CACV 511/2018

[2020] HKCA 705

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

CiviL Appeal no 511 of 2018

(on appeal from HCPI NO 898 of 2016)

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###### BETWEEN

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| LUCY MICHAELS | | | Plaintiff |
| and | | |  |
| HARBOUR GRAND HONG KONG | | | Defendant |
|  |

Before: Hon Kwan VP, Cheung JA and Yuen JA in Court

Dates of Written Submissions: 8 and 20 March 2020, 7 April 2020

Date of Judgment: 27 August 2020

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| J U D G M E N T |

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

1. This is the plaintiff’s appeal against the decision of Deputy ‍High Court Judge Paul Lam, SC on 12 September 2018 striking out the plaintiff’s claim in this action on the defendant’s application and **‍**dismissing her appeal against the decision of Master Leong on 25 **‍**January **‍**2017, by which the master dismissed her application for summary judgment.
2. The hearing of this appeal on 3 April 2020 was adjourned due to the general adjournment of court proceedings announced by the judiciary for public health reasons. The parties have agreed to disposing of this appeal on paper and leave was given to the plaintiff to lodge a skeleton argument in reply.
3. The plaintiff has been acting in person throughout. Mr **‍**Robin McLeish is the counsel for the defendant in this appeal.

Background

1. This action was brought by the plaintiff to recover damages arising out of her failure to obtain the occupancy of a room in the defendant hotel, Harbour Grand Hong Kong[[1]](#footnote-1) (“the defendant” or “the Hotel”), at No **‍**23 Oil Street, North Point, Hong Kong on 20 January 2015 for the period of one month, having made a reservation earlier. She declined to pay a “Loss & Damage Deposit” of $10,000 to guarantee any loss and damage of in-room inventory during her occupancy, which was to be paid by cash or credit card pre-authorization, upon checking in at the hotel. The checking-in procedure was not completed and her reservation was cancelled by the defendant.
2. The plaintiff stated in the writ of summons in this action that her causes of action are:

“1. Tort/Breach of Contract

2. Misrepresentation/Violation of Rights

3. Exposure to Danger and Physical Harm

4. Intentional Infliction of Emotional Distress”.

(1) The plaintiff’s case as pleaded

1. The writ of summons issued on 14 April 2016 has attached to it a statement of claim of 30 pages. The main allegations in this pleading may be summarised as follows.
2. On 14 January 2015, the plaintiff and her daughter Ms **‍**Marianne N Michaels contacted the sales department of the defendant to enquire about the availability and the rate of a room for one month starting from 20 January 2015.
3. After a number of telephone conversations, email exchanges and personal visits to the Hotel, the plaintiff and her daughter chose a “Grand Deluxe Harbour View Room without pantry” and the price quoted was $26,900 for a stay of 30 days.
4. On 19 January 2015, the plaintiff and her daughter went to the Hotel a number of times with the intention to sign the licence agreement with the defendant and to make payment in advance so that they could check in on the following day. They were repeatedly told by the defendant’s sales executive, Mr Harry Lam (“Mr Lam”), that the documents were not ready and they were asked to come back the next day. The plaintiff and her daughter expressed their concern as they needed to check out from their current hotel and were afraid to do so with no room guaranteed on hand. Mr Lam reassured them that the room they had chosen was guaranteed, all that they were required to do was to sign the licence agreement, register and pay the agreed rental. He asked them to register and check in around noon time the next day. Relying on his promise and reassurance, they checked out from the hotel where they were staying.
5. At about 11 am on 20 January 2015, the plaintiff and her daughter arrived at the Hotel with their luggage. They were told that the documents and the room were not ready. After they had gone back and forth to the Hotel several times, Mr Lam eventually took them to the front desk counter to register at about 6:40 pm.
6. Both were asked by the staff to provide their personal information for registration. As the plaintiff’s daughter was intended to be the licensee in the licence agreement, she was asked to sign the agreement. After she had signed two pages of the agreement, Mr Lam presented them with a third page headed “Benefits List” and under the sub‑heading “Bill Signing Privilege and Loss & Damage deposit”, it was provided that a “Bill signing privilege deposit” and a “Loss & Damage Deposit” were required. They declined the “Bill Signing Privilege” as they did not intend to charge any purchases to the room. Mr Lam agreed to waive the deposit for the “Bill Signing Privilege” but not the “Loss & Damage Deposit”. The “Loss & Damage Deposit” was never discussed or revealed before in the “seven meetings, three emails and numerous phone calls” they had with the defendant. It was “compelled” on them as mandatory at around 7 pm, “after the contract was signed”. The daughter did not sign the third page, and they did not pay this deposit.
7. They were told that the room was already rented out for the night but as a favour to them the defendant would hold the contract until the next day and, after they came up with the deposit, they would be rented the room. The plaintiff considered this as “nothing but a pretext and a deception”. Before leaving the Hotel, she asked for copies of the signed licence agreement and the signed registration forms, but her request was refused. Mr Lam refused to destroy the signed documents in her presence. She was told that a soft copy of the licence agreement was sent as an attachment in an email to her daughter earlier that day.
8. The plaintiff claimed that they had an agreement, verbally and in writing through emails, of the pre-paid room rental amount due upon registration, and there was no mention of the requirement to pay the “Loss **‍**& Damage Deposit”. The agreement was breached by the defendant through withholding this vital information from them until after the contract was signed. If they had known of this requirement beforehand, they would have rejected it.
9. As the registration had failed, the personal data they provided should not be kept by the defendant and should be destroyed immediately to protect their privacy. There was non-compliance with the data protection principles in the Personal Data (Privacy) Ordinance, Cap 486.
10. They were declined lodging at the Hotel, at night, with luggage and no reservation on hand. The defendant’s conduct with “intentional deception” was “extreme and outrageous”. After the failed registration, they were in a state of disbelief, anxiety, distress and disappointment. They suffered “emotional agony” and “severe emotional distress” due to the fear for their safety and wellbeing, including being exposed to hazard and danger to physical harm, and this had caused the plaintiff “severe insomnia”. Such “negative experience”, distress and anguish led to her inability to “focus on [her] business operation resulting in missing several business opportunities” and a “prompt weight loss”. She claimed damages for pain and suffering at such sum as the court may award.
11. The plaintiff issued a summons on 22 July 2016 seeking summary judgment notwithstanding a defence was filed by the defendant on 27 June 2016.

