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Two years on from the Civil Justice Reform: Reducing delay in litigation and facilitating out-of-court settlements

The 2nd of April 2011 marked the two year anniversary of the substantial statutory reform to the practice and procedure of the Hong Kong Court system: the so-called "Civil Justice Reform" (CJR). The CJR's underlying objectives - which parties have a duty to assist the Court in furthering - include reducing delay (and the attendant legal costs) in litigation and facilitating out-of-Court settlements, including by the sanctioned offer and payment regime. This article examines how the Court has recently applied and re-iterated the importance of these significant objectives of the CJR.

Reducing delay

Prior to the CJR, responsibility for the progress of cases through Court to trial was predominantly placed in the hands of the parties and cases were consequently often delayed, which also increased parties' legal costs.

To address this problem, the CJR introduced active case management: the process by which the Court now pro-actively controls the progress of cases to trial, including by the setting of immovable "milestone" dates. The Court continues to emphasise that "*justice delayed is justice denied*" and that it will not tolerate adjournments of milestone dates or other delays unless in exceptional circumstances.

Late interlocutory applications: In *Tsoi Yiu Chung v ING Life Insurance Co (Bermuda) Ltd*[1], the plaintiff applied six weeks prior to trial to substantially re-amend his statement of claim, which application, if allowed would have meant adjourning the trial. The Court noted that "*(t)here is no doubt whatsoever that the delay in making the application is very serious...In this more demanding post-CJR era milestone dates will only rarely be interfered with.*" The Court, in this case, did allow the application on exceptional grounds: the plaintiff had a compelling case, the originally drafted claim was insufficient having been prepared by relatively inexperienced counsel, and if the claim was left unamended and he did badly at trial on the defective claim, the plaintiff may have had to incur further costs in bringing proceedings against his solicitors.

The Court of Appeal[2] confirmed that "...*with the introduction of the Civil Justice Reform, it is important to deal with cases as expeditiously as is reasonably practicable and to achieve such an aim, the trial period is a milestone date, and should not be changed unless there are exceptional reasons"* but did not interfere with the judge's exercise of discretion.

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[1] *Tsoi Yiu Chung v ING Life Insurance Co (Bermuda) Ltd [2011] HKEC 113.*

[2] *Tsoi Yiu Chung v ING Life Insurance Co (Bermuda) Ltd [2011] HKEC 450.*

The Court has gone further to say that interlocutory applications made after a case is set down for trial are unlikely to be granted, absent exceptional circumstances, even if granting them would not mean vacating trial dates[3].

Indeed, the percentage of adjourned hearing milestones has been low during the first year of the CJR's implementation. At the Court of First Instance, the percentage of adjourned hearings at the CMC, pre-trial review and trial stage (all immovable, milestone dates) were 9%, 7% and 6% respectively[4].

Undue delay**:** In *Winpo Development Limited v Wong Kar Fu*[5], the plaintiff appealed an order dismissing its claim for want of prosecution. The plaintiff had failed to take any step in its action for vacant possession of land for over 12 years from 1996 and then a further 17 months from February 2009. The Court found such delay to be inordinate and inexcusable but allowed the appeal on the exceptional basis that if the plaintiff's claim was dismissed for want of prosecution, the very same underlying issues would still have to be determined in the defendant's counterclaim and plaintiff's counterclaim to counterclaim, as well as in parallel proceedings. Relevantly, the Court held:

"Since the introduction of the CJR in this jurisdiction...the court has a duty to further the underlying objectives of the Rules of the High Court by actively managing cases...and the parties to litigation and their legal representatives have a duty to assist the court to further the underlying objectives of the rules... (which) include...to ensure that a case is dealt with as expeditiously as is reasonably practicable...

The failure of the plaintiff otherwise to bring this action, commenced in 1993, to trial by now is a matter in respect of which the court should express strong disapproval. Putting the matter bluntly, the plaintiff's claim has survived only by the skin of its teeth. The court's disapproval of the dilatory manner in which the plaintiff has prosecuted the action to date can and should... be reflected in the costs order...Active case management should follow and the parties should be in no doubt that no further delay will be tolerated."

