

Strike out: no second bite of the cherry

DP World Djibouti FZCO v China Merchants Port Holdings Company Limited

In the latest episode of the dispute between port operators, DP World and China Merchants Port, the Hong Kong Court of First Instance struck out and dismissed a second action by DP World Djibouti FZCO (“DPWD”) that had been initiated in 2023, but which arose from the same subject matter as an earlier action against China Merchants Port Holdings Company Limited (“CMPH”) that had been commenced in 2018.¹

While the principles of *res judicata* or cause of action estoppel are often relied on in applications to strike out second actions arising from the same subject matter, they were not considered in this case given the first action against CMPH was still ongoing at the time the second action was commenced. However, the Court accepted that the second action constituted an abuse of process since the claims in the 2023 Action were substantively the same as those in the 2018 Action and certain new matters could and should be ventilated in the 2018 Action. With strike-outs of an entire action being relatively rare, this decision provides guidance to litigants on bringing two separate actions against the same defendant in relation to the same subject matter.

Background

In 2004 and 2006, certain companies affiliated with DP World entered into two concession agreements with the Djibouti Government (together, the “Concession Agreements”), whereby they were granted the exclusive right to establish and operate a new container terminal at Doraleh. A joint venture agreement (the “JVA”) was also signed between DPWD and the Djibouti Government in 2007. The relationship between the parties deteriorated around 2012. The Djibouti Government issued a series of laws declaring the Concession Agreements terminated and also terminated the JVA afterwards.

In August 2018, the DP World parties to the Concession Agreements and the JVA, including DPWD, commenced proceedings against CMPH, claiming that it had unlawfully procured the Djibouti Government to breach both Concession Agreements and the JVA (the “2018 Action”). Progress in the first action was slow. Due to multiple time extensions granted, CMPH had still not filed or served its defence by 2023.

In May 2023, DPWD commenced a parallel second action against CMPH (the “2023 Action”). Both actions shared the same factual background and involved some overlapping parties. In the 2023 Action, DPWD also claimed against CMPH for procuring a breach of contract, but relied on certain new matters related to the 2006 Concession Agreement. DPWD brought the 2023 Action in the hope that CMPH would file its defence promptly thus giving DPWD a preview of CMPH’s defence in the 2018 Action.

CMPH applied to strike out and dismiss the 2023 Action on the grounds that it constituted an abuse of process and disclosed no reasonable cause of action.

DPWD’s position

DPWD asserted that the purpose of bringing the 2023 Action was “to have sight of whatever defence CMPH may have on the allegations of the Djibouti Government’s breach of contract and its procurement of the same”, which would be “advantageous” to the conduct of both the 2018 Action and the 2023 Action.

DPWD submitted that, in considering whether to strike out a claim, there should be no presumption by the court that the bringing of the same claims against CMPH twice would constitute an abuse of process. The burden of establishing there was an abuse of process laid with CMPH. According to DPWD, the question to be determined by the Court was whether DPWD’s conduct was in all the circumstances an abuse of process by applying a “broad merits-based approach” – in particular,

¹ [2025] HKCFI 3861.

whether there were valid reasons for DPWD to bring the second action and whether this involved any unjust harassment or oppression of CMPH.

The decision

Rejecting DPWD's arguments, the Court held there was a distinction between the following two scenarios, as advanced in CMPH's submissions, where:

- (1) a plaintiff brings two actions against the same defendant for the same cause of action; and
- (2) a plaintiff brings two substantially overlapping actions involving different defendants and/or different causes of action.

In the first scenario, the later action is *prima facie* liable to be struck out due to the strong public interest in disallowing duplicative actions, and the onus would be on the plaintiff to justify why both actions should be maintained. Whereas in the second scenario, there is generally more room to argue why bringing two overlapping (but not identical) actions is not an abuse of process (e.g. due to awaiting full disclosure from third parties or discovery of further evidence).

Agreeing with CMPH, the Court held that by arguing an abuse of process may only be found upon further assessment of its conduct in all the circumstances, DPWD failed to appreciate the distinction between the two scenarios. The 2023 Action fell into the first scenario and there was "*no precedent*" to allow a plaintiff to bring two concurrent actions against the same defendant for the same claims.

Even where a plaintiff has a second action that is not identical to the first, the court will nonetheless consider whether the second action amounts to a '*Henderson v Henderson* abuse' which "*preclude[s] a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones, unless there are special circumstances*". In this case, the Court confirmed that such an abuse can arise when an earlier action is still ongoing and held that, although the 2018 Action and the 2023 Action were not strictly identical, the new matters raised in the 2023 Action did not serve as a sufficient basis to maintain the action. Absent special circumstances as to why the new matters were not or could not have been raised before, the proper way for DPWD to introduce them would be to amend its pleadings in the 2018 Action. However, the Court refrained from expressing any views on whether the 2023 Action disclosed no reasonable cause of action, as this would have pre-empted the merits of certain claims should they be ventilated in the 2018 Action.

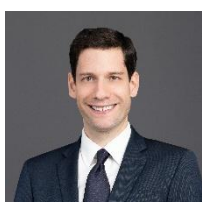
Key takeaway

This decision reinforces the need for litigants to ensure that all claims against a particular defendant should generally be brought together within the same action (even if, at the time of drafting the pleading, it is unknown how good certain claims may be). It may not be feasible to bring a second action and doing so without a justifiable reason may amount to an abuse of process.

Relatedly, litigants should also bear in mind that introducing additional claims into a pre-existing action at a later stage in the proceedings will not always be possible. The court's permission may be required to amend pleadings and leave may be refused if amendments have a prejudicial effect on the defendants and the progress of the proceedings.

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