# DCPI 4019/2019

[2020] HKDC 1083

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 4019 OF 2019

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BETWEEN

LEUNG Chung Tak Barry Plaintiff

and

WAN Hoi Ping Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (Open to Public)

Date of Hearing: 20 November 2020

Date of Decision: 20 November 2020

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DECISION

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*INTRODUCTION*

1. This is an appeal brought by the plaintiff against a master’s decision on a striking out summons taken out by the defendant.

*BACKGROUND*

*Procedural history*

1. This action arises out of a traffic accident on Sha Tau Kok Road on 23 March 2019 involving a private car registration number BK 809 (“BK 809”) which was driven by the plaintiff and another private car registration number RP 2628 driven by the defendant.
2. On 16 January 2020, the defendant admitted liability in this action, leaving damages to be assessed.
3. Interlocutory judgment was entered on 13 March 2020.
4. On 29 May 2020, the defendant took out a summons under Order 18, rule 19 of the Rules of the District Court Cap 336H (“RDC”) to strike out the plaintiff’s claim under §5 (under the heading of “Loss of Plaintiff’s Vehicle”) and §6 (under the heading of “Taxi Fare and Rental of a Replacement Vehicle”) in Section B (under the heading of “B. Particulars of Loss and Damage”) of the Statement of Damages (“the Impugned Paragraphs”) on the ground that those heads of damage constitute an abuse of the Court’s process and/or are frivolous and vexatious (“the Striking Out Summons”).
5. A supporting affirmation filed by the defendant’s solicitor confirmed that the registered owner of BK809 was in fact one Profit Power Engineering Limited (“Profit Power”), rather than the plaintiff. This fact is not disputed by the plaintiff.
6. At the hearing on 16 July 2020, Master Jacqueline Lee (“the Master”) struck out the Impugned Paragraphs (“the Master’s Order”).
7. By a Notice of Appeal taken out on 30 July 2020, the plaintiff seeks to overturn the Master’s Order.

*Issue Involved*

1. I agree with the defendant counsel Mr Dexter Leung that this appeal boils down to the following single question of law: *Is the plaintiff entitled to claim alleged losses arising out of damage to motor vehicle which, although driven by the plaintiff at the time of the accident, was owned by a limited company (even when the sole director and shareholder was the plaintiff himself)?*
2. The defendant submits that the answer is clearly in the negative. In short, the defendant submits that it has been well established that where a chattel is damaged by the negligence of a tortfeasor, only the owner of the chattel can claim damages for losses resulting therefrom. The defendant says that the Impugned Paragraphs plainly infringe the “proper plaintiff rule” and the “rule against reflective loss” and the Master was clearly correct in reaching her decision.
3. It is an undisputable fact that Profit Power is not a party to this action.
4. At the hearing before me, Mr Ching, solicitor for the plainitf, does not agree that this case involves the above legal question at all.

*Plaintiff’s belated attempts to remedy the defects*

1. On 15 July 2020 (ie the day before the hearing of the Striking Out Summons before the Master), the plaintiff filed a summons under Order 15 rule 6 and Order 20 rule 8 of the RDC for leave to add Profit Power as the 2nd plaintiff to this action (“the Joinder Summons”). However, the plaintiff did not serve the Joinder Summons on the defendant. This is perhaps not surprising as the Joinder Summons was issued less than 2 clear days prior to the hearing before the Master.
2. At the hearing on 16 July 2020, on the Master’s enquiry, the plaintiff’s solicitor stated that the Joinder Summons had not been served on the defendant and that the plaintiff would only rely on it as a “fallback position”.
3. By a letter dated 17 September 2020 to the defendant’s solicitors, the plaintiff’s solicitors enclosed a copy of the Joinder Summons which was marked “for your information” only.
4. Subsequently, on 21 September 2020, at the Checklist Review hearing, which also happened to be the return date of the Joinder Summons, the Master reminded the plaintiff to serve the Joinder Summons on the defendant.
5. On 13 November 2020, the plaintiff wrote to the defendant enclosing a copy of the writ of summons of a new action commenced by Profit Power against the defendant, namely, DCCJ 6069/2020, but stated “for your information only”.
6. On 14 November 2020, the defendant requested the plaintiff to clarify if the plaintiff was treating the Joinder Summons “as served, or still not served” by the letter dated 17 September 2020.
7. On 16 November 2020, the plaintiff stated that “(W)hether the [Joinder] Summons was served or not is a matter of fact. The important thing is that given the separate action of the owner, the [Joinder] Summons to amend will no longer be pursued.”
8. To date, neither the Joinder Summons nor the new writ in DCCJ 6069/2020 has been served on the defendant.

