IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

The Hon Mr Justice Andrew J. Jones QC
In Chambers, 15th August 2011

Cause No. FSD 140 of 2010

BETWEEN: STEVEN GONG Plaintiff

AND CDH CHINA MANAGEMENT COMPANY LIMITED Defendant

RULING

Appearances: Mr Stephen Alexander of Maples and Calder for the Defendant

The Plaintiff did not appear and was not represented

1. This is an application by CDH China Management Company Ltd ("the Defendant"), the only defendant remaining in this action, for an order pursuant to GCR O.18, r.19(1) and/or the inherent jurisdiction of the Court that the action be struck out as an abuse of the process. The Defendant is a company incorporated in this jurisdiction and carries on business as an investment manager, either directly or indirectly through various subsidiaries, in Hong Kong and Beijing. It is not necessary for the purposes of this application to analyse the Plaintiff's cause of action or describe the issues between the parties in any detail whatsoever. Suffice to say that the Plaintiff is a former employee of the Defendant. He claims that the Defendant is in breach of one or more contracts of employment by having failed to pay the "carry" earned by the investment funds for which it and/or its subsidiaries are acting as investment manager. The expression "carry" is a term of art which equates to "profit share". As the pleadings presently stand, the amount of the Plaintiff's claim is not particularized, but it is my understanding that the amount allegedly owing is millions of dollars.

2. The Plaintiff was originally represented by attorneys who ceased to act for him some months ago and he now acts in person. Since the Plaintiff is resident in Beijing, I made

orders to the effect that service between the parties could be affected by means of scanning and transmitting documents to specified e-mail addresses. The Plaintiff was duly served in this way. Given his residence in Beijing, the Court gave the Plaintiff the opportunity to participate in this hearing by telephone. He thanked the Court for giving him this opportunity, but said that he would not take part in the hearing.

3. On 22nd February 2011 I made an order that the Plaintiff must give security for costs and I gave detailed written reasons for that decision because the application raised a point of law of some general importance. I ordered that the sum of US$10,000 be paid into Court and that all further steps in the action be stayed unless payment was made within 14 days. The Plaintiff has not paid any money into Court, for reasons which are probably explained in his letter dated 2nd March 2011 and addressed to the Court. The result is that the action is now stayed. It is also relevant to note that the Plaintiff originally joined two other parties as defendants in this action, to whom I shall refer as "the Former Defendants". On 18th November 2010 the Former Defendants made an application that the action be struck out on the ground that the writ and statement of claim did not disclose any reasonable cause of action against them. In the event, the Plaintiff discontinued the action against them, although it is right to say that if he had not done so, I would have made a strike out order. However, it is accepted that the writ and statement of claim do disclose a reasonable cause of action against the Defendant which never issued any strike out application on this ground. Having discontinued the action against the Former Defendants, they were entitled to an order for costs. I am now told that they presented their bill of costs in the usual way and, in the absence of any response from the Plaintiff, a default certificate was issued in the sum of US$28,495 which remains unsatisfied. The Defendant now seeks an order that the action be struck out on the grounds that the Plaintiff's failure to give security for costs, his failure to comply with an order for directions and his failure to satisfy the orders for costs made in favour of the Former Defendants constitutes an abuse of the process of the Court. Counsel also suggests that the Plaintiff appears to have abandoned this litigation (which is not exactly what he said in the letter of 2nd March) and that its continued existence is somehow prejudicial to the Defendant. In my judgment, these grounds do not constitute a proper basis for striking this action out as an abuse of the process.

