DCCJ 1068/2022

[2023] HKDC 1446

**IN THE DISTRICT COURT OF THE**

HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL ACTION NO 1068 OF 2022

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BETWEEN

STANDARD CHARTERED BANK

(HONG KONG) LIMITED Plaintiff

and

KHANDURI SANJAY Defendant

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Before: Deputy District Judge G Chow in Chambers (Open to Public)

Date of Hearing: 4 October 2023

Date of Decision: 19 October 2023

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DECISION

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*Background and Summary of the parties’ pleaded case*

1. This is an appeal by the Defendant (“D”) under O 58 of the Rules of the District Court, Cap 336H (“RDC”) against the decision of Master Raymond Ho (“the Master”) dated 27 July 2023 (“Master’s Decision”):-
2. dismissing D’s application for transfer with no order as to costs; and
3. allowing the Plaintiff’s (“P”) application to strike out D’s Amended Counterclaim with costs to P summarily assessed at HK$150,000.
4. It is well established that an appeal from a master to a judge in chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the judge treats the matter as though it came before him or her for the first time. The judge will give the weight it deserves to the previous decision of the master, but he or she is in no way bound by it. The judge in chambers is in no way fettered by the previous exercise of master’s discretion: see *Hong Kong Civil Procedure 2023*, Vol 1, §58/1/2.
5. P is a bank and D is P’s customer.
6. D had applied to P for credit card facilities and was issued a credit card by P (“the Credit Card”). In consideration of P making available to D the credit card facilities under the Credit Card, D undertook and agreed to be bound by the terms and conditions applicable to the Credit Card (“the Terms and Conditions”) which included *inter alia*:-
7. despite any other term of the banking agreement, and subject to the applicable law, P may at any time demand immediate payment of any amounts owing to it, whether or not already reflected in a statement, and whether or not due and payable as at the date of the demand; and
8. at any time, P may choose to cancel or suspend D’s right to use the Credit Card or end the account for the card with notice.
9. In this action, P claims against D for outstanding sums under the Credit Card. It is P’s case that as at 4 February 2022, HK$181,010.37 was outstanding for which demand for repayment was made by letter issued by P’s solicitors dated 4 February 2022.
10. Partial repayments were then made by D between 17 February 2022 to 16 June 2022. By an Amended Statement of Claim, P claims the sum of HK$169,471.73 being the amount due as at 16 June 2022. D thereafter continued to make part payments from 18 July 2022 to 7 October 2022 bringing the balance to a credit of HK$0.54.
11. As I understand it, D does not accept that he was ever in default in repayment under the Credit Card because according to the online banking system of P, D had made payments of the Minimum Payment and the Minimum Payment Due was shown to be zero. He also relies on the fact that no default has been reported to the Credit Reference Agency (“CRA”) by P for late payment in respect of the Credit Card from February 2022 to present. It is averred that the maximum past due amount in the entire credit history for D was HK$73,250, as reported on 31 March 2021. See Amended Defence and Counterclaim (“AD&CC”), paragraphs 6, 7, 8 and 10.
12. Nonetheless, D avers that the entire amount outstanding has been settled by him to enable the court and Hong Kong Monetary Authority (“HKMA”) and other regulatory bodies to focus on the “operational and system errors, poor customer service, integrity, lack of appropriate competence, high-handedness, unfair treatment of customers and violations of applicable Hong Kong laws, HKMA regulations” as listed in paragraph 4 of the AD&CC: see AD&CC, paragraphs 4, 7 and 11.
