## DCPI 1119/2012

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1119 OF 2012

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##### BETWEEN

MOHAMMAD-ISHAQ Plaintiff

and

TRINITY WEALTH LIMITED trading as Defendant

BRILLIANT DELIGHT CLEANING CO.

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Coram : Deputy District Judge A. Yim

Date of hearing : 28 August 2013

Date of handing down Decision : 30 August 2013

# DECISION

1. This is the Defendant's application by summons issued on 19 April 2013("**Summons**") for the Statement of Claim dated 4 June 2012 to be struck out and for the action to be dismissed as against the Defendant, on the grounds that
2. it is scandalous, frivolous and vexatious, and/or
3. it is otherwise an abuse of the process of the Court, and/or
4. it may prejudice, embarrass or delay the fair trial of the action.

**Background**

1. According to the Statement of Claim, the Plaintiff's claim against the Defendant is for damages in respect of a traffic accident took place on 29 June 2009. The Plaintiff alleged the Defendant was his employer at the material time and the Defendant was negligence and breach of duties of employers in particular providing him with a defective vehicle, of which the Defendant was the registered owner.
2. The claim arises out of the fact that the Plaintiff was employed as a driver and assigned with the vehicle MN6532 (hereafter referred as the Vehicle) on 29 June 2009. The Defendant was the registered owner of the Vehicle. At the material time the Plaintiff drove the Vehicle along Castle Peak Road towards Tuen Mum from Nam Tei near lamp post FB 1347, for certain reason the Plaintiff lost control of the Vehicle, the front part of the Vehicle hit against the starting point of the anti-crash railing, a bollard and a road sign, the Vehicle then turned aside to its left on the road.
3. On the date of the accident, the Plaintiff was told by the Police that he needed to provide the Police with the relevant documents showing that he was the authorized driver of the Vehicle. Upon the Plaintiff’s request Mr Ngan on behalf of the Defendant issued a written confirmation dated 31st July 2009 to the Plaintiff.
4. Thereafter on 5 August 2009 the Plaintiff filed the Notification of Accident with the Labour Department with the assistance of his then solicitors Messrs. Lo, Wong & Tsui, stating that the Defendant was his employer. However, after the accident, periodical payments in the total amount of HK$172.888 for the Plaintiff’s sick leave was made to him by Mr Ngan trading as Sky Smark Transportation Co. (hereinafter referred as Sky Smark) until January 2011. In broad terms there are only three issues to be considered, namely
5. Is the identity of the employer an arguable issue?
6. Is the condition of the Vehicle an arguable issue?
7. How should the issue of costs be determined?

