##### HCA 1616/2024

[2025] HKCFI 1426

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

ACTION NO 1616 OF 2024

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BETWEEN

|  |  |
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| LEE SHI YAN ESTHER | Plaintiff |
| and | |
| APPLE ASIA LIMITED. (sued as APPLE INC, HONG KONG BRANCH) | Defendant |

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Before: Hon Au-Yeung J in Chambers

Date of Hearing: 6 March 2025

Date of Decision: 7 April 2025

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D E C I S I O N

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1. *INTRODUCTION*
2. The Plaintiff (“**Madam Lee**”) sues the Defendant (“**Apple Inc HK**”) for an interim injunction ordering Apple Inc HK to reply to her in writing in respect of iPhone problems and compensate her for damages for sufferings and disappearance of a photo taken by her iPhone.
3. Upon Apple Inc HK’s application, Master CK Chan struck out the statement of claim (“**SOC**”) on the ground that it discloses no reasonable cause of action and dismissed the claim on 25 September 2024 (“**the Strike-Out Order**”).
4. The time to appeal expired on 9 October 2024. Madam Lee lodged a notice of appeal against the Strike-Out Order on 15 November 2024 (“**the Notice of Appeal**”), being out of time by about 5 weeks. In her Notice of Appeal, she sought leave to appeal out of time to annul the Strike-Out Order and to have judgment granted under the writ.
5. On 19 December 2024 when the **Appeal** was to be heard (“**the Hearing**”), Madam Lee was absent, despite having fixed the date of the Hearing herself. This Court dismissed her Appeal for want of prosecution (“**the Dismissal Order**”).
6. The Dismissal Order was sealed and perfected on 9 January 2025.
7. On 19 February 2025, Madam Lee filed the present summons (“**the Set-Aside Summons**”), seeking to annul the Strike-Out Order, out of time, and to have judgment granted under the writ. She also seeks leave to appeal against the Strike-Out Order and Dismissal Order out of time.
8. Apple Inc HK opposes the Set-Aside Summons on the ground that the Court lacks jurisdiction to reopen the Appeal and that Madam Lee has no grounds to re-open. Further, there was substantial delay in lodging the Appeal and the Appeal is so hopeless as not to come close to satisfying the test for time extension.
9. This is the hearing of the Set-Aside Summons. Madam Lee has not filed any written submission.
10. At the outset it has to be made clear that Madam Lee’s applications for judgment in the Notice of Appeal and the Set-Aside Summons are unwarranted as there has been no application for judgment beforehand. I shall dismiss those applications outright without even considering the merits.
11. *LACK OF POWER TO RE-OPEN AN APPEAL*
12. If a matter is dealt with in the absence of a party and a proper explanation is put forward, the Court has power to re-hear the matter or re-open it until the order has been sealed: *Overseas Trust Bank Ltd v Moral Tact Co Ltd* [2003] 2 HKC 77, §9, Rogers VP.
13. In this case, the Set-Aside Summons was taken out only after the Dismissal Order was sealed. The Court has no power to re-open the Appeal.
14. This is different in comparison to:
15. An application by summons which has been dismissed without a hearing due to absence of a party. Under Order 32, rule 5 of the Rules of the High Court (“**RHC**”), the Court, if satisfied that it is just to do so, may allow the summons to be restored. The Appeal, however, was not brought by way of summons and hence this rule does not apply.
16. A judgment obtained at a trial where one party does not appear may be set aside on terms as it thinks just under Order 35, rule 2, RHC. The Appeal, however, was not a trial.
17. For the reasons given in paragraphs 10-12, the Set-Aside Summons should be dismissed.
18. *LACK OF GROUNDS FOR RE-OPENING THE APPEAL*
19. If the Court has power to re-open the Appeal, the Court will consider if there are reasonable grounds for doing so.
20. Madam Lee’s explanations for her absence at the Hearing are as follows:
21. “Unexpected delay in taking MTR as both (all in that level) ticket machines were out of order when [she was] approaching to buy tickets” (“**Explanation 1**”);