13. In the Amended Counterclaim, D complains against the “lack of accounting systems and systems of controls, lack of prudence and appropriate professional competence”.
14. D relies on the fact that the online banking system of P still shows an available credit limit of HK$275,000 notwithstanding the Credit Card account was cancelled on 31 October 2022: see *ibid*, paragraph 14.
15. D further relies on the credit reports of CRA not showing the amounts claimed by P to be due but Maximum Past Due Amount was $73,250 which was reported on 31 January 2020: see *ibid*, paragraph 16.
16. D avers that the lack of data accuracy in the information provided to CRA constitutes a violation of Data Protection Principle 2 under the Personal Data (Privacy) Ordinance, Cap 486 (“PDPO”), s 4 of PDPO and the Code of Practice on Consumer Credit Data (“CCD Code”) issued under PDPO: see *ibid*, paragraph 17.
17. D further complains the “Data Integrity issues, Lack of Quality Computer Systems and Lack of Adequate Professional Competence” results in a number of regulatory and compliance violations as mentioned in paragraph 29 of AD&CC: see *ibid*, paragraphs 18 and 19.
18. The alleged breaches of regulations and compliance by P under paragraph 29 are:-
19. 7th Schedule to the Banking Ordinance, Cap 155 (“BO”);
20. section 4 and Data Protection Principle 2 of PDPO;
21. paragraphs 2.5, 2.6 and 2.18 of CCD Code;
22. Guide to Authorization issued by HKMA pursuant to s  16 of BO (“Guide to Authorization”);
23. Guideline on Minimum Criteria for Authorization issued by HKMA pursuant to s 16(10) of BO (“Guideline on Minimum Criteria”);
24. “Treat Customers Fairly Charter” endorsed by HKMA (“the Charter”);
25. Principles for effective risk data aggregation and risk reporting issue by the Basel Committee on Banking Supervision in January 2013 (“Basel Principles”);
26. HKMA Supervisory Policy Manual: “IC-1 Risk Management Framework” (“Policy Manual IC-1”);
27. HKMA Supervisory Policy Manual: “IC-6 The Sharing and Use of Consumer Credit Data through Credit Reference Agencies” (“Policy Manual IC-6”);
28. HKMA Supervisory Policy Manual: “OR-1 Operational Risk Management” (“Policy Manual OR-1”);
29. HKMA Supervisory Policy Manual: “TM-G-1 General Principles for Technology Risk Management” (“Policy Manual TM-G-1”);
30. HKMA Supervisory Policy Manual: “TM-E-1 Risk Management of E-Banking” (“Policy Manual TM-E-1”);
31. HKMA Supervisory Policy Manual: “CR-S-5 Credit Card Business” (“Policy Manual CR-S-5”); and
32. HKMA Supervisory Policy Manual: “SA-1 Risk-Based Supervisory Approach” (“Policy Manual SA-1”).
33. In gist, D’s case is that as a result of the alleged operational error of P and lack of communication between the internal departments of P, he was chased and harassed by P’s debt collection agents to pay the full amount outstanding under the Credit Card which constitute violations as mentioned in paragraph 29 of AD&CC: see paragraph 24 of AD&CC.
34. The relief sought in AD&CC include orders that:-
35. the Credit Card be restored with existing approved credit limit of HK$275,000;
36. any negative entries made in information provided to CRA for credit score of D by P be rectified;
37. P issue a formal letter of apology to D with the letter co-signed by the CEO of P as well as the Group CEO of the parent company of P;
38. comprehensive HKMA audit of P’s online banking system specific to credit card and collections systems impacting the general public of Hong Kong;
39. “maximum punitive fines” as the court may consider appropriate;
40. should the Court deem in the public interest to transfer the case to the High Court for a more appropriate punitive fine for P; and
41. disclosure made by P to public/customer of the system errors and relief provided to such customers.

