

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
HIGH COURT ACTION NO 2599 OF 2016**

BETWEEN

KOO MING KOWN

Plaintiff

and

SECURITIES AND FUTURES COMMISSION Defendant

Before : Master M Wong in Chambers (Open to Public)

Date of Hearing : 25 April 2017

Date of Handing Down of Decision : 21 July 2017

DECISION

Background

1. By its summons dated 8 November 2016, the defendant applies to strike out the plaintiff's statement of claim filed on 7 October 2016 and to dismiss the plaintiff's action pursuant to Order 18, rule 19 of the Rules of the High Court.

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2. The defendant relies on the grounds that the plaintiff's statement of claim discloses no reasonable cause of action (Order 18, rule 19(1)(a)), is frivolous or vexatious (Order 18, rule 19(1)(b)), and/or is otherwise an abuse of the process of the court (Order 18, rule 19(1)(d)).

3. The defendant's summons is supported by an affirmation of Lee Ching Leung ("Mr Lee") filed on 8 November 2016. The plaintiff filed his affirmation in opposition to the defendant's summons on 21 November 2016. The defendant did not file any affirmation in reply.

4. In gist, the defendant makes this application because the plaintiff's claim is an attempt to enforce an alleged statutory duty to the public, and the alleged statutory duty is enforceable (if at all) only by judicial review.

5. At the hearing on 25 April 2017, the plaintiff mentioned that he wanted to apply for discovery of documents to support his allegations against Mr Chan Chi Mong Hopkins ("Mr Chan") in relation to his false qualification. He also wanted to amend his pleadings to include Mr Chan as a defendant in this case. He was, however, not permitted to make such applications because Master K Lo had made an order on 17 November 2016 to stay all further proceedings in this action.

6. Nevertheless, as the defendant's application is mainly based on the ground that the plaintiff has no reasonable cause of action and the plaintiff's case against Mr Chan as pleaded would be assumed to be true, there is no need to adduce evidence to support the plaintiff's allegations at this stage. The present application only concerns with whether there is a

A case against the defendant, not Mr Chan. So it is not necessary to include
B Mr Chan as a defendant before the present application can be considered.
C The plaintiff therefore agrees not to pursue with the intended applications
D for discovery and amendment of pleadings at this stage.

E *The plaintiff's case*

F 7. As stated in the Statement of Claim, it is the plaintiff's case
G that he is a Hong Kong citizen and a member of the public, and that the
H functions of the defendant is provided by section 5 of the Securities and
Futures Ordinance, Cap 571 ("the Ordinance").

I 8. The plaintiff alleges that Mr Chan has been appointed as
J Non-Executive Independent Director, Member of Audit Committee and
K Remuneration Committee of Pacific Online Limited, a listed company in
L Hong Kong, as well as Independent Non-Executive Director, Chairman of
M Remuneration Committee, Member of Audit Committee and Member of
N Nomination Committee of Talent Property Group Limited, another listed
O company in Hong Kong.

P 9. The plaintiff contends that Mr Chan is not a fit and proper
Q person to be so appointed as he has made false declaration of his academic
R qualification to the public. In particular, Mr Chan, as alleged by the
S plaintiff, has furnished information and/or declaration and/or statement to
T the Hong Kong Christian Council and/or some members of the public that
U he has a Ph. D degree from the European University of Ireland, but this
V university was not recognized by the Irish Government, had no degree

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B awarding authority under Irish law and its awards are not on the Irish
C National Framework of Qualifications.

D 10. The plaintiff contends that by an email dated 9 December
E 2015 (“the Email”), he had brought to the defendant’s notice of Mr Chan’s
F background, but the defendant declined to take any action, despite that the
G defendant is empowered under the Ordinance to conduct investigation into
H the appointments of Mr Chan in the two listed companies as aforesaid.

I 11. The plaintiff therefore claims against the defendant in this
J action for investigations to be conducted into the appointments of Mr Chan
K in the two listed companies, an order that the defendant do carry out its
L duties and responsibilities under the Ordinance to conduct the necessary
M investigation to ascertain that Mr Chan does not hold a valid or authentic
N doctoral degree and he made a false declaration of his academic
O qualifications to the public.

