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Extension of Validity of a Writ

In a series of proceedings[1] concerning China Medical Technologies, Inc. (in liquidation) ("**China Medical**"), the courts examined a number of important civil procedure principles. In this article, we look at how the judge's discretion in an application to extend the validity of a writ was exercised.

The original writ of summons in an action is valid for the purposes of service for 12 calendar months from the date of its issue. There is a large number of cases on this topic, and the general principle is that a plaintiff should serve a writ promptly, or there must be "good reason" to justify the exercise of a judge's discretion to extend the validity of a writ for up to 12 months. The underlying policy of the law promotes finality to litigation, the prevention of stale claims, and the protection of a defendant from having a claim hanging over his head indefinitely. The power to grant an extension of validity of a writ involves a two-stage process under Order 6, rule 8(2) of the Rules of the High Court (Cap. 4) ("**RHC**").

I. Background

1. China Medical, the Plaintiff ("**P**"), was wound up in the Cayman Islands in 2012. An ancillary winding-up order was made in Hong Kong in 2014. P was hopelessly insolvent, with provable claims in excess of US$400 million. The liquidators of P carried out investigations and revealed that P's management perpetrated a fraudulent scheme to misappropriate US$355.5 million of P's assets by purportedly acquiring some worthless medical technologies. There were transfers of funds from P's bank account to

[1] *China Medical Technologies, Inc (in liquidation) v Bank of China (Hong Kong) Limited* [2018] HKCFI 1395, [2019] HKCA 402 & [2019] HKCA 735, and *China Medical Technologies, Inc (in liquidation) v Bank of East Asia, Limited* [2019] HKCFI 2143.

Supreme Well Investments Limited held with Bank of China (Hong Kong) Limited ("**BOC**") and Bank of East Asia, Limited ("**BEA**"). The liquidators do not know the ultimate recipients of P's money.

2. P issued the protective writs of summons with general indorsement of claim on 2 December 2014 (the "**Writs**") alleging that the banks were liable for the loss for breach of contract, dishonest assistance, knowing receipt, breaches of duty and of trust, conspiracy, negligence and/or unjust enrichment.

3. Just before the expiry of the Writs, on 30 November 2015, P made *ex parte*[2] applications to extend the validity of the Writs for another 12 months (the "**Extension Applications**"). Essentially, the "good reason" in support of the Extension Applications was P's pending applications against the banks for production of documents and oral examination of certain employees of the banks (the "**Examination Application**"). P alleged that they need further information to make an informed decision as to whether to proceed with any of the potential claims against the banks.

4. On 7 December 2015, a Master made orders extending the validity of the Writs for 12 months (the "**Extension Orders**"), i.e., up to 1 December 2016. At this stage, there was a "good reason" to be suspicious of fraudulent conduct of the banks which required investigation.

5. A few days later, on 15 December 2015, Harris J dismissed P's Examination Application ("**Harris J's Judgment**"), and P's appeal did not overturn the decision. Harris J and the appellate judges were aware of the purpose of the Examination Application was to assess the potential claims against the banks, but have declined to order examination. By virtue of the dismissal, the liquidators could not point to any particular facts upon which to base a claim of dishonest assistance against the banks, thus the "good reason" in support of the Examination Application had arguably gone.

6. Shortly before the expiry date, on 29 November 2016, P purported to serve the Writs on the banks.

7. The banks applied to set aside the Extension Orders and service of the Writs

[2] For further information, see our publication "Duty of Full and Frank Disclosure".

based on various grounds[3]. The Court of First Instance ("**CFI**") hearing of BOC's applications took place in March 2018[4], and its appeals took place in March 2019[5] and May 2019[6]. The CFI hearing of BEA's application took place in March and May 2019[7].

II. Key Points

1. Under the two-stage process, in the first stage, the plaintiff must first establish matters amounting to "good reason" for extension or at least capable of so amounting. In the second stage, matters such as the balance of hardship will fall to be considered if the discretion to extend arises in the first place.

2. Where the failure to serve a writ within its normal validity period is a result of a choice, then it is necessary to decide whether the choice was made for a good reason.

3. A wish to obtain further evidence in a case which requires pleading of full particulars may be capable of being a good reason. Similarly, the saving of unnecessary legal proceedings and costs can be a good reason for extending the validity of a writ and in not requiring a party to prosecute its claim for the time being.

4. When considering the good reason ground, the court is to have regard to what the situation was at the date of the extension order (e.g., on 7 December 2015 in this case), albeit with the benefit of further evidence at the *inter parte* stage (i.e., in 2018 and 2019 respectively).

5. At the *inter parte* hearings, the court can take into account the evidence filed subsequent to the Extension Orders and the fact that the Examination Application was dismissed, notwithstanding that they were post-Extension Orders.

6. The court does not ordinarily treat a plaintiff's desire to see through some

[3] For further information, see our publications "Service of a Writ" and "Submission to Jurisdiction and Waiver".
[4] [2018] HKCFI 1395.
[5] [2019] HKCA 402.
[6] [2019] HKCA 735.
[7] [2019] HKCFI 2143.

parallel set of proceedings as a good reason for holding up service in other proceedings.

7. Whether the plaintiff genuinely held belief with regard to the adequacy of information to sue the defendant was reasonable is to be determined objectively by the court as a gatekeeper.

8. Where a plaintiff has sufficient evidence to make an informed decision that he has a viable claim, the underlying policy of the law would require him to bring and serve proceedings within the prescribed period.

III. Findings

Although Harris J and the Master dealt with different statutory provisions, different tests and different balancing exercise, the subject matter of Harris J's judgment substantially overlapped the basis of the Extension Applications. After considering the evidence carefully, Harris J found that the liquidators do not need any more information in order to decide whether or not they have a viable claim against the banks, and it was a decisive finding. Attaching great importance and giving considerable weight to Harris J's decision was not an error in law. It could not be a good reason to extend the Writ to enable P to obtain further information. All of the judges decided that there were no "good reasons" to extend the Writs on the date the Extension Orders were made. The Extension Orders were set aside.

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