



In this issue:

- 1 Welcome
- 1 Geotechnical Baseline Reports - Their Use & Abuse in Hong Kong
- 4 Hired Guns Bite the Dust?
- 7 ADR Analysis: The Cost Implications of an Unreasonable Refusal to Mediate
- 8 ADR Diary

➤ Welcome

In this edition of the *ADR Digest*, James Longbottom reviews how the traditional allocation of risk for adverse ground conditions has been affected by the introduction of Geotechnical Baseline Reports into some MTRC and Hong Kong Government contracts. Whilst the introduction of this innovative approach has seen Government shouldering an increased risk for adverse ground conditions, the reverse situation (either intentionally or unwittingly) has arguably occurred on some MTRC contracts.

We are pleased to have Ian Cocking, Partner and Head of Construction of Clyde & Co as our guest writer. Ian considers the recent controversial (and some would say surprising) judgment given in *Jones v Kaney* [2011] UKSC13, in which the expert's immunity has been removed by a majority decision of the UK's Supreme Court.

Finally, our *ADR Analysis* series considers the cost implications of an unreasonable refusal to mediate. In the recent Hong Kong case of *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* HCA 2032/2007 the courts have shown a willingness to impose taxation sanctions in such scenarios.

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➤ Geotechnical Baseline Reports - Their Use & Abuse in Hong Kong



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Introduction

Historically, the allocation of the risk of adverse ground conditions by the MTR Corporation (MTRC) and the Hong Kong Government has been diametrically opposed.

On the one hand, MTRC in Clause 38 of its Conditions of Contract and in line with international practice has accepted the risk of adverse ground conditions which "*could not reasonably have been foreseen by an experienced contractor*" at the time of tender. These words attribute an objective degree of foresight on the contractor and whilst there is no authority on the application of these words, the authors of *Keating on Construction Contracts* suggest that the question is whether it is reasonable to expect a contractor, assuming him to be experienced, to have foreseen a particular condition or obstruction. Whether something could have been foreseen must take into account all the available sources of information.¹

The advantage of allocating the risk of adverse ground conditions in this way is that the contractor is able to submit a more precise and competitive bid without high contingency factors.²

Conversely, the Hong Kong Government in Clause 13 of its General Conditions of Contract has placed the risk of adverse ground conditions entirely with the contractor, even where the contractor is misled by insufficient or inaccurate information given to him by Government. The Grove Report (1998) notes that "*Contractors regard this provision of the GCC as the most repugnant of all.*"³

This article considers how this traditional allocation of risk has been affected by the introduction of Geotechnical Baseline Reports (GBR) into some MTRC and Government contracts. ADR Partnership has experience of both forms from having advised on their commercial ramifications in tenders and in having prepared claims for adverse ground conditions.

What is a Geotechnical Baseline Report?

The GBR provides a contractual statement of the ground conditions anticipated (or to be assumed) to be encountered during underground and subsurface construction. This contractual statement is referred to as the baseline and is an interpretation of the available site investigation information (e.g. geological setting, borehole logs, laboratory tests and the like). This site information is normally compiled in a document referred to as the Geotechnical Data Report (GDR) which may also be included as a contract document. In the event of a conflict or ambiguity the GBR takes precedence over the GDR.

The contractor is deemed to have taken account of the GBR in his tender and the risk of adverse ground conditions encountered during construction are allocated as follows:

- ground conditions more adverse than the baseline are accepted by the employer; i.e. the employer agrees to compensate the contractor for any additional cost or delay; and
- ground conditions consistent with or less adverse than the baseline are accepted by the contractor.

What is the Contractual Mechanism for Making a Claim?

MTRC and the Hong Kong Government use different approaches in incorporating GBRs into their contracts.

In MTRC contracts, Clause 38 is retained and the GBR provides a baseline as to what "could not reasonably have been foreseen by an experienced contractor".