(2) The defendant’s case as pleaded

1. The defendant disputed many of the factual allegations in the statement of claim. It is not necessary to mention them all. Its pleaded case may be summarised as follows.
2. The defendant’s Serviced Suites Office received a phone call enquiry from the plaintiff’s daughter on 16 January 2015 in relation to a one-month stay. The Office received an email enquiry from the daughter on 19 January at around 10:34 am regarding two types of room in the Hotel **‍**with a list of her requirements including the arrival date of 19 or 20 **‍**January **‍**2015.
3. Mr Lam responded by an email on the same day at 2:57 pm In it, he provided details of a “Grand Deluxe Harbour View Room” with and without pantry, and stated that the earliest available time was late 20 **‍**January 2015 with check in after 2 pm. Under “Remarks”, it was stated *inter alia*: “ – Bill signing privilege deposit: HK$5,000 by credit card imprint authorization or HK$10,000 by cash is required for guarantee any incidental charge upon arrival” and “– Loss & damage deposit: HK$10,000 is required for guarantee by credit card or cash upon arrival”. He requested the daughter to indicate her acceptance by 5 pm on 19 January.
4. The defendant did not receive a reply by email that day. Instead, the plaintiff and her daughter went to the Hotel at around 6 pm. After a discussion with Mr Lam, they decided on a “Grand Deluxe Harbour View Room” without pantry which was due to be checked out the next day. Mr Lam told them to call in the afternoon of the next day and check when the room would be available for check-in.
5. Following the meeting on 19 January evening, Mr Lam prepared a licence agreement dated 20 January 2015 (and signed by him on behalf of the defendant) which he sent as an attachment to his email to the daughter on 20 January at 10:41 am. In his email, he stated that the check-in time would be around 6 pm that day. The licence agreement stated on the third page that a “Bill Signing Privilege Deposit” and a “Loss **‍**& Damage Deposit” would be required upon arrival.
6. The plaintiff and her daughter turned up at the Hotel with their luggage at around noon on 20 January without prior notice. Mr Lam requested them to leave their belongings with the concierge and return for check-in at 6 pm. He also told them that he had sent an email to the daughter earlier that day enclosing a signed licence agreement.
7. Upon their return at around 6 pm, the front desk staff proceeded with their registration and was provided only with the daughter’s Hong Kong Identity Card and a P.O. Box number as correspondence address. The daughter signed on pages 1 and 2 of the licence agreement but not page 3 because the plaintiff and her daughter disagreed with the requirement of a “Bill Signing Privilege Deposit” and a “Loss & Damage Deposit”. Mr Lam agreed to waive the “Bill Signing Privilege Deposit” at their request upon their indication they did not need the signing privilege. He and the Director of Guest Services Mr ‍Benoit ‍Heumez explained to the plaintiff and her daughter that the “Loss **‍**& **‍**Damage Deposit” could not be waived but could be made by credit card pre-authorization or by cash and if by cash it would be fully refundable upon check-out unless loss or damage of in-room inventory occurred. They refused to pay this deposit or to take up the option offered to them of returning the next day to check in on the basis that the room reserved would be held for them.
8. The personal data of the daughter provided to the front desk together with the signed pages of the licence agreement were destroyed in the presence of the plaintiff and her daughter. Thereafter they left the Hotel with their belongings and their reservation was cancelled at 7:13 pm.
9. The defendant averred that the requirements of the “Bill **‍**Signing Privilege Deposit” and “Loss & Damage Deposit” had been communicated to the plaintiff and her daughter by its email on 19 January at 2:57 pm and in the third page of the licence agreement sent as an attachment to its email on 20 January at 10:41 am, and no issue was raised by them with the defendant until upon their registration on 20 January. The defendant denied that Mr Lam had made any misrepresentation, promise or reassurance as alleged or at all. There was no formation of agreement between the daughter and/or the plaintiff on the one hand and the defendant on the other hand.

