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HCA 2335/2016

**IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE**

HIGH COURT ACTION NO 2335 OF 2016

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BETWEEN

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| KOO MING KOWN | Plaintiff |
| and | |
| TALENT PROPERTY GROUP LIMITED | Defendant |

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

Date of Hearing : 8 May 2017

Date of Handing Down of Decision : 18 August 2017

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# DECISION

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*Background*

1. There are two summonses before me. The first summons is dated 13 October 2016 and filed by the defendant on 14 October 2016 to strike out the plaintiff's Statement of Claim pursuant to Order 18, rule 19 of the Rules of the High Court and/or the court's inherent jurisdiction and to have the plaintiff's action dismissed ("the Striking Out Application").

2. The second summons is dated 23 March 2017 and filed by the plaintiff on the same date to join Mr Chan Chi Mong Hopkins ("Mr Chan") as the 2nd defendant in these proceedings and to amend the Writ of Summons (including the Statement of Claim) as per the draft annexed to the summons ("the Amendment Application").

3. At the hearing on 8 May 2017, the plaintiff intended to appear in person for the Striking Out Application, but represented by counsel for the Amendment Application. I did not allow the plaintiff to adopt that course, as the two applications are inter-related and should be heard together. The plaintiff then decided to appear in person for both applications, but he adopts the written submissions prepared by his counsel for the Amendment Application in addition to making his own submissions.

4. The plaintiff also applied to stay or adjourn the hearing of the Striking Out Application on the grounds that (1) he had obtained some new evidence from another High Court case to prove that Mr Chan's academic qualifications were false, but he was prevented from disclosing those evidence by an injunction order in that High Court case, and (2) there are pending applications in the present case as well as three other High Court actions for discovery of documents relating to Mr Chan's academic qualifications. The plaintiff contends that it would be unfair for him to proceed with the Striking Out Application without such evidence.

5. However, as the defendant's main contention in the Striking Out Application is that the plaintiff has no cause of action known in law or any locus to make his claims against the defendant, the falsity of Mr Chan's

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academic qualifications is not really material to the Striking Out Application. In any event, the plaintiff's case against Mr Chan as pleaded is assumed to be true at this stage and hence there is no need to adduce evidence on the falsity of Mr Chan's academic qualifications for the purpose of the Striking Out Application.

6. I therefore refused to stay or adjourn the Striking Out Application as requested by the plaintiff, and proceeded to hear the Striking Out Application and the Amendment Application together at the hearing.

*The plaintiff's case*

7. As held in *LY Group Development Limited v East Canton Limited* [2015] 4 HKLRD 84, "where an application to amend a statement of claim which is sought to be struck out has been made, it would be more expedient and convenient to deal with the striking out application on the basis of the facts as pleaded in the proposed amended statement of claim". Thus, I will deal with the Striking Out Application based on the facts pleaded in the plaintiff's proposed Amended Statement of Claim.

8. As pleaded, the plaintiff is a Hong Kong citizen and a member of the public. The defendant is a company listed on the Hong Kong Stock Exchange with Stock Code 760. Mr Chan has been appointed by the defendant's board of directors to take up several positions in the defendant, namely an Independent Non-Executive Director, Chairman of the Remuneration Committee, Member of the Audit Committee and Member of the Nomination Committee.

9. The plaintiff contends that Mr Chan's integrity is questionable, as he has made false declarations of his academic qualifications in that his Ph. D degree obtained from European University of Ireland and his MBA degree obtained from Barrington University were not granted by proper and valid authority. Given the significance of integrity, Mr Chan's fraudulent academic qualifications show that he is a person of highly questionable ethics and integrity and cannot be a fit and proper person to be appointed to take up the said positions in the defendant.

10. The plaintiff pleads that as a listed company in Hong Kong, the defendant owed a duty to the public and ought to have conducted due diligence on Mr Chan to make sure that he is a person with high integrity when he was first appointed for the said positions. However, despite the plaintiff's repeated complaints to the defendant, the defendant failed to take immediate action to investigate Mr Chan's academic qualifications, and hence the defendant is in breach of its duty as a listed company in Hong Kong.

