

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 2333 OF 2016**

BETWEEN

KOO MING KOWN

Plaintiff

And

PACIFIC ONLINE LIMITED

Defendant

Before : Deputy High Court Judge To in Chambers

Date of Hearing : 27 April 2017

Date of Decision : 16 May 2017

DECISION

Introduction

1. This is the hearing of the Plaintiff's appeal against Registrar Lung's order dated 24 February 2017:

- (1) striking out his statement of claim and dismissing his action (the "Striking Out Summons");
- (2) dismissing his application to adjourn the hearing of the Striking Summons (the "Adjournment Summons");
- (3) dismissing his application for third party specific discovery (the "Discovery Summons"); and
- (4) ordering him to pay costs summarily assessed at HK\$180,000.

The background

2. The Defendant is a company incorporated in the Cayman Islands whose shares are listed on the Main Board of the Hong Kong Stock Exchange (stock code: 543). Its principal activity is the provision of internet advertising services.

3. One Mr Chan Chi Mong Hopkins (“Chan”) was appointed by the Defendant’s board of directors as one of its independent non-executive directors and member of the Audit Committee and Remuneration Committee (collectively, “the Appointments”).

4. The Plaintiff is a member of the public who is neither a shareholder nor an investor of the Defendant. He has no business dealings with or interests in the Defendant. He claims he is a potential investor interested in buying or short-selling shares in the Defendant and has been doing due diligence investigation in the Defendant. He alleges that in the course of his due diligence investigation, he discovered that Chan is not a fit and proper person to hold the Appointments. He alleges that Chan furnished false information about his academic qualification, specifically that he claimed to be the holder of a PhD degree conferred by the European University of Ireland which the Plaintiff says has been denounced by the Dublin education authorities as a bogus university. He therefore queries Chan’s integrity and honesty as a director and whether he has the academic qualification and experience to hold the Appointments.

5. On his instructions, his former solicitors, Messrs Wilkinson & Grist (“W&G”), wrote to the Defendant on 15 July 2015 asserting that

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the Defendant was in breach of the *Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited* (the “listing rules”) by not disclosing Chan’s professional and/or academic qualifications; and that Chan had misrepresented in the Candidate Form for the 2011 Election of Christian Electors to the Election Committee that he held PhD, MBA and BSc degrees. W&G requested the Defendant to disclose information about Chan’s professional and/or academic qualifications, and to procure Chan to confirm whether he had accurately provided his personal particulars in the Candidate Form in compliance with the *Elections (Corrupt and Illegal Conduct) Ordinance, Cap 554*. W&G threatened that if the Defendant does not provide the information within 7 days, the Plaintiff would file a complaint with the Securities and Futures Commission and the Hong Kong Stock Exchange, and to issue a petition seeking the information and Chan’s removal as a director of the Defendant and another company, namely Talent Property Group Limited, without further notice. A draft petition was enclosed in the letter.

6. On 22 July 2015, the Defendant’s solicitors, Messrs Li & Partners (“L&P”), rejected the Plaintiff’s requests. They asserted that his accusations against the Defendant were groundless, frivolous and/or vexatious; that his reliance on and interpretation of the listing rules were misconceived; that he has no interest to protect in making the request for information; that he has no *locus standi* to file the petition; and that his intended action was an abuse of the process of court. They threatened to seek to dismiss the petition, if filed, with indemnity costs.

7. On 9 September 2016, the Plaintiff commenced the present action and four other related actions. On 17 October 2016, the

Defendant issued the Striking Out Summons premised on Order 18, rule 19(1)(a), (b) and (d) and the court's inherent jurisdiction.

8. On 1 February 2017, the Plaintiff sought third party discovery under the Discovery Summons. On 10 February 2017, W&G proposed to adjourn the substantive hearing of the Striking Out Summons and to deal with the direction hearing for the Discovery Summons by way of consent. While a consent summons was filed in respect of the Discovery Summons on 14 February 2017, L&P rejected W&G's proposal to adjourn the hearing of the Striking Out Summons. On 16 February 2017, the Plaintiff issued the Adjournment Summons. At the hearing on 24 February 2017, Registrar Lung made the orders set out in paragraph 1, against which the Plaintiff now appeals.