*DISCUSSION*

*Relevant legal principles*

*General principles relating to Order 58 rule 1 and Order 18 rule 19*

1. It is trite that an appeal from a master to a judge in chambers pursuant to Order 58 rule 1 of RDC is a hearing *de novo*. The judge treats the matter as though it has come before him/her for the first time. The judge will give the weight it deserves to the master’s decision, but is not bound by it (see: *Hong Kong Civil Procedure 2021, Vol 1* (“HKCP”), §58/1/2).
2. Order 58 rule 1(4) of RDC provides that no further evidence (other than evidence as to matters which have occurred since the order below) may be received on the hearing, except on special grounds.
3. In a personal injuries action, the statement of damages takes on the character of a pleading (see: HKCP, §18/12/52).
4. As stated above, the Striking Out Summons relies on two alternative grounds: (1) the Impugned Paragraphs are scandalous, frivolous or vexatious (ie Order 18 rule 19(1)(b) of RDC); and/or (2) the Impugned Paragraphs are otherwise an abuse of the process of the court (ie Order 18 rule 19(1)(d) of RDC).
5. The legal principles relating to applications for striking out pursuant to Order 18 rule 19(b) and (d) of RDC are well-established. As stated in HKCP:
6. Affidavit evidence is admissible for applications under Order 18 rule 19(1)(b), (c) and/or (d) (see: HKCP, §18/19/3(4)).
7. The applicant bears the burden of showing that it is a plain and obvious case that the other party’s claim is obviously unsustainable and bound to fail (see: HKCP, §18/19/4).
8. A claim is “frivolous” within the meaning of Order 18 rule 19(1)(b) when it is not capable of reasoned argument, without foundation or where it cannot possibly succeed (see: HKCP, §18/19/7).
9. Under Order 18 rule 19(1)(d), the Court will prevent an improper use of its machinery, for example where a claim is absolutely groundless or entirely without substance (see: HKCP, §18/19/9).
10. As Mr Ching for the plaintiff has rightly pointed out, it is for the party seeking to strike out an indorsement on a writ or pleading to demonstrate that the case is a plain and obvious one in which the other party’s claim is bound to fail: *The Artemis* [1983] HKLR 364; [1983] HKC 46.

*Negligence resulting in damage to and loss of use of a motor vehicle*

1. Mr Leung for the defendant relied on the judgment of Lord Mustill in *Giles v Thompson* [1994] 1 AC 142 at p154D-E, where it has been stated that there are 2 types of damages that may be awarded in litigation arising from motor accidents:
2. Damages for personal injury;
3. Damages related to the loss of or damage to the vehicle. Such damages may have 2 elements:
4. The diminution in value of the vehicle;
5. The financial loss suffered while the vehicle cannot be used whilst it is either being replaced (if written off) or undergoing repairs.
6. I consider the above principles are trite and are plain and obvious to any practitioners in the personal injury field.
7. I accept Mr Leung’s submission that the Striking Out Summons and the present appeal brought by the plaintiff only concerned with (2)(i) and (ii) above.
8. In respect of a claim for damages for diminution in value, Davies J distilled the relevant legal principles in *Zogiannis v Stevens* [2012] VSC 264 as follows:

“6. It is trite law that when goods are damaged by the negligence of a tortfeasor, *the owner* of the goods suffers an immediate and direct loss in consequence of the damage sustained and a cause of action accrues to *the owner* to recover that loss. The basic pecuniary loss recoverable by an owner in that circumstance is the diminution in the value of the damaged goods, on the principle that *the owner*is entitled to be put back, so far as money can do it, into the same position as if the damage had not occurred.” (emphasis added)

1. Thus, I accept the defendant’s submission that it is the owner of the damaged motor vehicle who has a cause of action against the tortfeasor to recover the diminution in value of the vehicle.
2. In respect of a claim for damages for loss of use, as observed by Lord Scott in *Lagden v O’Connor* [2004] 1 AC1067at §76 (p1093B):

“in car accident cases as in ship accident cases, the negligent driver must compensate the owner of the other car for his loss of use of the car while it is undergoing repair. If there is no more to the loss of use claim than that, the claim will be for general damages and a fair approach to quantum would be to award a sum based upon the spot rate hire charge for a comparable vehicle.”

1. Again, I accept the defendant’s submission that it is the owner of the vehicle who is entitled to make the loss of use claim.
2. As mentioned above, Lord Mustill observed in *Giles v Thompson* that a loss of use claim is also available where a vehicle is unrepairable and has been written off during the period when it is being replaced. In this connection, in *The Kowloon Motor Bus Co. (1993) Ltd v The Attorney General* [1984] HKLR 404, Hunter J (as he then was) noted at p407G that:

“it is not contested that if a vehicle is written off and then replaced specifically, and during the period of replacement the route is filled by a bus drawn from a standby facility, that during the time it took to obtain a replacement damages would be recoverable by the bus operator under this principle.” (emphasis added)

1. Similarly, the learned authors of *Charlesworth & Percy on Negligence* (14th edition, 2018) state at §§6-87, 6-91, 6-93 to 6-95 that in the case of damage to chattels, the owner of the chattel is the one who is entitled to claim damages for loss of use while the chattel is being repaired or replaced.

*The “proper plaintiff rule” and the “rule against reflective loss”*

1. As explained by Lord Millett NPJ in *Waddington Ltd v Chan Chun Hoo* (2008) 11 HKCFAR 370 at §47, it is trite that a company is a legal entity separate and distinct from its members. A company’s property belongs to the company and not to its shareholders. If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, I agree with the defendant’s counsel that where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue as plaintiff. No action lies at the suit of a shareholder suing as such.
2. The legal principles relating to the “rule against reflective loss” in the context of a strike out application were set out by Kwan VP in *Topping Chance Development Ltd v CCIF CPA Ltd*[2020] HKCA 478:
3. The underlying rationale for the no reflective loss principle is twofold. If the shareholder is allowed to recover in respect of loss that merely reflects the loss suffered by the company, either there will be double recovery at the expense of the defendant, or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; no discretion is involved (§21).
4. The no reflective loss principle is engaged not only where the company had the right to sue but also where it had declined or failed to sue, whether for lack of merits or lack of financial resources caused by the wrongdoer. It is not concerned with barring causes of action but with barring recovery of types of loss. It is based on the nature of the loss; what is important is that the company’s loss would be made good if the shareholder should recover from the defendant (§22).
5. As the no reflective loss principle is an exclusionary rule denying a plaintiff what otherwise would be his right to sue, the onus is on the defendant to establish its applicability (§23).
6. The court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. At the strike out stage, any reasonable doubt must be resolved in favour of the plaintiff (§24).

*Application of the law to the present case*

1. §5 of Section B of the Statement of Damages in this case pleaded as follows:

“5. Loss of the Plaintiff’s Vehicle

The Plaintiff’s Vehicle was severely damaged in the accident. As the Plaintiff was taken to hospital shortly after the accident, the Plaintiff’s Vehicle was towed to a garage, as arranged by the Defendant for the Plaintiff on the day of the accident. The **towing charges were in the sum of HK$700.** The next day, The [*sic*] Plaintiff attended the garage and arranged for the towing of the wreck back to Kowloon Bay Service Centre of the dealer of “Audi” motor vehicles for examination and repairs. However, it was soon found to be damaged beyond economic repairs in the accident. The accident was reported to the Bank of China Group Insurance Company Limited, the motor insurers of the Plaintiff’s Vehicle at the time of the accident. **After deducting a sum of HK$5,000 being excess, a sum of HK$382,000 was paid to and received by our client.** The Plaintiff has been authorized to recover the outlay by the insurers. Some accessories equipped in the Plaintiff’s Vehicle were also damaged or lost. The Plaintiff is making claims for all the losses.” (original emphasis)

