DCPI 227/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 227 OF 2013

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BETWEEN

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| WONG CHAU WAN (黃秋雲) | Plaintiff |
| and |  |
| INCORPORATED OWNERS OF NOS 11-12 CANAL ROAD WEST, HONG KONG | Defendant |

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Before: Deputy District Judge Winnie Tsui in Chambers

Date of Hearing: 6 October 2014

Date of Decision: 13 November 2014

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DECISION

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1. This is a striking out application taken out by the plaintiff for an order that paragraphs 10(a) to (n) and 11(a) of the defendant’s Amended Defence and Counterclaim be struck out and further that the whole of the Amended Counterclaim be struck out and the counterclaim be dismissed pursuant to RDC Order 18 rule 19(1)(a), (b), (c) and/or (d) and/or the inherent jurisdiction of the court.

*The parties and the pleadings*

1. This personal injuries action arises out of an alleged accident which took place on the ground floor of the residential building at Nos 11-12 Canal Road West, Wanchai (“the Building”).
2. At the time of the alleged accident, the plaintiff was a resident of the fourth floor of the Building (“the Unit”) whereas the registered owner of the Unit was a company called Ka Wan (International) Properties Limited (“Ka Wan”). The plaintiff was an 80% shareholder and director of Ka Wan. The remaining 20% shares were held by an individual called Chan Ka Wai Aaron, who was also a director. There is no evidence before the court as to who Mr Chan is and his relationship with the plaintiff.
3. The defendant was incorporated in August 2011 as the incorporated owners of the Building.
4. The plaintiff claims that on 27 March 2012, when she was leaving the Building, she stepped on a puddle of water at the bottom of the stairs on the ground floor of the Building. She slipped and fell down. As a result, she sustained injuries (“the Alleged Accident”). She claims against the defendant for negligence and breach of common duty of care. The Statement of Claim sets out various particulars, including, for instance, inadequate lighting and failure to cause the water puddle to be cleaned up.
5. In the Amended Defence and Counterclaim, the defendant puts the plaintiff to strict proof as to the circumstances in which she allegedly slipped and fell. Further, the defendant denies liability and further alleges contributory negligence on the part of the plaintiff.
6. In paragraphs 10(a) to (n), the defendant pleads an additional ground of defence. This was referred to in the hearing as the “Insurance Defence”. In gist, the defendant says the following:
   1. The plaintiff had erected an advertisement signboard forming an extension to an existing signboard erected on the external wall of the Building. The original signboard was approved by the Buildings Department and was erected outside the fourth floor only whereas the extension was not approved and was erected outside the windows stretching from the second floor to the fifth floor of the Building. From the photographs attached to the Amended Defence and Counterclaim, it can be seen that the Extended Signboard was one whole signboard stretching across the four floors. I shall refer to this advertisement signboard as “the Extended Signboard” and the original approved part (which formed part of the Extended Signboard) “the Original Signboard” below.
   2. The Extended Signboard was in breach of, amongst other things, the Building Management Ordinance, Cap 344, the deed of mutual covenant relating to the Building and applicable fire safety rules and regulations.
   3. Paragraph 10(b) of the Amended Defence and Counterclaim refers to the Extended Signboard as “[t]he said illegal extensions *by the Plaintiff* of an existing signboard” (emphasis added).
   4. Paragraph 10(c) states at the end: “*The Plaintiff* is in breach of the DMC.” (emphasis added)
   5. Paragraph 10(d) states that “*the Plaintiff* also fails to have regard to the safety regulations” (emphasis added) under various applicable Codes of Practice.
   6. Paragraph 10(h) states that *the plaintiff* has been collecting rental as a result of leasing out the Extended Signboard on a regular basis.
   7. In paragraph 10(j), the defendant pleads that by reason of, *inter alia*, “the acts or series of acts of wrongful acts and/or negligence and/or omission *on the part of the Plaintiff* at all material times in the erections of [the Extended Signboard]” (emphasis added), the defendant “was rendered totally incapable of securing an appropriate type of insurance policy to cover [the Building]”.
   8. The defendant further explains in paragraph 10(k): “The Defendant’s attempts to secure an appropriate form of insurance policy to cover third party liability were practically rejected by the insurance companies and frustrated by the wrongful acts and/or negligence and/or omission *on the part of the Plaintiff* at all material times in the erections of [the Extended Signboard]” (emphasis added).
   9. As a result, the defendant was not able to put in place a third party liability insurance policy to cover the plaintiff’s claim in this action.
   10. In the circumstances, the defendant says that the plaintiff is estopped from claiming against the defendant in respect of the Alleged Accident.
   11. Further or alternatively, the defendant says in paragraph 11(a) that if damages are payable by the defendant to the plaintiff in respect of the Alleged Accident, the damages should be “set off against the wrongful acts and/or negligence *committed by the Plaintiff* against the Defendant hereinabove” (emphasis added).
7. The plaintiff now seeks to strike out the Insurance Defence, whether it operates by way of estoppel, as pleaded in paragraphs 10(a) to (n), or by way of set off, as pleaded in paragraph 11(a). As the counterclaim is basically premised on the same allegations constituting the Insurance Defence, the plaintiff says that the entire counterclaim should be struck out as well.
8. In order to evaluate the viability of the Insurance Defence, it is necessary to look at the circumstances surrounding the Extended Signboard, including (a) how and by whom it was put up, (b) the action taken by the Buildings Department, and (c) the proceedings taken out by the defendant against Ka Wan at the Lands Tribunal under LDBM No 92 of 2012 (“the Lands Tribunal Action”).