22. She was not absent on the day of the Hearing but arrived at Court within the 45 minutes set for the Hearing (“**Explanation 2**”);
23. She was a lay person and did not know the procedure for re-opening the Appeal. She was not advised by one Mr Tam (later identified as Judicial Clerk to Au-Yeung J) as to the procedure to do so (“**Explanation 3**”).
24. She was pre-occupied in December 2024 due to “a quite full schedule for tutorial class” (“**Explanation 4**”).
25. Explanation 1 is a bare assertion unsupported by independent evidence. In any case, it is the obligation of a party to allow sufficient time to travel to court on time and to cater for traffic problems which can occur at any time.
26. Explanation 2, according to Madam Lee, was that she arrived at the Court at around 10:20 am only to find that “the door of the court could not be opened and no defendant and judge were inside the court”. She “should be allowed to seek for adjournment of the hearing but no such option was available at the spot.” She added in her oral submission at this hearing that she saw a clerk but forgot the details of what happened. She asked whether proceedings were going on but the clerk “could not answer” and “could not open the door”. She forgot where he came out from. Madam Lee stayed outside the courtroom for a long time. She later went to the information counter on the ground floor. It seemed that the clerk had got her telephone number. He allegedly said that Madam Lee should renew her application. Therefore, Madam Lee took out the present application.
27. Even taken at the highest, Madam Lee was still late in arrival. If she was told to renew her application, she only did so 2 months later. These were not reasonable explanations for her absence and delay in taking out the Set-Aside Summons.
28. Worse still, Explanation 2 was a half truth. According to the contemporaneous record of Mr Tam, after consulting me, Mr Tam had made telephone calls to Madam Lee (as per the telephone no. provided in the Notice of Appeal). However, no one answered the phone call. Apple Inc HK was informed about this at the Hearing. The Court made the Dismissal Order and proceedings ended at 10:10 am. At around 10:40 am, Madam Lee showed up in front of Court No. 32. Mr Tam informed Madam Lee that the Court had made an order dismissing the Appeal. Madam Lee was asked to consider what further step(s) she was to take if she wanted to continue the Appeal. That record was consistent with what Mr Tam reported to me soon after he learnt that Madam Lee had turned up outside the court room.
29. Madam Lee turned up at the Hearing much later than the time she told the Court. The Court and Apple Inc HK had effectively waited for her for 10 minutes before the Dismissal Order was made. Explanation 2 is not a reasonable explanation.
30. Explanation 3 is unsustainable. Mr Tam had no obligation to teach Madam Lee what to do about her own application. He had already given neutral guidance to a litigant in person to consider what further steps to take if she wanted to continue the Appeal. Madam Lee knew that there was a Resource Centre. She could have gone there to seek assistance on eg what forms to lodge to renew her application.
31. Explanation 4 is not supported by any objective evidence of Madam Lee’s tutorials that allegedly took place. In any case, it shows that Madam Lee put her other interests above her application and there was substantial delay in renewing her application. That was her choice but neither the Court nor the Defendant were obliged to indulge her. Explanation 4 is not a reasonable explanation.
32. In summary, none of the Explanations are reasonable.
33. Additionally, there was a substantial delay in the filing of the Set-Aside Summons to annul the Strike-Out Order when considered in the light of the fact that the Appeal itself was out of time. The Dismissal Order was only sealed about 3 weeks after the Hearing. A sealed copy of the Dismissal Order was served by hand on Madam Lee on the same day, not on 15 October 2024. It took her another 6 weeks from then to take out the Set-Aside Summons. Her delay was substantial.
34. For the reasons given in Section C, the Set-Aside Summons should be dismissed for lack of jurisdiction, lack of reasonable explanations and substantial delay.
35. *LEAVE TO APPEAL AGAINST A MASTER’S DECISION OUT OF TIME*

