DEBT COLLECTION MALPRACTICE

The problem of dubious and heavy-handed debt collection practices has been the subject of public concern in Hong Kong for some time. The use of such practices has escalated since the Asian financial crisis in 1997, after which time the number of complaints of criminal conduct in relation to debt collection increased from 447 in 1997 to 1,672 in 1998, and to 3,323 in 1999.[1] The gravity of the problem was acknowledged when, in 1998, the Chief Justice and the Secretary for Justice referred the matter to the Law Reform Commission, which in turn appointed the Sub-committee on Regulation of Debt Collection Practices (the "Sub-committee"). The major recommendations in the Sub-committee's consultation paper include the creation of a specific debt collection criminal offence of harassment of debtors, the establishment of a compulsory licensing system for debt collection agencies and their individual debt collection employees, and a code of practice, a breach of which may result in the suspension or revocation of a debt collector's licence.

Laudable as these recommendations are, they do not address what is in many cases the crux of the problem. Those unscrupulous elements of society prepared to engage in criminal conduct for profit in collecting the debts of others are unlikely to be discouraged by such measures. After all, there already exist ample criminal law offences prohibiting such conduct. The criminal law of assault, intimidation, blackmail, and criminal damage already provides ample sanctions, which, as the statistics show, have had minimal effect on the practice of criminal debt-collection tactics. At any rate, the actual perpetrators of such crimes are rarely apprehended and made answerable, whether under the civil or criminal law. Moreover, they are unlikely to be able to make good on any judgment entered against them. So why would these criminal elements be discouraged in their apparently profitable debt collection practices by the Sub-committee's recommendations?

The solution must lie with the creditors. For many creditors, the temptation to engage result-oriented but criminal-minded, debt collectors to collect their debts is just too great. So long as there exists a class of anxious creditors desperate to collect their debts, debt collection malpractice is likely to continue. The Sub-committee did, of course, discuss and consider the role of creditors in the debt collection process. However, it appears not to have fully appreciated their role – in particular their potential for a solution to the problem of debt collection malpractice by creating incentives for creditors to exert

1 Consultation Paper, Law Reform Commission of Hong Kong Debt Collection Sub-committee, 2000. Available at www.info.gov.hk/hkreform.

pressure on their debt collectors to ensure that civility and fair play are adhered to in the collection process.

The crux of the problem was exposed in recent Hong Kong case law such as *Wong Wai Hing and Another v Hui Wei Lee*,[2] and *Li Wai Ying and Lee Sin Tat v West Global Limited and Others*,[3] which were both decisions of the Court of First Instance. In these cases, the creditors engaged the debt collectors on terms whereby the debt collectors were expressly instructed to use "only lawful means". This is a nifty tactic on the part of creditors prepared to turn a blind eye, and one that, in these cases, the courts were prepared to respect. The courts came to the same conclusion in each case: the creditors were not liable as principals for the torts committed by the debt-collectors because they did not authorise or ratify the torts.

Moreover, vicarious liability cannot be imposed on the creditors in such cases, in the absence of a master / servant relationship, which is, in any case, not the basis on which creditors engage debt collectors. Lastly, lacking the necessary *mens rea* or conspiracy (always difficult to prove) or participation in the criminal activities, no criminal liability will attach either.

It is interesting to note that the Sub-committee's recommendations stopped short of addressing the role of creditors. Yet it is with the creditor that the greatest potential for an effective deterrent resides. After all, by definition the creditor is motivated by purely financial incentives, and if he is made to pay compensation for torts committed by his agent, then the civil law may offer the most effective solution to the problem.

The very recent Court of Appeal decision in *Wong Wai Hing and Another v Hui Wei Lee*[4] is therefore to be welcomed. In this case, the defendant was a Hong Kong medical practitioner seeking the return of her investment in a restaurant venture she had entered into with the plaintiffs and had since come to regret. The debt collection agency she retained in an attempt to recover the amount of her investment engaged in a range of tortious and criminal conduct directed at the plaintiffs and their staff, including threats of physical violence made by telephone and in repeated visits to the plaintiffs' business premises and the spraying of red paint outside the premises. In its decision, the Court of Appeal did what the Sub-committee failed to do: impose civil liability on the creditor as principal for the torts of her agent / debt collector. The decision is a creative one: it departs from the traditional view that, absent fraud, or specific authorisation for the torts, principals are not liable for

[2] (2000) HCA 2901/1998.
[3] (2001) HCA 1810/2000.
[4] (2001) CACV 136/2000.

the torts of their agents. In a unanimous decision, the Court proceeded by analogy with the law of master / servant, and cited the proposition from *Colonial Mutual Life Assurance Society Limited v The Producers and Citizens Co-operative Assurance Company of Australia Limited*[5] that:

> "one is liable for another's tortious act 'if he expressly directs him to do it, or if he employs that other person as his agent and the act complained of is within the scope of the agent's authority'. It is not necessary that the particular act should have been authorised: it is enough that the agent should have been put in a position to do the class of acts complained of (*Barwick v English Joint Stock Bank; Lloyd v Grace Smith & Co*)."[6]

Rogers V-P concluded that as the debt collectors were representing the defendant when the plaintiffs were approached and repayment demanded, the debt collectors were doing that which the creditor asked them to do, "namely, to use colloquial terms, make such a nuisance of themselves that the first plaintiff would pay [the debt collector], who would receive the money on behalf of the defendant." Moreover, the express instructions that only legal means were to be used did not take the debt collectors' conduct outside of the scope of their engagement. These instructions did not limit the sphere of the employment, only the mode of its being carried out.

Le Pichon JA went further and imposed liability on the additional basis of negligence in that the defendant failed to take reasonable care in the selection and instruction of the debt collector in circumstances where harm to the plaintiff was plainly foreseeable.

This decision represents a natural and essential development in the law of agency, in a context that clearly cries out for such a development. Of course, this decision does not in itself solve the problem of debt collection malpractice. In particular, it does nothing to dissuade creditors from the practice of assigning their debts at a discount to enterprising and unscrupulous elements undeterred by the general law or the Sub-committee's recommendations. It does, however, create a financial incentive for creditors to avoid the use of debt collectors prepared to engage in dubious debt collection practices, by piercing the veil behind which the creditor / principal could formerly hide.

Does the decision in *Wong Wai Hing and Another v Hui Wei Lee* go too far, in imposing civil liability on unsuspecting creditors who, by virtue of the decision, may unwittingly become victims of over-zealous debt collectors?

5 (1931) 46 CLR 41.

6 *Ibid.* at 46–47. *Barwick v English Joint Stock Bank* is reported at (1867) LR 2 Ex 259; *Lloyd v Grace Smith & Co* is reported at (1912) AC 716.

This concern can be addressed by tightening the Sub-committee's licensing proposal. The law can be improved by imposing on creditors a legal obligation (with criminal sanctions attached) to engage only those debt collectors who are licensed under the Sub-committee's proposed licensing scheme. At present, the Sub-committee's consultation paper does not include such a recommendation. Certainly, creditors employing only licensed debt collectors can easily rebut any charges of negligence in the selection of their debt collectors, and such a proposal will also serve to discourage those desperate creditors who may still be tempted to resort to dubious or criminal elements to make good on their loans.

Rick Glofcheski[*]

* Associate Professor, Faculty of Law, University of Hong Kong.