**Discussion**

Plaintiff’s employer

1. Sky Smark had contracted with the Defendant since December 2006 to carry lanundry for the Defendant to and from restaurants to the workshop of the Defendant, Sky Smark shall be responsible for the employment of the necessary drivers and labourers and the fuel, insurance premium etc of the vehicles provided by the Defendant. To cover the delivery workers and drivers employed, Sky Smark had taken out an Employees’ Compensation policy with Dah Sing Insurance Co. Ltd. (hereinafter referred as Insurance Co.). On 20 June 2011, the Plaintiff represented by Messrs Lo, Wong & Tsui received a further sum of $46,000 from the Insurance Co. for and on behalf of Sky Smark in full and final settlement of his intended employees compensation claim against the Insurance Co. and Sky Smark and or any other person arising from the accident in question without prejudice to any intended common law claim. A Release and Discharge was signed on the same day.
2. Sky Smark ceased business on 31 October 2011, yet Mr Ngan is still around. The Plaintiff chose instead to commence the present action against the Defendant on 4 June 2012, to claim against the Defendant as his employer. Mr Szeto for the Plaintiff submitted that the Release and Discharge is by no mean an admission or evidence that Sky Smark is the employer at the material time; the document is necessary for the conclusion of the intended ECC claim. Mr Szeto submitted there are other pieces of evidence showing that the Defendant was the employer, in particular the dealing between Mr Ngan and the Plaintiff and the written confirmation written by Mr Ngan after the traffic accident.
3. It is common ground that Mr Ngan was the proprietor of Sky Smark and the director and shareholder of the Defendant. The Defendant is carrying on the business of laundry for customers including restaurant, in the course of the business, the Defendant is required to carry laundry to and from restaurants. Mr Ngan commenced to trade as Sky Smark on 1 December 2006, and the Defendant contracted out of the transportation of the laundry to Sky Smark since 5 December 2006. Before that the Defendant has purchased the Vehicle in October 2006 and another vehicle was purchased earlier in June 2004, upon entering the contract with Sky Smark, Sky Smark could have the use of the vehicles according to the terms of the contract. The Plaintiff does not take issue upon the arrangement, apart from that he had no knowledge. The only reasonable inference is that the arrangement between Sky Smark and the Defendant is a genuine commercial arrangement.
4. The Plaintiff stated in paragraph 4 of his Reply that there was no written employment between him and the Defendant. The statutorily required employees compensation policy was taken out by Sky Smark, the relevant one was issued on 9 February 2009, covering the drivers employed driving the Vehicle in question. With the arrangement between Sky Smark, the Defendant would have no reason and needs to employ any driver or delivery worker.
5. The Plaintiff alleged that the Defendant as his employer provided him with the written confirmation that he has authority the Vehicle as a substitute driver. The written confirmation written by Mr Ngan as director for the Defendant was made upon the Plaintiff’s request to satisfy the Police that the Plaintiff was authorized to drive. According to the arrangement between Sky Smark and the Defendant, which Mr Ngan has direct knowledge; the Defendant allowed Sky Smark to use the Vehicle according to the terms of the contract, thus there must be an implied authority to the driver employed by Sky Smark to drive the Vehicle. This hardly supports the Plaintiff’s case that there was an employment relationship with the Defendant.
6. Whereas the conduct of Sky Smark was consistent to that of the Plaintiff’s employer, he honoured his duty as employer to make the period payment, reported the matter to the Insurance Co., and settled the intended employees’ compensation claim via the Insurance Co. with the plaintiff. And this is that part of the background that the Plaintiff has omitted from his Statement of Claim though he deducted the total amount received related to the employees’ compensation in his Statement of Damages dated 4 June 2012.
7. The Plaintiff said the Release and Discharge is neither admission nor evidence that Sky Smark was his employer; then in what capacity he received periodical payment and settled with Sky Smark? It is clear from the evidence that Sky Smark and the Defendant are two separate entities, Mr Ngan was the sole proprietor of Sky Smark but he is only one of the directors of the Defendant and with about 12.5% shareholding of the Defendant at the material time. The Plaintiff did not mention Sky Smark in the Statement of Claim, and after Sky Smark is mentioned in the Defence, the Plaintiff in paragraph 4, 5 and 12 of his Reply stated that there was no written employment contract between the Plaintiff with either the Defendant and/or Sky Smark and admitted Sky Smark paid him salary at the material time, and that the periodic payment and settlement with Sky Smark is not directly relevant to the Statement of Claim. I agreed with Mr Hung for the Defendant that the Plaintiff and his then solicitor must have satisfied that Sky Smark was the employer and negotiated the settlement of the employees compensation claim accordingly.
8. According to the Plaintiff, he was dealing with Mr Ngan during his course of employment, this is consistent with the arrangement between Sky Smark and the Defendant, as Mr Ngan was the proprietor of Sky Smark. Further the conduct of the Plaintiff and Sky Smark after the accident in relation to the periodical payment and settlement of the intended employee compensation claim also consistent with the arrangement between Sky Smark and the Defendant. I consider the evidence as stated in the various affirmations as a whole point clearly that the Plaintiff was not employed by the Defendant but by Sky Smark at the material time. The identity of the employer is not an arguable issue.