*Applicable principles for the strike out application*

1. I will deal with the strike out application first because it seems to me that the transfer application is premised on there being a viable cause of action against P which give rise to relief for punitive fines exceeding the jurisdiction of the District Court.
2. The applicable principles for striking out pleadings under O  18, r 19 RDC are trite: see *Hong Kong Civil Procedure 2023*, Vol 1, §18/19/4. These include that:-
3. The applicant bears the burden to show a plain and obvious case to strike out;
4. The claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out;
5. However, plain is not the same as simple, and obvious is not the same as short. If, on a careful reading of the Statement of Claim (or in this case, Counterclaim) however complicated, it can be seen that there is no cause of action or the claim will obviously not succeed, the court can and probably will order it to be struck out;
6. There should be no trial upon affidavits. Disputed facts are to be taken in favour of the party sought to be struck out;
7. Where the legal viability of a cause of action is sensitive to the facts or requires a minute or protracted examination of the documents and facts of a case, an order to strike out should not be made; and
8. The court should not decide difficult points of law in striking out proceedings.
9. Insofar as the application is premised on there being no reasonable cause of action, I proceed on the basis that the facts alleged in the AD&CC will be established. No evidence is admissible in relation to this limb of the application and I will simply address the matter on the basis of what is pleaded.

*Affirmation of D filed on 10 August 2023*

1. An Affirmation of D was filed on 10 August 2023 (“August 2023 Aff”). It was purportedly filed to seek leave of the Master to appeal against the Master’s Decision: see August 2023 Aff, §1 and D’s Skeleton Submissions, §5. Leave to appeal is of course not required so for that purpose the August 2023 Aff is unnecessary: see O 58, r 1(2) RDC.
2. In so far as it was used in support of the appeal and was relied upon at the hearing before me: (1) legal submissions against the Master’s Decision ought not to have been included in an affirmation; and (2) in seeking to adduce “Exhibit LTM4”, this was new evidence which was not previously adduced before the hearing before Master.
3. Mr Wong, counsel appearing for P, objected to the new evidence as failing to satisfy the requirements of *Ladd v Marshall*. The 3 requirements are:-
4. that the evidence could not have been obtained with reasonable diligence for use at the hearing below;
5. the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
6. the evidence must be such as is presumably to be believed.

See: *Hong Kong Civil Procedure 2023*, Vol 1, §58/1/3.

1. Mr Wong submitted that even on D’s own case (see D’s letter dated 25 July 2023 to the Master and August 2023 Aff, §3a), D had the evidence at the hearing before the Master but the evidence was not readily available at the time of the hearing.
2. D, who is not legally represented and appeared in person before me, confirmed that when asked by the Master for evidence that there was no delinquency in April 2021, he said he had the evidence but it was not readily available at the time of the hearing. Hence he submitted it on 25 July 2023, after the hearing on 19 July 2023 but before the Decision was given by the Master on 27 July 2023.
3. He submitted that, by referring to *E v Secretary of State for Home Department* [2004] EWCA Civ 49, leave ought to be granted to adduce the new evidence as *Ladd v Marshall* only applies to the case where there was new evidence after the decision was given.
4. To the extent that it was suggested that that decision has held *Ladd v Marshall* is not the applicable test, this must be rejected. See §23 where the principles under *Ladd v Marshall* were set out.
5. Furthermore, *E* was an asylum case such that the Court of Appeal stated to what extent the *Ladd v Marshall* principles are relaxed in asylum cases needs to be considered (§23). However, it can be seen further on at §27, it was held that the question (“Can the Tribunal take account of material which becomes available between the date of hearing and the date of the promulgation of its decision?”) was strictly academic because the new evidence was not available to the Immigration Appeal Tribunal before the decision date. Furthermore, both sides proceeded on the basis that the Immigration Appeal Tribunal would have been at liberty to admit further evidence (whether or not it was under any duty to do so). The case is therefore not authority that this court, not being concerned with an appeal against the decision of a statutory tribunal hearing an asylum claim, would not apply or apply a relaxed *Ladd v Marshall* test.
6. In any event, Mr Wong submitted that given there was never any plea of the fact that there was no delinquency in April 2021, the new evidence would probably not have an important influence on the case. I agree.
7. On a proper reading of AD&CC, the pleaded discrepancy between P’s online banking system and CRA are that: (1) there was no report to CRA for late payment in respect of the Credit Card from February 2022 to present; and (2) CRA still shows an available credit limit of HK$275,000 notwithstanding the Credit Card account was cancelled on 31 October 2022. P has pleaded that the last default recorded was $73,250 which was reported on 31 January 2020.
8. I agree that the fact in D’s Skeleton Submissions before Master there were references to Exhibit ECR3 and Exhibit ECR14 referring to “Delinquency Settled” or a vague and general assertion in D’s Affirmation that “if [P] looks at the CRA Report carefully at Field Level there are some consistency gaps”, those are not to be regarded as pleadings. It is trite that it is the pleadings which define the issues and not the evidence or skeleton submissions: see *Hong Kong Civil Procedure 2023*, Vol 1, §18/0/3, *Sinoearn International Ltd v Hyundai-CCECC Joint Venture* (2013) 16 HKCFAR 632, §§30-34 and *Kwok Chin Wing v 21 Holdings Ltd* (2013) 16 HKCFAR 663, §§21-26.
9. I therefore am of the view that there was never any plea to the effect that D was not delinquent in April 2021 contrary to the credit reports of CRA which shows delinquency as at 30 April 2021.
10. In any event, even allowing the new evidence on a *de bene essence* basis, as is apparent from my reasons below, it would not make an important influence on the outcome of the strike-out application.