The applicable legal principles

9. It is trite principle that an appeal against a master's decision to a judge in chambers is conducted by way of rehearing. The appellant has the right to open the appeal. The judge will determine its merit afresh. He may give weight to the master's decision but is not bound by it. See: *Hong Kong Civil Procedure (2017)*¹.

10. The court has jurisdiction under Order 18, rule 19 of the *Rules of the High Court* or its inherent jurisdiction to strike out pleadings at any stage of the proceedings on the ground that:

- (a) it discloses no reasonable cause of action or defence, as the case may be; or

¹ Vol 1, para 58/1/2

- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court.

The Defendant relies on grounds (a), (b) and (d).

11. The legal principles applicable to striking out applications are well established. See: *Hong Kong Civil Procedure (2017)*². Very briefly, 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. See *Ha Francesca v Tsai Kut Kan (No 1)*³. If the defective statement of claim could be amended to savage the deficiency, it should not be struck out nor should the claim be dismissed. The plaintiff should be allowed to produce a draft or proposed amended statement of claim to the judge at the time of the hearing. If the defect is curable by the proposed amendment, leave should be granted to amend the statement of claim and the striking out application dismissed. See: *Patriarch Partners Media Holdings LLC v Wong Siu Wa Sammy & Another*⁴.

² Vol 1, paras 18/19/4 to 18/19/7, 18/19/9 to 18/19/13
³ [1982] 1 HKC 382 at 392, *per* Fok JA, (as he then was)
⁴ (unreported) CACV 248/2014, 22 May 2015

Locus standi

12. The core issue underlying the striking out application is the Plaintiff's *locus standi* in instituting this action. In *佛山市宏達發展公司清算組 v East Legend Investment Ltd*⁵, the Court of Appeal held that it is not appropriate to raise the challenge as to the plaintiff's *locus standi* by way of defence. It must be raised at the outset or when it comes to the attention of the court or of the defence in the course of the proceedings. Once the issue has been raised it must be decided. It would be wrong to allow the action to go on without deciding the issue of standing because the defendant will not have a further chance to challenge it. Once it is clear that the action was improperly constituted, it must be brought to an end either by way of dismissal, striking out or stay. If a plaintiff has no *locus standi*, it must necessarily follow that his statement of claim, however well pleaded, could disclose no reasonable cause of action on his part and may also be scandalous, frivolous or vexatious. It may prejudice, embarrass or delay the fair trial of the action, which is bound to fail. Such a statement of claim must therefore be struck out and the action dismissed.

13. At the hearing before the Registrar, this issue was raised by the Defendant. By the Adjournment Summons, the Plaintiff sought an adjournment to allow him to obtain evidence of the falsity of Chan's academic qualification and to amend his Writ of Summons and Statement of Claim so as to join Chan as a defendant. He now complains that the Registrar wrongly refused his Adjournment Summons and wrongly struck out his Statement of Claim without allowing him the chance to amend it

⁵ [2009] 1 HKLRD 169 at para 18

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so as to join Chan as a co-defendant. He argues that the amendment, if allowed, would have given him *locus standi*. The Plaintiff has now produced a draft Amended Statement of Claim prepared by W&G. As the appeal is by way of a rehearing, I shall consider the merit of this appeal on the basis of both the Statement of Claim as it now stands and the draft Amended Statement of Claim.

14. In the draft Amended Statement of Claim, the Plaintiff added Chan as the “2nd Defendant”. He referred to webpages in which Chan had allegedly claimed to be a holder of a PhD degree issued by the European University of Ireland. He surmised that the MBA degree allegedly held by Chan was issued by another bogus university, namely Barrington University of the United States. He asserted that Chan’s false declaration about his PhD and MBA degrees put his integrity into serious question. Chan is therefore not a fit and proper person to take up the Appointments and the Defendant, being a listed company, owed a duty to the public and ought to have conducted due diligence investigation on Chan to make sure that he is a person with high integrity when he was first appointed to the Appointments. Except for adding Chan as a party, these pleas added little if not nothing new to what he has already pleaded in the Statement of Claim.