The Condition of the Vehicle

1. Mr Szeto conceded that where there was no employment relationship between the Plaintiff and the Defendant, the only ground for claim against the Defendant would be under agency that the Defendant as the principal provided a defective vehicle to his agent, the Plaintiff, was liable for negligence, as the Plaintiff was driving the subject vehicle with permission and for the benefit of the Defendant. Agency is not specifically pleaded, however, Mr Hung does not take issue on this, and instead he focused on his submission that the Vehicle was not defective. Mr Szeto also agreed that if the Vehicle was not defective, the Plaintiff would have no claim against the Defendant, where there was no employment relationship between the parties.
2. It is common ground that the Plaintiff was not prosecuted for any traffic summons related to the accident in question. Both parties relied on the M.V.E. Accident Report prepared shortly by the Police after the accident. In that report no defects was found upon examination apart from damage defects resulted from the accident and the pressure of the front nearside tyre was unsatisfactory. The Plaintiff in paragraph 6 of his Statement of Claim stated that “at the material time, the braking system and the steering system and the tyre of the Vehicle were defective.” The Plaintiff’s complaint related to the braking system and the steering system cannot be true.
3. Mr Szeto submitted that the M.V.E. Accident Report stated that the pressure of the front nearside tyre of the Vehicle was unsatisfactory, thus the Vehicle is defective. Mr Hung on the other hand submitted the report should be read as a whole with reference to the accident, and he referred to the description of the accident by the Police during the cautioned interview of the Plaintiff, in which the Plaintiff said he understood and had nothing to say. The description of the accident being “you failed to have a proper control of MN6532, that made MN6532’s front part hit the starting point of the anti-crash railing, a bollard and a road sign, MN6532 was turned aside to its left on the road.” This description is consistent to the Plaintiff’s account in his affirmation (paragraph 17) that the Vehicle went out of control and ran onto the pavement on the left of the Road and then turned over onto the Road and the findings of the damage defects as per the M.V.E. Accident Report, in particular the nearside front wheel rim buckled and tyre deflated.
4. Mr Hung submitted that the nearside front tyre’s pressure was found to be unsatisfactory was because the tyre was deflated after the accident, and the Vehicle provided by the Defendant was not defective. Mr Szeto on the other hand, submitted that the unsatisfactory tyre pressure not necessary related to the accident, the tyre might have some inherent defective condition which caused the unsatisfactory tyre pressure yet he cannot be more specific as to what possible inherent defective condition the tyre would have, where the condition of the tyre was found to be satisfactory in the M.V.E. Accident Report, and said this could be ascertained from the examiner during the trial. All the tyres were with satisfactory condition (including the deflated one) and satisfactory pressure apart from the one deflated after the accident. With respect, I agreed with Mr Hung that any suggestion that the nearside front tyre was with inherent defective condition is a fanciful one. From the evidence relied on by both parties, it is clear that the Vehicle was in satisfactory condition before the accident. The condition of the Vehicle is not an arguable issue.

**Conclusion**

1. The principles are clear. It is only in plain and obvious cases that the court should exercise its summary powers to strike out the endorsement on any writ or any pleading under Order 18 rule 19. Disputed facts are to be taken in favor of the party sought to be struck out. The court should not decide difficult points of law in striking out proceedings. The claim must be obviously unsustainable, the pleading unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out. It is for the party seeking to strike out to demonstrate that the case is a plain and obvious one in which the other party's claim is bound to fail.
2. In my judgment, the Defendant has established that it is plain and obvious that the claim of the Plaintiff is unsustainable and bound to fail. I am satisfied that the Statement of Claim is frivolous and vexatious and lacks bona fides, and this is an abuse of the process, the proceedings should not be allowed to continued. The Statement of Claim should be struck out and the action should be dismissed.

**Costs**

1. I consider that there is no reason to depart from the usual principle that costs follow event. I therefore grant a costs order *nisi* to be made absolute within 14 days that the Plaintiff is to pay the Defendant costs of this action including the costs of the application by Summons with counsel certificate.
2. At the end of the discussion I indicated to the parties that I intend to summarily assess the costs, and the parties did not put up any comment to the contrary. Yet I noticed that the Plaintiff is legally aided, this may have some implication on the matter of costs, if the parties still elected to have the costs summarily assessed; they are directed to make joint application for such within 7 days, otherwise the costs are to be taxed if not agreed. The Plaintiff’s own costs be taxed according to the Legal Aid Regulation.

(Ada Yim )

Deputy District Judge

*Mr Patrick Szeto instructed by Or & Partners for the Plaintiff*

*Mr Andy Hung instructed by Messrs. Wong, Kwan & Co. for the Defendant*