*Analysis of the strike out application*

1. Before the Master and at this hearing (as confirmed by D at today’s hearing), D accepts that the issues germane for the determination of the strike out application are:-
2. whether there is a legally viable action for any breach of PDPO by P;
3. whether any violation of BO by P can give rise to a private cause of action; and
4. whether the relief sought by D is viable in law.

*Whether there is a legally viable action for breach of PDPO*

1. In D’s Skeleton Submissions, D referred to August 2023 Aff, §3 where it is asserted therein that contrary to the Master’s view there is: (a) evidence submitted by D to prove that the Credit Card was not delinquent on 30 April 2021; and (b) this was not a new case which had not been pleaded. He then asserted that it is clear from (a) and (b) that D has a reasonable cause of action.
2. First, even considering Exhibit LTM4 on a *de bene essence* basis together with Exhibit ECR3 and Exhibit ECR14, at most it would demonstrate that the Credit Card had been delinquent previously, but this was settled by 30 April 2021. D disagreed and submitted that the entry “delinquency settled” means from 30 April 2021 there was delinquency and from that date thereon his credit rating plummeted. I disagree with that reading of Exhibits ECR3 and ECR14. Furthermore, in Exhibit ECR10, which is a “Credit Report Summary” as at 8 October 2022, “0” appears under “Delinquent” so there cannot be any doubt there is no delinquency recorded in the credit report of CRA.
3. Second, it is D’s pleaded case (“the crux” of D’s argument) despite his Credit Card was in good standing according to the credit reports by CRA, but because of the operational error of P, D was chased and harassed for repayment of outstanding sums: see AD&CC, paragraphs 23 and 24. As mentioned above, there was never any plea that P had reported delinquency to CRA on 30 April 2021 (so as to be an adverse or negative record in his credit report). Even if an application is made to amend the AD&CC (but which was not made), it ought not be allowed being inconsistent with D’s core pleaded case and would be embarrassing.
4. Third, even if I were to assume it is open for D to make such a plea (by allowing the necessary amendments to AD&CC) and there was negative/adverse credit rating with CRA when D’s case is that his credit was always good, I still need to be satisfied whether based on the matters pleaded in AD&CC there is a viable action based on breach of PDPO. Clearly, the mere assertion by D is insufficient.
5. D’s case taken to the highest is that the inaccuracy of data provided to CRA constitutes a violation of Data Protection Principle 2, s 4 of PDPO and the CCD Code issued under PDPO.
6. Even though s 66 of PDPO provides that an individual who suffers damage by reason of a contravention of a requirement under PDPO by a data user and which relates whether in whole or in part to personal data of which that individual is the data subject, shall be entitled to compensation, any such claim by D is bound to fail due to lack of any plea that D has suffered loss or damage as a result of any inaccuracy of data provided to CRA.
7. At most, D’s pleaded case on damage suffered by him is that he was chased and harassed by P to settle the outstanding sums: see paragraph 24 of AD&CC. There is no plea that P’s demand on D in February 2022 to settle all outstanding sums was because of any negative/adverse entries reported to CRA. Although D submitted at the hearing before me that as a result of the negative or adverse entry and plummeting of his credit rating with CRA, he was not able to apply and have issued to him a credit card and had to pay extortionate interest rates, all this was never pleaded. Paragraphs 16, 17, 18, 19, 23 and 24 of AD&CC which are the references for the alleged breaches of PDPO and CCD Code in AD&CC, paragraph 29(b) and (c), plainly do not contain such pleas.
8. Furthermore, given that under the Terms and Conditions, P is entitled to demand immediate payment of any amounts owing to it, it is difficult to see how any loss and damage flows from the alleged contravention of PDPO rather than the contractual bargain between the parties.
9. The lack of causal link between any breach of PDPO and loss/damage suffered by D is a sufficient answer to any claim based on PDPO. See *Lee Chick Choi v Best Spirits Company Limited* (unrep), HCMP 371/2015, 21 May 2015, §§13, 25-26, a case where the plaintiff sought to amend his statement of claim to include a claim for damages against the defendant under s 66 of PDPO but his statement of claim was struck out and the amendment refused on grounds that the claim was doomed to fail due to the lack of causal link between alleged breach of Data Protection Principle and alleged loss of the plaintiff.

