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Ref : Chans advice/78

To: Transport Industry Operators

Tug & Tow

In his Judgment of 5/6/2007, Judge W Waung of the Hong Kong High Court held a barge owner's claim against a tug owner time-barred.

As result of the towage of the dumb barge "*Wing Cheong No. 1*" ("Barge") by the tug "*Ming Sing 18*" ("Tug") on a voyage from Sanjianshan Dao in China to Tuen Muen in Hong Kong, the Barge sank on 22/8/1999, thereby causing loss to the barge owner. The sinking of the Barge was alleged to be caused by the fault of the Tug and of those responsible for the Tug.

The Writ was issued by the barge owner on 25/4/2005. Therefore when the Writ was issued, it was more than five years from the date of the complained act and of its consequent damage/loss. If section 7 of the Merchant Shipping (Collision Damage Liability and Salvage) Ordinance, Cap. 508 ("the Ordinance") applied, then by the time of the issue of the Writ, the claim of the barge owner against the tug owner had been time-barred.

Section 7 of the Ordinance provides :

"(1) Subject to subsection (3), no action shall be maintainable to enforce any claim or lien against a ship or its owners in respect of any damage or loss to another vessel ... caused by the fault of the former vessel, whether such vessel is wholly or partly in fault ... unless proceedings in the action are commenced within 2 years from the date when the damage ... was caused ...

(3) Any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of the court, extend period within which proceedings in the action must be commenced, to such extent and on such conditions as it thinks fit ..."

The first issue raised by the barge owner was that section 7 had no application to the claim because there was no physical contact between the Tug and the Barge, so that it could not be said that there was collision as envisaged by the Ordinance. At the hearing the point was very quickly seen to be untenable and it was not seriously pressed.

The Judge stated that there could be no doubt that physical contact between the vessels was not required in order for section 7 to be applicable. This was so, firstly because the 1910 Collision Convention based on which the 1911 Maritime Convention Act (and subsequently the Ordinance) was enacted expressly stated in Article 13 that "... even if no collision has actually taken place." Secondly, the law in England has long held that the statute is not confined to cases of physical contact collisions (see for example : *The Cairnbahn* [1914] P.25 at 32 and 37 and *The Bataviar III* (1923) 23 Ll. L. Rep. 21). Thirdly, there was no logical reason to exclude navigational fault of ships involving no physical contact between the two ships from

the scope of the operation of the Ordinance. In the Judge's view, section 7 clearly applied to the claim herein of the barge owner and therefore the claim was time-barred and therefore not maintainable.

The two-year time limit for collision claim is based on the international convention of 1910. The much shorter time limit for collision claim (compared to for example ordinary tort claims) seems not well known to the shipping or legal community at large. From time to time, the Admiralty Court of England and of Hong Kong are asked to extend time for the commencement of the collision action and whether the court would do so depends entirely on the particular circumstances of the case.

At the hearing it was not disputed that the court could only extend time upon "good reason" being shown by the plaintiff. In the unreported judgment dated 4/8/2006 of *ReKMTC Hong Kong* (AJ164/2004), the Judge applied the "good reason" test as expounded in *The Myrto (No.3)* [1987] 1 AC 597. The parties agreed that the good reason test was applicable. The dispute was whether on the facts of the case, "good reason" had been shown.

As said by Lord Brandon in *The Myrto (No 3)* at P. 622R:

"... whether there is or not good reason in any particular case must depend on all the circumstances of that case..."

The barge owner relied on the following matters in support of the case that there was good reason for extension of time:

- (1) it took some time for legal aid to be granted to the barge owner;
- (2) the barge owner was advised by several lawyers that there was a six years' limitation period for the barge owner's claim;
- (3) the tug owner and his lawyer apparently also took the same view of six years' limitation period;
- (4) the tug owner only took the section 7 limitation point after it was raised by the court at an initial hearing in September 2005; and
- (5) the granting of the time extension would not cause any prejudice to the tug owner.

The Judge accepted that a proper approach to the consideration of whether good reason was shown was to consider two periods of time, firstly from accident in August 1999 to the granting of legal aid in September 2002 and then from the granting of legal aid to the issue of the Writ in April 2005.

The Judge was prepared to accept that there might be some justification for the first period of delay of some three years due to the necessity of the barge owner to seek legal aid in order to properly pursue the legal remedy of launching proceedings. Although even here, the Judge had to observe that the barge owner seemed to have taken some time (after the accident) before the application for legal aid was made on 25/9/2000, which was one year after the accident.

The second period of delay of some two and half years (from September 2002 to April 2005) was however much more difficult to justify. After the legal aid was granted, it was the duty of the barge owner to pursue the claim diligently and properly. There was a paucity of explanation as to what took place exactly between September 2002 and April 2005 by the barge owner and his lawyer with no Writ being issued. The references to the barge owner

being told by various lawyers that the limitation period was six years could not be a justification or constitute good reason. Ignorance or the mistake of the barge owner as to applicable time limit could not constitute good reason. In the Judge's view, a wrong view of the applicable time limit whether by the barge owner or by his lawyers (or those giving him free advice) simply could not constitute good reason.

It is said that the tug owner's lawyers also took the same view of the applicable time period being six years. But this was strictly speaking not accurate. What happened was that when the barge owner's lawyers wrote to the tug owner, the tug owner's lawyer wrote back by its letter dated 7/5/2003 and in denying liability relied on a number of grounds but did not rely on the two-year limitation period under section 7. Apparently in the subsequent negotiation between the parties, the tug owner's lawyer never relied on a two-year limitation defence. The fact that a party does not rely on a particular limitation defence is not the same as a party asserting that the applicable period of limitation is six years. If that had been the case, then there might be room for consideration based on estoppel or equity. But there was no such crossing of the line which led to the mistake of the barge owner on the applicable time limitation period.

There was no affidavit evidence that during the second period that there was negotiation between the parties but even if there was such negotiation that would not provide a justification or good reason for the delay. A claimant is at serious risk if he puts all his eggs into the negotiation basket and he has only himself to blame if he thereby becomes time-barred.

The tug owner was *prima facie* entitled to the limitation defence which had accrued and ought not to be deprived of it merely because of the ignorance or mistake of those representing or acting for the barge owner or advising in a non-strictly lawyer's capacity.

The Judge had carefully looked at all the circumstances which had been put forward in this case and the Judge had not been able to find that having regard to all the circumstances, there was good reason for the requested time extension to be given. The legal action of the barge owner had to be dismissed with costs.

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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