

28 August 2009
Ref : Chans advice/104

To: Transport Industry Operators

Time bar extension

On 4/8/2009, the Hong Kong High Court refused to exercise its discretion to extend the 2-year time limit in a vessel collision case.

Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap. 508) s. 7(1) provides that no action for damages for loss of life due to a maritime collision may be brought after 2 years. But s. 7(3) gives the Court a jurisdiction to extend the 2-year limitations "to such extent and on such conditions as it thinks fit".

On 21/12/2005, just outside the Yaumatei Typhoon Shelter, Zhongshan's cargo vessel collided with a motor launch. As a result, the launch sank and its coxswain, Mr. Chow (aged 72) drowned. On 11/2/2008 Madam Yip (Mr. Chow's wife) issued a Writ against Zhongshan and Man Shun (alleged to be the cargo vessel's manager). By the Writ Madam Yip claimed damages arising out of her husband's death in the maritime collision. The Writ having been issued outside the 2-year limitation stipulated by the Ordinance, Zhongshan applied to strike it out. Madam Yip in turn asked for an extension of the 2-year time limit to enable her to pursue an action against Zhongshan.

The 2-year time limit in the Ordinance arises from the international agreement embodied in Article 7 of the 1910 Brussels Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels. "Good reason" must be shown for exercising the discretion in s. 7(3) to extend the limitation beyond the internationally agreed limit of 2 years. What constitutes "good reason" will depend on all the circumstances of a case. See *The "KMTC HONG KONG"* HCAJ No.164 of 2004, 4/8/2006 (Waung J at §8), citing *The "MYRTO" (No.3)* [1987] 1 AC 597. Relevant factors in assessing whether there is "good reason" for an extension might include the following:

- (1) the length of delay in issuing a Writ;
- (2) whether a defendant is to blame for any delay on the plaintiff's part;
- (3) whether the delay is due to circumstances beyond the plaintiff's control; and,
- (4) whether, if time is extended, there will be material unfairness, prejudice or injustice to the defendant.

See *The "ALBANY" and "MARIE JOSAINÉ"* [1983] 2 Lloyds Law Rep 195 (Sheen J).

Madam Yip submitted that the discretion to extend should be exercised in her favour for the following reasons:

- (1) She was elderly (74 years old) and illiterate.
- (2) From December 2005 and in the course of 2006 and 2007, Madam Yip (through her son) repeatedly asked the marine police about the result of their investigations into the collision. A "Ms. Yu" of the marine police apparently told Madam Yip "to wait for the investigation results".
- (3) Madam Yip did not learn that the marine police had completed their investigation until October 2007. She was informed by a letter dated 9/10/2007 from the marine police that no criminal charges had been brought due to insufficient evidence. But she could not afford any legal fees at the time to pursue a private action.

- (4) In December 2007 Madam Yip's son was erroneously advised by a Mr. Yip of Messrs. L, P, K & I during a duty lawyer session at the Wong Tai Sin District Office that the time limit was 3 years.
- (5) It was only in January 2008 when Madam Yip went with her son to the Legal Aid Department to apply for legal aid that she learned that the limitation "might be 2 years".
- (6) Legal aid was not granted to Madam Yip until 30/1/2008. Immediately following that grant, an in rem Writ against the cargo vessel was issued on 1/2/2008 and an in personam Writ was issued on 11/2/2008. Having discovered that the cargo vessel had been turned into scrap in September 2007, Madam Yip discontinued the in rem action on 8/10/2008.

The Judge sympathised with Madam Yip's plight following the collision and the loss of her husband. But he was not persuaded that the circumstances highlighted by Madam Yip amounted to good reason justifying the extension of the 2-year limit.

Awaiting the results of a marine police investigation could not be good reason. Madam Yip and her family might be of only limited means. But they could have applied for legal aid much earlier than they actually did. There was no cogent explanation why Madam Yip delayed going to Legal Aid until January 2008 (more than 2 years after the accident). Whatever one's educational background, it would have been apparent from the outset that something wrong had happened. A large cargo vessel should not normally have run into a small motor launch. There was nothing preventing Madam Yip from consulting the Legal Aid Department at an early stage, pressing them to look into the matter, and asking them to bring proceedings on her behalf. That was precisely what Madam Yip did when the police investigation decided that there was insufficient evidence to prosecute. Inexplicably, she waited many years before doing so.