*Whether violation of BO can give rise to a private right of action*

1. Turning next to consider D’s case based on breaches of 7th Schedule to BO and whether this gives rise to a private right of action.
2. The 7th Schedule concerns the minimum criteria that a company must satisfy before it can be authorized by HKMA to carry on a banking business under s 16(1) of BO.
3. Under s 16(2) of BO, HKMA shall refuse such authorization where one or more of the criteria specified in the 7th Schedule are not fulfilled.
4. It has been held that it is trite law that in the ordinary case, a breach of statutory duty does not, by itself, give rise to any private law cause of action: see *Kaisilk Development Ltd v Urban Renew Authority* [2004] 1 HKLRD 907 at 918D.
5. The authorities clearly establish that in order to maintain a claim for breach of statutory duty, it is necessary for the plaintiff to show as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Legislature intended to confer on members of that class a private right of action for breach of the duty: see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731D-E; *Stovin v Wise* [1996] AC 923 at 952F; and *Ko Hon Yue v Liu Ching Leung* [2008] 1 HKLRD 482, §5.
6. In *X (Minors)*, Lord Browne-Wilkinson held at 731E-F that although there is no general rule by reference to which it can be decided whether a statute creates such a right of action, there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.
7. Further at 731H-732B, his Lordship held that although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not treated as being passed for the benefit of those individuals but for the benefit of society in general. See also *Ko Hon Yue*, §12.
8. I do not accept, as D submitted, there is “no consensus or methodology agreed universally by the Legal fraternity, be it practitioners or academics when it comes to Legislative Intent.” To the extent that he referred to and relied upon various passages in the article by John F Manning, “Without the Pretense of Legislative Intent’, albeit a very interesting article and without undue respect to the Professor, I am not assisted nor bound by the views of academics or judges on their critique of the approach of the US courts in ascertaining legislative intent and whether there are better approaches. I should mention that in D’s Skeleton Submissions he also referred to some other journal articles and Australian cases (most were not provided or its complete form were not provided to me and Mr Wong). In any event, I do not consider they are binding on me. It is clear to me from the authorities cited by Mr Wong that the principles that are binding on me are well established. I would reject the submission of D that in the present case difficult questions of law are involved which are unsuited for determination on a strike out application.
9. Even though Lord Browne-Wilkinson said at 731D the principles are well established although the application of those principles in any particular case remains difficult, I also do not agree with D that the task of ascertaining the legislative intent is so difficult that it should not be a matter for striking out. *Kaisilk* was an appeal against the decision of the first instance judge to strike out the statement of claim on the basis that it discloses no reasonable cause of action. One of the bases for the claim was breach of statutory duty (that case concerned the Land Development Corporation Ordinance, Cap 15, now repealed). After applying *X (Minors)* and *Stovin*, the Court of Appeal held that it was not satisfied the intention of Legislature was to provide a private right of action to property owners for any breach of statutory by the defendant (see at §§25-29). It held that the judge below took the correct course to strike out the statement of claim (see §21).
10. Even more so, I disagree that I can and ought to derogate the court’s responsibility to HKMA and the Financial Secretary. In the Notice of Appeal dated 10 August 2023, D seeks leave of this Court to ask HKMA and the Financial Secretary the following “Explicit Question”:-

“Based on the legislative intent and objectives of [BO], if a Bank engages in Banking Misconduct of conducting business including any business which is not banking or the business of taking deposits, without integrity, prudence and appropriate degree of professional competence and in a manner which is detrimental to the interest of the depositors, does the depositor have a Private Cause of Action.”