The application for summary judgment

1. The plaintiff’s application for summary judgment was heard by Master Leong. He dismissed it on 25 January 2017 and ordered the plaintiff to pay forthwith the defendant’s costs of this application, which he assessed summarily at $60,000. He ordered that the action be stayed until the plaintiff pays the costs, with liberty to apply.
2. On 3 February 2017, the plaintiff lodged a notice of appeal against the master’s order.

The application to strike out the claim

1. On 14 February 2017, the defendant issued a summons to strike out the claim in this action and the statement of claim as disclosing no reasonable cause of action, and/or being frivolous or vexatious, and/or other being an abuse of the process of the court.
2. On 13 November 2017, Bharwaney J ordered that the **‍**strike **‍**out application should be heard together with the plaintiff’s **‍**appeal **‍**against the dismissal of her application for summary **‍**judgment. **‍**Both **‍**matters were scheduled for hearing before Deputy **‍**High **‍**Court **‍**Judge **‍**Saunders on 3 May 2018.
3. On 3 April 2018, the clerk to Au-Yeung J wrote to the parties informing them that Au-Yeung J had directed that the appeal and strike out application would be heard by a bilingual judge DHCJ Paul Lam, SC on the same date and time, together with another action involving the plaintiff and other litigants in person (HCPI 902/2016).
4. On 13 April 2018, the plaintiff wrote to the court requesting a stay of the hearing due to her “severe heart condition”. By a further letter to the court dated 20 April, she requested that the hearing be held before DHCJ Saunders. She repeated her request to stay the hearing by another letter dated 25 April 2018. The defendant wrote to the court on 25 April submitting that it would not be just and reasonable to accede to the plaintiff’s application to vacate the hearing date and stay the hearing indefinitely.
5. The clerk to DHCJ Lam replied on 27 April informing the parties that the judge had considered all the submissions made and was not satisfied there were good and sufficient reasons to adjourn the hearing on 3 May 2018 or why the matter must be heard by DHCJ Saunders, and that the judge had directed on 26 April that the hearing would take place before him on the date and time as scheduled.
6. On 2 May 2018, the judge’s clerk wrote to the parties referring to the plaintiff’s letter of 25 April and stating that the judge had rejected her application to adjourn the hearing which would proceed as scheduled and that the judge further directed the defendant’s solicitors in this action and the defendants’ solicitors in HCPI 902/2016 that they should use their best endeavours to serve a copy of his directions on 2 May at the plaintiff’s address as stated on the letter within the same day.
7. DHCJ Lam heard the appeal and the strike out application on 3 May and handed down his decision on 12 September 2018. He dismissed the plaintiff’s appeal and ordered that her claim in this action and the statement of claim be struck out. He directed the defendant to file a statement of costs within 14 days and the plaintiff to file a list of objections within 14 days thereafter, for the summary assessment of costs on paper.
8. On 9 November 2018, the judge handed down his decision on costs. He assessed the costs payable by the plaintiff to the defendant at $500,000, to be paid forthwith.