P 12. In the Statement of Claim, the plaintiff cited the whole section
Q 5(1) of the Ordinance, but it is not clear which particular provisions in
R section 5(1) he is relying on to make the aforesaid claims. In his
S affirmation, he states that “One of such functions requires to be undertaken
T by the Defendant is, as stated in Section 5(1)(d) of the said Ordinance, to
U promote, encourage and enforce the proper conduct, competence and
V integrity of persons carrying on activities regulated by [the Defendant]
under any of the relevant provisions in the conduct of such activities”.

13. Thus, it seems that section 5(1)(d) is one of the provisions the
plaintiff relies on. At the hearing, when he was asked to clarify which

A provisions in section 5 of the Ordinance he is relying on, he answered that
B he relies on section 5(1)(a), (b), (f) and (n). However, he did not mention
C section 5(1)(d) in his answer. Nevertheless, to take the plaintiff's case to
D the highest at this stage, I assume that he is relying on all the provisions in
E section 5(1) of the Ordinance.

F *The defendant's case*

G 14. The defendant contends that the statement of claim:

- H (1) discloses no reasonable cause of action because it contains no
I attempt to right a private wrong;
J (2) is frivolous and vexatious because the plaintiff pleads no, let
K alone no sufficient, interest in bringing the claim, and because
L it is subject to a statutory immunity; and
M (3) is an abuse of the process of the court because
N (a) it asserts exclusively a public law claim that must be
O brought, if at all, by judicial review,
P (b) it flouts the procedural protections afforded to public
Q bodies by the judicial review procedure.

R 15. Mr Lee, who is a Senior Manager in the External Relations
S Department of the Corporate Affairs Division of the defendant, explains in
T his affirmation how the Email was received and addressed. In sum, the
U defendant's External Relations Department took the view that the Email
V related to Mr Chan's role as a school supervisor and was not a matter within
the defendant's remit. Thus, no action was taken by the defendant.

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16. The plaintiff has issued a number of other writs seeking to raise the issue of Mr Chan's educational qualifications in different contexts. As exhibited in "LCL-3" of Mr Lee's affirmation, there are five other actions, including one against Mr Eddie Ng Hak-kim, the then Secretary of Education, and one against Ms Carrie Lam Cheng Yuet-ngor, the then Chief Secretary, as well as one against each of the two listed companies mentioned above, all duplicating the same basic allegation of a false declaration by Mr Chan of his academic qualifications to the Hong Kong Christian Council.

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17. The action against Pacific Online Limited (HCA 2333/2016) has already been struck out as frivolous and vexatious on the ground that the plaintiff had no sufficient interest in bringing the action. Although actions against others, even frivolous and vexatious actions, do not by themselves make the present action an abuse of the process of the court, the scattergun approach suggests that the present action is part of a campaign of vilification rather than a genuine attempt to seek relief from the court. As such, the existence of the five actions as exhibited in "LCL-3" may fortify any decision taken to strike out this action as an abuse of the process of the court.

The law

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18. The principles applicable to strike-out applications are well-known and set out in paragraphs 18/19/1 to 18/19/23 of the Hong

Kong Civil Procedure 2017 (“HKCP 2017”). In *Ha Francesca v Tsai Kut Kan & ors* (No 1) [1982] HKC 382, at 392, Silke JA said:

“My attention has been directed by counsel to the principles upon which the court acts on striking out applications. If I may encapsulate them, striking out should only be done in plain and obvious cases, there should be no trial upon affidavit. Disputed facts are to be taken in favour of the party sought to be struck out. The claim must be obviously unsustainable, the pleadings unarguably bad and that it be impossible, not just improbable, for the case to succeed before a court will strike out. If the court does not think the matter to be clear beyond doubt or if it fails to be satisfied that there is no reasonable cause of action or that the proceedings are frivolous or vexatious, then, there should be no striking out. One must be careful not to drive a plaintiff from the judgment seat nor should the court decide difficult points of law in proceedings such as this.

But that having been said, however difficult it may be, if the issue is plain, then the court can accede to a striking out application. There lies a discretion in the judge which discretion must, of course, be exercised judicially...”

19. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (see HKCP 2017, para 18/19/5).

20. The expression “frivolous or vexatious” includes proceedings which are an abuse of the process (see *E T Marler Ltd v Robertson* [1974] ICR 72 and *Ashmore v British Coal Corp* [1990] 2 QB 338), not capable of reasoned argument, without foundation or where it cannot possibly succeed (see HKCP 2017, para 18/19/7).