Therefore, the contractor is still required to make a claim for any adverse ground conditions under Clause 38; however, the engineer is required to take account of the GBR in making a decision as to whether the adverse ground conditions could reasonably have been foreseen. Where the GBR is silent on a matter (e.g. there are no baseline parameters because the ground conditions differ from those ordinarily encountered), then there is still an independent duty under Clause 14 (inspection of the site) for the contractor to have satisfied himself as to the nature of the sub-surface, subsoil and the like, however, only insofar as it is practicable and this would be taken into account as to whether something could reasonably have been foreseen.

The Hong Kong Government, who has traditionally placed the risk of adverse ground conditions on the contractor, has incorporated the GBR by replacing its original Clause 13 with a special condition of contract. Essentially, the revised clause provides that if the engineer agrees that the ground conditions are worse than the GBR and necessitate a change in the selected construction methods, design, resources and/or temporary works then the engineer shall, subject to certain conditions, value the changes necessary to deal with the ground conditions and grant any extensions of time.

What Baseline Parameters Should be Used?

Suggested guidelines for preparing GBRs have been prepared

by the Technical Committee on Geotechnical Reports of the Underground Technology Research Council (UTRC).⁴

The objective of the GBR according to the UTRC is to;

"translate the results of the geotechnical investigations and previous experience into clear descriptions of anticipated subsurface conditions upon which bidders may rely."

Accordingly, the baseline statements should generally be quantitative geotechnical parameters that are relevant to the contractor's methods of construction, production rates, temporary works design and the like.

The baselines should, therefore, where possible, comprise of geotechnical parameters expressed as maximum values, minimum values, average values and histograms of distribution values, or combinations thereof. For example, it may be anticipated in a given reach of a tunnel that the average strength of the rock is 150MPa and the range is from 100MPa to 200MPa. The average strength provides a clear baseline by which to measure conditions actually encountered and the range an indication of the level of risk that the contractor assumes in its tender.

Their Abuse

The problem with GBRs in Hong Kong is that they do not always provide a clear description of ground conditions on which tenderers may rely or properly consider how the baselines are to be measured. Some examples of these problems are as follows:

• The baseline parameters are not measureable during construction

The baseline parameters should be measureable or verifiable considering the methods of construction employed. Where it is not always possible to provide definitive comparisons with the baseline then a practical approach should be taken to the task in hand.

For example, an obvious difficulty is encountered with tunnel boring machines (TBM) which provide little or no access to the workface. In such circumstances, the quality of the rock mass and characteristics of discontinuities can only be determined from the chippings after the material has been through the rock crusher and into the conveyor or slurry system. Therefore, procedures need to be applied to sample and jointly agree the material being encountered. For instance, the presence of angular chips would indicate highly fractured rock with closely spaced joints, whereas, flat elongated and sub-rounded chips would indicate bedrock with widely spaced joints where the cutters created stress fractures in the rock, causing it to chip away from the rock. The agreed procedure would thus need to determine the proportions of the different types of the chips and how they relate to the joint spacing of the bedrock.

An alternative approach to this problem is considered by Freeman et al in *Geotechnical Baseline Reports – A Review*;

*"In some cases, it is better to baseline the end result, such as groundwater inflow into the tunnel, rather than a soil/rock property, such as permeability, which may vary widely and is difficult to measure in the field during construction. In Europe, partly to overcome these limitations, TBM boreability parameters (i.e. penetration rate and cutter wear) are sometimes used to classify the rock mass; however, these parameters can be difficult to interpret if machine operation becomes an issue."*⁵

- **The baseline parameters are meaningless**

The baseline parameters should be meaningful and relevant to the contractor's methods of construction.

For example, a standard penetration test (SPT) 'N' value provides an indication of the relative density of the ground. This test is relevant to driving sheet piles in that it is difficult to drive piles through soil with SPT 'N' values greater than 60 using a vibratory hammer. The implications are that if sheet piles cannot be driven using a vibratory hammer then a more costly and timely method may have to be considered; e.g. powerful pile hammers or preboring. A properly considered GBR might, therefore, provide percentages of different anticipated ranges of SPT 'N' values at different locations of the site with a view of enabling the tenderer to properly quantify the different methods that might be used to install the sheet piles. However, we have seen SPT 'N' values expressed as a range covering all possible values that might be encountered on the site.