The documents lodged by the plaintiff in this appeal

1. On 9 October 2018, the plaintiff filed a “Notice of Appeal” against the judge’s decision. The grounds of appeal were stated to be contained in 11 enclosures to this document. She lodged a set of appeal bundles on 30 October 2018.
2. On 18 December 2018, the Registrar of Civil Appeals directed her to file an amended notice of appeal, as the documents lodged by her were prolix and unfocused and contained lengthy submissions and enclosures not relevant to the appeal.
3. On 11 January 2019, the plaintiff filed an “Amended Notice of Appeal”. It is a document of 20 pages.
4. On 14 January 2019, the Registrar directed the plaintiff to prepare a succinct and focused summary of her grounds of appeal in table form, setting out in in four columns the findings challenged, the alleged errors, the paragraph numbers in the Amended Notice of Appeal, and the relevant documents. The Registrar withheld giving directions on the appeal bundles lodged by her until she had prepared a document framing in a proper manner her grounds of appeal.
5. On 13 February 2019, the plaintiff lodged a “Revised‑Amended Ground of Appeal” of 8 pages with a table of four columns running to 20 pages.
6. On 21 February 2019, the Registrar gave directions that the “Revised-Amended Ground of Appeal” shall be treated as the only Notice **‍**of Appeal of the plaintiff and she should retrieve her appeal bundles lodged on 30 October 2018 and prepare fresh bundles for the appeal containing only the documents relevant to the appeal with a proper index. He directed the defendant to provide comments on the new draft bundles within 14 days of receipt.
7. The plaintiff lodged fresh draft appeal bundles on 4 **‍**April **‍**2019. The defendant provided their comments on 18 April. On 6 June 2019, the Registrar gave directions to the plaintiff to lodge revised draft bundles. The plaintiff did so on 11 July and the defendant commented on the same on 1 August. As it had been almost one year since the plaintiff brought this appeal and she had not prepared draft appeal bundles in the manner as directed by the Registrar, on 4 September 2019 the Registrar directed the defendant to compile draft appeal bundles. On 21 October 2019, the Registrar approved the draft appeal bundles lodged by the defendant and directed the plaintiff to file an application for the hearing of the appeal.
8. On 31 October 2019, the plaintiff filed an application for the hearing of the appeal. On 19 November 2019, the Registrar gave directions that the appeal be fixed for hearing, that the defendant should lodge with the court three sets of the appeal bundles as approved by the Registrar on 21 October and serve another set on the plaintiff. He also directed the plaintiff to retrieve her bundles lodged on 11 July. The Registrar also gave directions for the parties to lodge skeleton arguments and list of authorities in compliance with Section G of Practice Direction **‍**4.1. The Registrar made clear that no further document or submission shall be lodged without leave of the court and that any document or submission lodged in non-compliance will not be considered.
9. The notice of hearing of the appeal was issued on 2 **‍**December **‍**2019, stating that the appeal was to be heard on 3 April 2020.
10. On 16 December 2019, the plaintiff wrote to the court asking the court to reconsider her draft appeal bundles. This was refused on 18 **‍**December 2019.
11. On 13 March 2020, the plaintiff lodged with the court a skeleton argument of 15 pages[[2]](#footnote-2), a “List of Authorities of the Plaintiff” of 16 pages and a “Chronology of the Claimant” of five pages.
12. The defendant lodged its skeleton argument and list of authorities on 20 March.
13. On 24 March 2020, this court wrote to the parties informing them that the hearing of the appeal on 3 April has been adjourned due to the general adjournment of court proceedings for public health reasons and asking them if they would consent to disposing of the appeal on paper. With the parties’ consent, on 31 March this court directed a paper disposal of this appeal and gave leave to the plaintiff to lodge a skeleton argument in reply of not more than five pages and a list of authorities.
14. On 7 April 2020, the plaintiff lodged a skeleton argument in reply of five pages and a “List of Authority” of 14 pages.
15. In the period between 5 March 2020 and 1 May 2020[[3]](#footnote-3), the plaintiff lodged with the court a very large number of documents via the no-reply email address of this court, including an appeal bundle compiled **‍**by her and further written submissions. These documents and submissions were lodged without leave of the court. The plaintiff well knew that the only appeal bundle was that approved by the Registrar on 21 **‍**October 2019 and lodged by the defendant pursuant to the directions on 19 November. Her request for reconsideration of her bundles was refused by the court in December 2019. There are no special circumstances to justify the lodging of the additional documents and submissions. They will not be considered by this court, apart from the documents already included in the appeal bundle lodged by the defendant and the two skeleton arguments served by the plaintiff on 13 March and 7 April.