11. The plaintiff also pleads that by his emails dated 2 July 2015 and 7 July 2015, as well as by his solicitors' letter dated 15 July 2015, he requested the defendant to disclose the details of Mr Chan's academic records, but no positive response has been received. Thus, the plaintiff could not conduct any due diligence on the defendant, thereby he was deprived of the opportunity to invest in the defendant's stocks. The plaintiff alleges that he suffered loss and damage as a result of the loss of opportunity to invest in the defendant.

12. The plaintiff therefore claims against the defendant for: (1) an order that an investigation be conducted into Mr Chan's academic qualifications; (2) an investigation be conducted into Mr Chan's appointment of the said positions in the defendant; (3) an order that Mr Chan's said appointment be revoked and terminated with immediate effect; (4) damages to be assessed; and (5) costs.

*Grounds for striking out*

13. At first, the defendant relied on all four grounds mentioned in Order 18, rule 19(1) of the Rules of the High Court to strike out the Statement of Claim, namely (1) it discloses no reasonable cause of action; (2) it is scandalous or frivolous or vexatious; (3) it may prejudice, embarrass or delay the fair trial of the action; and/or (4) it is otherwise an abuse of the process of the court. At the hearing, the defendant confirmed that it will not pursue with the aforesaid third ground. Thus, I am only concerned with the other three grounds.

14. In addition, the defendant also relies on the court's inherent jurisdiction to make the Striking Out Application.

15. I shall consider these grounds as discussed below.

*No reasonable cause of action*

16. The defendant submits that the plaintiff's case, even in the Amended Statement of Claim, does not disclose any cause of action known in law. On this basis alone, the court should refuse the plaintiff's

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application to amend the Statement of Claim, strike out the Statement of Claim and dismiss the action.

17. The Amended Statement of Claim suggests that the cause of action in this case is a tortious one, as it pleads that as a listed company in Hong Kong, the defendant owed a duty to the public and ought to have conducted due diligence on Mr Chan to make sure that he is a person with high integrity when he was first appointed for the said positions in the defendant (see paragraph 13 of the Amended Statement of Claim).

18. It further suggests that the defendant has a duty to disclose the details of Mr Chan's academic records to the plaintiff when such requests were made (see paragraph 16 of the Amended Statement of Claim).

19. However, there is no relationship between the plaintiff and the defendant. On the plaintiff's own case, he makes his claim against the defendant not on the basis that he is a shareholder of the defendant, but simply as a member of the public and one of the prospective investors of the defendant which is a public trading company (see paragraph 14 of the plaintiff's Affirmation filed on 8 November 2016).

20. It is clear to me that the defendant as a public trading company does not owe the alleged duties to the plaintiff as a member of the public or as a prospective investor at all. There is simply no such duty of care existed in law.

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21. In fact, in a similar case brought by the plaintiff against another listed company, Pacific Online Limited, Mr Registrar Lung has already ruled that the plaintiff has no *locus standi* to bring the action against the defendant in that case (see *Koo Ming Kown v Pacific Online Limited*, HCA 2333/2016). The claim in that case is on all fours with the present case. As the defendant has no known duty of care towards the plaintiff, I also find that the plaintiff has no *locus standi* to bring the present claims against the defendant.

22. However, the plaintiff's counsel in his written submissions (which are adopted by the plaintiff) refers to the case of *Luen Hing Fat Coating & Finishing Factory Ltd v Wong Chuen Ming* (2011) 14 HKCFAR 14, in which the Court of Final Appeal adopted the approach of the English House of Lord's case of *Caparo Industries Plc v Dickman and others* [1990] 2 AC 605 in determining whether a duty of care exists between two persons. The Court of Final Appeal held that "whether a duty of care existed required a holistic view of foreseeability, proximity and the need to be satisfied that it would be fair, just and reasonable to impose a duty of care".