Similarly, we have seen Rock Quality Designations (RQD) with baseline parameters of 0 to 100%! A RQD is a measure of the degree of jointing or fracture in a rock mass, measured as a percentage of the drill core over a predetermined length. By expressing a full range of RQD percentages there is essentially no baseline and the contractor arguably assumes the full risk of any conceivable degree of jointing or fractures in rock mass.

Interestingly, the UTRC recommends that the GBR should as part of its construction considerations include potential sources of delay. Thus, we have seen statements in Hong Kong GBRs such as;

"The following possible sources of delay shall be considered by tenderers in their tender..."

followed by a generic list of every conceivable head of claim that might arise, e.g;

"higher rock head or stronger rock than anticipated".

It is suggested that this obligation must be limited to the contractor considering such possible sources of delay in its risk register or similar and not the time and cost effects of the delay. Any other interpretation would clearly defeat the whole purpose of the GBR.

- **The baseline parameters do not reflect the anticipated ground conditions**

The baseline parameters should be realistic and should reflect ground conditions that could reasonably be expected to be encountered, since it is where the baseline is set that determines the allocation of risk for adverse ground conditions.

Nevertheless, in Hong Kong there appears to be a distinct tendency to artificially set baselines higher than what is reflected in the site investigation data. For example, we have seen the baseline parameters for the rockhead level specified at 10-15 metres lower than the level derived from borehole logs and rock strengths artificially increased without any justification. The possible consequences of this are:

- The tender price is increased because more risk is allocated to the contractor;
- The employer pays for a contingency that may not actually be encountered;
- The employer is allocated less risk and secures this under competitive tendering; and/or

- The contractor makes a claim that the baseline is not realistic. In this respect, a non-binding dispute review board in the USA has strongly criticized an employer for setting a baseline higher than derived from the site investigation data as a *"stratagem to protect the owner, not a proper baseline bid."*⁶

Either way, this at first blush is simply a move back to the Hong Kong Government's traditional approach in allocating the risk of adverse ground conditions entirely with the contractor. In this regard, the GBR provides a false sense of security to the contractor that the ground risk is being shared.

Conclusions

GBRs provide an innovative approach not seen before in Hong Kong to the administration of differing site condition clauses and the allocation of risk. In particular, the Hong Kong Government should be commended for shouldering an increased risk for adverse ground conditions on some of its contracts and moving away from the 'repugnant' Clause 13.

However, to properly evaluate whether ground conditions have changed, these GBRs should provide a meaningful, reasonable and realistic interpretation of the available site investigation data. Unfortunately, whilst most GBRs in Hong Kong cite the UTRC guidelines for *Geotechnical Baseline Reports for Construction*⁴ very few of them seem to have taken its recommendations to heart. This has left some contractors on MTRC contracts assuming potentially more risk than would otherwise have been the case if there was no GBR. It is not clear whether this re-allocation of risk is an intended policy decision or simply a result of overzealous consultants.

Either way, if contractors are to properly protect their interests then they should not automatically assume that the GBR meets the objectives of the UTRC. Nor should contractors assume that a consistent approach is taken by employers (or their consultants) in preparing the GBR and setting the baselines. Instead, the GBR should be comprehensively reviewed at tender stage, both technically and contractually, to identify potential risks and opportunities. ☞

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Footnotes:

1. Keating on Construction Contracts, Eighth Edition, page 981.
2. Bramble BB and Callahan MT, *Construction Delay Claims*, Third Edition, pages 2-46.
3. Grove J B (1998), Consultant's Report on Review of General Conditions of Contract for Construction Works, The Government of the Hong Kong Special Administrative Region.
4. Underground Technology Research Council (UTRC), 2007, *Geotechnical Baseline Reports for Construction*, Technical Committee on Geotechnical Reports of the UTRC, American Society of Civil Engineers.
5. Freeman T, Klein S, G Korbin and Quick W (2009), *Geotechnical Baseline Reports - A Review*, Jacobs Associates.
6. Gould J P (1995), *Geotechnology in Dispute Resolution*, Journal of Geotechnical Engineering, page 532.

Hired Guns Bite the Dust?