Failure to seek leave to appeal to the Court of Appeal

1. In the “Revised-Amended Ground of Appeal”, the plaintiff sought to reverse the order to strike out her claims in this action and instead allow summary judgment to be entered in her favour.
2. An order striking out an action is an order determining in a summary way the substantive rights of a party. The plaintiff does not need leave to appeal to the Court of Appeal against that part of the judge’s order striking out her claims in this action (section 14AA(1) of the High ‍Court Ordinance, Cap 4 and Order 59 rules 21(1)(a) and (2)(f) of the Rules of the High Court). However, in respect of the judge’s dismissal of her appeal against the master’s order dismissing her application for summary judgment, the effect of this part of his order is not to determine in a summary way the substantive rights of any party to this action. When a court refuses to grant an application for summary judgment, the action will go to trial in the usual way and the substantive rights of the parties will be determined at the trial (unless the action is struck out as in this instance). Hence, leave to appeal is required from the dismissal of the application for summary judgment (*Winpo Development Ltd v Wong Kar Fu & Ors*, CACV 39/2011, 22 July 2011, §§24 to 28; *Kwok Mei Ha May v Chiu Yung* [2018] HKCA 311).
3. The plaintiff did not seek leave to appeal to the Court of Appeal against that part of the judge’s order dismissing her appeal against the master’s order refusing to grant her application for summary judgment. That part of her appeal is incompetent even though the defendant has not raised any objection to this. We do not propose to deal with this part of her appeal. In any event, if the plaintiff’s claims are obviously unsustainable and her appeal against the striking order is not successful, it follows that the purported appeal against the refusal to grant summary judgment would also be dismissed.

The grounds of appeal

1. The grounds of appeal raised in the “Revised-Amended Ground of Appeal” and the plaintiff’s skeleton arguments may be summarised as follows:

(1) There had been prejudice, partiality, administrative irregularities and judicial misconduct in the conduct of these proceedings: there was a sudden change of the presiding judge before the hearing on 3 May 2018; the judge refused to adjourn the hearing on 3 May 2018 despite the medical reasons raised by the plaintiff, he forced her to attend the hearing and ordered the defendant’s solicitors to go to her residence to remind her; she was harassed and intimidated by the couriers who went to her residence on 2 May 2018; the court allowed the bundle prepared by the plaintiff to be replaced by the defendant’s bundle.

(2) The judge’s decision was biased or perverse or both. He just repeated and relied on the defendant’s statements, arguments and authorities cited.

(3) He erred in ignoring the fact that the plaintiff’s causes of action were all pleaded in the statement of claim.

(4) He misinterpreted some facts, failed to take into account material evidence, and failed to give adequate reasons for excluding such evidence.

(5) He failed to draw adverse inference against the defendant notwithstanding it was admitted in the defence that the defendant refused to provide the original copy of the licence agreement to the plaintiff at her request, and that the defendant had refused to provide footage of CCTV.

(6) He failed to properly take into account that the licence agreement ended on the second page.

(7) He erred in law and in fact in deciding that her claim for misrepresentation must fail.

(8) He erred in law as the decision was not made in accordance with (a) Hong Kong legislation being: Control of Exemption Clauses Ordinance, Cap 71; Misrepresentation Ordinance, Cap 284; Trade Descriptions Ordinance, Cap 362; Supply **‍**of **‍**Services (Implied Terms) Ordinance, Cap 457; Unconscionable Contracts Ordinance, Cap 458; (b) UK legislation being: Consumer Rights Act 2015; and (c) US legislation being: Truth in Hotel Advertising Act 2016; Hotel **‍**Advertising Transparency Act 2019.

(9) The decision was unjust and unlawful as it was based on reinstating the master’s decision which was not supported by actual hearing and the judge failed to give adequate reasons for his decision.

1. For reasons explained below, we do not find it necessary to deal with each of the grounds of appeal raised by the plaintiff for the proper resolution of this appeal.

The approach in this appeal

1. As the defendant is the applicant seeking to strike out the plaintiff’s claims, it is incumbent on it to establish a plain and obvious case for the court to exercise this summary power. The claims must be demonstrated to be obviously unsustainable, the pleadings unarguably bad, and it must be impossible, not just improbable, for the claims to succeed before the court would order striking out.
2. The judge decided to consider the striking out application first. This is the right approach.
3. The critical issue in this appeal is whether the causes of action pleaded by the plaintiff are obviously unsustainable and unarguably bad. Where there are factual disputes, we would approach them on the basis whether they are material to the resolution of this critical issue, and if it is necessary to resolve them, whether they can be resolved on the basis of undisputed or indisputable evidence. We would only address such of the plaintiff’s arguments on fact and law only insofar as they are material to the resolution of the critical issue. The court is not required to deal with each and every argument raised by a party in support of his or her case, but only to identify the issues critical to its decision and explain how the issues should be resolved (*Eagil Trust* *Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122c to e; *English v Emery* *Reimbold & Strick Ltd* [2002] 1 WLR 2409 at §§16 to 21; *Welltus Ltd v Fornton Knitting Co Ltd*, CACV **‍**268/2011, 14 March 2013, §§19 to 25). The plaintiff’s complaints that the judge has failed to give adequate reasons for various aspects of his decision are misconceived. We are satisfied that the judge has given his reasons in sufficient detail to show the principles on which he has acted, and the reasons which led him to his decision.
4. As pleaded in the statement of claim, the causes of action may be categorised under the claims in contract and the claims in tort. Before we consider the viability of the causes of action, we will first deal with the complaints of bias, administrative irregularities and judicial misconduct.