*The Extended Signboard*

1. According to the Land Registry records, the plaintiff purchased the Unit in April 2009. In September that year, Ka Wan was incorporated. There was a sale and purchase agreement in respect of the Unit between the plaintiff and Ka Wan in October 2010 and the assignment was executed the following month.
2. In the Lands Tribunal Action, it was Ka Wan’s case (as respondent) that application papers were initially submitted to the Buildings Department for approval for the erection of the Original Signboard outside the Unit in late 2009. When Ka Wan acquired the Unit, it took over such application. According to Ka Wan, a certificate of completion was issued in respect of the Original Signboard on 3 March 2011. There is no evidence before me which helps to pinpoint the exact time of when the Original Signboard and the Extended Signboard were respectively put up.
3. However, the Extended Signboard must have been erected prior to 29 April 2011 as on that day the Buildings Authority served a section 24(1) notice on the plaintiff ordering her to demolish that part of the Extended Signboard which formed the unauthorised extension to the Original Signboard.
4. This was followed by a summons laid against the plaintiff on 20 September 2011 for failing to comply with the section 24(1) order. However, the summons was subsequently withdrawn. Instead, on 16 July 2012, the Buildings Department issued a notice of Dangerous Advertisement Hoardings under section 105(1) of the *Public Health and Municipal Services Ordinance*, Cap 132 to the “owner” of the Extended Signboard ordering the demolition of the Extended Signboard on the ground that it was dangerous. Then in early August 2011, the Buildings Department removed the part of the Extended Signboard forming the unauthorised extension to the Original Signboard.

*The Lands Tribunal Action*

1. Following a number of owners meetings held by the defendant (and, prior to its incorporation in August 2011, by owners of the Building) in which the Extended Signboard was discussed, the defendant commenced the Lands Tribunal Action on 21 March 2012. I do not propose to go into any detail of this application save to highlight the following matters which are relevant to the issues presently before me:
   1. The Lands Tribunal Action was taken out against Ka Wan, and *not* the plaintiff.
   2. In paragraphs 19 to 21 of the Application, the defendant pleaded that Ka Wan had refused to pull down the Extended Signboard, which was unauthorised, and as a result the defendant was not able to secure insurance cover for the Building.
   3. In paragraph 22 of the Application, the defendant sought, amongst other things, an injunction against Ka Wan for the removal of the Extended Signboard.
   4. A number of interlocutory steps were taken by the defendant and Ka Wan in the course of 2012. The action was however brought to a conclusion in the hearing on 12 December 2012 where it was ordered, *inter alia*, that there be no order made as to defendant’s application in the action.
   5. It would appear that the presiding officer made the above order after he had been told that the unauthorised portion of the Extended Signboard had already been removed.

*The plaintiff’s grounds of striking out application*

1. Ms Jolie Chao, counsel for the plaintiff, put forward the following grounds in support of the striking out application:
   1. The Insurance Defence is wholly irrelevant to the plaintiff’s present personal injuries action.
   2. There is no basis for the operation of the estoppel, as relied upon by the defendant.
   3. The plaintiff was not the owner of the Extended Signboard. In fact, it is the defendant’s own case that Ka Wan was its owner but the defendant has not joined Ka Wan as a party to the present action.
   4. The defendant should not be allowed to re-litigate the Insurance Defence as it was a matter already determined in the Lands Tribunal Action.

