



High Court reviews permission for expert reports and delay after general adjourned period

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Introduction

In *Redland Precast Concrete Products (China) Ltd v AES Steel Mould (Hong Kong) Ltd*¹ the Court of Appeal emphasised that it is unlikely to interfere with the exercise of a first instance court's case management discretion regarding directions for expert reports, unless an applicant can show that the lower court's decision is plainly wrong. This presents a party seeking to challenge such directions with a high threshold to overcome in order to obtain permission to appeal. In this case, the applicant (the plaintiff) was unable to meet the threshold – therefore, its application for permission to appeal was refused by the court. Had the plaintiff acted more expeditiously, immediately after the general adjourned period (when the courts were generally closed between January and May 2020 because of the pandemic), things may have turned out differently.

Background

The dispute between the plaintiff and the defendant arose out of an agreement pursuant to which the defendant agreed to design, supply and deliver a steel hydraulic system for the plaintiff. The plaintiff commenced proceedings against the defendant alleging that the system contained numerous defects as particularised in the schedule to the plaintiff's claim. The proceedings commenced in November 2015.

In November 2019, the judge case managing the proceedings through to trial issued directions that the parties give expert

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evidence on questions of liability and quantum by a single joint expert ("SJE"). Given the nature of the proceedings (arising out of a construction dispute), such a direction was not unusual². A SJE was instructed by the parties in December 2019 and he produced a report in January 2020.

Notes

- ¹ [2021] HKCA 1229, CAMP 229/2021, 19 August 2021.
- ² *Perpetual Wealth (Hong Kong) Ltd v Be Solutions Co. Ltd* [2021] HKCFI 2539.

The trial was supposed to start in February 2020 but had to be adjourned because of the general adjourned period between January and May 2020 during which the courts were closed (save for urgent and essential business) because of the COVID-19 pandemic. The trial was rescheduled to start in September 2021 (with 12 days reserved).

In February 2021, the plaintiff applied for permission to rely on its own expert report at trial. It appears that the plaintiff had instructed the expert in approximately March 2020 and he produced a report, of 192 pages (excluding appendices) responding to some 128 alleged defects, which took approximately eight months to prepare.

The plaintiff's application was heard by the judge in May 2021, a few months before the rescheduled trial date. The plaintiff claimed that the SJE's report's conclusions were unsustainable and largely based on the parties' "unpleaded" case³. The judge dismissed the plaintiff's application on the basis that (among other things) – the plaintiff's expert's report was not necessary, it was too late to submit a further expert report and doing so would cause real prejudice to the defendant.

The plaintiff applied for permission to appeal which was refused by the judge. The matter came before the Court of Appeal. The issue for determination was whether to grant permission to appeal the judge's case management decision. The plaintiff raised several potential grounds of appeal, including that:

- given the nature of the technical evidence, there were good reasons for allowing the plaintiff to rely on its expert report at trial
- the judge had been wrong to consider that the plaintiff's concerns about the SJE's report could be adequately dealt with at trial when the SJE's report (so the argument went) referred to so many "unpleaded matters"⁴, and
- any delay by the plaintiff had not caused the defendant to suffer any real prejudice that could not be compensated by an order for costs, in the event that the plaintiff was allowed to rely on its expert's report.

Notes

3. *Supra* note 1, at para 8.
4. *Supra* note 1, at para 16.
5. *Supra* note 1, at para 34.
6. *Supra* note 1, at paras 10-11.
7. *Supra* note 1, at para 13 and Rules of the High Court, Order 1A, Rule 1.
8. *Supra* note 1, at para 18.

Decision

The Court of Appeal refused to grant the plaintiff permission to appeal and, in doing so, concluded that the plaintiff's application was "wholly unmeritorious"⁵.

Exercise of case management discretion

The Court of Appeal referred to established case law that confirms that an appeal court should not interfere with a lower court's case management decisions, unless the appeal court is exercising a discretion afresh (for example, at a hearing *de novo* – which was not the case here) or the lower court had made a decision that was plainly wrong⁶. This presented an applicant with a "high hurdle" to overcome; particularly, where the case managing judge had been dealing with all the interlocutory matters since the case had been transferred to a specialist court list (as was the case here – namely, the "Construction List") and was the designated trial judge.

This was probably enough to reject the plaintiff's application – however, the Court of Appeal went on to consider in some detail the potential grounds of appeal raised by the plaintiff.

Good reasons

The fact that a party might have a good reason for putting forward a second expert report was not conclusive and was only one factor to be considered. Ultimately, the courts had to be guided by the interests of justice and the overall or underlying objectives of the court rules⁷.

SJE's alleged reliance on "unpleaded matters"

The Court of Appeal's response to the plaintiff's concern that the SJE had attributed certain alleged defects to causes not asserted by either party serves as a telling reminder for expert witnesses:

"An expert, still less a joint expert, is not an advocate for either party. He is not bound to choose between the rival contentions of the adversaries, pleaded or otherwise. If, based on the materials provided, his considered opinion is that a specific defect was due neither to the cause alleged by the plaintiff nor to that suggested by the defendant but to a third cause, he is not only free but duty-bound to say so."⁸

Delay

This presented a major hurdle for the plaintiff. There appears to have been no good reason why the plaintiff had not raised concerns about the SJE's report between approximately March 2020 and February 2021. The plaintiff also appears to have had little or no answer to the observation by the judge that it had been inactive in seeking further directions for expert evidence prior to February 2021 – indeed, the plaintiff waited until February 2021 to apply to rely on its expert report and until March 2021 (some five months before the rescheduled trial date) to serve the defendant with the expert report.

Comment

The Court of Appeal's decision is another reminder of the difficulties in challenging the exercise of a court's case management discretion and of the courts' more proactive approach in reviewing directions for expert evidence – these have been key features of the litigation landscape in Hong Kong since the civil justice procedure reforms in April 2009, particularly in the past few years.

The issue of delay in the case is illustrative and, perhaps, gives rise to some lessons to be learned. Delay has a context and is fact based. In this case, it is quite possible that had the plaintiff applied much earlier to rely on its expert's report, the first instance court may have allowed it to do so – particularly as it was likely that any prejudice then suffered by the defendant could have been compensated by an appropriate costs order against the plaintiff.

As it turned out, the general adjourned period (between January and May 2020) and the rescheduled trial date appear to have given the plaintiff an opportunity to address its concerns about the SJE's report but, rather than move expeditiously, things appear to have moved at what might be described as a more leisurely pace and, in doing so, the plaintiff lost the initiative. There is even a suggestion in the court's decision that the plaintiff's approach smacked of "expert shopping".⁹

Contact us

Please contact [Antony](#) or [Rebecca](#) if you have any queries regarding the issues raised in this article, or if you wish to consider any commercial dispute resolution matters in Hong Kong.

A version of this article was originally published in the Litigation Newsletter of the *International Law Office* – www.internationallawoffice.com.

This article is intended to give general information only. It is not a complete statement of the law. It is not intended to be relied upon or to be a substitute for legal advice in relation to particular circumstances.

Notes

9. *Supra* note 1, at 33. Also see first instance decision: [2021] HKCFI 1342, 11 May 2021, at para 21.