CAMP 79/2018

[2018] HKCA 449

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF APPEAL**

MISCELLANEOUS PROCEEDINGS NO 79 OF 2018

(ON AN INTENDED APPEAL FROM DCCJ NO 1988 OF 2017)

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BETWEEN

LEE CHICK CHOI Plaintiff

and

BEST SPIRITS COMPANY LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Before : Hon Kwan and Poon JJA

Dates of Written Submissions : 11 and 25 June 2018

Date of Judgment : 31 July 2018

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| J U D G M E N T |

Hon Poon JA (giving the Judgment of the Court) :

1. By a judgment handed down on 24 April 2018 (“the Main Judgment”), His Honour Judge Andrew Li (“the Judge”) ordered that: (i) the plaintiff’s writ of summons be struck out and the action be dismissed; (ii) the plaintiff’s appeal against Master D To’s order on costs be dismissed and (iii) a restrictive proceedings order (“RPO”) be granted against the plaintiff. By another judgment dated 23 May 2018 (“the Leave Judgment”), the Judge refused the plaintiff’s application for leave to appeal against the Main Judgment. The plaintiff now renews his application for leave to appeal before this Court. Having considered the parties’ written submissions, we take the view that the plaintiff’s renewed application can be disposed of on paper without an oral hearing. We now hand down our judgment.

**Background**

1. The background leading to the present application is set out in the Main Judgment, which we would respectfully adopt.
2. In brief, the plaintiff was previously employed by the defendant as a general manager under a contract of employment dated 4 July 2006. His employment was terminated in late 2010. The plaintiff had since 2011 commenced multiple actions and proceedings against the defendant. The present claim against the defendant is for a sum of HK$14,475,849.00 purportedly under section 66 of the Personal Data (Privacy) Ordinance, Cap 486 (“PDPO”). It was first raised by the plaintiff in HCA 2045/2012 and was struck out by Deputy High Court Judge Kent Yee on 1 December 2014. The plaintiff appealed against the Deputy Judge’s decision, which was refused by the Court of Appeal in HCMP 371/2015 on 21 May 2015. Undeterred, the plaintiff issued a fresh claim in this present action seeking to re-litigate the PDPO claim.
3. The defendant applied to strike out a plaintiff’s indorsement of writ under O18, r 19 of the Rules of the District Court (“RDC”), on the grounds that (a) it disclosed no reasonable cause of action; (b) it was scandalous, frivolous and vexatious; (c) it was otherwise an abuse of the process of the court and (d) *res judicata*.