1. I agree with Mr Leung’s submissions that the following are the salient facts in this case regarding the above pleaded facts:
2. Contrary to the assertion that BK809 was the “Plaintiff’s Vehicle”, Profit Power was in fact the registered owner of BK809 at the material time of the accident.
3. that the plaintiff has been less than forthcoming and has refused to answer the defendant’s query (contained in the letter dated 18 March 2020 from the defendant’s solicitors) as to whether BOC Insurance (being the insurer in respect of BK809) had authorised the plaintiff specifically (as opposed to Profit Power) to claim against the defendant for losses resulting from damage to BK809. The plaintiff’s stance is set out in the letter dated 17 April 2020 from the plaintiff’s solicitors as follows:

“Our client is the beneficial owner of the vehicle in question which was registered under a limited company in the name of “Profit Power Engineering Limited” of which our client is the sole director and shareholder. Thus, we maintain that our client is the proper claimant. In any event, our client would be willing to give an undertaking to transfer all the damages received on behalf of the company, into the bank account of the company, if necessary.

Regarding the claim for loss of the vehicle, the proper measure of damages is the difference between the market values of the vehicle before and after the accident. Thus, the question of how much our client received from his own insurers is irrelevant. It remains a matter between our client and the insurers. Again, if any undertaking would be necessary, our client would be willing to give the same.”

1. I agree with Mr Leung that the plaintiff’s stance as to his own standing is unsustainable as a matter of law. The mere fact that the plaintiff is the sole director and shareholder of Profit Power does not thereby render him the beneficial owner of BK809 (being the property of Profit Power). As set out in §§30-31 above, only the owner of a chattel can recover damages for the diminution in value of the chattel.
2. Accordingly, in my judgment, the plaintiff’s claim in §5 of Section B of the Statement of Damages was plainly and obviously wring and bound to fail. The Master was absolutely right to strike it out.
3. Under §6 of Section B of the Statement of Damages, the plaintiff’s pleaded claim therein is as follows:

“6. Taxi Fare and Rental of a Replacement Vehicle

From date of the accident until 18th April 2019, the Plaintiff mostly travelled by taxi, and incurred taxi fares as a result. Then, the Plaintiff hired a replacement vehicle from 18th April 2019 to 17th June 2019 (for 2 months) at the rate of HK$16,500 per month, from Inchcape Mobility Limited, totalling **HK$33,000**. Thereafter, on about 18th June 2019, a new car was purchased. However, extra loading of about **HK$5,929.20** was imposed upon buying insurance for the new car as a result of the insurance claim made as a result of the traffic accident in question. A sum of **HK$560** was also paid to the Transport department for retaining the registration number from the Plaintiff’s Vehicle for the new car. The Plaintiffs is making claims for all the losses.” (original emphasis)

1. As discussed in §§32-35 above, as a matter of legal principle, only the owner of a chattel which is damaged by the negligence of a tortfeasor can recover damages for the loss of use of the chattel. Therefore, in the present case, the plaintiff is not entitled to recover the cost of the replacement vehicle hire.
2. Nor is the plaintiff entitled to claim the cost of retaining the registration number of BK809 (given that BK809 belonged to Profit Power and not the plaintiff) and the “extra loading” in respect of the motor vehicle insurance policy (as the owner of BK809 and the insured was Profit Power rather than the plaintiff).
3. In my judgment, the plaintiff’s claim in §6 of Section B of the Statement of Damages was clearly unsustainable and again it was rightly struck out by the Master.

