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To: Transport Industry Operators

Abuse of process & Want of prosecution

On 5/8/2011, the District Court of Hong Kong dismissed a shipping company's container claims against a forwarder for want of prosecution and abuse of process. [DCC] 765/2005]

On 21/2/2005, the shipping company commenced the legal action against the forwarder for payment of detention charges, return of containers or alternatively, damages to be assessed as a result of the failure of the forwarder to return 5 containers. The shipping company amended its statement of claim on 8/3/2005. The forwarder issued Third Party Notice claiming indemnity from Third Party on 31/3/2005. Defence was filed by the forwarder on 11/5/2005. The shipping company later served its answer on the forwarder to the forwarder's request for Further and Better Particulars on its Amended Statement of Claim on 5/7/2005. The shipping company also filed and served its Reply on 6/7/2005. On 30/9/2007, the shipping company's solicitors Messrs. Keith Ho & Co. ceased practice after serving notice of ceasing practice on 15/8/2007 on the shipping company. The shipping company did not instruct new firm of solicitors. On 21/1/2011, the forwarder's solicitors wrote to the shipping company seeking their agreement to discontinue the legal action. There was no reply. On 11/2/2011, the forwarder took out one Summons to dismiss the shipping company's claim for want of prosecution. On 16/2/2011, the shipping company appointed Messrs. Choi & Liu as their solicitors in the legal action. On 6/5/2011, the forwarder took out the other Summons seeking to dismiss the shipping company's legal action for abuse of process.

Want of Prosecution

The parties accepted that the approach in the House of Lords case of *Birkett v. James* [1978] AC 297 and as adopted by the Court of Appeal in *New China Hong Kong Group Ltd (in liquidation) and Another v. AIG Asia Infrastructure Fund LP and Others* [2005] 1 HKLRD 383 is the trite law in the area prior to implementation of Civil Justice Reform on 2 April 2009, i.e. that an action is liable to be dismissed for want of prosecution on either of two limbs:-

- (a) There has been intentional and contumelious default, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of process; or
- (b) There has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers and such delay will give rise to a substantial risk that it is not possible to have a fair trial or is such as is likely to cause or to have caused serious prejudice to the Defendant.

Subsequent to the implementation of Civil Justice Reform however, it was laid down in the case of *Winpo Development Limited v. Wong Kar Fu and Others* [2011] 2 HKC 524 by Fok J, as he then was, that the introduction of Civil Justice Reform had brought changes to the court's approach to applications to dismiss for want of prosecution. The court and the parties to litigation together with their legal representatives all had a duty to further the underlying objectives of the Rules of the High Court. The relevant underlying objectives included ensuring that the case was dealt with as expeditiously as was reasonably practicable and to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings as well as to ensure that the resources of the court were distributed fairly. The consequence to other litigants and to the courts of inordinate delay was to be a consideration of increasing significance.

Where the delay occurred before as well as after the introduction of Civil Justice Reform, the context in which the delay occurred must be looked at. A party could not be blamed for not observing a rule that did not exist at the relevant time. But where the period of delay or part of that delay had occurred since the introduction of Civil Justice Reform, the court would have to take into consideration any non-observance of the new rules.

Inordinate and inexcusable delay?

The shipping company had fairly and rightly conceded that there had been inordinate delay in their conduct of the case. They said however the delay was not inexcusable and that there was no substantial risk that it was not possible to have a fair trial or that there was serious prejudice to the forwarder.

Since the filing and serving of the Reply on 6/7/2005, the whole case had been “warehoused”. The shipping company had done nothing towards conclusion of the case. Even when they were notified in advance by their former solicitors, Messrs. Keith Ho & Co., that they would soon cease practice, they did nothing to instruct a new firm of solicitors in the legal action. The whole case had gone to sleep. Further, when the forwarder’s solicitors wrote to them on 21/1/2011, they still chose not to reply. It was only after the forwarder took out the Summons on the 11/2/2011 that the shipping company on 16/2/2011 instructed a new firm of solicitors. There had been a delay of 5 ½ years.

It was agreed between the parties that whether or not there was inexcusable delay, one should examine primarily from the forwarder’s point of view or at least, objectively, to decide if there was inexcusable delay (Hong Kong Civil Procedure 2011 25/L/7 at 586).