1. D has submitted no legal basis under BO or any laws or rules for this Court to ask such question of HKMA or the Financial Secretary. Even if there were such jurisdiction, the answer cannot be binding on this Court and therefore I would have declined to exercise such jurisdiction.
2. Turning back to consider the intention of the Legislature, it was submitted by Mr Wong that it is clear that the Legislature did not intend to confer on individual banking customers any private right of action for any breaches of BO.
3. In Mr Wong’s Skeleton and in oral submissions, he provided an overview of the BO and various sections which he submitted are incompatible with Legislature intending a private cause of action including the following:-
4. section 7 which provides that HKMA shall be responsible for *inter alia* supervising compliance with provisions of BO, promote and encourage proper standards of conduct and sound and prudent business practices amongst authorized institutions, take reasonable steps to ensure any banking business carried on by an authorized institution is carried on with integrity, prudence and the appropriate degree of professional competence and in a manner not detrimental, or likely to be detrimental to the interests of depositors. See also the long title;
5. sections 9 and 10 which in gist provide HKMA shall in its report furnished to the Financial Secretary report any breach of BO and the Financial Secretary may decline to publish in whole or in part such report;
6. the 7th Schedule which prescribes a set of criteria for HKMA’s consideration in approving the status of a banking institution as an authorized institution under s  16 of BO. Section 16(10) gives HKMA the power to prepare and publish guidelines indicating the manner in which HKMA proposes to exercise the functions under s 16;
7. the 8th Schedule provides grounds for revocation of authorization. In gist, if HKMA is satisfied that an authorized institute does not fulfil the criteria in the 7th Schedule HKMA may propose a revocation;
8. there is a mechanism for appeal against the proposed revocation and only if there is no appeal or appeal is unsuccessful shall HKMA circulate by newspaper the revocation notice under s 22(9);
9. section 52(1)(c) provides where HKMA is of the opinion that an authorized institution is carrying on business in a manner detrimental to *inter alia* the interests of its depositors, or an authorized institution has contravened or failed to comply with any provision of BO, HKMA may after consultation with the Financial Secretary: (i) require the institution to take action/do any act in relation to its affairs as he may consider necessary; (ii) give direction that the institution shall seek advice on management of its affairs; (iii) give direction that the affairs of the institution shall be managed by a Manager appointed by HKMA; and (iv) report the circumstances to the Chief Executive in Council; and
10. There are provisions under s 132A for appealing to the Chief Executive in Council by any person aggrieved by such decisions of HKMA and power is given to the Chief Executive under s 53 to confirm, vary or reverse any requirement, appointment or direction made by HKMA.
11. I agree with Mr Wong from the above overview that it was not intended for there to be to a private right of action for depositors for any breach of BO. BO is plainly a regulatory legislation intended to benefit and protect the public at large and not individual customers or depositors.
12. Furthermore, in respect of breaches of the authorization requirement, it is plain that it was intended for HKMA to regulate compliance with those requirements. Allowing a private action would by-pass the statutory procedure for appeal and usurp the powers of HKMA, Financial Secretary and Chief Executive in Council in those matters.
13. This view is also fortified by the Guideline on Minimum Criteria, Guide to Authorization, Policy Manual IC-1 and Policy Manual IC-6, all issued pursuant to s 16(10) of BO, which makes clear it is for HKMA to decide whether the criteria set out in the 7th Schedule are met.
14. As for the other Guidelines issued by HKMA relied upon by D (Policy Manual OR-1, Policy Manual TM-E-1, Policy Manual TM-G-1, Policy Manual CR-S-5 and Policy Manual SA-1) they are expressly stated to be *non-statutory* and issued by HKMA as a guidance note. Hence they plainly cannot be relied upon as a basis for D’s claim for breach of *statutory* duty. Similarly, the Charter and the Basel Principles have no statutory basis.
15. Notwithstanding D has submitted that under the Securities and Futures Ordinance, Cap 571 (“SFO”) there is a right of action for losses as a result of market misconduct and false public communication, I do not regard that is relevant as D’s claim is not based on SFO but BO and the task of this Court is to ascertain the legislative intent of BO.