**Judgments below**

1. In the Main Judgment, the Judge held that the plaintiff’s claim was bound to fail and should be struck out for the following reasons:
2. The plaintiff’s claim was clearly a claim disguised to re-litigate on the PDPO claim which the plaintiff had lost before Deputy Judge Yee and the Court of Appeal.
3. As previously held by the Court of Appeal in HCMP 371/2015, the PDPO claim was doomed to fail because it was wholly unmeritorious. There was no conceivable causal link between any breach of Data Protection Principles under PDPO and the alleged income loss. The plaintiff’s inability to secure a similar job to his dismissal was far-fetched. And the Labour Tribunal had already decided that the plaintiff was dismissed for valid reasons in LBTC 588/2011.
4. The claim was another foolhardy attempt to re-run the claim brought by the plaintiff’s wife in *Yuen Oi Yee Lisa v. Charoen Sirivadhanabhakdi and Others*, DCCJ 1914/2015, which was struck out and found to be an abuse of process by His Honour Judge Ko on 16 November 2015.
5. Last but not least, upon the plaintiff’s bankruptcy, his right of action has been vested in the trustee in bankruptcy. The plaintiff’s trustees had indicated that (save as the plaintiff’s claim is for injury to feelings only which does not vest in the trustees) they did not agree to issue the present proceeding against the defendant. As the plaintiff’s present claim was a mere re-run of the claim in HCA 2045/2012 which was a claim for compensation of loss of income, the plaintiff, as a bankrupt, had no *locus standi* at all to commence the present action and the claim should be dismissed for this additional reason.
6. Turning to the plaintiff’s appeal on costs made by Master D To, the judge held that it was completely misconceived. Based on the trite principle that the court will not allow an appeal from a master’s costs order unless it is unreasonable or the master erred in law, the Judge held that since Master D To regarded the plaintiff’s claim against the defendant was completely groundless, it was not unreasonable nor erroneous for the master to make no order as to costs on the plaintiff’s application.
7. As to the defendant’s application for the RPO, the Judge found from the history of this case that the plaintiff had displayed the classic features of a vexatious litigant as identified by the CFA in *Ng Yat Chi v Max Share Ltd* [2005] 1 HKLRD 473 and was indeed a vexatious litigant. Without the RPO, the judge expected the plaintiff and his wife would continue abusing the process of court by their unrelenting campaign against the defendant.
8. The plaintiff then applied for leave to appeal against the Main Judgment. The grounds of appeal were essentially: (a) the plaintiff’s present claim was for “injury to feelings” only and not a claim of damages for loss of income and therefore, was not a duplication of the previously litigated actions and did not require the consent of his trustee in bankruptcy; (b) the court had failed to consider and rely on the judgement of HH Judge Ko in DCCJ 1914/2015 and (c) the issue concerning section 66 of PDPO has not been decided in Hong Kong before and has no precedent cases, thus, the matter should be decided by the Court of Appeal.
9. After hearing the parties’ submissions, the Judge dismissed the plaintiff’s application for leave to appeal by the Leave Judgment with the following reasons:
10. The plaintiff’s claim was struck out mainly because it failed to disclose any reasonable cause of action and/or was scandalous, frivolous and vexatious or otherwise an abuse of process of the court. The lack of *locus standi* was merely an additional reason.
11. The judge found that the plaintiff’s claim was in reality a claim for the alleged breaches of the employment contract against his former employer i.e. the defendant and for loss of income as explained at [5] – [8] of the Main Judgment.
12. The plaintiff’s complaint that the Judge failed to consider the judgment of HH Judge Ko in DCCJ 1914/2015 was of no substance.
13. It is not true that section 66 of the PDPO had not been decided upon by the courts and there are in fact plenty of decided cases on this issue.

**the renewed application**

1. By way of summons taken out on 31 May 2018, the plaintiff now renews his application for leave to appeal before us under Order 58 rule 2(4A), RDC.
2. Leave to appeal shall not be granted under section 63A of the District Court Ordinance, Cap 336 unless this court is satisfied that the appeal has a reasonable prospect of success or there is some other reason in the interests of justice that the appeal should be heard. The applicant bears the burden of satisfying this Court that his appeal has a reasonable prospect of success which means an appeal with prospects that are more than fanciful but which do not need to be shown to be probable. When the applicant seeks to challenge the findings of facts made by the court below, unless he can show that the judge misunderstood the evidence, or failed to appreciate its effects, or overlooked some documentary or other indisputable evidence which should have compelled him to a different conclusion, this Court will not interfere with those findings of facts.
3. Here, the plaintiff raised four main grounds of appeal which are essentially the same as those put before the Judge in the leave application, namely:
4. The plaintiff alleges his case is for claim for injury to feelings only under section 66 of PDPO and it does not require the consent of his trustee in bankruptcy. Thus, he has *locus standi* in pursuing the claim. (Ground 1)
5. The plaintiff disagrees his present claim is a re-litigation or *res judicata* and seeks to rely on the order made by HH Judge Ko on 16 November 2015 that “Notwithstanding the other provisions in this order (the RPO Order), the Plaintiff (Madam Yuen Oi Yee Lisa) is at liberty to commence fresh proceedings against the 8th Defendant herein (namely, Best Spirits Company Limited) under section 66 of the Personal Data (Privacy) Ordinance, Cap 486 to claim for damage for injury to her feelings as a result of the contravention identified in the Result of Investigation dated 16 May 2013 of the Privacy Commissioner (ie Annex 2 to the letter from the Privacy Commissioner to the 8th Defendant dated 16 May 2013).” (Ground 2)
6. He maintains his appeal against the costs order made by Master D To in respect of his application for amendment of certain court orders. (Ground 3)
7. He also questions the making of the RPO and asks the Court to rescind it. (Ground 4)

We should deal with them in turn.