23. *Caparo* is a case where a shareholder sued for damages on the misstatement of the auditor's account, for the decreased value of the shares. The facts of the case are summarized in the headnote, which reads,

> "The plaintiffs, a public limited company, which had accomplished the take-over of F. Plc., brought an action against its directors alleging fraudulent misrepresentation and against its auditors claiming that they were negligent in carrying out the audit and making their report, which they were required to do within the terms of sections 236 and 237 of the Companies Act 1985. In the statement of claim the plaintiffs alleged that they had begun purchasing shares in F. Plc. a few days before the

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> annual accounts had been published to shareholders, that in reliance on those accounts they made further purchases of shares so as to take over the company, and that the auditors owed both shareholders and potential investors a duty of care in respect of the certification of the accounts and should have known that as F. Plc.'s profits were not as high as projected and its share price had fallen significantly, that it was susceptible to a take-over bid and that reliance on the accuracy of the accounts would be placed by any potential bidder such as the plaintiffs. On the trial of a preliminary issue against the auditors, on the facts as alleged, the judge determined that the auditors did not owe the plaintiffs a duty of care at common law either as a shareholder of F. Plc. or as an investor holding no shares. On appeal by the plaintiffs the Court of Appeal, by a majority, held that a duty of care was owed to the plaintiffs as shareholders but not as investors."

24. The holding of the House of Lords on the preliminary issue was that,

> "liability for economic loss due to negligent misstatement was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment; that since the purpose of the statutory requirement for an audit of public companies under the Act of 1985 was the making of a report to enable shareholders to exercise their class rights in general meeting and did not extend to the provision of information to assist shareholders in the making of decisions as to future investment in the company, and since, additionally, there was no reason in policy or principle why auditors should be deemed to have a special relationship with non-shareholders contemplating investment in the company in reliance on the published accounts, even when the affairs of the company were known to be such as to render it susceptible to an attempted take-over, the auditors had not owed any duty of care to the plaintiffs in respect of their purchase of F. Plc.'s shares"

25. Although the present case is not based on negligent statement, the plaintiff submits that the approach of the House of Lord (adopted by the Court of Final Appeal) in determining the existence and the scope of duty of care will be relevant to the present case.

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26. The plaintiff submits that the integrity of officers managing the company, in particular, an independent non-executive director in an audit committee who has influence on the authenticity of the financial reports, will obviously affect the share price and the decision of investing in that listed company. The "foreseeability" test is satisfied, or at least, arguable.

27. As to the test of "proximity", the plaintiff submits two points:

(1) Because of the function to be discharged by an independent non-executive director and audit committee, a listed company knows that the general public (who at the same time are also potential investor) will have a reasonable expectation in the integrity of those officers appointed for the purpose of maintaining corporate governance; and

(2) Furtherance of good corporate governance is a matter of public interest (see paragraph 5 of *Re Wing Fai Construction Co Ltd* [2006] 4 HKLRD 58). Nowadays "good corporate governance" is regarded as an integral part of proper operation of a listed company, and has become a proximal or immediate matter to be considered from the viewpoint of "investor relationship".

28. As to the question of whether it is fair, just and reasonable to impose a duty of care falls to be a value judgment based on the circumstances of that particular case. The House of Lords in the *Caparo* case held that there was no reason in policy or principle why auditor should be deemed to have a special relationship with non-shareholders

contemplating investment in the company in reliance on the published accounts.

