SUN MOBILITY
Insurance and Claims Services Limited
新移動保賠顧問有限公司

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To: Transport Industry Operators

# Writ's validity

The Hong Kong High Court issued a decision on 11/9/2013 concerning a shipowner's application to extend the validity of a writ of summons against a Taiwan hull and machinery insurer. [HCAJ 95/2012]

The shipowner, a company incorporated in the British Virgin Islands, was the registered owner of a vessel called MV Princess Rowena. By a cover note dated 28/6/2005, CTP insured the shipowner in respect of 50% of the value of the hull and machinery, equipment and everything connected with the vessel with a sum insured for US$8 million. By a second cover note dated 4/8/2005, CTP, QBE, Cathay and BOC insured the shipowner in respect of 50% of the vessel's value. The 50% risk of the vessel's value under the second cover note was taken up by CTP, QBE, Cathay and BOC in the proportion of 20%: 15%: 10%: 5% respectively. On about 1/7/2006, during the validity of the two insurance policies, the vessel sustained damage to her starboard main engine. The shipowner lodged a claim with the four insurers for reimbursement of the repair and replacement expenses under the policies.

Before long, the shipowner came to the view that the expenses would not exceed substantially the deductibles under the policies which in total stood at US$325,000. Thus, when the time came for renewal of cover in August 2006, and when CTP offered to renew the insurance "provided that the outstanding premium [was] cleared off prior to expiry and the claim on starboard main engine damage on 1/7/2006 [was] closed at Nil claim", the insurance broker replied on behalf of the shipowner as follows:

> "Pleased to advise that quotation accepted by Assured. They've now settled all o/s premium and confirmed that M/E claim withdrawn. In this connection, please advise Peter Y.C. Ng & Associates to close their file."

On 19/1/2007, in an email from the broker to CTP copied to Cathay, it was stated, however, that

> "You may recall that the Assured withdrew their claim as they felt that the cost of repairs would be below or just marginally above the policy deductibles of USD250,000 (Cl. 12) and USD75,000 (AMD).
> Repairs to the engine has not be carried out and the vessel was operating with her port main engine. The classification society recently advised the Assured that they would require the starboard main engine to be opened up and inspected by the engine maker so as to ascertain the extent of repairs required.
> Accordingly, the Assured obtained quotations from (1) the engine maker MAN B & W (2) HUD and their quotations arc herewith attached.
> In view of this development, the Assured has asked us to re-open the case. We shall therefore be very grateful if you will kindly request Peter Y.C. Ng & Associates Ltd. to re-attend."

On 15/12/2009, the surveyors, Peter Y.C. Ng & Associates Ltd., sent a letter to CTP enclosing their Survey Reports and indicating that the damage to the starboard main engine was due to the negligence of crew, and that should the owners intend to establish their claim, they would be obliged to prove that they had exercised due diligence in maintaining the vessel. On 20/7/2011, the shipowner through its broker sent its comments on the surveyor's report to CTP. On 15/12/2011, the surveyors provided their response in turn on the comment of the shipowner to CTP. On 13/1/2012, the broker sent an email to CTP stating that they were under heavy pressure from the shipowner to make progress in settlement of the claim and asking for a response from CTP. On 9/3/2012, CTP sent an email to the broker enclosing the surveyor's further comments and stating:

> "Based upon the available information and documentary evidence, we, without prejudice, consider that the damage to starboard M/E caused by alleged crew negligence has resulted from want of due diligence by the insureds."

CTP had informed the shipowner that it considered the damage to the starboard engine was caused by crew negligence due to want of due diligence on the shipowner's part and thus fell within the relevant exception under the Institute Time Clause.

On 18/5/2012, the shipowner caused the writ to be issued out of the High Court. The only defendant then named was CTP, who was sued in respect of the second policy. On 12/6/2012, the writ was amended without leave pursuant to RHC Order 20 rule 1 by the addition of QBE, Cathay and BOC as defendants. The writ as amended thus still did not refer to the first policy. This was the subject matter of a separate application for leave to re-amend the writ to add a claim under the first policy as against CTP. The amended writ, which was valid for service for a year, was not immediately served.

On 13/5/2013, the shipowner's solicitors wrote by email to Cathay, which was a company incorporated in Taiwan, asking whether it would appoint solicitors in Hong Kong to accept service in these terms:

"We attach a sealed copy of the writ issued by our clients naming you as one of the Defendants. Please could you kindly confirm no later than 9am in Hong Kong time on Wednesday 15 May 2013 whether you will appoint a law firm in Hong Kong to accept service of this writ on your behalf? If so, we look forward to hearing details of your acting law firm.