By **Ian Cocking**, Partner and Head of Construction for Hong Kong & China of Clyde & Co

Introduction

Traditionally, all witnesses enjoyed a general immunity from being sued for the evidence they gave. Therefore no matter what an expert said in court, he could not be sued by his client. The position has changed recently. This article concerns a controversial (and some would say surprising) judgment given on 30 March 2011, *Jones v Kaney* [2011] UKSC13, in which the expert's immunity has been removed by a majority decision of the Supreme Court, which is the highest court in the United Kingdom. This controversy is set to rage and divide opinions the world over. At its core are a number of sweeping assumptions about experts. For the reasons explained below, it is to be hoped that the Hong Kong courts will consider carefully the dissenting opinions of Lord Hope and Lady Hale before implementing the same changes here. I will also discuss the practical implications of this change in law, which could be very significant both for experts and those seeking their assistance.

Jones v Kaney

The facts of this case are straightforward. The appellant was injured in a road traffic accident. His solicitors instructed the Respondent, a consultant clinical psychologist. In due course a district court ordered that the Respondent meet with the expert retained by the other side and prepare a joint statement. That joint statement was damaging to the appellant's claim. It transpired that the Respondent's expert had signed the joint statement even though it did not reflect what she had agreed because she had felt under pressure and she had not agreed with the statement's conclusions. The district judge would not permit the appellant to change his expert and the appellant felt obliged to settle the case for less than would have been achieved had the Respondent not signed the statement. The appellant's claim against the Respondent for negligence was dismissed at first instance because of the long-standing principle that expert witnesses are immune from liability in negligence in relation to the performance of their duties in that capacity. However, since the issue raised a point of law of general public importance, the judge allowed the case to "leapfrog" to the Supreme Court.

...expert witnesses are no longer immune from suit in relation to the evidence which they give in court or for the views which they express in anticipation of court proceedings.

By a majority of 5:2, the Supreme Court allowed the appeal. The main reasons given by the majority for abolishing the immunity were as follows:

1. Analogy with the position for advocates. In *Hall v Simons* [2002], the House of Lords swept away the advocate's immunity from liability in negligence (both in court and out – but not their immunity from claims for defamation). However, in that case a distinction was drawn between advocates and expert witnesses. The Supreme Court has now held that that distinction is no longer tenable since both undertake a duty to provide services to the client.
2. There was no basis for assuming that expert witnesses would be discouraged from providing their services or would not give full and frank evidence to the court if the immunity was removed (the so-called "chilling" factor). It was also not realistic to anticipate that they would become subject to vexatious claims. Lord Brown opined that the courts should be alert to protect expert witnesses against specious claims by disappointed litigants, "not to mention to stamp vigorously upon any sort of attempt to pressurize experts to adopt or alter opinions other than those genuinely held."
3. Wasted costs orders and disciplinary proceedings can already be made against witnesses. There were therefore no longer any policy reasons for retaining the immunity.

Accordingly, expert witnesses are no longer immune from suit in relation to the evidence which they give in court or for the views which they express in anticipation of court proceedings. Witnesses of fact, however, remain immune from suit.

However the minority judges were unusually outspoken in delivering their dissenting judgments. In disagreeing with the majority decision Lady Hale said,

"... it does not seem to me self evident that the policy considerations in favour of making this exception to the rule are so strong that this Court should depart from previous authorities to make it. To my mind, it is irresponsible to make such a change on an experimental basis. This seems to me self-evidently a topic more suitable for consideration by the Law Commissioner and reform, if thought appropriate, by Parliament rather than by this Court."

The other minority judge, Lord Hope, Deputy President of the Supreme Court, concluded his speech by saying,

"... I doubt whether it is right that we should proceed in this way only on the basis of assumption, which is really all we have to go on in this case ... The lack of a secure principled basis for removing the immunity from expert witnesses, the lack of a clear dividing line between what is to be affected by the removal and what is not, the uncertainties that this would cause and the lack of reliable evidence to indicate what the effects might be suggest that the wiser course would be to leave matters as they stand."

