SUN MOBILITY
Insurance and Claims Services Limited

31 May 2010
Ref : Chans advice / 113

To: Transport Industry Operators

# Time bar extension (II)

Remember our Chans advice / 104 that the High Court refused to extend the 2-year time limit in the vessel collision case? On 25 / 2 / 2010, the Hong Kong Court of Appeal by majority overruled the High Court's Judgment (CACV 225 / 2009).

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. 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.

It was common ground that for the discretion under section 7(3) to be exercised, "good reason" has to be shown. The concept has its origins in the jurisprudence relating to the extension of the validity of writs.

The High Court judge considered that the relevant factors to be taken into account might include the following:

"7. …

(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."

The High Court judge went on to consider the circumstances highlighted by Madam Yip's counsel, which he set out as follows:

"8. …

(1) She is 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 October 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. Sammy Yip of Messrs. Y. C. Lee, Pang, Kwok & Ip 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 January 2008. Immediately following that grant, an in rem Writ against the cargo vessel was issued on 1 February 2008 and the present in personam Writ was issued on 11 February 2008. Having discovered that the cargo vessel had been turned into scrap in September 2007, Madam Yip discontinued the in rem action on 8 October 2008."

The High Court judge took the view that there was no "cogent" explanation why Madam Yip had delayed going to legal aid until January 2008 and that there was nothing "preventing" her from consulting the Legal Aid Department at an early stage. On the issue of prejudice, Zhongshan had filed evidence to the effect that, by November 2008, three potential witnesses (the master of the cargo vessel, the quartermaster and a crew member) had left its employment. Zhongshan stated that it had lost contact with them. The judge appeared to have accepted that Zhongshan would be seriously prejudiced if time were to be extended. For, *inter alia*, those reasons, the High Court judge declined to exercise his discretion to grant the extension.

Madam Yip appealed against the High Court's Judgment.

The relevant factors taken into account by the High Court judge in deciding whether there was 'good reason' to extend time were derived from *The Albany*. On closer consideration, there were significant differences between the *Albany* factors (stated by Sheen J in *The Albany*) and those stated by the High Court judge. In particular, in relation to the degree of 'blameworthiness', Sheen J considered that the question to be addressed was whether the delay before the issue of the writ was excusable. The High Court judge's approach to 'blameworthiness' was markedly different: namely, whether

Zhongshan was in some way to blame for Madam Yip's delay which, in the Court of Appeal's view, was an entirely different question. Further, in relation to factor (3), the High Court judge appeared to have narrowed Sheen J's formulation by omitting the additional words, namely, "and, whether there were very special circumstances". It would be fair to say that in deciding whether or not to exercise his discretion, the High Court judge applied, not the *Albany* factors to the circumstances of the case, but those factors as modified by him. While the *Albany* factors were not intended to be a comprehensive list of the only factors to be taken into account, reformulations of the factors were another matter where the focus or substance of a particular factor was altered.

In § 10 of his judgment, the High Court judge stated that no "cogent" explanation had been given by Madam Yip for not going to legal aid until January 2008. In § 12 of his judgment, the High Court judge elaborated on this. He said:

> "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 is 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."

A number of difficulties arose from this passage. By using the word "preventing", which was redolent of matters beyond one's control, it would appear that the judge was applying his own formulation of factor (3) to the facts. The High Court judge's narrower formulation necessarily meant that no consideration was given to the existence or otherwise of "very special circumstances" and what might come within that phrase. In other words, the 'wrong' yardstick had been used. The question whether "very special circumstances" exist in any particular case is necessarily fact- sensitive. But implicit in the High Court judge's finding of no "cogent" explanation was that *irrespective* of a litigant's background, personal circumstances, age and education, he or she must be taken to know about the availability of legal aid. In the Court of Appeal's view, there was no valid basis for adopting that as an absolute. It could not be correct to consider as irrelevant, and so disregard, the background, personal circumstances, age and education of Madam Yip when considering whether her explanation was satisfactory. Further, the Court of Appeal had some difficulty with the second sentence of the passage cited. As a summary of what happened after learning of the decision not to prosecute, it was inaccurate. Madam Yip did not, as was suggested, immediately seek legal aid. Rather, she said that out of desperation through lack of resources, she asked her son to approach a district councillor in order to access the free services of a duty lawyer. This tended to suggest that Madam Yip did not know about the availability of legal aid at that stage. Why else would Madam Yip and her son have gone to all that trouble to get advice from a duty lawyer through the auspices of a district councillor? While there was no evidence as to how she came to know about the availability of legal aid, in December 2008, she did meet with a duty lawyer who advised that she had a cause of action. Within weeks of receiving that advice, Madam Yip applied for legal aid. In the Court of Appeal's view, the evidence did not justify the judge to proceed on the footing that Madam Yip had known or must be taken to have known about legal aid all along. As earlier noted, the High Court judge's reasoning was premised on an absolute, the validity of which had not been established.