29. The plaintiff submits that, although it was held by Bingham LJ (as he then was) in the *Caparo* case at the Court of Appeal ([1989] QB 653) that at the time of judgment it was not fair, just and reasonable to impose duty of care on the auditor to the non-shareholding investor regarding the contents in the audit report, he did not rule out that it might be just and reasonable to impose such duty in the future. His Lordship said at p.688A and 691H-692C that,

> "I come, therefore, to the third requirement to be satisfied by the plaintiffs, that it is in all the circumstances just and reasonable to impose a duty of care on a statutory auditor towards individual shareholders...
>
> If, contrary to my view, the plaintiffs can show sufficient proximity I should nonetheless conclude that it could not on the facts assumed satisfy the third requirement. It is true that the obligation to make the report and accounts available for public inspection, and the general commercial considerations to which I earlier referred, would weigh in favour of a duty not limited to shareholders. It could be said with force to be anomalous that a duty is owed to one who is registered as a shareholder at the date of the general meeting but not to one who becomes a shareholder thereafter and exercises his right to obtain a copy of the accounts under section 246. To extend the duty to non-shareholding investors adds nothing to the substance of what the auditor is in practical terms required to do. It merely increases his potential liability. But this would be a large extension of potential liability. Time and experience may show such an extension to be desirable or necessary. It is, however, preferable that analogical developments of this kind should be gradual and cautious. I am not at present persuaded that it would be just and reasonable, or politic, that the law should be extended so as to impose a duty when no more is shown than the facts the plaintiffs have pleaded." (underlines added)

30. Thus, the plaintiff submits that the concept of duty of care under tort law evolves as time passes. There is a special relationship between the company/corporate governance officer/potential investor regarding the question of the propriety of appointments in relation to corporate governance, which in turn affects the question of existence of duty of care, and the extent of such duty.

31. The plaintiff further submits that all the circumstances of the case have to be examined before the court can come to a conclusion of the question of duty of care. Therefore, the proper time to determine this question is at the trial of the action, where the trial judge will be equipped with the full facts. As Lord Bridge of Harwich said at p.617H-618E of the *Caparo* case at the House of Lords,

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of

the words of Brennan J. in the *High Court of Australia in Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1 , 43-44 where he said:

> 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'."

(underlines added)

32. The plaintiff therefore submits that it is at least arguable that the tests of "proximity" and "foreseeability" are satisfied, and that it is fair, just and reasonable to impose a duty of care on the company towards the general public or potential investor to take whatever steps to be satisfied that an officer who is appointed for the purpose of good corporate governance to have unquestionable integrity, and to remove any officer whose integrity is in doubt from the offices.

33. I do not accept the plaintiff's submissions that the law should now be changed to extend the duty of care of a listed company to prospective investors in the ways suggested by the plaintiff. First of all, there is no evidence adduced by the plaintiff on the factual circumstances that could justify the alleged extension of duty of care to the general public. If the alleged duties exist, they are not just duties owed to the plaintiff, but to many unspecified and unidentified members of the public. There must be very strong reasons and justifications to open such a floodgate for listed companies to have such huge potential liabilities towards the public. Good corporate governance does not mean that listed companies should be subject to such burdensome responsibilities to the general public at large.

I therefore do not agree with the plaintiff that the test adopted by the Court of Final Appeal in *Luen Hing Fat Coating & Finishing Factory Ltd*, supra, has been satisfied so as to establish a new duty of care.

34. It is not right to leave it to the trial court to decide on the extension of the law when there is simply no prima facie case existed for the change of the law and no evidence in support of the contention.

35. Moreover, although the plaintiff alleges that he suffers loss and damage, there is simply no evidence that he suffers any real loss or damages. The loss of opportunity to invest cannot be regarded as real loss, as the share value of the defendant can go up and down depending on many factors. There is no guarantee that the plaintiff would definitely make a profit by investing in the defendant's shares.

36. The plaintiff submits that the causation of the loss and the quantum of the loss, which are matter of evidence, will be shown at the stage of discovery and exchange of witness statement. However, I seriously doubt that the plaintiff could be able to produce such evidence as suggested. In any event, when the plaintiff cannot establish any real loss or damage at this stage, the contention that the law on duty of care should be extended is purely academic. The court should not entertain any claim that is purely academic when no loss or damage can be shown.

