Hong Kong’s top court rules on delay in pursuing civil claims

Warning on letting dogs sleep in warehouse

A view from Tom Fyfe and Melissa Chim

In our e-alert of 8 December 2011 we reported on the Court of Final Appeal’s judgment handed down that day in Re Wing Fai Construction Co. Ltd (in compulsory liquidation) [2011] HKEC 1616, FACV No.3 of 2011; the first landmark judgment on how the Hong Kong courts should apply the core principles of the civil justice reforms relating to litigation in Hong Kong. In its judgment Hong Kong’s highest court has also restated the principles that apply to applications to dismiss claims on grounds of delay before they get to trial. In this article we take a closer look at the judgment and what it may mean for litigants in Hong Kong (particularly, with respect to cases that lie dormant).

Key points

– The core principles of the civil justice reforms (CJR) and the amended court rules introduced in Hong Kong in April 2009 are aimed at the twin challenges of civil litigation: delay and cost.
– Crucial to addressing those twin challenges is the responsibility of the courts (assisted by the parties and their legal representatives) to actively manage cases with the ultimate aim of securing a just resolution of disputes in accordance with the parties’ substantive rights.
– The ethos of the CJR is to bring about a new litigation culture in order to address these twin challenges and this applies equally to court proceedings that were commenced before April 2009.
– As the courts manage cases under the CJR they are increasingly alive to plaintiffs who “warehouse” claims.
The legal principles upon which a defendant could traditionally apply to strike out a plaintiff’s claim before trial (on the basis of inordinate and inexcusable delay or serious default) have been restated in light of the new litigation culture. In this context, pre-CJR case law will usually be of no more than historical interest. Going forward this should help clarify some of the confusion of the past.

An order to strike out (ie, dismiss) a plaintiff’s claim before trial should only be made in “plain and obvious cases” where it is just to do so (generally a high threshold for a defendant to overcome). The legal basis for the court’s power to strike out for delay is predicated on an abuse of court process by the plaintiff.

Abuse of process can take many forms. Serious delay (without good excuse) that causes prejudice to another party is one instance; for example, where as a result of the delay a fair trial is no longer possible.

However, prejudice to the defendant is not an absolute requirement. For example, egregious conduct on the part of the plaintiff could suffice to justify strike out.

Mere delay does not, of itself, constitute abuse of process. But it can be an abuse of process for a party to commence a claim with no intention of bringing it to trial; post-CJR a delay of two years or so could be indicative of such an intention.

The court’s general reluctance under the pre-CJR rules to strike out a plaintiff’s claim for delay until after it had become statute barred is no longer relevant to the court’s power.

The court’s power to strike out for abuse of process will be regarded as a sanction of last resort (an ultimate weapon).

This does not signal a more relaxed approach on the part of the courts in Hong Kong to delay during litigation. Rather, when delays do occur the courts will have regard to their wider array of powers under the CJR to ensure that cases get “back on track” and avoid further delays. Such powers include peremptory orders at the court’s own initiative, an order that a party pay a sum of money into court, serious and immediate adverse costs orders and interest sanctions.

**Facts**

A winding-up petition was presented against Wing Fai Construction Co. Ltd (the company) in July 2002 and a winding-up order made in December 2002. In August 2004 the liquidator commenced court proceedings alleging misfeasance against three of the former directors of the company who had resigned between 2001/2 (the respondents). The parties’ formal statements of case closed before the end of 2004. There followed an exchange of correspondence about discovery and the pleadings. The action went to sleep after April 2006. It was revived when, in May 2008, the liquidator applied for court directions to take the case to trial. In light of the delay the respondents applied to dismiss the liquidator’s claim in August 2008 for “want of prosecution” (ie, delay) and/or abuse of process (the respondents’ application).

The respondents’ application was commenced before the CPR came into effect in April 2009 but came to be heard after this (in September 2009). The respondents argued (among other things) that while their application to dismiss related to delay that occurred before the coming into force of the CJR it should be considered in light of the CJR; therefore, they argued, delay that was inordinate and inexcusable was enough to justify strike out of the liquidator’s claim even in the absence of prejudice to the respondents (prejudice generally being a required element under the long-standing Birkett v James principles²).

At first instance the judge found that the two-year delay between 2006 and 2008 was inordinate and inexcusable but that the prejudice to the respondents was (among other things) not so serious as to present a significant risk that a fair trial was no longer possible. As a result the respondents’ application was dismissed. The respondents appealed. The judge’s decision was upheld by the Court of Appeal.

The respondents obtained permission to appeal to the Court of Final Appeal (the Court).