15. In paragraph 16 of the draft Amended Statement of Claim, the Defendant asserted that shares in the Defendant is one of the designated securities eligible for short selling pursuant to the List of Designated Securities Eligible for Short Selling dated 15 February 2017 issued by the Hong Kong Stock Exchange. He alleges that due to the Defendant’s and Chan’s failure to disclose the details of Chan’s academic

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record, he cannot conduct any proper due diligence investigation on the Defendant. He was thus deprived of the opportunity to invest or short sell shares in the Defendant and suffered loss. He emphasised on the significance of Chan's appointment as an independent non-executive director and member of the Audit Committee in influencing the authenticity of the Defendant's financial reports.

16. In paragraphs 17 and 18, he seeks an order against the Defendant that it investigates into Chan's academic qualifications and Appointments; and an order against the Defendant and Chan that the Appointments be revoked and terminated with immediate effect.

17. For the purpose of this appeal, I shall assume what he pleads in the draft Amended Statement of Claim is true; specifically that Chan had made false representations about his academic qualifications and is an unfit and improper person to take up the Appointments. The remaining issue is whether the Plaintiff has *locus standi*.

18. The Plaintiff made very lengthy written submissions, which he repeated and highlighted orally in court. However, he made no claim that he is a shareholder or member of the Defendant or that he has business or other beneficial interest in the Defendant or its shares. He asserts that honesty and integrity are important qualities of a company director. He asserts that he is now 73 years old, was the founder, managing director, executive director, chief financial controller and chief executive officer of a listed company in various stock exchanges in the United States of America, Canada and Germany. That company also has subsidiaries listed in the Hong Kong Stock Exchange. He claims he is

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vastly experienced as a company director. Not with any disrespect, I do not think his age and remarkable experience could be give him any *locus standi* to seek the remedy he sought in this action.

19. The highest he can put his case of *locus standi* is, as asserted in paragraph 16 of the draft Amended Statement of Claim, that he is a potential investor intending to buy or short sell shares in the Defendant. He argues that a listed company owes a duty to answer reasonable enquiries raised by a potential investor. He relies on section 214 of the *Securities and Futures Ordinance, Cap 571* and rules 3.08(a), 3.10 and 3.21 of the *Main Board Listing Rules of the Stock Exchange of Hong Kong Limited* (the “*Main Board Listing Rules*”) as the basis of the Defendant’s duty to investigate into the honesty, integrity and academic qualifications of its directors and to answer enquiries raised by its potential investors.

20. Section 214 of the *Securities and Futures Ordinance* gives the Commission a right to petition to the Court of First Instance to seek certain orders against a listed company if its business or affairs have been conducted in a manner oppressive or unfairly prejudicial to its members; involving defalcation, fraud, misfeasance or other misconduct towards the company or its members; or resulting in its members not having been given all information with respect to its business or affairs that they might reasonably expect. The section does not create any obligation on the company towards a potential investor or member of the public who is not a member of the company. In addition, the remedy under this section is only available to the Commission or through it indirectly to members of the company. Even if the Defendant has conducted its business in any

way as to invoke the operation of the section, it is the Commission which has the *locus standi* to seek the remedy in court, not the Plaintiff.

21. I now turn to the Plaintiff's reliance on the *Main Board Listing Rules*. These rules are reproduced hereunder for easy reference.

Rule 3.08 provides as follows:

“ 3.08 The board of directors of an issuer is collectively responsible for its management and operations. The Exchange expects the directors, both collectively and individually, to fulfil fiduciary duties and duties of skill, care and diligence to a standard at least commensurate with the standard established by Hong Kong law. This means that every director must, in the performance of his duties as a director: -

- (a) act honestly and in good faith in the interests of the company as a whole;
- (b) act for proper purpose;
- (c) be answerable to the issuer for the application or misapplication of its assets;
- (d) avoid actual and potential conflicts of interest and duty;
- (e) disclose fully and fairly his interests in contracts with the issuer; and
- (f) apply such degree of skill, care and diligence as may reasonably be expected of a person of his knowledge and experience and holding his office within the issuer.