37. Thus, I do not find that the Statement of Claim (even with the proposed amendments) has disclosed any reasonable cause of action, and

hence it should be struck out on this ground. The action should also be dismissed on the same ground.

38. For the sake of completeness, I should mention that the plaintiff in his own written submissions in Chinese refers to some statutory provisions concerning the listing rules of the Stock Exchange. However, as they are not pleaded in the Amended Statement of Claim, I do not find it necessary to discuss them at all. In any event, I do not find that those rules could support the plaintiff's contention that the defendant's duty of care should be extended.

*Scandalous or frivolous or vexatious and abuse of the process of the court*

39. The defendant contends that the plaintiff's claims are scandalous or frivolous or vexatious and/or an abuse of the process of the court as the plaintiff has no *locus standi* to make the claims, and the plaintiff appears to have a personal grudge against Mr Chan and is pursuing a personal vendetta against Mr Chan. The defendant also contends that the plaintiff has no right whatsoever to ask for an order for investigation, an order revoking Mr Chan's various positions in the defendant, and/or damages.

40. At the hearing, the defendant purported to submit a table showing various cases that the plaintiff has commenced against various parties and the defendant suggests that it could show that the plaintiff has a personal grudge against Mr Chan. However, as the contents of the table

were not produced as evidence by way of affirmation or affidavit, I do not find it appropriate to refer to them at all.

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

42. It is also trite that the term "abuse of the process of the court" connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery, and will, in a proper case (eg where an action is absolutely groundless) or where the pleading is entirely without substance, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see HKCP 2017, para 18/19/9).

43. As the plaintiff has no reasonable cause of action against the defendant, it means that the proceedings are not capable of reasoned argument, without foundation or cannot possibly succeed. This by itself is already "frivolous and vexatious".

44. It is also "an abuse of the process of the court" as the action is absolutely groundless and the pleading is entirely without substance.

45. Thus, the Statement of Claim (even with the proposed amendments) should also be struck out and the action dismissed on the

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ground that it is frivolous, vexatious and an abuse of the process of the court.

*Inherent jurisdiction*

46. The court has similar powers to strike out the Statement of Claim and to dismiss the action as those contained in Order 18, rule 19. Thus, by the same token, the Statement of Claim should be struck out and the action dismissed under the court's inherent jurisdiction.

*Joining Mr Chan as the 2nd defendant*

47. In the Amendment Application, the plaintiff seeks to join Mr Chan as the 2nd defendant for the reasons that the plaintiff has also a claim against Mr Chan out of the same matters being litigated with the defendant, the dispute can be effectually and completely determined at the same time without delay and inconvenience, and Mr Chan will also be bound by the injunctive order the court may make.

48. However, irrespective of whether the plaintiff has a valid claim against Mr Chan or not, when the plaintiff has no reasonable cause of action against the defendant and the claims against the defendant are struck out, there is no reason to join Mr Chan as a defendant in the present action. The plaintiff can always commence another action against Mr Chan, if he insists that he has a valid claim against Mr Chan. Thus, the application to join Mr Chan as the 2nd defendant in this action should also be dismissed.

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*Conclusion*

49. By reasons aforesaid, the Amendment Application should be dismissed, the Statement of Claim be struck out on the grounds that it discloses no reasonable cause of action and is frivolous, vexatious and an abuse of the process of the court, and the plaintiff's action be dismissed accordingly.

50. I therefore order as follows:-

(1) The plaintiff's Statement of Claim be struck out and the action herein be dismissed.

(2) The summons dated 23 March 2017 be dismissed.

(3) Costs order nisi: the plaintiff do pay the defendant costs of the action including costs of the two summonses dated 13 October 2016 and 23 March 2017 respectively with certificate for counsel to be taxed if not agreed.

(Michael Wong)
Master of the High Court

The plaintiff acting in person
Ms Elizabeth Cheung instructed by Dechert for the defendant

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