*D1. Legal principles on seeking leave to appeal out of time*

1. An appeal against a Master’s decision operates by way of rehearing. The judge considers the application afresh as if the matter comes before the judge for the first time.
2. In considering whether to grant leave to appeal out of time, the Court will take into account the length of the delay, the reasons for the delay, the chances of the appeal succeeding if an extension of time is granted and the degree of prejudice to the other party if the application is granted: *Lee Chick Choi v Best Spirits Company Ltd,* HCMP 371/2015, 21 May 2015, §19, Kwan JA (as she then was).
3. Where the delay is substantial and not wholly excusable, the applicant must show a real prospect of success on the merits, not merely reasonable prospect of success. In other words, she would need to demonstrate a strongly arguable case: *Lee Chick Choi,* §19.
4. A delay of 14 days is not insubstantial: *Tsang Wai Fan v Hui Siu Kwong,* HCMP 409/2016, 12 April 2016, §23, Chu JA (as she then was).

*D2. Legal principles for striking out*

1. Striking-out is for plain and obvious cases. The claim must be obviously unsustainable, the pleadings unarguably bad, and it must be impossible (not just improbable) for the claim to succeed: *Hong Kong Civil Procedure 2025*, §18/19/4.
2. An unintelligible or indecipherable statement of claim ought to be struck out. The opposing party “is entitled to an intelligible Statement of Claim”: *Chan Lai Shing v Amercian Express International, Inc* [2024] HKCFI 2817, §3.7(2); *Asset Choice Group Ltd v Onboard Technology Ltd* HCA 3215/2002, 7 May 2003, §24, DHCJ A Cheung (as he then was).
3. The Court does not blindly accept evidence put forward by the plaintiff, but considers it from a commercial and common-sense point of view against contemporaneous documents, inherent implausibility and other compelling evidence: *Chan Lai Shing*, §3.7(3).
4. Further, purported reliance on unpleaded statutes does not prevent a strike-out: *Singh Baljit v Forward & Co Lawyers* [2022] HKCA 1209, §§14, 31, 33, G Lam JA.

*D3. Length of the delay in the Appeal*

1. Madam Lee was 5 weeks out of time in lodging the Notice of Appeal. It was a substantial delay.

*D4. Reasons for the delay*

1. Madam Lee gave 5 reasons for the delay in her Notice of Appeal:
2. She made phone call to the Resource Centre of the Judiciary to make enquiry on the proper procedure to appeal but was unanswered. She therefore wrote emails on 26 September 2024 to the Resource Centre. She checked for reply nearly every day but only found the “delayed” reply appearing in her email *outbox* on 9 October 2024, while 99% of other replies to her emails came through her email inbox; (“**Reason 1**”)
3. The Order of the Master only reached Madam Lee on 15 October 2024 (“**Reason 2**”);
4. Available free legal advice in respect of the Appeal required approximately several months’ waiting time (“**Reason 3**”);
5. Drafting leave application and grounds of appeal took time for a layman and Madam Lee had started a new job recently (“**Reason 4**”); and
6. Madam Lee lost her mobile phone in October and had not found it yet on the date of the Notice of Appeal, causing her hiccups (“**Reason 5**”).
7. Reasons (1), (2), (3) and (4) should have at least some paper trail to back it up but it is entirely missing.
8. In any case, Reasons (1), (3) and (4), even if true, do not constitute reasonable explanations for delay. Notwithstanding the difficulties faced by a litigant in person, it was incumbent on Madam Lee to comply with the procedural timeframe in accordance with the rules and procedure of the Court: *AXA China Rgion Insurance Co Ltd v Leong Fong Cheng,* CACV 113/2016, 28 October 2016, §47, Lam VP (as he then was).
9. It has also been said that whilst the lack of legal representation may justify making allowances in making case management decisions and in conducting hearings, it will generally not justify applying a lower standard of compliance with rules or orders of the Court: *Success Lane Development Limited v Fergurson Hong Kong Limited trading as New World Millenium Hong Kong Hotel* [2024] HKCA 839, §26 (G Lam JA).
10. Reason (2) is unsustainable because Apple Inc HK has served the Strike-Out Order on Madam Lee on 9 October 2024. In any event, Madam Lee would have known there and then, at the hearing on 25 September 2024 which she attended, that her claim was struck out when the learned Master pronounced his decision.
11. Reason (4) shows that Madam Lee prioritized her new job over her own court case and failed to obtain any time extension from the Court. She cannot expect indulgence from the Court and the Defendant.
12. Reason (5) simply has nothing to do with lodging an appeal.
13. Accordingly, even if the 5 Reasons were true in fact, they were inexcusable for Madam Lee’s substantial delay in lodging the Appeal.