Directors must satisfy the required levels of skill, care and diligence. Delegating their functions is permissible but does not absolve them from their responsibilities or from applying the required levels of skill, care and diligence. Directors do not satisfy these required levels if they pay attention to the issuer's affairs only at formal meetings. At a minimum, they must take an active interest in the issuer's affairs and obtain a general understanding of its business. They must follow up anything untoward that comes to their attention.

Directors are reminded that if they fail to discharge their duties and responsibilities, they may be disciplined by the Exchange

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B and may attract civil and/or criminal liabilities under Hong Kong law or the laws of other jurisdictions. B

C Note: These duties are summarised in 'A Guide on Directors' Duties' issued by the Companies Registry. In addition, C
D directors are generally expected by the Exchange to be D
E guided by the Guidelines for Directors and the Guide E
F for Independent Non-executive Directors published by F
G the Hong Kong Institute of Directors (www.hkiod.com). G
H In determining whether a director has met the expected H
standard of care, skill and diligence, courts will
generally consider a number of factors. These include
the functions that are to be performed by the director
concerned, whether he is a full-time executive director
or a part-time non-executive director and his
professional skills and knowledge." (The Plaintiff's
emphasis underlined.)

I 22. It seems that the Plaintiff is relying on Chan's I
J misrepresentation of his academic qualification, particularly the PhD and J
K MBA degrees, as his breaches of duty to act honestly and in good faith in K
L the interests of the company, which impose on the Defendant the duty to L
investigate and to answer a potential investor's enquiry. It is difficult to
see how a director's misrepresentation of his academic qualifications, as
distinct from his professional qualifications and experience as mentioned
M in the other rules, could amount to a failure to act honestly and in good M
N faith in the performance of his duties as a director. In fact, apart from N
O criticising Chan for misrepresentation, the Plaintiff has not advanced any O
P argument or allegation that Chan is not a fit and proper person to be a P
Q director of the Defendant. Even assuming that Chan was in breach of Q
R duty by his misrepresentation and that that creates a duty on the R
S Defendant to investigate into the director's breach of fiduciary duty S
T towards the company, it is impossible to argue that that creates a duty on T
U the company to answer questions raised by a potential investor, who is U
V not even a shareholder or member of the company or person beneficially V

interested in it. The duty to investigate, if at all it exists, is owed to the Hong Kong Stock Exchange under the *Main Board Listing Rules*. There is no duty under those rules requiring the company to answer any enquiries raised by the public as regards the qualification and fitness for appointment of its directors. If the Plaintiff has any genuine complaint against Chan in respect of compliance issue, he could and should have complained to the Hong Kong Stock Exchange or the Securities and Futures Commission or other regulatory bodies.

23. The next Main Board Listing Rule relied on by the Plaintiff is rule 3.10 which provides as follows:

“ 3.10 Subject to the transitional provisions in rule 3.19,

- (1) every board of directors of a listed issuer must include at least three independent non-executive directors; and
- (2) at least one of the independent non-executive directors must have appropriate professional qualifications or accounting or related financial management expertise.

Note: With regard to ‘appropriate accounting or related financial management expertise’, the Exchange would expect the person to have, through experience as a public accountant or auditor or as a chief financial officer, controller or principal accounting officer of a public company or through performance of similar functions, experience with internal controls and in preparing or auditing comparable financial statements or experience reviewing or analysing audited financial statements of public companies. It is the responsibility of the board to determine on a case-by-case basis whether the candidate is suitable for the position. In making its decision, the board must evaluate the totality of the individual’s education and experience.” (The Plaintiff’s emphasis underlined.)

24. The Plaintiff argues that since Chan’s PhD and MBA degrees were issued by bogus universities, he does not have the appropriate professional qualifications required of a non-executive director under

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rule 3.10(2). He was quoting selectively from that rule, which only stipulated that at least one, and not each and every one, of the three independent non-executive directors must have appropriate professional qualifications or accounting or related financial management expertise. Besides, these three qualifying requirements must be read disjunctively. Though the note to the rule provides that in making its decision, the board must evaluate the totality of the individual's education and experience, there is nothing to suggest that a non-executive director must have certain academic qualification, let alone a PhD or MBA degree from a recognised or accredited university. There is no pleading that the other two non-executive directors are not qualified such that the Defendant is in breach of this rule. The Plaintiff's argument that Chan does not have the necessary professional qualification and hence create a duty on the Defendant to investigate and to answer his enquiries must fail.