4. The Plaintiff's failure to give security for costs does not, by itself, constitute an abuse of the process of the Court. The ordinary remedy available to a defendant in the event that a plaintiff fails to put up security when ordered to so, is that the action will be stayed unless and until there is compliance. This is the remedy which this Defendant sought in its summons and the remedy which I granted. The consequence of the Plaintiff's failure is that the action is now stayed and will remain stayed unless and until he pays, although there is no guarantee that the stay will be lifted even if he does tender payment out of

time. The consequence of allowing the action to remain stayed, which means that neither party can take any further steps, for an inordinate length of time is that the Defendant could make an application for an order that it be dismissed for want of prosecution, relying upon the principles laid down by the House of Lords in *Birkett v. James* [1978] AC 297 which have been consistently followed and applied in this jurisdiction. In deciding how to exercise its discretionary power to dismiss an action for want of prosecution, it is established that limitation is an important factor. If this action were to be struck out or dismissed for want of prosecution today, the Plaintiff would be entitled to issue a new writ and start over again. His cause of action is based upon the breach of four contracts said to have been made on various dates between January 2007 and December 2009. The date(s) on which the breaches are said to have occurred is open to argument but it is clear, on any view, that none of the Plaintiff's pleaded causes of action will become statute barred for two or three years.

5. The Defendant also relies upon the fact that the Plaintiff failed to comply with my earlier order for directions made on 10th January 2011 in that he (a) failed to exchange lists of documents on 21st February and (b) failed to amend his writ to include his personal residential address. Counsel relied upon an unreported decision of the English Court of Appeal in *Choraria –v- Sethia* (transcript dated 15th January 1998) as authority for the following proposition –

   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 rules of court with full awareness of the consequences is capable of amounting to an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground." (Per Nourse L.J.)

   In that case the plaintiff was found to have been guilty of causing inordinate delay and breaching the rules and/or non-peremptory orders on ten occasions over a period of almost six years. On its facts *Choraria v. Sethia* bears no resemblance to the present case. The Plaintiff's failed to exchange lists of documents on 21st February. He was just one day out of time when I made the order for security and the action became stayed 14 days later. Similarly, the failure to amend the writ has little consequence, because I subsequently made an order to the effect that the Defendant could serve the Plaintiff by scanning and transmitting documents to his e-mail address. The Defendant's counsel suggests that the Plaintiff appears to have abandoned his action. Even if he is right, it does not constitute an abuse of the process for a plaintiff to abandon his action. The rules allow the Plaintiff to do so, without giving any reasons, by the simple mechanism of serving a notice of discontinuance, as he did in respect of the Former Defendants. If it can be established that the Plaintiff has in fact abandoned his claim and no longer intends to pursue it, at least in this jurisdiction, it would be open to the Court to dismiss the action

for want of prosecution prior to the expiry of the limitation period, but this is not the application before me today.

6. Counsel also seeks to rely upon the fact that the Plaintiff has not satisfied the default costs certificate issued in favour of the Former Defendants. This point is misconceived for two reasons. First, the failure to satisfy a judgment debt (or its equivalent) is not an abuse of the Court's process which entitles the judgment creditor to have the action struck out. The judgment creditor's remedy is to commence enforcement or insolvency proceedings. Second, the Former Defendants are no longer parties to this action. This Defendant cannot be heard to say that the Plaintiff is abusing the process of the Court because he is failing to satisfy a judgment debt (or its equivalent) owing to someone else.

7. Finally, it has been suggested by counsel that the continued existence of this action (albeit stayed) is somehow prejudicial to the Defendant's business reputation because it has to be disclosed in offering documents issued by its investment fund clients. In the absence of evidence, I am afraid that I do not understand this point. The Defendant is an investment manager. I do not understand why its clients need to disclose in their offering documents the fact that their manager is being sued by a former employee for breach of his contracts of employment. Even if the existence of this litigation does have to be disclosed in this way and even if it does reflect badly upon the Defendant's business reputation, this would not be a factor which I should take into account in deciding whether or not to strike the action out as an abuse of the process.

8. For these reasons, this application is dismissed. Since the Plaintiff has not opposed this application, I make no order as to costs.

DATED the 15th day of August 2011

Hon Mr Justice Andrew J. Jones QC