Facilitating settlements by the sanctioned offer and sanctioned payment regime

The underlying objective of the statutory sanctioned offer and payment regime is to encourage the settlement of disputes.[6]

The regime introduced the flexibility for both parties to make settlement offers that relate to the whole or part of the claims in any proceedings, whether monetary or non-monetary claims. In brief:

- if the plaintiff rejects a sanctioned offer or payment and subsequently fails to achieve a better result at trial (even if successful), the Court may disallow interest on any judgment sum and order indemnity costs with penalty interest on those costs after the date when the plaintiff could have accepted the defendant's offer or payment (without leave of the Court); and

- similarly, if a defendant rejects a plaintiff's sanctioned offer (and the plaintiff achieves a better result at trial), the defendant may be ordered to pay enhanced interest on the judgment sum, indemnity costs and penalty interest on those costs.

In *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd*[7] the plaintiff bettered its rejected sanctioned offer and the Court awarded indemnity costs and penalty interest on those costs to the plaintiff. The Court would have also awarded enhanced interest on the judgment sum, however, the parties had already agreed the terms of a draft judgment which included enhanced interest. The Court recognized that its power to award enhanced interest on a judgment sum is aimed at compensating the plaintiff for the inconvenience, anxiety and distress of having to resort to litigation which are not normally compensated by the usual costs and interest orders and which it had sought to avoid by a settlement offer. The Court's powers under the regime are not meant to be penal in nature, but are aimed at achieving a fairer result for the winning party.

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[3] *Ho Mei Wah v Boon Chi Sun [2010] HKEC 1841.*

[4] Legislative Council Panel on Administration of Justice and Legal Services; *"The First Year's Implementation of the Civil Justice Reform from 2 April 2009 to 31 March 2010"*; LC Paper No. CB(2)591/10-11(06); December 2010.

[5] *Winpo Development Limited v Wong Kar Fu & Others [2011] HKCU 257.*

[6] Order 22 of the Rules of High Court.

[7] [2010] 3 HKLRD 273 per Lam J (*McPhilemy v Times Newspapers (No. 2)* [2001] 4 All ER 861 cited)

In *Wealthy Century Investment Limited v DBS Bank (HK) Limited*[8], the Court clarified the characteristics of a sanctioned offer. The defendant bank sought to argue that since the plaintiffs made a "without prejudice" offer subsequent to a sanctioned offer, the original sanctioned offer must be taken to have been revoked on the application of the rules of offer and acceptance.

The Court confirmed that a sanctioned offer is not contractual in nature. The plaintiffs' subsequent offer made no reference to the original sanctioned offer. It is possible that parties may make further offers for settlement in tandem with an existing sanctioned offer or payment outside the Order 22 settlement procedure without withdrawing or revoking an earlier sanctioned offer. Thus by operation of the original sanctioned offer, the bank was ordered to pay enhanced interest on the judgment sum and costs with interest.

The practical effect of the regime can further be seen in the first year of the CJR's implementation. At the Court of First Instance, 1,913 sanctioned payments were made. Of these, 435 were accepted within time, consisting of 53 cases finally resolved and 382 cases partly disposed of by the sanctioned payment[9].

The regime encourages parties to give settlement serious consideration by providing the offeror with a high level of protection on costs, and putting the offeree under pressure of potentially severe costs consequences if he fails to better a rejected sanction offer or payment. When used appropriately, sanctioned offers and payments can be potent tools in avoiding the unproductive and expensive prolongation of litigation.

Conclusion

The Court has taken a robust approach in its application of the CJR's objectives of reducing delay in proceedings and encouraging out-of-Court settlements. Parties should be aware that the Court expects cases to be progressed expeditiously and will readily make adverse costs orders against parties who fall foul of the sanctioned offer and payment regime.

[8] *Wealthy Century Investment Limited v DBS Bank (HK) Limited [2010] HKCU 1915*

[9] Please refer to Footnote 4 above.

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