*D5. Chances of the Appeal succeeding if extension of time is granted*

1. Given the substantial and inexcusable delay, Madam Lee has to show that her appeal is strongly arguable on the merits. In her Notice of Appeal, she has given 8 grounds of appeal. I will first analyze each paragraph of SOC before dealing with the grounds of appeal.
2. The SOC contains 5 paragraphs in support of the interlocutory injunction claimed.
3. **SOC §1** requires Apple Inc HK to “reply in writing to [Madam Lee] (not merely an acknowledgement) in respect of the iPhone problems stated in a letter sent by [Madam Lee] in early September 2023 by registered post since [Madam Lee] has not received any reply (in writing or not) as of now for 10 months already but some problems persist”.
4. This paragraph pleads a relief but not a cause of action eg as to why there was a duty on the part of Apple Inc HK to reply. Accordingly, no reasonable cause of action has been disclosed.
5. Mr Yeung points out that the same point was raised at the hearing before Master CK Chan, as evidenced by Apple Inc HK’s written submission. It is therefore incorrect for Madam Lee to assert in her Notice of Appeal that the Defendant “did not deny and being silent on paragraphs 1 and 4 of SOC which were also not discussed at the hearing.”
6. **SOC §2** prays that Apple Inc HK should pay Madam Lee HK$14,000,000 as damages for sufferings due to the use of Apple ID of Madam Lee by third parties. She pleads that “email address (containing much personal information) is compulsorily required in creating an Apple ID; whereas generally speaking other accounts login would instead assign a user ID without requesting for user’s email address as key identifier”. “Therefore the data collected by [Apple Inc HK] is far more than necessary and adequate but excessive which is in breach of the principle of data privacy law (commonly known as DPP1).”
7. However, there is no common law tort of invasion of privacy: *Wainwright v Home Office* [2004] 2 AC 406, §35, Lord Hoffmann. Madam Lee has attempted to distinguish *Wainwright* on the facts in the Notice of Appeal and Set-Aside Summons. This is futile as the non-existence of this tort applies irrespective of the facts of a case.
8. To the extent Madam Lee relies on a statutory claim, there is no statutory provision pleaded. A purported reliance on unpleaded statute does not prevent a strike-out: *Singh Baljit,* above.
9. To the extent Madam Lee purports to rely on the Personal Data (Privacy) Ordinance, Cap 486 (“**PDPO**”),
10. Section 66(1) of PDPO provides that “an individual who suffers damage by reason of a contravention (a) of a requirement under this Ordinance; (b) by a data user; and (c) which relates, whether in whole or in part, to personal data of which that individual is the data subject, shall be entitled to compensation from that data user for that damage.”
11. Section 66(5) provides that “proceedings brought by an individual in reliance on subsection (1) are to be brought in the District Court but all such remedies are obtainable in those proceedings as would be obtainable in the Court of First Instance”.
12. Although the District Court does not possess exclusive jurisdiction over claims under PDPO, the correct forum to start a suit is the District Court: *Lee Kwok Tung Albert v Chiyu Banking Corp Ltd* [2018] 2 HKLRD 273, §4.20, Cheung JA.
13. Be that as it may, the pleaded claim, taken at its highest does not fulfil the requirements of section 66(1) of PDPO.
14. Firstly, the SOC has not pleaded that Apple Inc HK was a “data user”, defined in section 2 of PDPO as “a person who, either alone or jointly or in common with other persons, *controls* the collection, holding, processing or use of [personal data]” for Apple ID.
15. Secondly, there are no particulars of the alleged breach by Apple Inc HK to show that the collection of Madam Lee’s email address was far more than necessary and adequate and excessive.
16. Thirdly, there are no pleas to show that her Apple ID had been used by third parties.
17. Fourthly, there is no pleaded causal link between the collection of Madam Lee’s email address and third parties’ alleged access to her Apple ID. There is no plea to show, eg that if a user ID had been assigned to Madam Lee, the alleged third parties would not have been able to access her Apple ID.
18. Fifthly, even if there was a breach of PDPO, the SOC has not shown a causal link between the breach and the alleged loss suffered by Madam Lee and how the damages of HK$14 million were computed.
19. For these 5 reasons, the claim under section 66(1) of PDPO is bound to fail: *Lee Chick Choi,* §§13, 25-26, 28, Kwan JA (as she then was). *Standard Chartered Bank (Hong Kong) Ltd v Khanduri Sanjay* [2023] HKDC 1446, §§40-42, was an example of a claim under section 66 of PDPO being struck out on this basis.
20. **SOC §3** asks for an interlocutory injunction that the Defendant shall compensate Madam Lee’s “suffering in using authorized iPhone Apps”. She gave an example of the HSBC app suddenly requesting her, on 17 July 2024, to update phone number (already which has been provided in the internet banking profile) and mandating her to take selfie photos and her HKID card before proceeding to the next step. “Since [Madam Lee] does not like taking selfie photos all along, such iPhone bank App request is also more than necessary and adequate but excessive which is in breach of the principle of data privacy law and the Defendant should be responsible for authorizing such iPhone bank App.”
21. The analyses in paragraphs 49-59 above equally apply here. There are no pleas as to what provisions in PDPO have been breached and why requiring Madam Lee’s photo is said to be a breach of Apple Inc HK of such statutory provisions. There is no plea as to what suffering she has sustained from the collection of her photo. There is no reason why any relief should be in the form of an interlocutory injunction either. SOC §3 is plainly unsustainable.