The shipping company said they waited for the outcome of the recovery of containers by the forwarder from Third Party. The shipping company said that the shipping company provided documents for the forwarder to pursue the Third Party and instructed its solicitors not to proceed pending the forwarder’s action against the Third Party. The shipping company said also that the shipping company relied on the letter dated 28/9/2004 from the forwarder’s solicitors and took the view that the parties would want to avoid costly litigation in view of the modest amount claimed. It was submitted by the shipping company that they also took time to consider the issue of the proper law and forum, i.e. whether the shipping company should take proceedings in French Court. The shipping company said the forwarder had also pleaded that the proper law was French law and had reserved its right to amend the pleadings after seeking legal advice from French lawyers. The shipping company explained that they changed their executive manager (including the one who was handling these proceedings) in year 2005 and year 2008 and also moved its office in December 2008.

The forwarder said the shipping company’s explanations for the delay was not valid or genuine. There was no evidence showing that the shipping company had pressed the forwarder to proceed with its claim against the Third Party or otherwise monitored the progress of such third party proceedings. Hence, there was no truth in the assertion that the shipping company chose to withhold its claim pending the determination of the third party proceedings. There was also no evidence showing that the shipping company actually brought or did contemplate bringing proceedings in the French courts. After starting the legal action in Hong Kong, it was difficult to see why the shipping company would wish to bring a separate action in France when the forwarder was a company incorporated and operated in Hong Kong. The forwarder submitted that the delay was inexcusable both from the forwarder’s point of view and also viewed objectively.

The Court had no hesitation to accept the submission by the forwarder that the delay was inexcusable, in particular having regard to the length of delay, reaction or rather inaction of the shipping company on receipt of the notice of cessation of practice from Messrs. Keith Ho & Co., the lack of response on receipt of the letter from the forwarder’s solicitors dated 21/1/2011 and the explanations given. Even if the shipping company had the intention to wait for the result of 3rd party proceedings and/or consider the commencement of legal action in French Courts, it was totally unreasonable for them to be idle for 5 ½ years. The Judge ruled therefore that the delay was both inordinate and inexcusable.

Substantial risk that fair trial impossible/serious prejudice to the forwarder?

In order to examine the above issue, it was necessary to consider the pleadings in order to identify the issues to be resolved.

The shipping company summarized its case as follows:-

- (a) The shipping company was entitled to the immediate possession of 5 containers that were loaned to the forwarder;
- (b) The shipping company’s claim was based on 2 bills of lading (“the Bills of Lading”) and an indemnity agreement as evidenced by 2 Indemnity Letters, an Arrival Notice, and a Notice for Hong Kong Import Charges;
- (c) The forwarder had converted the Containers for its own use.

The forwarder took out third party proceedings before putting in a Defence. In summary, the forwarder’s pleaded case was as follows:-

- (a) The shipping company was not a party to the Bills of Lading and was therefore not entitled to rely on Bills of Lading;
- (b) The forwarder denied that an Arrival Notice or Notice for Hong Kong Import Charges were issued by the shipping company to the forwarder;
- (c) The shipping company was not a party to the Indemnity Letters or that the Indemnity Letters were unenforceable against the forwarder;
- (d) The forwarder denied that it had converted the Containers for its own use;

(e) The shipping company's claim was based on a penalty clause and therefore unenforceable.

The forwarder argued that as one of the issues involved in the legal action was whether or not the shipping company could rely on the indemnity letters signed by the forwarder (though they were not addressed to the shipping company). The forwarder said therefore that they needed to find out which staff of the forwarder signed the documents and which staff of the forwarder tendered them to the shipping company and to whom. The forwarder said after the long lapse of time coupled with the fact that the shipping company had not yet served their witnesses statements, it was difficult for the forwarder to know exactly the case they were going to meet and to identify and locate their witnesses to give oral evidence of the circumstances under which these documents came into existence and were handled. The forwarder said even if the possible witnesses were identified, their memory of the events occurring in year 2004 might not be reliable due to the lapse of time. Further, it was submitted by the forwarder that depending on the circumstances of each case, the Court is entitled and should be prepared to draw the inference that by reason of the delay, serious prejudice would be caused to the Defendant as a result of impairment of witnesses' recollection.

The forwarder further argued that the shipping company relied on certain documents in order to establish their right to immediate possession of the containers but had not disclosed the same nor did they file their list of documents in the legal action. Moreover, the forwarder criticized that as it was submitted by the shipping company that due to office relocation, they had lost the original documents and could only serve copies of the same on the forwarder, after they reentered the same from their previous firm of solicitors. In the circumstances, the forwarder was denied opportunity to inspect original documents. The forwarder commented also that as there was change in persons handling the file for the shipping company, the shipping company would not actually know whether the documents kept by their former solicitors were in fact full set of documents as the shipping company might not previously have given all documents to their solicitors. The forwarder said therefore serious prejudice had been caused to the forwarder as they were deprived of proper and full discovery of relevant documents.