*Legal principles on striking out*

1. The principles on which the court approaches an application to strike out, whether under RDC Order 18 rule 19 or the inherent jurisdiction, are clear and were not in dispute.  It is only in plain and obvious cases that the court should exercise its summary powers to strike out an action or pleading.  There should be no trial upon affidavits.  Disputed facts are to be taken in favour of the party sought to be struck out.  Nor should the court decide difficult points of law in striking out proceedings.  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. See *Hong Kong Civil Procedure 2015* *(Vol 1)* at paragraph 18/19/4.

*The issue of ownership of the Extended Signboard*

1. I shall first deal with the issue of ownership of the Extended Signboard, which in my view would conclusively determine the outcome of this striking out application against the defendant.
2. Mr Jackson Poon, counsel for the defendant, argued, first, that the Extended Signboard was owned by the plaintiff *and/or* Ka Wan. It is to be noted that this notion of joint or alternative ownership is itself unclear and Mr Poon did not elaborate on this either in his written submissions or at the hearing. Secondly, he submitted that even though Ka Wan might have officially owned the Extended Signboard, the corporate veil should be lifted or pierced to the effect that the plaintiff should be treated as the owner or being responsible for the Extended Signboard.
3. On the first part of the submission, I refer to the following:
   1. In the affirmation made by a Madam Fung Kit Ying and filed on behalf of the defendant, Madam Fung deposed (at paragraph 15) as follows:

“In light of the above matters, I verily believe that there is no doubt that at the material time of the Alleged Accident, the ownership of the Advertisement Signboard [ie, the Extended Signboard], which was an illegal structure, belonged to *Ka Wan and/or the Plaintiff*. …” (emphasis added)

* 1. Further, in the defendant’s written skeleton submissions, Mr Poon wrote (at paragraph 17(a)):

“The Plaintiff impliedly admitted that *she and/or Ka Wan* was the owner of the Advertisement Signboard.” (emphasis added)

1. Notwithstanding the defendant’s position that the ownership vests in the plaintiff and/or Ka Wan, there is no evidence adduced by the defendant to support this notion of joint or alternative ownership. Instead, the undisputed evidence, the evidence adduced by the defendant itself and the position taken by the defendant prior to the present striking out application all point overwhelmingly towards the finding that the Extended Signboard was owned solely by Ka Wan at the relevant time.
2. In coming to the above conclusion, I have relied on the following matters:
   1. First, in the affirmation made by Madam Fung filed on behalf of the defendant, it was accepted that Ka Wan was the owner of the Unit. This is also clear from the Land Registry records – see paragraph 10 above.
   2. The summons laid against the plaintiff with regard to the Extended Signboard was subsequently withdrawn – see paragraph 13 above.
   3. More importantly, in her witness statement filed on behalf of the defendant, Madam Au Yeung Pik Chun, the present chairperson of the defendant, recounted the history relating to the Extended Signboard and throughout cited as a fact that Ka Wan was the owner of the Extended Signboard (see, eg, paragraphs 24, 27, 30 and 36).
   4. Equally significant is the defendant’s stance in the Lands Tribunal Action. In that action, the defendant complained about the Extended Signboard. The defendant sought relief against Ka Wan alone – see paragraph 14 above. The defendant has not offered any reason why it did not claim against the plaintiff either jointly or in the alternative in that action. I consider that this is inconsistent with, and contradicts, the position now taken by the defendant, namely that the ownership vests in the plaintiff and/or Ka Wan.
   5. In his written skeleton submissions, Mr Poon referred to a number of matters which point to the fact that Ka Wan was the owner of the Extended Signboard, including, for instance, a letter dated 10 April 2012 from Ka Wan to the defendant confirming that Ka Wan was the owner – see paragraphs 17(b) and (c) of the defendant’s skeleton submissions.
3. On the basis that Ka Wan alone was the owner of the Extended Signboard, the matters complained of in the Insurance Defence (assuming for present purposes that the defence does work as a matter of law) would only operate against Ka Wan, but *not* the plaintiff. That is to say, for example, if there is indeed an estoppel arising out of the facts, that estoppel would work against Ka Wan only, but not the plaintiff. This would be so notwithstanding that the plaintiff was at the material time a shareholder and director of Ka Wan. As submitted by Ms Chao, it is trite law that a company is a separate and distinct entity from its shareholders: see *Salomon v Salomon* [1897] AC 22 at 51.
4. However, in the Amended Defence and Counterclaim, Ka Wan is not joined as a party. In fact, Ka Wan is not mentioned *at all* in the pleading.
5. As quoted in paragraph 7 above, the defendant has pleaded the Insurance Defence on the basis that it was the plaintiff, and not Ka Wan, who committed the various wrongful acts in relation to the Extended Signboard. As such, the Insurance Defence, as presently pleaded, must fail.
6. In answer to this, Mr Poon submitted that even if Ka Wan was legally responsible for the Extended Signboard, the plaintiff should be regarded by the court as the person in control and hence should be responsible for the wrongful act of Ka Wan in relation to the Extended Signboard.
7. In this regard, I quote from Mr Poon’s written submissions:

“Secondly, the Defendant submits that even though Ka Wan was the owner of the flat on 4th Floor of No. 11 Canal Road West (the “Flat”), it is an appropriate case for the Court to lift the corporate veil as Ka Wan is only a device used to conceal the fact that the Plaintiff is the real person controlling Ka Wan.” (paragraph 22)

“Even though Ka Wan was the official owner of the Flat, the Defendant submits that it is an appropriate case for the Court to lift the corporate veil.” (paragraph 31)

1. Initially, at the hearing, Mr Poon sought to rely on the concealment principle as recently explained in the Supreme Court decision in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 (at paragraph 28 and 61) and submitted that although Ka Wan might have been the legal owner, the plaintiff was the ‘real actor’ in causing the wrongful erection of the Extended Signboard thus contributing to the defendant’s failure to secure the requisite insurance cover for the Building. Mr Poon invited the court to take into account the fact that (1) the plaintiff was at that time a shareholder (holding 80% shares) and director of Ka Wan, and (2) she had represented Ka Wan at one of the owners meeting in June 2011. He submitted that it does not matter that the plaintiff, in so acting, might have acted in her capacity as director of Ka Wan and not in her individual capacity. She nonetheless had caused or contributed to the wrongful act of Ka Wan. Because of that, she should be personally responsible for such act, namely that the estoppel or set off as pleaded in the Insurance Defence should operate against her personally.
2. At the hearing, Mr Poon further expanded this submission and said that the plaintiff had used Ka Wan to engage in an illegal activity (ie the erection of the Extended Signboard which was unauthorised) so as to escape liability herself. On that basis, she should be held liable for that illegal activity and be deprived of the advantage which she would otherwise have obtained by reason of Ka Wan having a separate legal personality. The evasion principle as described in *Prest v Petrodel Resources Ltd* (at paragraph 35) should apply and the corporate veil should accordingly be pierced.
3. In my mind, it is doubtful whether this would indeed be an appropriate case for the court to either lift or pierce the corporate veil in the manner suggested by the defendant. All that the defendant seems to be relying on is the plaintiff’s shareholding and directorship in Ka Wan and her acting as its representative in the context of the Extended Signboard. These factors do seem to me to be consistent with how generally a company incorporated for the purpose of holding or managing properties would be run. Also, there is to date no evidence adduced to the effect that the plaintiff had deliberately evaded liability in respect of the Extended Signboard. However, I do not propose to comment further on this point save to raise my initial doubts on the viability of the argument.
4. More importantly, however, for the purpose of the present striking out application, it must be noted that none of the matters set out in paragraphs 26 to 28 above and relied upon by the defendant in seeking to lift or pierce the corporate veil are pleaded in the Amended Defence and Counterclaim. As already observed, Ka Wan does not feature at all in the pleading. The plaintiff’s shareholding and directorship in Ka Wan is not pleaded. Neither is the plaintiff’s intention to use Ka Wan to conceal her involvement in the Extended Signboard or make use of Ka Wan’s separate legal personality to evade liability referred to at all, let alone supporting particulars.
5. As Ms Chao rightly submitted, it is simply impossible for the plaintiff to answer such claims relating to Ka Wan because they are just not there in the present form of the Amended Defence and Counterclaim.
6. For the above reasons, the Insurance Defence as presently pleaded is unarguably bad and should be struck out.
7. In light of this conclusion, it is not necessary for me to deal with the other grounds put forward by the plaintiff. However, for completeness, I shall briefly deal with each of them.

*Estoppel*

1. Insofar as the estoppel as pleaded in paragraph 10 of the Amended Defence is concerned, the defendant relies on two grounds.
2. First, the defendant submits that the plaintiff has “made a waiver by election inconsistent with a tort claim” and therefore she should be estopped from claiming against the defendant. This point is further developed in the defendant’s skeleton submissions:

“26. The Plaintiff, as the Managing Director of Ka Wan, had 2 choices. The first was to keep the Advertisement Signboard, which was an illegal structure, and obtain benefit by leasing it out. As the owner of a flat in the Premises, she would take up the risk of facing legal actions without protection of the insurance companies. The second choice was to dismantle the Advertisement Signboard. The Defendant could then secure the Insurance Policy and obtain protection of the insurance companies.