Madam Yip might have been misled by bad advice from Mr. Yip to the effect that the limitation was 3 years. The advice was unfortunate. But the law is clear that:-

"Mistakes on the part of those representing the plaintiffs as to when the limitation period is expired is the sort of fault or carelessness which is unlikely to give rise to good reason....

The defendants are prima facie entitled to the limitation defence which has accrued to them and ought not ... to be deprived of it merely because of the carelessness of those representing the plaintiffs."

See *The "AL TABITH"* [1995] 2 Lloyd's Rep 336 (Rose LJ at 343).

The Writ was issued about a month and half after the 2-year limitation expired. The Judge did not think that he could treat such period of delay as negligible.

Insofar as blame was concerned, prior to the issue of the Writ, Zhongshan had no contact or communication with Madam Yip or her son. Therefore, it could not be said that Zhongshan contributed to or caused the delay in issuing the Writ.

Nor did the Judge see any basis for saying that Madam Yip was prevented by circumstances beyond her control from consulting Legal Aid at a much earlier stage.

Zhongshan suggested that it would be prejudiced if time was extended. As at November 2008, 3 potential witnesses had left Zhongshan's employment. Those are Mr Lam (the master of the cargo vessel), Mr Au (the quartermaster) and Mr Wan (a crew member). Zhongshan said that it had lost contact with these 3 persons. Madam Yip suggested that the statements which the marine police took of the 3 crew members could stand as evidence. Madam Yip noted the conclusion in a Marine Department investigation report that the quartermaster (who might have been under the influence of alcohol at the time) failed to give way and keep a proper look out. But it seemed to the Judge that, in the absence of the 3 witnesses, Zhongshan might well suffer prejudice. At any rate, the Judge could not rule out such possibility. Zhongshan would undoubtedly find itself in a difficult position at trial.

At the very least, Zhongshan would have to rebut the allegations in the Marina Department investigation report by tendering the 3 witnesses for cross-examination. Unless it did so, it might find itself being held liable on documents and hearsay evidence.

Madam Yip argued that Zhongshan should only have itself to blame for difficulties in locating the 3 witnesses. Madam Yip contended that Zhongshan ought to have known about the present proceedings since about 23/8/2008. This was because Madam Yip's solicitors wrote at that time to Zhongshan in the Mainland inviting it to identify a process agent in Hong Kong to accept service. Zhongshan did not reply. But it ought to have realised from the letter that it should maintain contact with the 3 witnesses in the event of Madam Yip's claim coming to trial. The Judge did not think that a short English letter, received out of the blue from Hong Kong solicitors, some 8 months after the 2-year limitation had expired, would alert Zhongshan to everything which Madam Yip suggested that the letter ought to have. In all the circumstances, Zhongshan might reasonably have decided to wait and see whether anything materialised in connection with the proceedings foreshadowed in the letter. The Judge could not conclude that Zhongshan had only itself to blame in losing touch with the 3 witnesses.

For the foregoing reasons, the Judge was unable to exercise his discretion to extend the 2-year time limit. The Writ would be struck out and the actions against the Defendants dismissed.

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

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: 2866 7096
E-mail: gm@smicsl.com Website: www.sun-mobility.com
CTB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

It goes without saying the economy is heading further south as 2009 sets sail into the second quarter.

Unrealistic it is to expect turnaround any time soon. Before we see the lights, we see rising number of E&O, uncollected cargo and completion of carriage claims. The global credit crunch has created chain effects leading to, forced or otherwise, found or unfounded, breach of contracts and obligations along the logistics chain. Our claims team are on full gear recently in dealing with those claims.

If you are in need of a cost effective service in defending claims lodged against you, SMIC is just a phone call away.