1. In the letter dated 6 April 2017, the trustee-in-bankruptcy stated that “We refer to your letter dated 24 March 2017. Your right of action against Best Spirits Company Limited for monetary loss has been vested in us. Having considered HCA 2045/2012 and HCMP 371/2015, we do not agree to issue proceedings against Best Spirits Company Limited. However, if your claim is for injury to feelings only, we are of the view that it does not vest in us as trustee-in-bankruptcy.” In short, the trustee’s position is that they did not consent to issue the present proceedings against the defendant for monetary loss.
2. As rightly held by the Judge at [13] of the Main Judgment, this is clearly a disguised claim to re-litigate on the PDPO claim under HCA 2045/2012 which had been dismissed by Deputy Judge Yee and the Court of Appeal under HCMP 371/2015. Court of Appeal at [26] and [28] of the judgment said that the plaintiff’s claim is “clear beyond peradventure that the claim for damages for loss of earnings for the rest of the plaintiff’s working life is unsustainable at law as being far too remote” and “the lack of a causal link between the contravention of DPP5 and the damages allegedly suffered in the new claim is still an insurmountable hurdle”. In the circumstance, the consent of trustee-in-bankruptcy is clearly required and in the absence of the same, the plaintiff did not have *locus standi* to commence the present action.
3. In any event, the main reason for the Judge to strike out the plaintiff’s claim is that the PDPO claim disclosed no reasonable cause of action, was frivolous and vexatious and otherwise amounted to an abuse of the court’s process: see [12] – [16] of the Main Judgment. We agree with Judge’s findings.
4. Ground 1 has no prospect of success at all.
5. As to Ground 2, the plaintiff merely repeats his arguments in the leave application before the Judge. However, as pointed by the Judge at [4] – [9] of the Main Judgment and [6] – [7] of the Leave Judgment, the plaintiff’s PDPO claim had been litigated in HCA 2045/2012, HCMP 371/2015 and by his wife in DCCJ 1914/2015. All the claims had been rejected and dismissed by different levels of courts with the same clear and unequivocal finding that the claim was doomed to fail and/or an abuse of process of the court. In our view, it is more than an obvious case of *res judicata* and the Judge was entirely correct in so holding. Ground 2 has no substance.
6. As to Ground 3, the plaintiff wishes to appeal against the costs order made by Master D To dated 18 August 2017, namely, that there be no order as to costs on the plaintiff’s application for the amendment of court orders and the plaintiff seeks an order that such costs be paid to the plaintiff by the defendant forthwith. We agree with the Judge’s ruling at [24] and [25] of the Main Judgment. We see no basis to interfere with the master’s exercise of discretion on costs. Ground 3 is wholly unmeritorious.
7. As to Ground 4, we entirely agree with the Judge that based on the plaintiff’s conduct, the RPO is plainly called for. Ground 4 has no substance either.

**DISPOSITIONS**

1. For the above reasons, we are not satisfied that the plaintiff’s intended appeal has any reasonable prospect of success. There is no other reason in the interest of justice why the appeal should be heard. Accordingly, we refuse his renewed application for leave to appeal and dismiss his summons dated 31 May 2018.
2. As the plaintiff’s applications are devoid of merits, we make an order pursuant to Order 59 rule 2A (8) of the Rules of the High Court, Cap 4A, that no party may under rule 2A (7) request the determination of this Court to be reconsidered at an oral hearing inter partes.
3. Costs should follow event. We would order the plaintiff to pay the costs of the defendant. As to the basis of taxation, the defendant asks for indemnity costs in view of the plaintiff’s conduct. It is well-established that the successful party’s costs may be taxed on an indemnity basis if the proceedings were scandalous or vexatious, or had been initiated or prosecuted maliciously, or for an ulterior motive, or in an oppressive manner. Any proceedings instituted or prosecuted in such circumstances as to constitute an affront to the court could properly be the subject of a direction for the taxation of the successful party’s cost on the indemnity basis. Here, we have no doubt whatever that the plaintiff’s conduct constitutes an abuse of process and is indeed an affront to the court. It is an appropriate case for us to exercise our discretion and order indemnity costs against him.
4. We accordingly order the plaintiff to pay the defendant’s costs on an indemnity basis as summarily assessed on paper. Having considered the defendant’s statement of costs, we allow the entire sum claimed being HK$21,602.00 as reasonable costs. Our costs order and summary assessment are orders *nisi*. In the absence of any application to vary them within 14 days of the handing down of this judgment, they will be made absolute.

(Susan Kwan) (Jeremy Poon)

Justice of Appeal Justice of Appeal

The applicant, unrepresented, acting in person

M/s Hobson & Ma, for the Defendant