The allegations of bias, administrative irregularities and judicial misconduct

1. There is no substance in the plaintiff’s complaint about the change of the presiding judge. Nor could it be said that the judge was in error in refusing to adjourn the hearing on 3 May 2018. These are case management decisions within the province of the trial court. There is no basis for the appeal court to interfere with the proper exercise of discretion by the court below on the well-established principles (*Wong Kar Gee Mimi v Severn Villa Ltd* [2012] 1 HKLRD 887 at §31).
2. There was no administrative irregularity and the Registrar did not act improperly in declining to accept the draft appeal bundle compiled by the plaintiff. The plaintiff was given adequate opportunity to submit a draft bundle for the appeal that is compliant with the directions given by the Registrar, including the requirement that the bundle should contain only the documents relevant to the determination of the appeal and documents that had been placed before the judge. It was after her repeated failure to submit a compliant draft bundle that the Registrar gave directions to the defendant to prepare a draft bundle for his approval so that the appeal could proceed without any further delay.
3. As for the allegation of bias and partiality of the judge towards the defendant, there is no basis for this complaint, whether this be actual or apparent bias. A fair-minded and informed observer would not reasonably conclude there was a real possibility of bias from the mere fact that the judge had referred to and accepted the defendant’s arguments and did not appear to have addressed the plaintiff’s arguments.
4. The allegations of harassment and intimidation against the couriers sent by the defendant’s solicitors to her residence are wholly irrelevant to the claims in this action or this appeal.

The causes of action in contract

1. The plaintiff pleaded that the parties had “an agreement verbally and in writing through emails”[[4]](#footnote-4) and that they had “an agreement, even a signed one, confirmed verbally and by emails, and the first two pages were signed”[[5]](#footnote-5), and that this agreement was breached by the defendant withholding vital information concerning the “Loss & Damage Deposit” and by “imposing an undeclared amount after the registration and the signing of the “Lease [sic] Agreement” ”[[6]](#footnote-6).
2. Before dealing with any allegation of breach of contract, the first thing to consider is whether there was a concluded contract at all. As rightly pointed out by the judge[[7]](#footnote-7), whether the parties intended to enter into a concluded contract is a matter to be looked at objectively, and it is necessary to consider the contemporaneous documents to decide whether objectively the parties had unconditionally reached final agreement on all the intended terms of the contract, citing *World Food Fair Ltd v Hong ‍Kong Island Development Ltd* (2006) 9 HKCFAR 735 at §§35 to 38. Quite clearly, the defendant had no legal duty to provide a room to the plaintiff unless and until the parties had made a legally binding agreement.
3. If it is alleged that a binding agreement was reached verbally, this allegation is simply untenable. On the plaintiff’s own pleaded case, she was well aware all along that a licence agreement was required to be signed:

“After we selected the room and we were assigned the room number [2821], we were ready to sign the Licence Agreement …”[[8]](#footnote-8)

“We decided to wait few more minutes so we can sign the Licence Agreement immediately, for a peace of mind, to register and pay in full the amount of HK$26,900 as stated on his email …”[[9]](#footnote-9)

“After collecting all private data, Mr Harry Lam presented us with the first two pages of the contract, we were pleased to know that the room is finally secured, the rental amount remained the same as confirmed through all emails and in person as agreed, and we were almost certain we were about to have a place to sleep …”[[10]](#footnote-10)

1. A copy of the licence agreement was sent to the plaintiff’s daughter as an attachment to the defendant’s email on 20 January 2015. These statements at the bottom of page 1 of the licence agreement made clear that the booking of accommodation was not confirmed until the agreement was signed:

“Upon signing of this Licence Agreement, the Licensee agrees to the grant of use of the Serviced Suite on the terms as stated above and subject to the conditions annexed herewith.

The Licence Agreement should be signed and returned to the Serviced Suites Department within 7 days of the issue date, otherwise the booking is not confirmed …”