Background

Interestingly, the rule that an expert witness was protected by a general immunity had not been challenged seriously before. Immunity had simply been taken for granted by courts at all levels for a very long time. It was first established in a defamation claim 400 years ago before the tort of negligence even existed. This privilege was subsequently extended to all kinds of claim (e.g. a negligence claim or a claim for breach of confidence). However the immunity never covered prosecution for perjury or for contempt of court.

The historical policy reasons for granting immunity to witnesses may be summarised as follows:

1. To encourage an expert to give full and frank evidence in accordance with his duty to the court even if it conflicts with the interests of his client.
2. To promote impartiality, the absence of immunity would lead to a loss of objectivity and the threat of civil liability would encourage experts to assert extreme positions favourable to the client.
3. To protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims.
4. To encourage honest and well meaning persons to assist justice.
5. To secure that the witness will speak freely and fearlessly.
6. To avoid a multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again.
7. To facilitate full and frank discussion between experts and allow the experts to make proper concessions without fear to depart from previous positions.
8. To allow the expert to resile fearlessly and with dignity.
9. To encourage more experts to provide their services.

Thus, in *Raiss v Palmano* [2001] PNLR 21, a claim against a surveyor was struck out even though he conceded that he did not have the qualification claimed in his expert report.

Reasons for Taking Away the Immunity

Two reasons were advanced by the Respondent in support of continued immunity.

The first was that it was necessary to ensure that expert witnesses will be prepared to give evidence at all.

The majority were unimpressed. Lord Dyson said,

"Whether professional persons are willing to give expert evidence depends on many factors. I am not persuaded that the possibility of being sued if they are negligent is likely to be a significant factor in many cases in determining whether a person will be willing to act as an expert. Professional persons engage in many activities where the possibility of being sued is more realistic than it is in relation to undertaking the role of an expert in litigation ..."

The second ground advanced by the Respondent was that expert witnesses would be reluctant to give evidence against their clients' interests if there was a risk they would be sued. This is what has been called the divided loyalty argument. By drawing close comparisons between experts and advocates, the majority concluded that the prospect of an action for negligence was *"unlikely to tempt an expert to disregard his duty to the Court."*

Lord Dyson went so far as to say that there was no conflict at all.

"There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus the discharge

of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client. If, however, he gives an independent and unbiased opinion which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court, because he will have provided independent and unbiased assistance to the court. But he will be in breach of the duty owed to his client."

Concerns Raised

One of the concerns raised by the minority was the lack of evidence pointing either one way or the other, as to the need to remove the immunity or the consequences of doing so. Lord Hope regretted the absence of any intervention in the proceedings by a body with experience across the whole range of this area of practice such as the Academy of Experts which could have provided evidence to inform the Court.

"I am unwilling to assume that every witness who gives evidence as an 'expert' belongs to a professional organisation or engages regularly in court work. Some may be academics, and some may come forward to give expert evidence only once in a lifetime. It seems to me that it would be unwise to assume that they all have insurance cover against claims for negligence."

To the minority, the question of negligent experts diverted attention from the consequences for those who are wholly innocent but are nevertheless exposed to harassment by the *"disgruntled or the unscrupulous"*. To them the question in this case was whether the reasons which justify immunity for witnesses generally did not apply to expert witnesses.

Lord Hope disagreed strongly with Lord Phillips and Lord Dyson and thought there was an obvious conflict between the duties that the expert owes to his client and those that, in the public interest, he owes to the court. In his view it was plain that the paid expert owes duties to the client by whom he is being paid. Nevertheless when it came to the content of that evidence, his overriding duty is to the court, not to the party for whom he appears. His duty is to give his own unbiased opinion on matters within his expertise. It is on that basis that he must be assumed to have agreed to act for his client. It would be contrary to the public interest for him to undertake to confine himself to making points that were in the client's interest only and to refrain from saying anything to the court to which his client might take objection.

As regards the analogy with the removal of the immunity from advocates, Lord Hope was in no doubt that the witness and the advocate perform different functions. The duties that the advocate owes to the court are not as far reaching as the overriding duty to the court that rests on the expert. His principal duty is to his client, not to the court.