**Issue**

The appeal before the Court raised an important issue of great general or public importance. Namely, the impact of the CJR on applications to strike out based on delay; particularly, as regards applications that straddled the period before and after the coming into force of the CJR. The respondents argued that one of the guiding lights of the CJR was the emphasis on eliminating delay in litigation and this had changed the way the court ought to deal with delayed litigations. The respondents invited the Court to exercise its discretion afresh based on post-CJR principles.

**Decision**

The Court dismissed the respondents’ appeal. The Court agreed with the respondents’ legal submission that on considering applications to strike out for delay taken out before the coming into force of the CJR the courts should take those reforms into account. In so doing, the Court restated the relevant principles.

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² [1978] AC 297
The core theme of these principles was that abuse of the court process by litigants should be discouraged, and that usually the courts should first deploy a number of the less draconian weapons in their armoury to ensure litigants observed the court timetable before opting for strike out (eg, costs orders). Delay on its own, without more, did not justify strike out. It was a matter for the judge’s discretion in each case, but applications to strike out based on delay should only be allowed in plain and obvious cases where it was just to do so.

On the facts of this case, the Court held that the degree of abuse of process necessary to justify striking out the claim for delay was missing.

The Court considered that the first instance judge had properly applied her discretion in dismissing the respondents’ application, albeit on pre-CJR principles.

The Court’s judgment is firmly based on an application of the core principles of the CJR, as illustrated in the following quotes:

“Critical to the success of the CJR and its objectives is the realization that litigation is not to be treated as a game, but as a serious legal contest…”

“This attitude of ‘letting sleeping dogs lie’ is no longer acceptable post-CJR, where all parties to a litigation have the obligation to progress an action so that they are brought closer to the resolution of their dispute…” (our emphasis)

“While certain delays may be unavoidable, certainly the type of delays that have in the past led to applications to strike out for want of prosecution, should now be consigned to history.”

“…Unlike the pre-CJR position, the court should only in rare cases have to face such an application arising from delay.”

One by-product of this “abuse of process” refinement is that it is no longer a reason to refuse to dismiss a claim on the ground that the limitation period had not expired and thus, so the old reasoning went, the plaintiff could simply start a new action.

Comment
This is the first landmark case concerning the application of the core principles of the CJR. The judgment was given by the Chief Justice and was unanimous among the five judges. While the power to strike out remains a matter of discretion for the case managing judge, the Court’s judgment is a helpful reminder to judges, litigants and their advisers of the new litigation culture.

Before the introduction of the CJR defendants and their lawyers often had to decide between when to launch an application for strike out based on delay and avoiding any action that might awaken the plaintiff and run up legal costs. Typically, the default strategy was to “let sleeping dogs lie”, a proverb that has stood the test of time over the centuries and is well understood in both Chinese⁴ and English speaking communities the world over, although its exact origin appears uncertain⁴.

It is also not unknown for plaintiffs (such as banks) to launch many claims but then selectively pursue some of them at any one time (sometimes known as “warehousing”). Claims arising out of liquidations are also often “warehoused” while liquidators seek to investigate a company’s affairs and/or seek to raise funds for legal costs.

Now where there is “warehousing” the courts will only strike out where it is evident that there is no intention to bring proceedings to a conclusion or there is a wholesale disregard of the rules or court orders. What this means for defendants is that they now need to consider taking a more active stance rather than simply “let the sleeping dog lie”, for the length of the delay or the extent of “warehousing” is less likely (on its own) to justify strike out.

Moreover, the conduct of both plaintiff and defendant will be a relevant consideration in the exercise of the court’s discretion. Therefore, a defendant will be expected to take steps to collect evidence (witness and documentary) and help push the proceedings along, or else the courts may look less favourably on a defendant’s application to strike out for delay. Save for severe cases, the courts will want to ratchet up the pressure by degrees before striking out.

Going forward, the Court expects applications to strike out a plaintiff’s case for delay to be rarer, since in theory judges are to have a more active case management role post-CJR than they did before the reforms. However, such applications may in fact not be so uncommon, as weak claims or those which plaintiffs really have no intention to progress (eg, because they are looking only for a settlement) are flushed out earlier and not allowed to go to sleep. In such cases this will necessarily entail more costs for both the defendant and the plaintiff, as claims will no longer be allowed to die a natural death through inactivity, but it ought to bring proceedings to a conclusion more quickly.

Sleep deprivation is, perhaps, now a recommended tactic for sorting the serious plaintiffs from the serial time-wasters.

In this case Clyde & Co’s Tom Fyfe and Melissa Chim were instructed for the appellants.

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⁴ 不要去惹正在睡覺的狗
⁵ The Hon. Geoffrey Chaucer: “It is nought good a slepyng hound to wake” (“Troilus and Criseyde” c. 1374)
Further information
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