1. Nor could there be a binding agreement reached by emails. In the defendant’s email to the plaintiff’s daughter dated 19 January 2015, it was stated under “Remarks” that a “Loss & Damage Deposit” of $10,000 was required. This term in the email was not accepted by the plaintiff at any time.
2. The licence agreement sent to the plaintiff’s daughter clearly consisted of a third page, which also contained the requirement of a “Loss ***‍***& Damage Deposit” of $10,000 and this page was required to be signed. There is no basis for the plaintiff’s contention that the licence agreement ended on the second page. The plaintiff sought to rely on the “entire agreement clause” in clause 15 of the Conditions on the second page of the licence agreement to contend that the licence agreement comprised only the first two pages as no further documents or addendum were referred to within the first two pages. Clause 15 provides that the licence agreement comprises the entire agreement between the parties. The fact that the “entire agreement clause” appeared on the second page cannot be relied on to support an argument that any term which came after the second page would not be treated as part of the agreement when it is clear that the third page was part of the agreement, as the third page contained substantially the same terms mentioned in the earlier email of the defendant on 19 January 2015.
3. There could not be a concluded agreement by signing only the first two pages without accepting the terms on the third page by signing on that page as well.
4. It is plain and obvious that there was no legally enforceable agreement between the plaintiff and the defendant. The judge’s holding in this respect is plainly correct. Any claim for breach of contract cannot get off the ground.
5. Besides, it is the plaintiff’s daughter whose name was stated in the licence agreement as the licensee and it was the daughter who was to sign that agreement[[11]](#footnote-11) and she did sign the first two pages. There is no basis for the plaintiff to claim for breach of contract as she was not even intended to be a party to the licence agreement. It is wholly immaterial that the staff at the front desk also asked the plaintiff to provide her full name, passport details, correspondence address and contact number for registration as pleaded in the defence[[12]](#footnote-12).
6. The plaintiff contended in the “Revised-Amended Ground of Appeal” and her first skeleton argument that the licence agreement was signed “with both [the plaintiff] and [the plaintiff’s] daughter name”. This is contrary to her case as pleaded in the statement of claim:

“Mr Lam asked my daughter, whose name would be posted on the Licence Agreement, to register with the front desk employee …”[[13]](#footnote-13)

“ … the front desk employee proceeded with my registration, even though my name would not be posted on the Licence Agreement.”[[14]](#footnote-14)

“Mr Harry Lam, at that point, asked my daughter to sign the first page of the contract, reflecting the same assigned room rental price as quoted and agreed upon, she did, and then he asked her to sign the second page of the contract, and she did …”[[15]](#footnote-15)

1. The complaint that the judge had misinterpreted the evidence that her daughter was intended to be the licensee is unfounded.
2. It is unnecessary to deal with the plaintiff’s other contentions on the evidence, as none of them would help her to establish a cause of action in contract against the defendant.
3. For all the above reasons, we conclude there is no viable cause of action in contract and any claim for breach of contract is bound to fail.

The causes of action in tort

1. The judge considered all possible causes of action in tort based on the facts pleaded in the statement of claim and identified them as follows: breaking off negotiations[[16]](#footnote-16); misrepresentation[[17]](#footnote-17); intentional or reckless infliction of emotional distress[[18]](#footnote-18). He concluded that there is no viable cause of action in respect of any of them.
2. Other than the possible causes of action identified by the judge, the plaintiff contended that her causes of action as pleaded would also include “fraudulent breach of trust” and “unjust enrichment”. That is plainly not so. On the facts as pleaded, there is no basis at all for alleging breach of trust or unjust enrichment. No relationship of trust can possibly be imported into this commercial transaction between the plaintiff and the defendant, which had fallen through.
3. We will confine ourselves to considering the possible causes of action as identified by the judge.
4. The judge is plainly right in holding that breaking off negotiations is not a tort and that the defendant was entitled to insist on the payment of the “Loss & Damage Deposit” and to refuse to rent the room to the plaintiff unless the deposit was paid. There is no general duty not to cause loss by breaking off negotiations and no general duty of care to respect the other party’s interest during the negotiations. Even the deliberate breaking off of negotiations, in the knowledge that the other party will suffer loss, is not tortious (*Formation and Variation of Contracts* by John Cartwright (2nd ed) at §2-11).
5. As for the claim in misrepresentation based on the withholding of vital information regarding the “Loss & Damage Deposit” until the third page of the licence agreement was shown to the plaintiff and her daughter, we agree with the judge this is bound to fail on the facts which are indisputable and on the law. It is clear from the emails sent by the defendant to the daughter on 19 and 20 January 2015 that the requirement for the deposit was disclosed by Mr Lam. And non‑disclosure does not constitute actionable misrepresentation as there is no general duty of disclosure between negotiating parties (*Formation and Variation of Contracts* by John Cartwright at §2-10; *Misrepresentation, Mistake and Non-disclosure* by John Cartwright (5th ed) at §17-45).
6. For the tort of intentional or reckless infliction of injury based on the allegation that the defendant’s conduct was “extreme and outrageous” and had caused the plaintiff and her daughter to suffer “emotional agony” and “severe emotional distress”, we agree with the judge that in light of the emails of the defendant, which stated clearly the requirement to pay the “Loss & Damage Deposit”, any allegation that the defendant had intentionally inflicted any injury by deliberate concealment of the required deposit is unsustainable.
7. We do not think it necessary to discuss the authorities considered by the judge (*Wong Tai Wai David v The Hong Kong SAR* ***‍****Government*, CACV19 and 247/2003, 7 September 2004; *Wong v Parkside Health NHS Trust & Anr* [2003] 3 All ER 932; *Clerk & Lindsell* ***‍****on Torts* (22nd ed) at §§15-14 to 15-17[[19]](#footnote-19)), save to mention the decision of the UK Supreme Court in *O (A Child) v Rhodes* [2016] AC 219, which was apparently not brought to the judge’s attention.
8. In *O (A Child) v Rhodes*, the Supreme Court reformulated the cause of action in the tort of intentional infliction of injury as comprising three elements: conduct, mental and consequence. The conduct element requires words or conduct directed at the claimant for which there is no justification or excuse. The mental element requires an intention to cause physical harm or severe mental or emotional distress, mere recklessness does not suffice. The consequence element (held by the majority of the law lords) requires physical harm or recognised psychiatric illness.
9. There is clearly no realistic prospect for the plaintiff to prove the mental element as the judge has held. Nor would it be possible for her to satisfy the conduct and consequence elements on her case as pleaded.
10. We agree with the judge that the plaintiff does not have any viable cause of action in tort.