As regards the reliance placed by Lord Phillips and Lord Dyson upon the fact that the immunity had been withdrawn from advocates as an argument for withdrawing it from experts, Lord Hope said,

"I find this disturbing. I do not think that anyone who sat in Arthur J S Hall & Co v Simons foresaw that removing the immunity from advocates would be taken as an indication that it should be removed from expert witnesses too. Yet here we are a decade later contemplating taking just that step. There is a warning here, to repeat the old adage, that one thing leads to another. Removing just one brick from

the wall that sustains the witness immunity may have unforeseen consequences."

With reference to wasted costs orders and disciplinary proceedings against experts, the suggestion of the majority was that the protection of the immunity had been significantly eroded by these developments.

The minority were not convinced by this argument either. It is one thing to be liable to a wasted costs order at the instance of the court itself or to proceedings by a professional body for professional misconduct,

"It is quite another to be at risk of worthless but possibly embarrassing and time-consuming proceedings by a disgruntled and disaffected litigant in person."

With regard to whether abolition of the immunity would deter a significant number of potential experts from giving evidence, the minority judges felt that without hard information, it was not possible to assess how much weight should be given to it. They accepted that there may be some situations – some kinds of case, some kinds of client – where the expert would be reluctant to become involved at all. If that were to happen it would raise questions as to whether access to justice for the disadvantaged was being inhibited. This is a reason for wishing to be cautious before taking a step which, for all practical purposes, would be irretrievable.

Implications

Despite the assurances of the majority of the Supreme Court, this decision may well deter expert witnesses from acting, especially when the provision of expert evidence does not form the bulk of a practitioner's work.

It is clear that the majority took a fairly jaundiced view of professional experts. However the main justification for removing the immunity seems to be little more than that immunity had been removed for advocates. There is scant reason given as to what is supposed to have actually changed.

Experts will certainly need to be more cautious about early opinions and preliminary reports in case these change significantly later on.

It is possible that this decision will reduce the tendency of some experts to act as 'hired guns', but unlikely. If anything, it will increase the pressure on experts to stick to their opinions for fear of being sued for making unnecessary concessions or compromises.

Experts will certainly need to be more cautious about early opinions and preliminary reports in case these change significantly later on.

Contrary to the intent, there is a danger that it will further 'professionalise' this field of practice and impact the willingness of experts (or the organisations in which they work) to come forward to give expert testimony.

Good experts will be even harder to find in some disciplines. There are significant differences between experts and advocates, not least, experts have a choice. Experts decide whether to take on expert assignments with their other work. It is frequently difficult finding (and persuading) experts in specialised areas in a small market like Hong Kong.

It is unclear whether the immunity is to be removed in respect of confidential information. An expert may be placed in a difficult position if he feels he should reveal information which the court needs if it is to be told the truth.

The position will be particularly difficult for jointly instructed experts, who owe duties to each of the parties who instruct them. As such, they might (as Lady Hale suggested in her dissenting opinion) be more vulnerable to claims because they are likely to disappoint at least one of those instructing them.

In the construction context, witnesses frequently come forward with a mixture of factual and expert evidence. It may be difficult to determine, for the purposes of the removal of the immunity, whether those witnesses are covered.

Experts must be extremely careful when making the necessary investigations and preparations for the giving of their evidence. In construction cases experts will need to be particularly wary about the work of teams assisting them in the preparation of their reports or run the risk of breaching their duty of care by over delegation.

PI underwriters may also require additional information from professionals as to the amount of expert witness work they generally undertake and may consider an increase in premiums for those for whom this type of work forms a significant proportion of their time.

Exclusion clauses will undoubtedly be introduced into contracts to give expert evidence, in which case, (as Lady Hale observed) we shall be back to where we started.

Lady Hale concluded her opinion by observing that the major concern is about the effect upon disappointed litigants. The object of the rule is to protect all witnesses, including experts,

"... against the understandable but usually unjustifiable desire of a disappointed litigant to blame someone else for his lack of success in Court."

