under the inherent jurisdiction of the court on the grounds that it discloses no reasonable grounds of appeal, it is frivolous and vexatious, and/or it is an abuse of the process of the court. The second is a summons issued by Leung ‍Chung Lan Lorraine, the plaintiff and appellant, to adduce new evidence in the appeal. The plaintiff has been acting in person throughout.
2. Having considered the papers and submissions lodged by the parties, we think it appropriate to determine both applications on paper without an oral hearing.
3. The relevant factual background and procedural history may be stated as follows.

The plaintiff’s claim in the Small Claims Tribunal

1. In June 2002, the plaintiff applied for and was issued an insurance policy (“the Policy”) by the defendant. The Policy had a term of ten years, during which modal premium in the monthly sum of $995.40 was to be paid by her through direct debit from her bank account with the defendant. Upon maturity of the Policy in ten years’ time, the plaintiff would be entitled to be paid settlement benefits by the defendant.
2. In May 2010, the plaintiff opened an integrated account with the defendant (“the 385 Account”). In April 2011, she gave written instructions to the defendant to change the debit account for payment of the premium of the Policy to the 385 Account.
3. According to the plaintiff, she lost her Hong Kong Identity **‍**Card in October 2011 and had telephoned the defendant’s hotline **‍**shortly thereafter to report the loss. The records of the defendant showed that on 28 October 2011, a new account in the plaintiff’s name was opened with the defendant (“the 242 Account”). The plaintiff claimed that the 242 Account was not opened by her but by a fraudster who impersonated her using the information on her lost Identity Card. She claimed she had no knowledge about the 242 Account until much later.
4. The defendant’s records showed that on 23 November 2011, instructions were received from the plaintiff to change the direct debit account for payment of the Policy premium from the 385 Account to the 242 Account. The 385 Account was closed shortly afterwards on 25 **‍**November 2011, and the records showed that since then and until the maturity of the Policy in June 2012, the monthly modal premium payments had in fact been debited from the 242 Account. The plaintiff claimed that she did not give instructions to the defendant to change the direct debit account to the 242 Account and was not aware that the premium payments were no longer debited from the 385 Account after October 2011.
5. In April 2012, when the maturity of the Policy was approaching, the defendant sent to the plaintiff two sets of documents in Chinese and English requesting for instructions as to how the maturity benefits were to be settled. The defendant received as reply both sets of documents, which appeared to be signed by the plaintiff. According to the reply, the defendant was instructed to transfer the maturity benefits to the 242 Account. The plaintiff claimed that she did not sign the settlement instructions.
6. The defendant followed the instructions received and transferred the settlement benefits of $128,654.15 to the 242 Account on 7 **‍**June 2012. A notice to that effect was sent to the postal address of the plaintiff.
7. The plaintiff claimed that she did not receive the settlement benefits and brought a claim in the Small Claims Tribunal against the defendant seeking the return of the settlement benefits (SCTC 46908/2016). She alleged that she was the victim of an identity fraud on the basis of the matters as mentioned above.
8. The defence of the defendant was straightforward. It asserted that the 242 Account was opened properly with the usual identity verification procedure, and no irregularity of any kind had been detected.
9. On 10 August 2017, the plaintiff’s claim was dismissed by the Small Claims Tribunal. Reasons for the decision were handed down on 17 **‍**October 2017. In the reasons, the deputy adjudicator analysed the oral **‍**and documentary evidence of the plaintiff in some detail. She referred **‍**to **‍**a “Certificate of Registered Particulars” issued by the Immigration **‍**Department, which stated that the plaintiff reported loss of her Identity Card on 15 December 2011, not in October 2011 as alleged. There were other factual inconsistencies in the plaintiff’s evidence. Importantly, the plaintiff applied for another insurance policy with the defendant in May 2013, and this was at a time when she claimed she was still unaware of the 242 Account. However, in the application form for this new policy, the 242 Account was put down as the debit account for future premium payments. By then the 385 Account had been cancelled. The deputy adjudicator found the plaintiff’s explanation wholly unreasonable and in the end rejected her evidence in the entirety.
10. The plaintiff applied to the Court of First Instance for leave to appeal against the decision of the Small Claims Tribunal (HCSA 43/2017). On 9 February 2018, Deputy High Court Judge Keith Yeung SC dismissed her application, as the decision of the deputy adjudicator was based on the assessment of the plaintiff’s credibility and the finding of facts. Under section 28(1) of the Small Claims Tribunal Ordinance, Cap 338, it is provided that any party aggrieved by a decision of the tribunal can only appeal on any ground involving a question of law alone, or on the ground that the claim was outside the jurisdiction of the tribunal. As no point of law or any jurisdiction issue was involved, the Court of First Instance had no power to grant leave to appeal.