L 25. Next, the Plaintiff relies on rule 3.21 which reads:

M " 3.21 Every listed issuer must establish an audit committee comprising non-executive directors only. The audit committee must comprise a minimum of three members, at least one of whom is an independent non-executive director with appropriate professional qualifications or accounting or related financial management expertise as required under rule 3.10(2). The majority of the audit committee members must be independent non-executive directors of the listed issuer. The audit committee must be chaired by an independent non-executive director." (The Plaintiff's emphasis underlined.)

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Relying on this rule, the Plaintiff launches a similar argument about Chan's professional qualifications. This argument must also fail for similar reasons as stated in the preceding paragraph.

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26. The Plaintiff argues that being a listed company, the Defendant has the duty to investigate and answer enquiries raised by a potential investor as to the qualification and fitness for appointment of its directors. Apart from the *Main Board Listing Rules* discussed above, the Plaintiff cannot refer me to any statutory or common law rule creating such a duty to investigate and to answer enquiries raised by a potential investor as a member of the public who is neither a shareholder or member of the company. Who to appoint as its director and whether that director is qualified for appointment under the *Main Board Listing Rules* are matters for the company or its board of directors. If the Plaintiff is genuinely aggrieved by the Defendant's refusal to answer his enquiries, he should seek assistance from the Hong Kong Stock Exchange, the Securities and Futures Commission and other regulatory bodies. To ask the court to create a common law obligation on a company to investigate and to answer such matters raised by a potential investor is contrary to all principles of company law and tantamounts to asking the court to usurp the function of the company or its board. The company would be flooded by questions from curious bystanders and the courts will be flooded with unmeritorious actions.

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27. Except for enlarging his claim as a potential investor intending to short sell or buy shares in the Defendant, the draft Amended Statement of Claim cannot change the fact that the Plaintiff has no business or beneficial interest in the Defendant and is not a shareholder or member of the Defendant. These considerations are equally applicable to the Plaintiff's intended action against Chan as proposed in the draft Amended Statement of Claim. For the above reasons, I find that the Plaintiff has no *locus standi* to commence action against the Defendant

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B on the basis of the Statement of Claim as it now stands or against the
C Defendant and Chan as proposed in the draft Amended Statement of
D Claim.

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F *Ground (a) — Failing to disclose reasonable cause of action*

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H 28. Even if a statement of claim has pleaded a viable cause of
I action, if the plaintiff has no *locus standi* to pursue that cause of action, it
J must necessarily mean his statement of claim has disclosed no reasonable
K cause of action. On this ground alone, the Plaintiff's Statement of Claim
L must be struck out and the action dismissed.

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N *Ground (b) — Scandalous, frivolous or vexatious*

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P 29. The Plaintiff argues, quoting the Court of Appeal's decision
Q in *Jonathan Lu v Paul Chan Mo Po*⁶, that “惡意中傷” (“scandalous”)
R means malice and that “‘recklessness’ in jumping to conclusions which
S are irrational, reached without adequate inquiry or based on insufficient
T evidence is not enough to constitute malice if a defendant does believe in
U the truth of the statement”. His argument is based on the Chinese
V version of Order 18, rule 19 in which the word “scandalous” is translated
as “惡意中傷”, which he then translates into English as “malice” and not
“scandalous”. It should be noted that in *Jonathan Lu v Paul Chan Mo
Po*, the issue before the court was whether a defamatory statement was
made with malice. The word “malice” was construed in its technical
sense in the context of the law of defamation. The words “惡意中傷” or
“scandalous”, whether under the Chinese version or the English version
of Order 18, rule 19 has the same meaning and should be construed in the

⁶ [2016] HKCA 622; CACV 251/2015 (23 December 2016)

A context of pleading. A pleading is scandalous and liable to be struck
B out, if it contains degrading, indecent or offensive charges made against
C the plaintiff which are irrelevant or are for the sole purpose of abusing or
D prejudicing the other party: see: *Christie v Christie*⁷. On the other hand,
E allegations of dishonesty, immorality and outrageous conduct, however
F serious, are not scandalous and not liable to be struck out, if it is relevant
G or necessary to any issue in the action: see *Everett v Prythergch*⁸ and
H *Whitney v Moignard*⁹.

