HCA 2045/2012

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

# COURT OF FIRST INSTANCE

ACTION NO. 2045 OF 2012

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BETWEEN

LEE CHICK CHOI Plaintiff

and

BEST SPIRITS COMPANY LIMITED Defendant

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Before: Deputy High Court Judge Kent Yee in Chambers

Date of Hearing: 18 November 2014

Date of Decision: 1 December 2014

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D E C I S I O N

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Introduction

This is an application of Best Spirits Company Limited (**“the Company”**) to strike out the Writ and the Statement of Claim of Mr Lee by its summons dated 17 July 2013 (“**the Summons**”). On the day before this hearing, Mr Lee took out a summons dated 17 November 2014 for his application for leave to abandon the Statement of Claim, which is to be replaced by his “proposed/draft Statement of Claim”.

2. Mr Yu, counsel for the Company, does not oppose Mr Lee’s abandonment of his Statement of Claim. He however objects to the filing of the proposed/draft Statement of Claim on the ground that it is doomed to failure.

3. It is clear that Mr Lee does not seek to defend the integrity of his Writ and Statement of Claim. With the assistance of Mr Yu’s written submissions, I am also satisfied that the grounds set out in the Summons are made out. It is plain and obvious that the Writ and the Statement of Claim are unmeritorious and should be struck out.

4. If a statement of claim does not disclose the cause of action relied on, an opportunity to amend may be given. However, where the amendments would be far-reaching and so radical as to amount to a totally new pleading which would probably provoke a fresh application to strike out, the correct course is to strike out: *Hong Kong Civil Procedure 2015* Vol.1 §18/19/4 at p.436.

5. The remaining question is whether I should exercise my discretion to allow the present action to proceed with the introduction of the proposed/draft Statement of Claim whereby Mr Lee claims damages against the Company pursuant to section 66 of the Personal Data (Privacy) Ordinance, Cap. 486 (“**the Ordinance**”). He alleges that he is entitled to compensation in excess of HK$1 million.

6. I shall give my analysis of the viability of Mr Lee’s new claim. For this purpose, the background facts can be briefly stated as follows.

7. Mr Lee was an employee of the Company from June 2006 to late 2010 as its General Manager. Mr Lee contends that the employment was terminated upon his resignation on 3 December 2010 whilst the Company contends that Mr Lee was dismissed due to his misconduct in November 2010. This debate was resolved in Mr Lee’s claim in the Labour Tribunal No. LBTC 588/2011 on 28 October 2011 in the favour of the Company among other matters.

8. Mr Lee decided to take his claim to the High Court for an appeal. However, Mimmie Chan J dismissed his application for leave to appeal on 6 June 2013.

9. In the course of the proceedings in the Labour Tribunal, it transpired that in one of the witness statements, the Company made use of some personal data of his wife stored in the lap-top computer of Mr Lee handed over to the Company upon the termination of the employment. The lap-top computer was assigned to Mr Lee for his official use during his employment with the Company. It was protected by a password only known to Mr Lee.

10. The wife of Mr Lee, Madam Yuen Oi Yee Lisa, lodged a complaint with the Office of the Privacy Commissioner for Personal Data, Hong Kong (“**the PCPD Office**”). By a letter dated 16 May 2013 (“**the Letter**”), the PCPD Office informed Madam Yuen of the result of its investigation of her complaint. Mr Lee’s new claim is based on the Letter.

11. In the Letter, the PCPD Office explained that while they rejected all other complaints of Madam Yuen, they did consider that the Company had failed to take all reasonably practicable steps to make known to its staff its policy in relation to accessing, checking, deleting and backing up information (including personal data) held at the computers assigned to them for official use, upon their cessation of employment. The PCPD Office hence concluded that the Company contravened the requirements of DPP5 (Data Protection Principle 5). The said provision provides that a data user shall take all practicable steps to ensure that its policies and practices in relation to the kind of personal data held and its purposes of use should be made generally available.

12. The PCPD Office further considered that the Company had already in the course of their investigation revised their staff handbook and drawn to their staff’s attention to its relevant policies and practices. In light of their remedial work, the PCPD Office decided not to serve an enforcement notice on the Company.

13. Lastly, the PCPD Office reminded Madam Yuen of section 66 of the Ordinance, which provides that an individual who suffers damage (including injury to feelings) by reason of a contravention of a requirement under the Ordinance by a data user shall be entitled to compensation from that data user for that damage.

14. The new claim of Mr Lee is based on this provision. He claims that he has suffered financial loss in the sum of HK$14.475 million arising from the Company’s breach of DPP5. His allegation in his proposed/draft Statement of Claim is that the breach led to the rejection of Mr Lee’s resignation and, in its place, his dismissal due to alleged misconduct. As a result, he has been unable to find a comparable job in a high level managerial position and has been suffering a loss of income in the sum of HK$89,000 per month for the rest of his life.

*Analysis*

15. The proposed/draft Statement of Claim is undoubtedly a totally new claim based on the Ordinance. Mr Lee’s claim is, in my view, bad and should not be allowed to be pursued in the High Court for the following reasons.

16. First and foremost, as pointed out by Mr Yu, Mr Lee’s new claim should be brought in the District Court pursuant to section 66(5) of the Ordinance, which provides,

“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 available in the Court of First Instance.”

17. In my view, the District Court has exclusive jurisdiction over all claims in reliance on section 66(1) including those involving monetary claims in excess of its jurisdiction. It means that Mr Lee’s new claim albeit involving more than HK$1 million allegedly should be dealt with in the District Court.

18. Jurisdiction issue aside, I fail to see any causal link between the alleged breach of DPP5 on the one hand and the alleged income loss sustained on the other. The alleged breach had nothing to do with the dismissal of Mr Lee to start with. It is also far-fetched to attribute his inability to secure a similar job to his dismissal by the Company. As the proposed/draft Statement of Claim now stands, I am convinced that it would also be doomed to failure.

19. For completeness, I should mention that after the hearing, Mr Lee sent to this court his letter dated 19 November 2014. Both the Company and the PCPD Office were given a copy of the said letter. There, Mr Lee asked me to transfer his new claim to the District Court.

20. Given my dim view of the merit of his new claim, I would not accede to his suggestion.

*Conclusion and Orders*

21. I am satisfied that it is a plain and obvious case that the Writ and the Statement of Claim should be struck out. Accordingly, I grant the application of the Company. I make an order in terms of the Summons save the paragraph relating to the service of the Defence and Counterclaim. I do not find it necessary given my decision.

22. I also dismiss the application of Mr Lee by his summons. I make an order *nisi* that Mr Lee is to pay the Company its costs of both summonses, to be taxed if not agreed.

( Kent Yee )

Deputy High Court Judge

The plaintiff appeared in person

Mr Jason Yu, instructed by Hobson & Ma, for the defendant