So we shall have to see whether the hired guns remain the hunter or have, in fact, become the hunted. ↩

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➤ The Cost Implications of an Unreasonable Refusal to Mediate

In the Winter 2010 edition of the *ADR Digest*, the Civil Justice Reforms and in particular Practice Direction 6.1 were examined and the greater role mediation is destined to play in the future processing of legal proceedings, as a result. In the article, emphasis was placed on the court's ability to impose costs sanctions when a party unreasonably refuses to attempt mediation. The recent case of *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* HCA 2032/2007 shows the court's willingness to impose cost sanctions in such a scenario.

Golden Eagle specifically made reference to Practice Direction 31 (which excludes 'construction cases'); however, similar provisions to Practice Direction 31 are found in Practice Direction 6.1 ("PD-6.1") which covers 'construction cases'. In summary, PD-6.1 provides that the court may impose cost sanctions where a party unreasonably refuses to mediate¹, and sets out how to establish if a party has acted unreasonably²; it also requires participating in mediation to the minimum level of participation agreed beforehand or as determined by the court³.

Background

In *Golden Eagle*, the Plaintiff was appointed by the Defendant to sell shares in a company held by the company's subsidiary. The contract between the parties provided for the company to pay the Plaintiff commission based on the share purchase price. However, disputes arose as to the amount of commission owed to the Plaintiff.

After the Plaintiff made a sanctioned offer, the Defendant proposed mediation to which the Plaintiff indicated he was willing to accept. However, subsequently, the Defendant's solicitors wrote to the Plaintiff advising him that the Defendant was not willing to mediate. No reason for this refusal was given. At the pre-trial review, the court enquired about the Defendant's reason for refusing to mediate, and the Defendant advised that it was for 'commercial reason'. The court did not consider this a sufficient reason and requested the Defendant to reconsider mediation accordingly; however, notwithstanding the courts request the Defendant did not agree to mediate.

The Plaintiff succeeded at trial and was awarded a sum higher than its previous sanctioned offer. Costs were sought by the Plaintiff on an indemnity basis, given that attempts were made to mediate and which were unreasonably refused by the Defendant.

To justify its refusal to mediate, the Defendant relied on various matters identified in the English decision in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002. The judge in *Golden Eagle*, the Honourable Lam J noted that *Halsey* is not binding on the courts of Hong Kong, but given the close affinity of the English court's rules and practices to those of Hong Kong he should pay great respect and attention to the judgment.

The Nature of the Dispute

The Defendant alleged that the dispute was not a dispute that could be "easily mediated". However, Justice Lam noted in *Halsey* that Dyson LJ gave examples of disputes which may not be suitable for mediation and noted his Lordship's view that,

"... most cases are not by their very nature unsuitable for ADR."⁴

Justice Lam saw no reasons in the nature of the present dispute which could justify the Defendant's refusal to mediate.

A Reasonable Belief of a Strong Case

The Defendant also noted in *Halsey* that Dyson LJ considered that a party's reasonable belief that he has a strong case may be a relevant factor in deciding whether he has acted reasonably in refusing to mediate. However, Justice Lam noted the reasoning behind Dyson LJ's position was,

"[to avoid] scope for a claimant to use the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit. Courts should be particularly astute to this danger."⁵

As far as the position in Hong Kong is concerned, Justice Lam considered this scenario was unlikely to occur since,

1. "the costs sanction is only applicable if a party refuses to mediate. There is no costs sanction if the parties cannot reach settlement after making a reasonable effort in mediation";
2. "under the Practice Direction 31 [similar to Practice Direction 6.1], the parties can avoid costs sanction after they have participated in mediation up to the agreed minimum level of participation";
3. "the costs involved in such participation in Hong Kong would usually not be high enough to encourage such nuisance claim"; and
4. "in Hong Kong the costs of mediation can be included as part of the legal costs and recoverable by the successful party if the mediation were unfruitful, see *Chun Wo Construction & Engineering Co Ltd v China Win Engineering, HCCT 37 of 2006*".⁶

Justice Lam could not see a reasonable belief of a strong case in the present dispute and referred to Dyson LJ,

"Some cases are clear-cut. A good example is where a party would have succeeded in an application for summary judgement"⁷.

Whether Other Methods of Settlement Have Been Attempted

The Defendant also made reference to the offer made by the Defendant to settle the case and which was rejected, and the Plaintiff's counter-offer, as other methods attempted to settle the case.