Conclusion and orders

1. For the above reasons, the judge is plainly right in striking out the plaintiff’s claim in this action. We dismiss the plaintiff’s appeal against the striking out order. We strike out the purported appeal from the dismissal of her appeal against the master’s decision in rejecting her application for summary judgment on the basis it is incompetent as leave to appeal has not been obtained.
2. Costs of the appeal should follow the event. We make an order *nisi* that the plaintiff is to pay the defendant’s costs of this appeal. If no summons is taken out by any party to vary the order *nisi* within 14 ***‍***days of the handing down of this judgment, the costs order *nisi* will be made absolute.
3. We propose to assess costs of the appeal by summary assessment. We direct the defendant’s solicitors to lodge a statement of costs for this purpose within 14 days hereof, and give leave to the plaintiff to lodge a submission if she wishes to object to any item of costs within 14 ***‍***days thereafter. The plaintiff’s submission is not to exceed three pages on A4 paper, printed in font size of not less than 14 and in line spacing of not less than 1.5. Any non-compliant submission will not be read by the court.

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

The Plaintiff (Appellant), acting in person

Mr Robin McLeish, instructed by Clyde & Co, for the Defendant (Respondent)

1. Owned by Harbour Grand Hong Kong Limited [↑](#footnote-ref-1)
2. This skeleton argument as well as the skeleton argument lodged on 7 April are not strictly in compliance with Section G of Practice Direction 4.1 in that the font size is less than 14 and the line spacing is less than 1.5. The skeleton arguments have greatly exceeded the length permitted under the Practice Direction. [↑](#footnote-ref-2)
3. Emails were sent by the plaintiff to the court, sometimes several emails on the same day on the following dates in March 2020 (4, 5, 9, 10, 11, 12, 13, 15, 25, 26 and 30), April 2020 (5, 6, 7, 14, 21, 24 and 28) and May 2020 (1). [↑](#footnote-ref-3)
4. Statement of Claim, p 16 para 21.4 [↑](#footnote-ref-4)
5. Statement of Claim, p 25, paragraph under the first heading “My Comments” [↑](#footnote-ref-5)
6. Statement of Claim, pp 26 to 27, para 24 [↑](#footnote-ref-6)
7. Decision, §12 [↑](#footnote-ref-7)
8. Statement of Claim, p 2, para 4 1st para [↑](#footnote-ref-8)
9. Statement of Claim, pp 2 to 3, para 4 3rd para [↑](#footnote-ref-9)
10. Statement of Claim, p 6, para 9 3rd para [↑](#footnote-ref-10)
11. Statement of Claim, p 6 para 9 1st para [↑](#footnote-ref-11)
12. Defence, §§3(f)(i) and 3(g)(iii)(1) [↑](#footnote-ref-12)
13. Statement of Claim, p 6 para 9 1st para [↑](#footnote-ref-13)
14. Statement of Claim, p 6 para 9 2nd para [↑](#footnote-ref-14)
15. Statement of Claim, pp 6 and 7 para 9 4th para [↑](#footnote-ref-15)
16. Decision, §15 [↑](#footnote-ref-16)
17. Decision, §16 [↑](#footnote-ref-17)
18. Decision, §17 [↑](#footnote-ref-18)
19. The judge had cited the earlier 21st ed of *Clerk & Lindsell on Torts.* [↑](#footnote-ref-19)