The plaintiff’s claim in the High Court

1. On 20 February 2018, the plaintiff issued a writ in the High **‍**Court against the defendant (HCA 428/2018), claiming for the recovery of the settlement benefits of the Policy in the sum of $128,654.15. It is the same claim as in the Small Claims Tribunal and was founded on the same allegations.
2. On 16 March 2018, the plaintiff filed a summons in the High **‍**Court action, without specifying what relief she was seeking in her summons or her supporting affidavit. In her summons, she alleged that someone had used her lost Identity Card to open a bank account with the defendant and stolen her money. She also alleged that someone had stolen her documents from the Small Claims Tribunal and “this is the case appeal from HCSA 43/2017”. She further alleged that the defendant issued a credit card to her with an incorrect name, in that “Lorraine” was missing from her name in English. The summons was dismissed by Master Ho on 28 March. Her appeal against the master’s decision was dismissed by Au-Yeung J on 4 July 2018. Au-Yeung J pointed out that if the summons was intended to be an appeal against the decision of Deputy **‍**High Court Judge Yeung on 9 February, this was misconceived as a refusal by the Court of First Instance to grant leave to appeal against a decision of the Small Claims Tribunal is final by virtue of section 28(3) of the Small Claims Tribunal Ordinance.
3. On 29 May 2018, the defendant filed a defence in the High **‍**Court action without prejudice to its right to apply to strike out the statement of claim.

The defendant’s application to strike out the statement of claim

1. The defendant issued a summons to strike out the statement of claim in the High Court action on 13 June 2018, on the basis that the **‍**plaintiff’s claim for the settlement benefits of the Policy has already **‍**been **‍**fully determined as part of an already concluded litigation in SCTC ‍46908/2016 and HCSA 43/2017 and it is an abuse of process for the plaintiff to seek to re-open or re-litigate this issue in HCA 428/2018.
2. The plaintiff issued a summons on 18 September 2018 to enter judgment against the defendant.
3. Both summonses were dealt with by Master Hui. On 28 **‍**September 2018, he ordered the plaintiff’s claim be struck out and her action be dismissed, and he dismissed the plaintiff’s summons.
4. On 11 October 2018, the plaintiff filed a notice of appeal to a judge in chambers against Master Hui’s decision. The appeal was heard by Lok J who gave judgment on 14 November 2018. Lok J held that in the High Court action the plaintiff is bringing the same claim as in the Small Claims Tribunal, and as her claim for the settlement benefits of the Policy had already been adjudicated in SCTC 46908/2016, she cannot bring a fresh claim against the defendant in HCA 428/2018. As for the plaintiff’s allegation of the loss of her documents in the Small Claims Tribunal, this had been dealt with in the reasons for decision of the deputy adjudicator and decided in favour of the defendant. The judge also rejected the procedural complaints raised by the plaintiff against the defendant as groundless.

The plaintiff’s appeal against the striking out of her claim

1. The plaintiff filed a notice of appeal on 20 November 2018 to **‍**appeal against the judgment of Lok J. This is the present appeal (CACV **‍**551/2018).
2. The grounds of appeal stated in her notice of appeal are as follows:

(1) she did not receive the settlement benefits of $128,654.15;

(2) she has already informed the judge that she opened her insurance with the defendant at the Mongkok branch but the insurance was opened at the Cheung Sha Wan branch;

(3) she already told the judge many times that the form was filled out with an incorrect insurance number; and

(4) there are a lot of “misconduct things [that] happen to [the **‍**defendant’s] staff”, for example, using her Identity Card to buy stocks.