30. The Plaintiff has made allegations of dishonesty and lack of
I integrity against Chan. *Prima facie*, they are scandalous. I have not
J heard argument on either side as to whether they are necessary or
K unnecessary. But it appears to me in the context of the Statement of
L Claim that they are. The Statement of Claim is therefore not scandalous.

31. On the other hand, frivolous and vexatious pleadings refer to
M pleadings which are obviously unsustainable: see *Att-Gen of Duchy of*
N *Lancaster v L & NW Ry Co*¹⁰. The expression includes proceedings
O which are an abuse of the process: see *ET Marler Ltd v Robertson*¹¹. A
P proceeding is frivolous when it is not capable of reasoned argument,
Q without foundation or where it cannot possibly succeed. A proceeding is
R vexatious when it is oppressive and/or lacks *bona fides*. On my finding
S that the Plaintiff has no *locus standi* to pursue this action, it must follow
T that his Statement of Claim cannot possibly succeed. The proceeding is
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⁷ (1873) LR 8 Ch App 499

⁸ (1841) 12 Sim. 363

⁹ (1890) 24 QBD 630

¹⁰ [1892] 3 Ch 274 at 277

¹¹ [1974] 1 CR 72

therefore frivolous, vexatious and an abuse of process of court. The Statement of Claim must also be struck out on this ground.

Ground (d) — Abuse of the process of the court

32. The process of the court must be used *bona fide* and properly and must not be abused. Hence the court has power under Order 18, rule 19(d) and its inherent jurisdiction to strike out any proceeding which is an abuse of the process of the court to prevent improper use of its machinery as a means of vexation and oppression in the process of litigation: see *Castro v Murray*¹². To prosecute an action which has absolutely no chance of success is a clear case of abuse of the process of the court. The court will strike out proceedings which are absolutely groundless, time-barred (*Romex Properties Ltd v John Laing Construction Ltd*¹³), where the pleading is entirely without substance (*Hutchvision Asia Ltd v Asia Television Ltd*¹⁴) or where the plaintiff has no *locus standi*: see *Gurdas S Choithramani v Hong Kong and Shanghai Banking Corp Ltd*¹⁵. On my finding that the Plaintiff has no *locus standi*, that the Statement of Claim disclosed no reasonable cause of action, and that it is frivolous and vexatious, the action has no chance of success. It must necessarily follow that the proceeding is an abuse of the process of the court.

Conclusion

33. For the above reasons, the Statement of Claim as it now stands or as proposed to be amended in the draft Statement of Claim

¹² (1875) 10 Ex 213

¹³ [1983] QB 398

¹⁴ [1993] 2 HKC 510

¹⁵ Unreported, HCA 2073/2011; [2014] HKEC 810

A disclosed no reasonable cause of action. That being the case, it would
B serve no purpose to adjourn the hearing of the Striking Out Summons to
C enable the Plaintiff to amend it, or to enable him to obtain evidence as to
D the falsity of Chan's academic qualification through third party discovery.
E In any event, it is not necessary at this stage of the proceeding because for
F the purpose of this appeal, I proceed on the basis that all the allegations
G contained in the Statement of Claim and the draft Amended Statement of
H Claim are true. Accordingly, the Statement of Claim must be struck out
I and the action dismissed. It must necessarily follow that the Adjournment
J Summons and Discovery Summons must also be dismissed. In the
K circumstances, the costs order made by the Registrar, being one which
L follows the event, is appropriate.

34. For the above reasons, I uphold the order of the Registrar
K dated 24 February 2017 and dismiss the Plaintiff's appeal with costs. I
L also direct that the Defendant's costs be assessed summarily in chamber.
M The Defendant shall lodge its statement of costs with my clerk and serve
N a copy on the Plaintiff within 7 days; and the Plaintiff shall lodge his
O statement of objection with my clerk and serve a copy on the Defendant's
P solicitors within 7 days thereof.

(Anthony To)
Deputy High Court Judge

R The Plaintiff appeared in person
S Mr Anthony Chan, instructed by Li & Partners, for the Defendant
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