However, Justice Lam found that the offer of the Defendant was,

"way off the mark whilst the sanctioned offer of the Plaintiff indicated that the Plaintiff was sensible and realistic in trying to achieve a settlement"⁸.

Whether Mediation has a Reasonable Prospect of Success

As to mediation having little prospect of success, Justice Lam noted a point made in *Halsey* that a party cannot rely on his own unreasonable attitude (resulting in mediation with no

prospect of success) as a ground to refuse mediation. To this end, Justice Lam noted that the process of mediation may change attitudes and referred to Lightman J's observations in *Hurst v Leeming* [2003] 1 LI Rep 379.

Justice Lam also noted that mediation often succeeds where previous attempts to settle have failed and highlighted *Supply Chain and Logistics Technology Ltd v NEC Hong Kong Ltd* HCA 1939 of 2006.

In light of the above, Justice Lam concluded that he did not regard "the wide difference between the parties in the correspondence as indicating that the mediation would be a waste of time and efforts"⁹.

Whether the Cost of Mediation is Disproportionately High

As to the Defendant's argument that the costs of mediation would be disproportionately high, Justice Lam felt that in light of the claim and the counterclaim values of RMB 12 million and RMB 7 million respectively, and considering the nature of the case, the costs for a reasonable attempt to mediate should not be regarded as disproportionately high.

Summary

Justice Lam could not see any reasonable explanation on the part of the Defendant for refusing to mediate and he considered that this was "a relevant consideration in assessing whether a higher basis of taxation should be ordered against the Defendant in respect of the costs of the action" incurred after the date of the Defendant's refusal to mediate¹⁰.

In light of the above, the courts will not accept a party's unreasonable failure to mediate. To this end, parties should take note and seek advice and strongly consider whether it is first reasonable to mediate, prior to resorting to litigation. Whether such cost sanctions will extend to arbitration proceedings which first do not use mediation is yet to be seen. ↩

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Footnotes:

1. PD-6.1, paragraph 21.
2. PD-6.1, paragraph 44.
3. PD-6.1, paragraph 42.
4. Paragraph 17 of *Halsey*.
5. Paragraph 18 of *Halsey*.
6. Paragraph 29 of *Golden Eagle*.
7. Paragraph 19 of *Halsey*.
8. Paragraph 33 of *Golden Eagle*.
9. Paragraph 37 of *Golden Eagle*.
10. Paragraph 46 of *Golden Eagle*.

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➤ Forthcoming Events 2011

- 12 May Society of Construction Law: The End of Expert Witness Immunity, Philip Boulding QC - HKIAC
- 12/13 May HKIAC International Arbitration, ADR and Mediation Summit 2011 - Harbour Grand Hotel, Hong Kong
- 14 May RICS Annual Conference: Why, What and How - The truth behind sustainability: building towards a vision - Conrad Hong Kong Hotel
- 16 May Hong Kong Institute of Surveyors: Expert Witness - A Sharing Experience, TT Cheung - HKIS
- 27 May British Chamber of Commerce Breakfast Briefing: Are Your Projects Costing the Earth? - Hong Kong Club

- 2/3 Jun Lighthouse Club Two Day International Seminar: Caring Construction, Collaborative Contracting - Hong Kong Convention & Exhibition Centre, Wanchoi
- 3 Jun Lighthouse Club - June Get Together - Delaney's 1st Floor, Wanchoi
- 4 Jun Lighthouse Club Annual Ball - Hong Kong Convention & Exhibition Centre, Wanchoi
- 9 Jun ADR Partnership Cocktails - The China Club
- 24 Jun British Chamber of Commerce and Standard Chartered Bank Annual Ball 2011 - The Grand Hyatt
- 8 Jul Lighthouse Club - July Get Together - Delaney's 1st Floor, Wanchoi
- 21 Jul Lighthouse Club - Eddie Ward Dinner - Royal Hong Kong Yacht Club, Causeway Bay
- 5 Aug Lighthouse Club - August Get Together - Delaney's 1st Floor, Wanchoi

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