The defendant’s summons to strike out the notice of appeal

1. The defendant issued a summons on 3 June 2019 to strike out the notice of appeal under the inherent jurisdiction of the court and filed a supporting affirmation on the same day.
2. On 5 June 2019, the Registrar of Civil Appeals gave directions on the filing of evidence and lodging of submissions regarding the summons. On 2 July, the Registrar directed that unless the plaintiff files and serves her affidavit in opposition by 4 pm on 18 July 2019, she shall be debarred from doing so.
3. On 8 July 2019, the plaintiff wrote to the Registrar stating the reasons in support of her case and asserting that she does not have to file and serve an affidavit in opposition as directed.
4. As no affidavit in opposition was filed and served by 18 **‍**July **‍**2019, the plaintiff is debarred from filing any such affidavit. She was notified of this by a letter from the Registrar dated 22 July.
5. The defendant lodged its submissions on 1 August, the plaintiff lodged hers on 30 August, and the defendant replied on 10 **‍**September.

The plaintiff’s summons to adduce further evidence in the appeal

1. On 26 September 2019, the plaintiff issued a summons to adduce new evidence in the appeal with an affidavit in support. She also wrote a letter to the court on the same day and referred to this letter in her affidavit.
2. The documents sought to be adduced as new evidence are copies of documents relating to her insurance plan with the defendant under **‍**policy number 31074121 and a letter from the defendant dated 30 **‍**August **‍**2019 regarding an application for the change of beneficiary for the said policy.
3. On 30 September 2019, the Registrar directed that the plaintiff’s summons and affidavit filed on 26 September be referred to the Court of Appeal for consideration together with the defendant’s summons to strike out the notice of appeal, and that no further document may be filed or lodged without leave of the court. Both parties were notified of the above directions by letter dated 2 October 2019.
4. Notwithstanding the above directions of the Registrar, the plaintiff wrote to the court on 30 September 2019, 22 October, 28 October, 29 October, 5 November and 2 December making submissions and/or seeking to adduce additional documents in support of her case. The additional submissions and the attempts to adduce further evidence without leave are out of order. The proper procedure for making applications in an appeal is by way of summons, which should set out the relief sought and supported by affidavit where appropriate, not by way of a letter to the court. For litigation to be conducted fairly and in an orderly manner, litigants, whether they act in person or otherwise, must abide by the directions given by the court regarding the filing of evidence and lodging of submissions. They are not permitted to make submissions as and when they see fit without leave of the court.
5. In *AXA China Region Insurance Co Ltd v Leong Fong Cheng*, CACV 113/2016, 28 October 2016, at §§43 to 53, the Court of Appeal deplored the habit of litigants who engaged in lengthy and unfocused correspondence with the court and gave fair warning that the time has come to reinstate proper procedural discipline and that the court generally will not take heed of applications, requests or assertions advanced by litigants in correspondence. The court stated firmly that if a party should wish to make an application, he should apply by summons, supported by affidavit and he cannot expect the court to read or reply to his letter unless it is written pursuant to direction or leave granted by the judge.
6. We have considered the aforesaid letters of the plaintiff *de* ***‍****bene esse*. Her submissions and additional documents do not assist her case at all, for the reasons mentioned below. We decline to give leave to her to rely on them.

