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ADVERSE COSTS ORDER AGAINST A PARTY WHO UNREASONABLY HAS REFUSED TO ENGAGE IN MEDIATION

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SUMMARY

A recent Hong Kong judgment where the court made an adverse costs order against a party who unreasonably has refused to engage in mediation. This article discusses about the implications of this judgment, in particular on parties' obligation to attempt to engage in mediation and solicitors' duty to advise their clients of possible alternative dispute resolution processes.

Introduction

The recent Hong Kong Court of First Instance (HKCFI) case *Re Chow Tak Wa [2020] HKCFI 2020* provides a helpful and timely reminder that the courts will have no hesitation in making an adverse costs order against a party who unreasonably has refused to engage in mediation.

Background

This case concerned an application to vary a costs order on the sole ground of the other party's refusal to mediate. The underlying dispute arose in the context of an alleged loan between a cohabiting couple where the Plaintiff claimed against the Defendant seeking repayment of the alleged loan.

At trial, the court had found the Plaintiff's evidence unsatisfactory and inconsistent, and dismissed her claim with a costs order made against her to pay the Defendant's costs of and incidental to the claim. That costs order, of course, was quite orthodox given that the Plaintiff's claim was dismissed. The Plaintiff applied to vary the costs order so that there would be no order as to costs, on the basis that the Defendant had refused to mediate.

Chronology of events

Event	Date
The Plaintiff filed with the court a Mediation Certificate indicating that she was willing to resolve the dispute by mediation.	5 January 2017
The Defendant filed his 1st Mediation Certificate saying that he was unwilling to attempt mediation.	8 February 2017
The Registrar ordered the Defendant to file another Medication Certificate.	26 July 2017
The Defendant filed his 2nd Mediation Certificate saying that he was unwilling to attempt mediation, but explaining why he refused mediation.	27 July 2017
Notwithstanding the Defendant's refusal, the court ordered that the parties should attempt mediation as soon as practicable.	16 May 2019
The Plaintiff's solicitors proposed two mediators to the Defendant's solicitors.	22 May 2019
The Defendant wrote a letter to the court indicating that he remained reluctant to mediate.	23 May 2019

Arguments

The Defendant submitted that he had refused to mediate due to the following reasons:

- He believed that he did not owe the Plaintiff any money and that the Plaintiff lacked the integrity and sincerity to be trusted, and on that basis he was of the view that there was no room for him to make any concessions at a mediation.
- Agreeing to pay any amount at a mediation would amount to admitting liability which was contrary to his position.
- The Plaintiff's strong adherence to her case during the trial led him to believe that any mediation would have had no reasonable prospect of success, because the Plaintiff would not have agreed to accept an amount much less than that she was claiming.

Issue

The primary issue before the court in *Chow* was whether the Defendant's explanation for refusing to mediate was reasonable.

Decision

In its analysis, the court found that the reasons given by the Defendant for his refusal to mediate were not sound.

The court took the view that the Defendant could (and should) have attempted to mediate and expressed that the mediation was to be without prejudice to liability, so that any communications made in the mediation would not be used for determining liability. Alternatively, he could have attempted to reach a settlement along the lines that costs that already had been incurred or ordered

should be waived with no payment being made in respect of them. In fact, the court found that "*there has been a complete misunderstanding on his (the Defendant's) part as to the mediation process*".

The court ordered the costs order be varied to that the Plaintiff was to pay 80% - rather than 100% - of the Defendant's costs (to be taxed if not agreed).

Commentary

The decision in essence is a costs sanction against the Defendant as the successful party, albeit a limited one.

On the one hand, the court expressed that an outright refusal to even attempt to mediate is not likely to be reasonable, whether it is based on an impression or belief that there is no room to concede at a mediation or for any other reason.

On the other hand, the court recognised that the Defendant as the winning party should not be deprived of his costs completely, in particular considering that he won the case, the Plaintiff's unsatisfactory and inconsistent evidence and her misjudgement in defending the claim and going to court which resulted in the incurring of substantial legal fees by both parties.

Chow is a timely reminder that it is one thing to give reasons to refuse to engage in mediation and quite another simply to refuse to mediate. Of course, even if mediation is refused with reasons, not all reasons will be regarded or accepted by the court as being good reasons. The court will take into account any unreasonable failure to engage in mediation when exercising its discretion as to costs. Indeed, this is stated in Practice Direction 31 (Mediation) and Order 62 rule 5(1)(e) and (2) of the Rules of High Court.

Apart from considering mediation, lawyers also carefully should consider if their clients should make open offers of settlement or "without prejudice save as to costs" offers, or sanctioned payments / offer under the relevant court rules.

An open offer does not attract confidentiality, meaning its entire content may be disclosed to the court. Such an offer may be a useful tool to exert pressure on the other side and to support an argument for a more favourable costs award, especially when the other party is being particularly unreasonable in settlement negotiations. For example, even if a claimant loses at trial, evidence that he has made an offer to the defendant on terms more favourable than that awarded by the court may result in him being awarded a portion of his costs.

In practice, however, many settlement negotiations proceed on either a "without prejudice" or a "without prejudice save as to costs" basis so that confidentiality is preserved.

Practice Direction 31 (Mediation) was implemented only after the commencement of the civil procedure reforms in April 2009. At its root are the core principles that mediation is a consensual

process and it is important for both parties' legal representatives to drive the process. As a matter of professional conduct, solicitors are duty bound to consider alternative dispute resolution processes for their clients (HK Guide to Professional Conduct, Principle 10.17) and advise them of the possibility of the court making an adverse costs order where a party unreasonably fails to engage in mediation (Paragraph 4 of Practice Direction 31). It is vital that clients can rely on their lawyers to provide fulsome and timely information and advice to assist in making decisions on possible alternative dispute resolution processes.

This article was co-written with Trainee Mary Lam.

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MEET THE TEAM

Glenn Haley

Co-Author, Hong Kong SAR

glenn.haley@bclplaw.com
+852 3143 8450