22. It is only in the Notice of Appeal and Set-Aside Summons that Madam Lee asserts that the Defendant “is responsible for taking necessary action e.g. put the bank App off its App Store” because the HSBC banking app “is an authorised iPhone App available at the App Store of the Defendant for download to use”.
23. Such assertions have not been pleaded. In any case, there is no discernible basis, statutory or otherwise, for asserting that the Defendant had the responsibility to take the alleged “necessary action”. It does not follow that the Defendant *controlled* the collection, holding, processing or use of personal data in the HSBC banking app which led to breach of section 66(1) of PDPO.
24. **SOC §4** asks Apple Inc HK to compensate Madam Lee for “subsequent disappearance (not loss) of the photo taken by the iPhone of [Madam Lee] on a document submitted to the registry in relation to a company of which [Madam Lee] is a stakeholder”.
25. This is a prayer for relief of which the cause of action is unknown. It is not even alleged that it was Apple Inc HK who caused the disappearance of the photo. It is not stated what loss arose from the disappearance of the photo. SOC §4 is plainly unsustainable.
26. Again the same point had been raised before Master CK Chan as evidenced by the Defendant’s written submission before the learned Master. It is wrong for Madam Lee to assert that the Defendant “did not deny and being silent on paragraph … 4 of SOC which were also not discussed at the hearing”.
27. **SOC §5** asks Apple Inc HK to compensate Madam Lee for her sufferings “in various occasions when using the iPhone under warranty period and bought at Apple HK shop, including the consequential negative impact on social networking of [Madam Lee]; specifically, the time being shortened, delayed when loading information, unusual happenings (the ‘Incident’) when the same email address (as Apple ID) is being used as the contact email address in an internet account with service fee paid etc; the said Incident is [Madam Lee] being deducted another service fee after turning off the renewal button after logging on the internet account of Domain.com, and the photo taken by the iPhone of [Madam Lee] when turning off the renewal button has been disappeared recently.”
28. SOC §5 is unintelligible. Moreover, it is not even alleged that Apple Inc HK was responsible for any of the acts complained of and how that responsibility arose. No cause of action can be derived from that long paragraph.
29. In her first, second and eighth grounds of appeal, Madam Lee says that the learned Master made the wrong decision, basing himself solely on the *Wainwright* case that was outdated as the relevant legislation in Hong Kong is PDPO. Apple Inc HK has not explained why it did not assign a user ID similar to other usual login approaches but requested for email address or phone number as key identifier.
30. In view of the lack of reference to any provision in PDPO in the SOC and for the reasons given in respect of SOC §§2 and 3 above, these grounds of appeal have no merits.
31. The third ground of appeal seeks to distinguish the present case from the *Wainwright* caseon the facts. Her experience as pleaded in SOC §5 that “the time being shortened” when using the iPhone was an intrusion upon her seclusion or solitude or private affairs. The *Wainwright* casewas related to strip-search, which was an “inevitable action by public authority/officers” whereas her use of the mobile phone was part of daily life.
32. In my view, this distinction has no substance. Even if it is accepted to be true, there is still a lack of common law tort of invasion of privacy. This ground of appeal has no merits.
33. The fourth ground of appeal seeks to distinguish the *Wainwright* caseon the ground that Madam Lee’s mobile phone was “being controlled by unknown as video-recorded on 5 September 2024 (notwithstanding the year is stated in error in the clip) is truly an intrusion upon [Madam Lee’s] seclusion or solitude or private affairs”.
34. With respect, this is a new plea and evidence unrelated to any part of her SOC. It is not even alleged that the “unknown” was Apple Inc HK. This ground of appeal has no merits.
35. The fifth ground of appeal alleges that Apple Inc HK was the manufacturer of Madam Lee’s mobile phone and is absolutely responsible for the creation and maintenance of Apple ID. Again, this is a new plea and new evidence. Even if it were true, that would not automatically make Apple Inc HK the creator, maintainer or controller of the Apple ID. This ground of appeal has no merits.
36. The sixth ground of appeal asserts that if the banking app involves privacy invasion, Apple Inc HK is responsible for taking necessary action to put the banking app off its App store. Again, this ground ignores the fact that it has not been pleaded that Apple Inc HK was in control of the banking app/the data, or the bases under which Apple Inc HK had the duty to ascertain if the banking app had invaded privacy and the duty to take the banking app off its record. This ground of appeal has no merits.
37. The seventh ground of appeal asserts that Apple Inc HK did not deny and was silent on SOC §§1-4. Without disrespect, this was not true. §3 of Apple Inc HK’s written submission lodged before the learned Master dealt with all 5 paragraphs of the SOC to explain why the pleas were unsustainable. This ground of appeal has no merits.
38. In summary, none of the grounds of appeal are arguable. The SOC lacks reasonable causes of action and is incurably bad. There is no chance for the claim to succeed.