*Whether the relief sought by D are viable*

1. Given that I have taken the view there is no viable cause of action based on breaches of PDPO and BO, there can be no basis to seek the relief sought under AD&CC.
2. In respect of §(1), as indicated in D’s Skeleton Submissions, this is based on there being violation of the 7th Schedule. Given my view that there is no private right of action for any breach of 7th Schedule of BO, this relief ought to be struck out. In any event, I am not satisfied that there is jurisdiction for this court to order the restoration sought notwithstanding the assertion in D’s Skeleton Submissions that that Securities and Futures Commission have made many “restorative orders” over the years.
3. As for §(2), this relief is based on there being a violation of PDPO and given my rejection of the viability of such a claim, this relief also should be struck out.
4. As for §(3), notwithstanding D has referred me to the an article in the Hong Kong Lawyer in July 2021 referring to the case of *Chow Wing Kai v Liang Jing* [2021] HKDC 609, for the proposition that this court has jurisdiction to make an apology order, it is clear in *Chow Wing Kai* that concerned a defamation action and even though it was held there was jurisdiction, the court refused to exercise the discretion to make such order on the facts of that case. In the present case, where there is no underlying cause of action for alleged breaches of BO and Guidelines, there is no basis for the relief even if (without deciding) there is jurisdiction to order an apology in actions other than defamation. This relief ought also to be struck out.
5. As for §(4), it is premised on there being breaches of BO for which I have already taken the view there is no right of action by P. Furthermore, D has submitted the court can make an order of *mandamus* to compel performance of statutory duty by HKMA. However, as the present case is not an application for judicial review taken out in the High Court pursuant to O 53, r 1 of the Rules of the High Court to which HKMA is made a respondent to such application, this relief is bound to fail and ought to be struck out.
6. As for §(5), as mentioned above, the claim based on breach of PDPO is doomed to fail and should be struck out so this relief which is based on that claim likewise should be struck out. In any event, no legal basis for seeking “punitive fines” has been demonstrated and for this reason also this relief should be struck out.
7. As for §(6), this is premised on there being legal basis for ordering “punitive fines” which exceeds the jurisdiction of the District Court. Accordingly, it should also be struck out.
8. As for §(7), according to D’s Skeleton Submissions, the basis for the relief is Policy Manual TM-E-1 but I have held that this guidance note is non-statutory and cannot be the basis of D’s claim for breach of statutory duty. In any event, there is no private cause of action for breach of BO. Therefore there is no basis for this relief. Furthermore, if there was any breach of BO, this is a matter for HKMA and whether to disclose any report by HKMA on such breaches is for the Financial Secretary to decide. For all these reasons, this relief ought also be struck out.

*Costs order made by the Master*

1. D appeals against the costs order made by the Master. However, I can discern no error of law nor am I of the view the order made was unreasonable: see *Hong Kong Civil Procedure 2023*, Vol 1, §58/1/6. I would therefore not allow the appeal against costs.

*D’s application for transfer*

1. For the reasons given above, there is no reasonable cause of action against P by D based on the matters pleaded by D in AD&CC, and it follows the relief sought are bound to fail. Therefore, there is no basis for applying for transfer of this action to the High Court. I will not order a transfer.

*Disposition and Costs*

1. I would accordingly dismiss D’s appeal against the Master’s Decision.
2. Parties agreed that costs should follow the event and there be a summary assessment of costs.
3. I therefore make a costs order *nisi* that costs of and occasioned by this appeal shall be to P. Any application to vary the costs order *nisi* shall be made by letter within 14 days hereof and will be determined on paper. If no application is made to vary the costs order *nisi* within 14 days hereof*,* the costs order shall become absolute.
4. Summary assessment based on the Statement of Costs submitted to me by P will be assessed upon the costs order *nisi* becoming absolute or following the determination by me of any application to vary, whichever is later. If D has any objection to P’s Statement of Costs, D should file a Statement of Objections (stating which items are objected to and give succinct reasons for the objection) within 14 days hereof.

( G Chow )

Deputy District Judge

Mr Wong C K Adrian, instructed by Tsang, Chan & Wong, for the plaintiff

The defendant appeared in person