*The plaintiff’s submissions*

1. With respect to Mr Ching, in my judgment, both the plaintiff’s written and oral submissions contain no real substance at all.
2. Besides citing some passages on the general principles under §§58/1/2, 18/19/4, 18/19/7 and 18/19/8 of the HKCP, the submissions contain no explanation or clarification as to why, as a matter of law, the plaintiff is entitled to make those claims on behalf of the owner of BK 809 under §§5&6 of the Statement of Damages. It provides no legal principles or authorities to support his proposition. It merely consists of rhetoric conjunctures without any proper legal foundation.
3. For example, in relation to the claims under §5 of Section B of the Statement of Damages, the plaintiff makes the bold assertion that “the plaintiff being the *beneficial owner* of the vehicle could have made the claim for the loss of the vehicle damaged beyond repairs, in his own name as the beneficial owner thereof, or as an agent for the legal owner as he is also the sole director and shareholder of the owner company” (emphasis added) , yet he has failed to plead this in the Statement of Damages itself or to support this with any legal authorities to demonstrate why this is the case. The plaintiff has also failed to deal with any of the legal propositions put forward by the defendant’s counsel as expounded above.
4. Mr Ching keeps repeating this theme in his oral submissions at the appeal hearing today but without giving the court any authorities to support his proposition. He accepts that he has not pleaded the fact that the plaintiff was claiming the special damages items in respect of the vehicle in his capacity as the “beneficial owner” of the vehicle. He concedes that he does not have any authority to support his proposition that “the beneficial owner can make a claim on behalf of the legal owner without making a plea of that in the pleading itself”.
5. In my judgment, the same could be said of how the plaintiff deals with §6 of his claim under the Statement of Damages. Mr Ching submits that the plaintiff could, in his capacity as the “beneficial owner”, claim for taxi fares; costs of hiring a replacement vehicle for 2 months; costs of extra insurance loading when buying a new car; and the fee of retaining the registration number from the damaged vehicle for the new car as “damages for loss of use, or special damages” himself and not by the owner of the vehicle, yet he has provided no legal basis of why this should be the case. With respect, I do not see how that could be the case at all when he was not even the owner of the vehicle and on the pleading itself there was no plea to say that he was claiming those items in his capacity as “beneficial owner”.
6. In my judgment, the plaintiff’s contention contained in his written submissions that the Master “ought not have been struck out [the Impugned Paragraphs] when the “defects” of the pleadings could have been cured by amendments” is totally misconceived.
7. As stated in §§12-18 above, the Joinder Summons was not an application before the Master at the hearing of the Striking Out Summons on 16 July 2020. The Master quite rightly refused to hear the application on that day. To date, the Joinder Summons has not been served on the defendant and the plaintiff’s latest position is that he no longer seeks to make an application to join Profit Power as a plaintiff to this action. Similarly, the new writ taken out by Profit Power has not been served on the defendant. In my view, the plaintiff can either amend the pleadings in the existing case to include Profit Power as the 2nd plaintiff to claim for those items or he can take out and serve a new writ on the defendant to make a fresh claim against the defendant for the same. He did neither of those things. He needs to nail his colours to the mast. He cannot blow hot and cold on this matter.

*CONCLUSION*

1. For the reasons set out above, I find the plaintiff’s appeal contains of no merits at all and I have no hesitation to dismiss it and uphold the Master’s decision.
2. Hence, I shall make the following order:
3. The plaintiff’s appeal be dismissed;
4. Costs of and occasioned by this appeal be paid by the plaintiff to the defendant forthwith, such costs to be taxed if not agreed, with certificate for counsel; and
5. Such costs will be summarily assessed by this Court by way of paper disposal. For that purpose, the defendant is directed to lodge with the clerk of the Court a statement of costs and serve a copy on the other side within 7 days and the plaintiff is directed to lodge a list of objections, if any, within 7 days thereof, with copy served on the defendant.

( Andrew SY Li )

District Judge

Mr Ching Ming Yu, of Messrs Ching & Co, for the plaintiff

Mr Dexter Leung, instructed by Messrs Hastings & Co, for the defendant