…

28. The Plaintiff’s action would imply that she has chosen to indemnify any accident by herself and unfairly deprive the other owners of the Premises from having protection of the Insurance Policy. ...

29. The Plaintiff had taken the former route when she had clear notice of the Defendant’s problem of securing the Insurance Policy due to the Advertisement Signboard. She should be responsible for damages successfully claimed against the Defendant and the owners of the Premises, who have no other choices because of the Plaintiff’s deliberate and conscious decision to take the first route and ignore the Defendant’s failure to secure the Insurance Policy.”

1. The defendant seeks to rely on the passages in *Clerk & Lindsell on Torts* (20th ed) at paragraph 31-03 and *Balgobin v South West Regional Health Authority* [2013] 1 AC 582 at paragraph 29 which discuss the effect of an election out of two inconsistent remedies. In gist, if a person is entitled to one of two inconsistent remedies and has chosen one of them by an unequivocal act, he cannot afterwards pursue the other. He must be taken as having waived the latter remedy.
2. I do not consider that the above estoppel is arguable as a matter of law on the defendant’s pleaded case.
3. First, in the present situation, assuming all the facts are in favour of the defendant, namely, that it was due to the Extended Signboard that the defendant could not put in place insurance to cover the plaintiff’s personal injuries claim, it remains the case, which Mr Poon accepted at the hearing, that if the plaintiff succeeds in proving her personal injuries claim at trial, the defendant would remain liable to the plaintiff whether or not it can claim on any insurance policy. The plaintiff’s right to damages in this regard is not dependent on the existence of an insurance cover for the Building.
4. Any insurance cover is there to protect the defendant, rather than the plaintiff (or other potential claimants). It helps the defendant to pay up and satisfy any legal liability owed to a potential claimant. But it does not in any way operate to relieve the defendant from such liability. As such, there are no inconsistent rights open to the plaintiff as submitted by the defendant. The defendant remains liable to the plaintiff for her tort claim. The plaintiff may consistently claim damages from the defendant in respect of the Alleged Accident (rather than get reimbursement from the insurance company) and at the same time enjoy (though wrongfully) the benefits derived from the Extended Signboard.
5. Secondly, the passages relied upon by Mr Poon show clearly that the principle discussed there is relevant in the context of legal remedies. Where the waiver operates, it does so by barring a claimant from pursuing a legal remedy. It does not prevent a cause of action from arising in the first place. Examples of inconsistent remedies cited in the passage in *Clerk & Lindsell* include, for instance, a landlord’s choice to sue for rent rather than bringing ejectment proceedings by way of forfeiture for breach of covenant. Mr Poon could point to no authority which extends the application of such principle to support the Insurance Defence, which effectively bars a substantive cause of action from arising.
6. Next, the defendant relies on equitable estoppels in pais – see the defendant’s supplemental skeleton submissions (at paragraph 1):

“By the conduct of the Plaintiff in erecting the illegal signboard, she has prevented the Defendant from securing insurance policy for accidents similar to the alleged accident. The improper conduct of the Plaintiff has led to the situation with no insurance policy for the Defendant. She has by conduct represented that she has given up her right to be protected by insurance for such accidents. Therefore, she is estopped from claiming against the Defendant.”

1. For the same reasons set out in paragraphs 38 and 39 above, I do not think that such estoppel can arise on the defendant’s factual case.

*Relevance of the Insurance Defence*

1. While the estoppel point is not arguable, I consider that the defence of set off as pleaded in paragraph 11(a) is potentially arguable (that is, assuming that the plaintiff was the owner of the Extended Signboard).
2. Although in her written submissions, Ms Chao argued that the Insurance Defence is wholly irrelevant to the Alleged Accident and the plaintiff’s alleged injuries and for that reason alone ought to be struck out. At the hearing, Ms Chao conceded that if the plaintiff was indeed the owner of the Extended Signboard, the defence of set off which is premised on the Insurance Defence can stay. I think that she is right in making that concession. This is because on that factual basis, the plaintiff is arguably in breach of the Building Management Ordinance and the Deed of Mutual Covenant and it is arguable that such breach has led to the defendant’s failure to obtain insurance cover and consequently be reimbursed for any damages that may be awarded to the plaintiff in the personal injuries action. The defendant has suffered loss as a result, for which the plaintiff is liable. The defence of set off against the plaintiff’s personal injuries claim thus potentially arises.
3. While it is true that the Alleged Accident and the matters raised in the Insurance Defence are independent events, there is no reason why they cannot be tried in the same action. The Insurance Defence operates as both a defence and a counterclaim. As noted in *Hong Kong Civil Procedure 2015 (Vol 1)* at paragraph 15/2/2, if a defendant has a valid cause of action of any description against a plaintiff, there is no necessity for him to bring a cross-action, unless his cause of action is of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the plaintiff’s claim.
4. In summary, it seems to me that (assuming that the plaintiff owned the Extended Signboard) there is an arguable basis on which the plaintiff might be entitled to seek relief under the Insurance Defence by way of set-off.