Should we not hear from you by 9am of 15 May 2013, we are instructed to proceed with the application to the High Court for service of the writ on you without further notice which we hope will be unnecessary. In the interest of minimizing your exposure to our clients claim for legal costs, we kindly urge you to revert with details of your acting law firm in Hong Kong as soon as convenient."

On 14/5/2013, the shipowner served the amended writ on CTP, QBE and BOC in Hong Kong. On the same day, Cathay sent an email to the shipowner's solicitors, stating:

"As you are aware, we are one of the Co-insurers in this case and, as a matter of principle, we follow the decision of the leader in claims matters as well. Therefore, we would suggest that you check with M/S China Taiping Insurance for the identity and details of the lawyers whom they have appointed or would appoint to act on our behalf. We will join the leader in appointing the same lawyers since we are located overseas."

The shipowner's solicitors replied to Cathay by email, stating:

"Since the writ is due to expire on 17 May 2013 which is a public holiday in HK, we are to either serve the writ or apply to renew it. It is our objectives to pursue our clients case in a most cost-effective manner. We shall contact Mr Franco Sze of the Leader reading in copy and hope to avoid any application to the Court."

The email was followed by a telephone conversation between the solicitors and Mr Sze of CTP, after which Mr Sze sent an email to the shipowner's solicitors stating:

"We as Claims Leaders are going to instruct Mr. Patrick Yeung of Holman Fenwick Willan to act on behalf of the Hull Underwriters concerned in respect of the above case."

There was then an email by the shipowner's solicitors to Mr Yeung on the same day stating:

"We shall serve the writ on Cathay Century by leaving it at your firm tomorrow. Should you not have instructions to accept service, we should be grateful if you could let us know by return."

On 15/5/2013, Wednesday, when at 10:21 am, Mr Yeung of Holman Fenwick Willan sent an email to the shipowner's solicitors as follows:

"For the other Defendants including Cathay Century Insurance Co., Ltd, we have explained to Thomas that we can only act for them if there is no conflict of interests and until we have receive the papers and take instruction or confirmation from Cathay, we cannot at this stage confirm whether there is a conflict issue or whether we can accept service for Cathay. We however expect that it will take time for us to consider the papers and take instruction from Cathay and it is likely that the instruction may not be obtained today and so we suggest that you should proceed on the basis that we do NOT have the authority to accept service on behalf of Cathay."

On 15/5/2013, the shipowner filed an affirmation made by its solicitor to apply *ex parte*, for, *inter alia*, extension of the validity of the amended writ for 12 months and for leave to serve it out of the jurisdiction on Cathay. On 14/6/2013, a notice to act was filed on behalf of Cathay stating Messrs Holman Fenwick Willan had been appointed to act as its solicitors in the action.

The power that the shipowner sought to invoke is that of the court under RHC Order 6 rule 8. This rule provides as follows:

"(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for twelve months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow."

The court has a discretionary power. The principles that guide the exercise of the court's discretion are well established. In *Chow Ching Man v Sun Wah Ornament Manufactory Limited* [1996] 2 HKLR 338 at 341 and 344, Bokhary JA (as he then was) said:

"It is clear from the decisions of the House of Lords in *Kleinwort Benson Ltd v. Barbrak Ltd* [1987] AC 597, *Waddon v. Whitecroft Scovell Ltd* [1988] 1 WLR 309 and *Baly v. Barrett* [1988] NI 368 that (i) Order 6, rule 8(2) is to be construed so that the discretion to extend the validity of a writ does not arise unless the plaintiff first establishes matters amounting to good reason for extension or at least capable of so amounting; and that (ii) matters such as the balance of hardship only fall to be considered if the discretion to extend arises in the first place.

...

On the strength of the principle laid down by the House of Lords in *the Kleinwort Benson case* (supra) and of how their Lordships applied it in that and subsequent cases, the law seems to me to be this. Where the failure to serve a writ within its normal validity period is the result of a choice, then it is necessary to decide whether the choice was made for a good reason, meaning one which supports a deliberate failure to comply with the time limit involved. And no discretion to extend the writ would arise unless the choice was made for a reason which is at least capable of amounting to a good reason."