*D6. Prejudice to the other party if time extension is granted*

1. No prejudice has been asserted by the Defendant.
2. Madam Lee has mentioned in §18.3 of her Set-Aside Summons that the Defendant had approached her for settlement. She waited. By January, she felt that she needed to take some action. She thus came to the High Court and asked what she should do.
3. The Defendant has denied any approach to Madam Lee to settle the present proceedings. In any case, even if there had been such approach, it would not have affected the unmeritorious nature of the Appeal or the Set-Aside Summons.

*E. CONCLUSION*

1. I agree with Master CK Chan’s decision that the SOC should be struck out for disclosing no reasonable cause of action. As Madam Lee has substantially delayed in lodging the Appeal and her intended Appeal is doomed to fail, I decline to grant any extension of time to appeal.
2. The court has no power to re-open the Appeal after the Dismissal Order was perfected. Even if there is such power, there are no reasonable grounds for re-opening the Appeal. The Set-Aside Summons has no merits and is dismissed as well.
3. Apple Inc HK does not seek costs and I make no order as to costs.
4. I thank Mr Yeung for his assistance.

(Queeny Au-Yeung)

Judge of the Court of First Instance

High Court

The Plaintiff appeared in person

Mr Cedric Yeung, instructed by Morrison & Foerster, for the Defendant