*Res judicata – the Lands Tribunal Action*

1. Under this head, Ms Chao submitted in her written submissions that since the Lands Tribunal Action was dismissed, it is “an abuse of process for the defendant to now reopen the identical matter of insurance which has already been or should have been brought forward in previous proceedings and which have, or could have, been decided in earlier proceedings.”
2. In light of the matters set out in paragraph 14 above, I think it is incorrect to say that the Lands Tribunal Action was dismissed. There was simply no adjudication on the merits of the defendant’s application. No order was made on the defendant’s application. In this regard, I agree with the defendant that the Insurance Defence does not amount to a re-litigation of the present subject-matter as no estoppel, whether cause of action estoppel, issue estoppel or *res judicata* can be said to have arisen by reason of the Lands Tribunal Action.

*Conclusion*

1. In conclusion, the Insurance Defence ought to be struck out for the reasons set out in paragraphs 17 to 42 above, as it is obviously unsustainable and bound to fail.
2. I should perhaps deal briefly with the defendant’s submission on the lateness of the striking out application. The application was taken out more than a year after the filing of the Amended Defence and Counterclaim. Discovery had already taken place and witness statements had been exchanged. However, given that the Insurance Defence as presently drafted is clearly unsustainable, I consider that it is one of those clear cases in which the defence should not be allowed to stay, notwithstanding the lateness: see, eg, *Poon Lai Bing v Golden Dragon Ltd trading as Club Paris*, CACV 136/2007, 13 December 2017 at paragraph 30.
3. By way of footnote, I should also add that the Insurance Defence is to be struck out pursuant to RDC Order 18 rule 19(b) and the inherent jurisdiction of the court, on the ground that it is obviously unsustainable. In substance, Ms Chao did not really pursue the striking out pursuant to RDC Order 18 rule 19(a) in her arguments as she had made references to the affidavit evidence which is plainly not allowed under that sub-rule.
4. I have come to the conclusion that the Insurance Defence, as pleaded, ought to be struck out. It simply does not plead or reflect the defendant’s case. While I have indicated my doubt on the viability of the case, I cannot say for sure that there is no realistic possibility of the Amended Defence and Counterclaim being amended to cure the defect. Accordingly, I do not think that the counterclaim should be dismissed now: see *Pido v Compass Technology Company Ltd* [2010] 2 HKLRD 537 at paragraph 27. The defendant should be given an opportunity to take such steps to make good its case against the plaintiff and/or Ka Wan. If it chooses not to take up this opportunity, it may face the consequence of not being allowed to bring such claim in the future: see *Total Lubricants HK Ltd v De Chanterac (No 2)* [2013] 2 HKLRD 838 at paragraph 40.
5. In the circumstances, I make the following orders:
   1. paragraphs 10(a) to (n) and 11(a) of the Amended Defence and Counterclaim be struck out;
   2. the whole of the Amended Counterclaim be struck out;
   3. unless within 21 days or such further time as may be agreed between the parties or allowed by the court, the defendant takes out a summons seeking leave to amend its Amended Defence and Counterclaim, the Counterclaim be dismissed;
   4. there will be a costs order *nisi* that the defendant pay the plaintiff’s costs of the application, with certificate for counsel; and
   5. there will be a summary assessment of the plaintiff’s costs on the papers. I direct that the plaintiff lodge and serve her statement of costs within 7 days from the date of this decision and the defendant lodge and serve its list of objections within 7 days thereafter.

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|  |  | (Winnie Tsui) |
|  |  | Deputy District Judge |

Ms Jolie Chao, instructed by Yip, Tse & Tang, for the plaintiff

Mr Jackson Poon, instructed by K.Y. Lo & Co., for the defendant