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To: Transport Industry Operators

Barge arrest time barred

On 24/4/2009, the Hong Kong High Court Judge Reyes issued a Judgment (HCAJ 68/2007) setting aside the arrest of a barge "ZHU SHENG 2".

The cargo owner alleged that their cargo was damaged while being carried on board the barge "ZHU SHENG 2" between Jiuzhou (in the Mainland) and Hong Kong in July 2006. The cargo owner issued a Writ on 13/4/2007. The Writ was amended on 11/6/2007. The cargo owner did not serve the Writ on the barge during the initial 12 month period of the Writ's validity. Instead, by an Affirmation dated 10/4/2008, the cargo owner applied ex parte to Waung J to extend the validity of the Writ for a further period of 12 months. The relevant part of the Affirmation in support of the extension application was brief. It stated:-

4. It has not been possible for the amended Writ to be served upon the 'ZHU SHENG 2'. I have made inquiries with the Marine Department who have confirmed that the 'ZHU SHENG 2' have not called in Hong Kong since 13 April 2007. A copy of letter from Marine Department confirming the position is produced and shown to me marked 'LCMR-1'. It is not possible for the Plaintiffs to simply issue a new writ as the one year limitation period under the Hague Rules expired during April 2007.
5. In the premises, I respectfully ask that the validity of the amended Writ herein for service be extended for a further period of twelve months from 13 April 2008."

Consequent on the application, on 14/4/2008 Waung J ordered that the validity of the Writ be renewed for 12 months from 13/4/2008. The Writ was thus extended to 12/4/2009. The barge was arrested in Hong Kong on 26/3/2009. The extended Writ was served on the barge on the same day.

The ship owner pointed out that the barge was a Hong Kong registered vessel (Licence No. B21278V). Between 15/7/2006 and 30/4/2008 (i.e. during the entire initial 12 month currency of the Writ) the barge was in Hong Kong waters. The barge returned to Hong Kong after a job in the Mainland on 15/7/2006. It had never since left Hong Kong again. Between 13/4/2007 and 13/4/2008 the barge was regularly berthed at Yau Ma Tei. The ship owner argued that, had Waung J been aware of the facts just summarised, he would not have extended the validity of the Writ. It was incumbent upon the cargo owner to serve the Writ as soon as possible. The barge being in Hong Kong all along, there was nothing preventing the barge from having been served during the initial validity of the Writ. The summarised facts (had they been disclosed) would have been material to Waung J's decision to extend the Writ. Since such material facts were not disclosed, Waung J's ex parte order ought to be set aside.

In Judge Reyes' view, the ship owner was right. Judge Reyes did not see that the cargo owner had any answer to the ship owner's argument. It was the Plaintiffs' duty (through their solicitors) "to take all reasonable steps to ensure that [a Writ] is served during its initial currency" (Waung J in *The "ORIENTAL LILY"* [2005] 2 HKC 343 (at 345B), citing Brandon J in *The "BERNY"* [1979] 1 QB 80).

In a further Affirmation in opposition to the ship owner's application, the cargo owner deposed as follows:-

7. The Plaintiffs have good reason to believe that since the incident leading to the damage of the Cargo happened in Zhuhai, China, the Vessel was trading between China and Hong Kong. Therefore, after the Writ was issued, the Plaintiffs placed the Vessel on the daily watch list [of the Marine Department]. Ship watch exercise was conducted twice a day through the Website of the Marine Department.
8. Apart from maintaining the Vessel on watch, the Plaintiffs have conducted a license search of the Vessel. It revealed that the Vessel was owned by a company called Zhu Sheng Maritime (HK), Ltd. (see page 22 of 'LCMR-2'). The Plaintiffs had also tried to ascertain the location and trading pattern of the Vessel but such effort ended in vain.
9. When the Writ was about to expire in April 2008, the Plaintiffs were unable to locate the whereabouts of the Vessel despite various efforts. As the Plaintiff was unable to effect service of the Writ on the

Defendants, an application was made to extend the validity for service of the Writ. Enquiry was made with the Marine Department which confirmed that no entry/ clearance record could be found as from the date when the Writ was issued (see page 21 of 'LCMR-2') and an Order was granted for the renewal of the Writ.

10. After the renewal, the Plaintiffs continued to seek to trace the location of the Vessel. Eventually, before the expiry of the renewed Writ, the Plaintiffs proved to be able to trace the location of the Vessel and the Vessel was arrested promptly thereafter."

Judge Reyes was far from satisfied on that affirmation evidence that the cargo owner took all reasonable steps. The cargo owner's Affirmations were short on detail as to what steps the cargo owner actually took to ascertain the whereabouts of the barge during the initial currency of the Writ. The 1st Affirmation merely asserted that it was not possible to serve the barge during the initial validity of the amended Writ. No explanation was given as to why precisely it was not possible. The 1st Affirmation stated that the Marine Department was asked whether the barge had entered into Hong Kong waters since 13/4/2007. The Marine Department replied in the negative. This was not surprising given the barge had been in Hong Kong waters all along. But the 1st Affirmation offered no explanation why the cargo owner assumed that, since time of the incident, the barge had been absent from Hong Kong waters. This was despite the fact that the cargo owner would have known that the barge was owned by a Hong Kong company and was registered here with a Hong Kong licence number. It seemed to Judge Reyes that a more natural assumption would have been that, being a Hong Kong vessel, the barge was likely to be found in one or other of the areas of Hong Kong harbour (including Yau Ma Tei) where barges are typically stationed. The further Affirmation continued to assume that the barge had been absent from Hong Kong waters since July 2006, the time of the incident of which complaint was made. The incident might have taken place in Zhuhai. But that by itself could not justify the cargo owner's assumption as reasonable. The further Affirmation then deposed to the cargo owner having in vain "tried to ascertain the location and trading pattern of the Vessel". But no particulars were given as to what those "efforts" entailed. Did the cargo owner, for example, have a look through the Yau Ma Tei harbour shelter? Apparently, after the renewal of the Writ, the cargo owner "proved able to be able to trace the vessel". But again no particulars were given as to what further types of search or inquiry were conducted following renewal of the Writ. It was not said why such methods could not have been employed earlier before renewal. The further Affirmation was much too coy over details. It needed to be far more frank with the Court, if it was to justify the reasonableness of the Writ's extension.

In the circumstances, there was insufficient evidence of the cargo owner having acted reasonably to serve the Writ during its initial period of validity. On the contrary, the cargo owner's difficulty in serving the Writ during its initial period of validity appeared to have been self-induced. The cargo owner started off on a wrong assumption (namely, that the barge was outside Hong Kong waters) which did not seem to Judge Reyes to have been justified. For the foregoing reasons, the ex parte extension of the amended Writ should be set aside. Accordingly, the arrest should also be set aside.

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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Thanks to the colossal injections by worldwide governments, the fourth quarter of 2009 imparted some hope as we saw both seafreight and airfreight cargo rush in the last quarter created temporary space shortage. Whether the robust trend will continue is uncertain as worldwide governments are not in unison in their fiscal policies. The "visible" hand will still haunt the economy in 2010.

During time of uncertainty, we believe the number of E&O, uncollected cargo and completion of carriage claims will be unabated. If you need a cost effective professional service to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.