Madam Yip submitted that the High Court judge had made an error of law on the issue of prejudice that would taint the exercise of his discretion. It was submitted that the evidence did not warrant a finding of prejudice. The only evidence concerning the three relevant witnesses who, by November 2008, were no longer in Zhongshan's employ was to be found in the affirmation of Li Xianghui:

> " 17. By November 2008, among the 3 witnesses … Mr Au Yu Chow [the quartermaster] was retired. Mr Lam [the master] and Mr Wan [a crew member] are no longer working as crew members. The 1st Defendant tried to make contact with the said witnesses. However, their effort is still unsuccessful up to the present moment.
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> 18. Should the 1st Defendant possess knowledge of the present claim within 2 years after the accident, there would be a far better chance for the 1st Defendant to locate the 3 witnessess.
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> 19. The 1st Defendant's Defence is heavily relying on the evidence of the 3 witnesses whose evidence could show that sufficient evasive actions was taken by the crew members of the Defendant's Vessel. Without the evidence of the 3 witnesses, the 1st Defendant's defence on liability is seriously prejudiced."

Mr Li's evidence in this regard was unsatisfactory in that it did not state when each of the three witnesses ceased employment, much less what attempts had been made to contact them and when. On one reading, they only ceased employment in November 2008 or shortly before. In any event, it was wholly unclear how the 52-day delay could have caused prejudice to Zhongshan. Had the writ been issued immediately before the two-year time limit, Madam Yip would still have had another year (until 20/12/2008) within which to serve it on Zhongshan. On that basis, Zhongshan would have found itself in the same position as now and would not have been any better off had there been no 52-day delay. For these reasons, the Court of Appeal by majority was inclined to agree with Madam Yip that the High Court judge did make an error on the prejudice issue.

It would appear that the High Court judge was not referred to the two-stage approach to be adopted in considering the exercise of the discretion for extensions of the validity of writs and thus for section 7(3). The parties as well as the High Court judge proceeded on the basis of the approach in *The Albany*. As regards the two-stage test, at stage one, it must be shown that there are

> "… matters which could, *potentially at least*, constitute good reason for extension …"
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> (see per Lord Brandon in *Waddon v Whitecroft Scovell Ltd* [1988] 1 WLR 309 at 318A) (*emphasis added*).
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> or

"… matters amounting to good reason for extension, or at least capable of so amounting …"
(see per Lord Brandon in *Baly v Barrett* [1988] NI 369 at 417A)

Once stage one has been satisfied, the court can have regard to all relevant factors in the exercise of its discretion including the question of hardship.

There is a useful passage from the judgment of Waite LJ In *Lewis v Harewood* [1997] PIQR P58 at P 60-61 explaining the practical application of the two-stage test:

> "A judge exercising the discretion to extend time, at the suit of a party seeking an extension of time for service after the validity of the proceedings has expired and after expiry of any relevant limitation period, has to conduct the inquiry in two stages. He must first be satisfied, at stage one, that there is good reason to extend time, and also that the plaintiff has given a satisfactory explanation for his failure to apply before the validity of the proceedings expired. If he is not so satisfied, that is the end of the application and stage two will never arise. If he is so satisfied, then he must go on, at stage two, to a general exercise of a discretion involving a consideration of all the circumstances including the balance of prejudice or hardship. Matters relevant at stage two are not, however, irrelevant at stage one. There is a degree of overlap, and a judge addressing the inquiry at stage one is entitled and bound to take into account any matters which appear to him to be relevant to the issues of good reason and satisfactory explanation, notwithstanding that the same matters will also be relevant (assuming it arises at all) to the exercise of his discretion at stage two."

Zhongshan submitted that despite the generality of the wording of section 7(3) of the Ordinance, a strict construction was required and appropriate. It was said that it was made clear in the English maritime cases that a principled approach must be adopted. But a principled approach does not mean that the ordinary canons of construction do not apply. In the Court of Appeal's view, the fact that maritime cases were involved did not make a difference. The words must be accorded their natural and ordinary meaning. There is nothing in the provision itself that mandates a strict or narrow construction. The issue was whether Madam Yip's explanation for the delay could, potentially at least, constitute good reason for extension. The Court of Appeal did not see why not. In cases where the court has refused extension, the delay was almost invariably attributable to oversight or mistake per se of the party's legal adviser. See, for example, *Waddon* (solicitor's failure to obtain the removal of a legal aid restriction when he could have done so within time), *The Al Tabith* (slip-up on the part of the plaintiff's adviser who had miscalculated the time extension), and *Baly* (where the effective reason for the delay was the failure of the receivers to provide the plaintiff with necessary funds to prosecute the action). Such errors have been held not to amount to "good reason". The facts of the case in question could be said to be unique. The Court of Appeal was dealing with an elderly and illiterate sampan lady. While the Marine Department's report was information in the public domain, someone in her circumstances could not reasonably have been expected to know how to access that information. It is true that some 20 months elapsed before she knew that the investigation had been completed but it was not a question of her sitting on her hands during this period. Her evidence was that she did request her son to chase Ms Yu of the Marine police on a regular basis during this time. The Court of Appeal was unable to agree with Zhongshan that her explanation could not "potentially at least" constitute good reason for extension. On the question whether the discretion should be exercised in her favour, the Court of Appeal by majority came to the conclusion that it should. The Marine Department's report supported the view that Madam Yip's claim was meritorious. If an extension was not granted, it would cause considerable hardship given that it would be the end of the road for Madam Yip. The Court of Appeal already explained why Zhongshan would not suffer serious prejudice as a result. The answer to the question of the balance of hardship was therefore clear.

For all those reasons, the Court of Appeal by majority would set aside the High Court's order below and allow the appeal. The Court of Appeal would extend the time limit for commencing the action to the date when the writ of summons was issued.

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.