

Case Bulletin: 2019/06

Service of a Writ

In a series of *China Medical* related proceedings¹, the courts examined a number of important civil procedure principles. In this article, we look at the requirement to serve a writ of summons within the period of validity. For background and the defined terms used in this article, please see our publication “Extension of Validity of a Writ”.

It is a fundamental principle of the common law that defendants must be given due and fair notice of those proceedings. The rules governing service of the originating process and other documents within the jurisdiction are contained in Orders 10 and 65 of the Rules of the High Court (Cap. 4A) (“**RHC**”). The Companies Ordinance (Cap. 622) (“**CO**”) specifies how service could be effected on companies registered under it. A striking feature of these provisions are their purely procedural character.

I. Background

1. In *China Medical v BOC*, it should be noted that shortly before the expiry of the Writ (i.e., on 1 December 2016 as extended by the court), P purported to serve the Writ by leaving and by ordinary post on BOC on 29 November 2016.
2. A peculiar fact was that the Writ was not left at the registered office of BOC on 14th floor, BOC Tower, 1 Garden Road, Hong Kong (the “**Registered Office**”) but on the ground floor of the BOC Tower and the receptionist was

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.

not an employee of BOC. The deemed date of service by ordinary post was also in issue.

3. On the evidence, P's solicitors could only depose to the "*usual practice*" of handling of mails that it was "*likely that the letter was put in a post box on 29 November 2016*". However, the judge found that the postal chop bearing the date of 30 November 2016 was the best evidence of the posting date of 30 November 2016. There is a dispute as to the date of service.

II. Key Points

1. Section 827 of the CO provides that "[a] *document may be served on a company by leaving it at, or sending it by post to, the company's registered office.*"
2. The procedure under section 827 of the CO must be strictly adhered to by leaving a writ at the registered office of a limited company. This could be done by either inserting the writ under the door at the entrance or by leaving it outside, at the foot of the door.
3. In relation to service by ordinary post under section 827 of the CO, unless the contrary is proved, it is deemed to be served on the second working day after posting. Working day means any day of the week excluding Sundays, public holidays, and gale warning days or black rainstorm warning days.
4. Under Order 2, rule 1 of the RHC, defective service of proceedings, however gross the defect and even a total failure to serve, is curable by the court, which may exercise its discretion not to set aside service if (i) the irregularity is technical rather than substantive, and (ii) the court is satisfied that the proceedings have come to the attention of the defendant. There are ample examples of the court's exercise of such discretion. One of the elements that the court should consider is the prejudice to the defendant.

III. Findings

It was found that the Writ was not left at the Registered Office, but at the reception desk on the ground floor of BOC Tower. It was perfectly possible for the process

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server to go up to the 14th floor where the Registered Office is to effect service, but it was not done. The service on the ground floor of BOC was not a valid service. Furthermore, the judge found that the Writ was served by ordinary post on 30 November 2016, hence, it was deemed to be served on the second working date after posting, i.e., on 2 December 2016, after the Writ had expired on 1 December 2016. The judge found that P had deliberately deferred service of the Writ till the end of a 2-year validity period, and it could hardly expect any indulgence of the court. Further given the findings on material non-disclosure and misrepresentation, the judge declined to make any order to cure the irregularity of service.

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