The Judge noted also that there was the issue of whether the forwarder did convert the containers.

Although the Judge agreed that the disputed issues substantially rested on construction of the documents and legal argument, there was still the factual dispute of whether the forwarder did convert the containers, whether the shipping company did issue the Arrival Notice or Notice for Hong Kong Import charges and the circumstances under which the Indemnity Letters came into existence and/or were handled were also relevant and important. The Judge agreed with the forwarder and they had discharged their burden of proof, that the delay was likely to cause or have caused serious prejudice to the forwarder. Furthermore, it was clear that the shipping company had failed its duty to further the underlying objectives of Civil Justice Reform and therefore adopting the approach in the *Winpo* case, the Judge found it appropriate to exercise the Judge's discretion to dismiss the shipping company's action.

For completeness, the Judge dealt with the Summons dated 6/5/2011 seeking to strike out the shipping company's claim on the ground that it was an abuse of process of the Court.

Abuse of Process

The parties both referred the Court to the case *Grovit v. Doctor* [1997] 1 WLR 640 HL where at P. 647G – 648A, Lord Woolf said:-

*"The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v James* [1978] A. C. 297."*

Both parties agreed that inordinate and inexcusable delay alone, however great, did not amount to an abuse of process. This is the position taken by Lord Woolf in the case of *Arbutnot Latham Bank Ltd v. Trafalgar Holdings* [1998] 1 WLR 1426. This in fact is also the stance taken by Nourse LJ in the case of *Choraria Sethia* [1998] CLC 625. After referring to *Birkett v. James* and *Grovit v. Doctor*, at P. 630F, he says:-

"The law ... may therefore be stated thus. Although inordinate and inexcusable delay alone, however great, does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground..." (Emphasis added)

In the case in question, there was inordinate and inexcusable delay of 5 ½ years. The delay started from 6/7/2005 and ended on 16/2/2011. It therefore covered both pre and post Civil Justice Reform period.

O. 1A, r. 1 and O. 1A, r. 2 of RHC reads:-

"1. The underlying objectives of these rules are-

- (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
 - (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
 - (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
 - (d) to ensure fairness between the parties;
 - (e) to facilitate the settlement of disputes; and
 - (f) to ensure that the resources of the Court are distributed fairly.
2. (1) The Court shall seek to give effect to the underlying objectives of these rules when it –
 - (a) exercises any of its powers (whether under its inherent jurisdiction or given to it by these rules or otherwise); or
 - (b) interprets any of these rules or a practice direction.
 - (2) In giving effect to the underlying objectives of these rules, the Court shall always recognize that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.

Clearly, the shipping company had failed to comply with the rules governing the timetable for steps to be taken for the case to trial without delay.

It was said by the forwarder that having regard to the underlying objectives of CIVIL JUSTICE REFORM, the continuance of the action in question was clearly an abuse of process of the Court. The forwarder said that there was no doubt that the shipping company had no intention to prosecute the action in question until trial for the following reasons:-

- (a) Out of the 5 ½ years delay, nearly 2 years occurred after the implementation of the CIVIL JUSTICE REFORM.
- (b) The delay was inordinate and inexcusable
- (c) That the shipping company even after being notified by its solicitors on record that they would cease practice in September 2007 chose not to appoint another firm of solicitors to act on its behalf in this action. This strongly supported the inference that the shipping company had no intention to proceed with this action.
- (d) That the shipping company when asked by the forwarder's solicitors not to proceed with the action again chose not to respond and also continued its inaction. No steps was taken to proceed further with the action, despite such enquires from the forwarder.
- (e) The conduct on the part of the shipping company in not keeping the documents in safe custody again supported the shipping company's lack of intention to bring the case to trial.

The forwarder submitted that above conduct clearly was in blatant breach of the rules of Court and the underlying objectives of CIVIL JUSTICE REFORM. The Judge agreed. The conduct of the shipping company, was, in the Judge's view, a total disregard of the rules. Having regard to the above, even recognizing the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties, the Judge found it appropriate to exercise the Judge's discretion to dismiss this action also on the ground of abuse of process of the Court under the *Grovit v. Doctor* doctrine.

Conclusion

It was ordered that the shipping company's claim be dismissed and there be an order nisi that the shipping company should pay the costs of the action in question.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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