21. Since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the

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B process of the court for a plaintiff complaining of a public authority's
C infringement of his public law rights to seek redress by ordinary action (see
D *O'Reilly v Mackman* [1983] 2 AC 237 at 238).

E
F 22. It is appropriate that an issue which depends exclusively on
G the existence of a purely public law right should be determined in judicial
H review proceedings and not otherwise. But where a litigant asserts his
I entitlement to a subsisting right in private law, whether by way of claim or
J defence, the circumstance that the existence and extent of the private right
K asserted may incidentally involve the examination of a public law issue
L cannot prevent the litigant from seeking to establish his right by action
M commenced by writ or originating summons, any more than it can prevent
N him from setting up his private law right in proceedings brought against
O him (see *Roy v Kensington and Chelsea and Westminster Family
P Practitioner Committee* [1992] 1 AC 624 at 628H).

Q
R 23. However, purely public acts should be challenged by judicial
S review, and it is in the public interest that the legality of the formal acts of
T a public authority should be established without delay (see *Trim v North
U Dorset District Council* [2011] 1 WLR 1901, at 1907H-1908A).

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24. If the matters relied upon by the plaintiff in his Statement of
Claim are patently public law challenges, and yet, instead of proceeding by
way of judicial review, the plaintiff issues a writ in an action, he is
circumventing the usual procedure for advancing public law challenges in
terms of seeking leave for judicial review under section 21K(3) of the High
Court Ordinance and Order 53, rule 3 of the Rules of the High Court (see
Wong Fuk Tim v HKSAR Government & ors, HCA 1008/2011).

No reasonable cause of action

25. Section 5(1) of the Ordinance reads as follows:-

“5.(1) The functions of the Commission are, so far as reasonably practicable—

(a) to take such steps as it considers appropriate to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry;

(b) to supervise, monitor and regulate—

(i) the activities carried on by recognized exchange companies, recognized clearing houses, recognized exchange controllers or recognized investor compensation companies, or by persons carrying on activities regulated by the Commission under any of the relevant provisions, other than registered institutions; and

(ii) such of the activities carried on by registered institutions as are required to be regulated by the Commission under any of the relevant provisions;

(c) to promote and develop an appropriate degree of self-regulation in the securities and futures industry;

(d) to promote, encourage and enforce the proper conduct, competence and integrity of persons carrying on activities regulated by the Commission under any of the relevant provisions in the conduct of such activities;

(e) to encourage the provision of sound, balanced and informed advice regarding transactions or activities related to financial products;

(f) to take such steps as it considers appropriate to ensure that the relevant provisions are complied with;

(g) to maintain and promote confidence in the securities and futures industry in such manner as it considers appropriate, including by the exercise of its discretion to disclose to the public any matter relating or incidental to the performance of any of its functions;

(h) to co-operate with and provide assistance to regulatory authorities or organizations, whether formed or established in Hong Kong or elsewhere;

(i) to enhance the understanding and knowledge of members of the public of financial services including—

(i) the operation and functioning of the securities and futures industry; and

(ii) the benefits, risks and liabilities associated with purchasing financial services including investing in financial products;

(j) to encourage the public to appreciate the relative benefits of purchasing different types of financial services including investing in financial products through persons carrying on activities regulated by the Commission under any of the relevant provisions;

(k) to promote understanding by the public of the importance of—

(i) making informed decisions regarding the purchasing of financial services and transactions and activities related to financial products; and

(ii) taking responsibility for those decisions;

(l) to secure an appropriate degree of protection for members of the public investing in or holding financial products, having regard to their degree of understanding and expertise in respect of investing in or holding financial products;

(m) to promote, encourage and enforce—

(i) the adoption of appropriate internal controls and risk management systems by persons carrying on activities regulated by the Commission under any of the relevant provisions, other than registered institutions; and

(ii) the adoption of appropriate internal controls and risk management systems by registered institutions in the conduct of activities regulated by the Commission under any of the relevant provisions;

(n) to suppress illegal, dishonourable and improper practices in the securities and futures industry;

(o) to take appropriate steps in relation to the securities and futures industry further to any requirement of the Financial Secretary for the purpose of providing assistance in maintaining the financial stability of Hong Kong;

(p) to recommend reforms of the law relating to the securities and futures industry;

(q) to advise the Financial Secretary on matters relating to the securities and futures industry and provide him with such information in relation thereto as it considers appropriate; and

(r) to perform functions conferred or imposed on it by or under this or any other Ordinance.”