The shipowner seemed to suggest that the authorities that predated the changes to the Rules of the High Court brought about by the Civil Justice Reform (effective on 2/4/2009) were no longer to be treated as authoritative. Relying on RHC Order 1A rule 2(2), which requires the court, "[i]n giving effect to the underlying objectives of these rules, [to] recognize that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties", the shipowner submitted that the court should now weigh the "procedural

hardship" to the parties and above all give effect to the substantive rights of the parties. The shipowner was the one who had the substantive right, not Cathay. The shipowner should not be made to lose its substantive right by reason of some procedural problem.

The Judge was unable to subscribe to this view. The law concerning the validity of a writ and its extension is no mere formal procedural rule. Underlying it is the policy of the law that promotes finality to litigation, the prevention of stale claims, and the protection of a defendant from having a claim hanging over his head indefinitely. Inasmuch as a plaintiff with a reasonable cause of action has a right to bring and serve proceedings within prescribed periods, a (potential) defendant has a right not to be vexed by actions that are time-barred or writs that have expired, unless they are extended by the court in accordance with the law. It was open for 6 years, after the vessel was damaged, in this case for the shipowner to issue a writ and then open for another year for the shipowner to serve it. These were generous time limits. The application in question concerned whether the shipowner should be granted an indulgence where it had not served the proceedings on Cathay within these limits. The Judge was not persuaded that, post-Civil Justice Reform, the court should more readily grant applications for extension of the validity of writs. In *Hashtroodi v Hancock* [2004] 1 WLR 3206, which was decided after the Civil Procedure Reform in England took effect in 1999, the English Court of Appeal said at para 20:

> "… One of the important aims of the Woolf reforms was to introduce more discipline into the conduct of civil litigation. One of the ways of achieving this is to insist that time limits be adhered to unless there is good reason for a departure."

The Judge had no doubt that no good reason had been shown why the validity of the amended writ should be extended. No explanation had been given at all why no steps were taken to serve the writ on Cathay until 13/5/2013, four days before its expiry on 17/5/2013 which was a public holiday in Hong Kong. There was no suggestion that nothing was done because of a mistake or inadvertence, or because of any unexpected mishap which created some kind of impediment. The only reasonable inference in these circumstances was that the inaction was the result of a deliberate choice. No reason, let alone good reason, had been given for that choice. Putting the most benevolent interpretation on the correspondence and affidavit evidence before the Judge, what happened might have been that the shipowner was hoping to settle the dispute with the four insurers and thought that if eventually the writ had to be served, there would be no difficulty in getting Cathay to agree to accept service in Hong Kong which could be done in a short time. That in the Judge's view did not provide any good reason for extending the validity of the writ.

The shipowner put forward a large number of matters on the basis of which this was a proper case for exercising the discretion to extend the validity of the writ. Among other things, the shipowner said "in marine insurance matters progress is often regrettably slow on all sides". The Judge did not accept this statement as a matter of fact, nor did the Judge accept it (even if made out) to be a reason justifying extension of the writ. Then the shipowner said all the defendants are professional insurers and all of them knew about the claim. The Judge did not think professional insurers were entitled to less protection of the court. The evidence was that after Cathay was told in January 2007 that the shipowner wished to re-open the claim, the next communication it received was the email/fax on 13/5/2013 asking it to accept service of the writ.

The shipowner further submitted that if the shipowner's *ex parte* application for service out of the jurisdiction had been heard by the court on 15 or 16/5/2013, and if leave were granted, the writ could have been served, as quickly as air travel allowed, on Cathay in Taiwan. But no request was made to the court to deal with the *ex parte* application urgently. In any event, as the case of *Baker v Bowketts Cakes Ltd* [1966] 1 WLR 861 shows, a plaintiff who leaves matters to the very last moment has only himself to blame.

The shipowner also prayed in aid the dissenting judgment of Wynn LJ in *Baker v Bowketts Cakes Ltd* which referred to the test being whether the court is satisfied that reasonable efforts have been made to serve the writ on the defendant. That was a reference to the old rule in RSC Order 8 rule 1. In any event, the Judge was not satisfied that what the shipowner did on the last few days before expiry of the writ could be characterised as reasonable efforts to serve the writ on the defendant which was a company resident in Taiwan.

At the end of the day, the Judge did not think that the matters raised by the shipowner, whether taken singly or in combination, amounted or are even capable of amounting to a good reason for extension. The shipowner's application for extension of the validity of the writ as against Cathay was therefore dismissed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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