Legal principles

1. The Court of Appeal has inherent jurisdiction to strike out a notice of appeal where an appeal is plainly not competent (*Aviagents Ltd v Balstravest Investments Ltd* [1966] 1 WLR 150 at 154B to E, 155D to G; *Ng Shek Po & Anr v Director of Lands* [1996] 4 HKC 616 at 619D to E), or where the appeal is frivolous, vexatious or an abuse of the process of the court (*Burgess v Stafford Hotel Ltd* [1990] 1 WLR 1215 at 1220A to G, 1221B to D; *Fok Siu Wing v Hong Kong Housing Authority* [2016] 1 HKLRD 238 at §§6, 11 to 13). In the case of the latter, the inherent jurisdiction would be exercised on precisely the same basis as if Order 18 rule 19 strictly applied to notices of appeal (*Burgess v Stafford Hotel Ltd* at 1221D).
2. The jurisdiction to strike out a notice of appeal should be confined to clear and obvious cases. It should not be utilised, and an order to strike out should not be made, where any extensive inquiry into the facts is likely to be necessary (*Burgess v Stafford Hotel Ltd* at 1222C to D).
3. Regarding the admission of new evidence in an appeal, three conditions must be satisfied as laid down in *Ladd v Marshall* [1954] 1 WLR 1489 at 1491. Further evidence is admissible on appeal only where such evidence: (1) could not have been obtained with reasonable diligence for use at the trial; (2) would or might, if believed, have an important influence on the result of the case, though it need not be decisive; and (3) **‍**is of a sort which is apparently credible though it need not be incontrovertible.

Analysis and disposition

1. We will first deal with the plaintiff’s summons to adduce new evidence. Condition (2) in *Ladd v Marshall* is plainly not satisfied. The new evidence relates to a different insurance policy and is wholly unrelated to the issue in dispute in the High Court action, namely, whether the plaintiff had received the settlement benefits under the Policy. It could not possibly have any or any important influence on the outcome of the appeal.
2. We dismiss the plaintiff’s application to adduce new evidence. We will make no order as to costs in respect of that summons, as the defendant does not appear to have incurred costs in that application.
3. We turn to the strike out application. It cannot be disputed that the plaintiff’s claim in the High Court action is the same as her claim in the Small Claims Tribunal. It is a clear case of an abuse of process to seek to re-litigate the same claim and issue which have been conclusively determined against her by a tribunal of competent jurisdiction.
4. The plaintiff raised a number of arguments and allegations: all summonses should be submitted by the plaintiff instead of the defendant under the Rules of the High Court; the defendant’s summons served on her was not sealed with the seal of the court and not supported by affidavit; the staff of the court had violated the Personal Data (Privacy) Ordinance, Cap **‍**486 in putting her name as plaintiff of the action on the mailing envelope and the defendant’s solicitors had violated the High Court Ordinance, Cap 4 in not complying with the Rules in issuing the summons.
5. All these arguments are misconceived. The defendant is entitled to take out the summons to strike out the notice of appeal pursuant to the inherent jurisdiction of the court. The Rules of the High Court do not require that the copy of a summons served on the other party has to bear the seal of the court. The allegations against the court staff and the defendant’s solicitors are without substance. They are also irrelevant.
6. We are satisfied that this appeal is frivolous, vexatious and an abuse of the process of the court and there is no possibility that any of the grounds of appeal raised in the notice of appeal and the plaintiff’s submissions is capable of argument. This is a clear and obvious case to exercise the power to strike out under the inherent jurisdiction of the court.
7. The defendant seeks a restricted proceedings order against the plaintiff restricting her from commencing any fresh legal proceedings in **‍**relation to any matters involving, relating to, touching upon or leading **‍**to **‍**SCTC 46908/2016, HCSA 43/2017 and HCA 428/2018, citing *Fok* ***‍****Siu* ***‍****Wing v Hong Kong Housing Authority* at §15.
8. We will not make a restricted proceedings order on this occasion, but we will issue a stern warning to the plaintiff that if she should commence fresh proceedings on the same matter against the defendant yet again, she may well attract a restricted proceedings order against her.
9. Costs of the strike out application should follow the event. We have considered the revised statement of costs submitted by the defendant’s solicitors on 10 September 2019. The costs claimed appear to be on the high side, bearing in mind that the same team of legal representatives has been engaged in the High Court action. We reduce the amount of costs claimed from $103,820 to $70,000.
10. The costs order and the summary assessment are orders *nisi*. These orders will be made absolute if there is no application for variation by any party within 14 days of the handing down of this judgment.

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| (Susan Kwan)  Vice President | (Maria Yuen)  Justice of Appeal |

The Plaintiff (Appellant), acting in person

The Defendant (Respondent), represented by Mayer Brown