26. As aforesaid, the plaintiff did not state clearly in the Statement of Claim which provisions in section 5(1) he relies upon and I will assume that he relies on all the provisions therein. It is clear that all the provisions in section 5(1) refer to the functions of the defendant.

27. The defendant is a statutory body established under the repealed Securities and Futures Commission Ordinance, Cap 24, and continues in existence by virtue of section 3 of the Ordinance. Thus, section 5(1) simply sets out the functions of the defendant as a statutory body, and the defendant is only required to carry out such functions “so far as reasonably practicable”.

28. However, even assuming for the purposes of this application that all of the allegations in the Statement of Claim are true, including the falsity of Mr Chan’s academic qualification, the plaintiff:

- (1) claims no private rights against the defendant;
- (2) does not claim that the Ordinance gives him any right to require the defendant to conduct an investigation;

(3) does not claim that the Ordinance gives the public any right to an investigation, or that the defendant not conducting an investigation has caused him special damage;

(4) does not claim that the defendant is under a duty to conduct an investigation into Mr Chan's appointments, only that it is empowered to do so;

(5) makes no claim for damages.

29. There is simply no allegation of a private right, whether legal, equitable or otherwise, pleaded in the Statement of Claim, which the plaintiff seeks to enforce or protect. There is no claim in contract, e.g. no suggestion that the defendant had bound itself by contract to investigate; no claim in tort, e.g. no claim for breach of statutory duty or for nuisance or any other tort; no claim in equity, or for restitution; and no claim that the plaintiff's rights in private law have been infringed or are threatened with infringement in any way.

30. There is also no allegation that the defendant appointed Mr Chan to those positions or otherwise had anything to do with it. It is not alleged that the defendant has done any legal wrong to the plaintiff. The plaintiff's claim simply discloses no cause of action against the defendant.

31. All that is alleged against the defendant is that the defendant has not exercised an alleged power to investigate Mr Chan's appointments to the two listed companies. This by itself, however, cannot give rise to a private law cause of action. As held in *X (Minors) v Bedfordshire CC* [1995] 2 AC 633, at 730G and 732B, the breach of a public law right by

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itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action. The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.

32. It is clear to me that section 5(1) of the Ordinance sets out the general functions of the defendant and the defendant has discretion in the exercise of the functions in that the defendant is only required to carry out the functions "so far as reasonably practicable". Thus, there can be no specific statutory duty that could give rise to a private right of action.

33. At the hearing, the plaintiff submits that he is a potential investor of the two listed companies as he wanted to buy the shares of the two companies from the stock exchange. The defendant's failure in investigating into the appointments of Mr Chan in the two companies has prevented him from investing in these two companies and he has suffered loss as a result of not being able to invest in these companies.

34. I do not accept this argument at all. As the plaintiff has not bought the shares of these two companies, he simply has no relationship with them. There cannot be any loss to him when he does not even hold any shares in the two companies. Even assuming there is this loss of opportunity to buy the shares of these two companies, it does not mean that there is a loss to the plaintiff. The share value can go up or down depending on many factors. There is no guarantee that the plaintiff would definitely make a profit by buying the shares of these companies.

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35. In any event, this alleged loss is not pleaded in the Statement of Claim. Even if it is pleaded, there is simply no averment of violation of a private right for which relief might be claimed (see *Lau Wong Fat v Attorney General* [1997] HKLRD 533, at 537H).

36. In fact, the plaintiff does not even have a cause of action against the two companies, let alone the defendant. In HCA 2333/2016, the plaintiff's claim against Pacific Online Limited was dismissed as the court finds that there was no relationship between the plaintiff and Pacific Online Limited and the plaintiff has no locus standi to institute the action.

37. It is plain and obvious to me that the plaintiff does not have any private law claim against the defendant. What the plaintiff is trying to do in this action is to compel the defendant to exercise an alleged statutory power, which is a public law claim at most. It does not arise out of a private law claim, and there can be no claim for damages. As it is at most a purely public law claim, it must be brought by way of judicial review (see *O'Reilly v Mackman*, supra and *Trim v North Dorset District Council*, supra).

38. In the premises, I find that the plaintiff's claims have no chance of success. The Statement of Claim should therefore be struck out and the action dismissed for failure to disclose a reasonable cause of action.

Frivolous and vexatious

39. The defendant submits that the plaintiff does not disclose what, if any, interest he has in making this claim beyond being a Hong

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B Kong "citizen" and a member of the public. Had he made an application
C for judicial review, his first hurdle would have been to show that he had
D standing to make the application (see RHC Order 53, rule 3(7) and
Anderson Asphalt Ltd v Town Planning Board [2007] 3 HKLRD 18).

E 40. If the plaintiff has no sufficient interest in this claim, his
F application for judicial review would be unsustainable.

G 41. In addition, section 380 of the Ordinance confers an immunity
H from civil liability on the defendant. The defendant therefore submits
I that this action is frivolous and vexatious within the meaning of RHC
Order 18, rule 19(1)(b).

J 42. On the other hand, as submitted by the plaintiff at the hearing,
K he is making the claims because he has the interest as a potential investor
L of the two companies, even though that matter is not pleaded.

M 43. Even taking the plaintiff's alleged interest into consideration,
N there is still no sufficient interest that would give rise to a private law claim
O against the defendant as discussed above. Section 380 of the Ordinance
P would also bar the plaintiff from making a civil claim against the
defendant. Thus, the plaintiff's claim cannot possibly succeed.

Q 44. As mentioned above, it is trite that the expression "frivolous
R or vexatious" includes proceedings which are an abuse of the process, not
S capable of reasoned argument, without foundation or where it cannot
possibly succeed (see HKCP 2017, para 18/19/7).

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45. It is therefore frivolous and vexatious to proceed with a claim that cannot possibly succeed.

46. It is also frivolous and vexatious when there is an abuse of the process. As discussed below, I find that it is an abuse of the process, and hence frivolous and vexatious, for the plaintiff to make the claims in the present action.

Abuse of process

47. What the plaintiff is seeking to raise in this action is whether the defendant is right in declining to exercise its power to investigate the aforesaid appointments of Mr Chan. This should be an “application for a review of the lawfulness of a decision or failure to act in relation to the exercise of a public function”, which is one of the types of application that may be made by judicial review as defined in Order 53, rule 1A of the Rules of the High Court.

48. The plaintiff’s claims are in substance in the nature of a claim for mandamus to compel the exercise of the alleged power to investigate (see *Wade, Administrative Law*, 11th ed, 520-521; *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102; *Attorney-General v Clerkenwell Vestry* [1891] 3 Ch 527; and *Davy v Spelthorne Borough Council* (1983) 81 LGR 580).

49. Under section 21K(1) of the High Court Ordinance, Cap 4, and under Order 53, rule 1 of the Rules of the High Court, judicial review

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procedure must be used for a claim for mandamus. There is no discretion. An ordinary writ action claiming mandamus is not permissible.

50. Thus, it is totally wrong for the plaintiff to use an ordinary writ action to claim what are in substance orders of mandamus.

51. The case is clearly a purely public law claim. There is no question of overlapping with a private law claim and there is no possibility of a private law right or claim being jeopardised by the striking out of the Statement of Claim. Hence, this case does not fall within any exception to the general rule in *O'Reilly v Mackman*, supra (see *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*, supra).

52. There are safeguards of the judicial review procedure. Leave must be obtained from the court to proceed with an application for judicial review, and the applicant must establish that the case is arguable, he has sufficient interest to make the application and there is no delay in making the application before leave is granted. The plaintiff has evaded this requirement for leave when he uses a writ action instead. It is an abuse of process to circumvent these safeguards by using a writ action instead of a judicial review application (see *Wong Fuk Tim v HKSAR Government & ors*, supra).

53. I also accept the defendant's submission that by bringing all these actions against different parties based on the same allegation against Mr Chan, it shows that the present action is a campaign of vilification rather than a genuine attempt to seek relief from the court. As such, it is an abuse of the process of the court.

Conclusion

54. Thus, apart from having no reasonable cause of action, I am satisfied that the plaintiff's claims should also be struck out for being frivolous, vexatious and an abuse of process.

55. I therefore order as follows:-

- (1) The plaintiff's Statement of Claim be struck out and the action herein be dismissed.
- (2) Costs order nisi: the plaintiff do pay the defendant costs of the action including costs of the summons dated 8 November 2016 with certificate for counsel to be taxed if not agreed.

(Michael Wong)

Master of the High Court

The plaintiff acting in person

Mr Roger Beresford (counsel) for the defendant