



# Challenging extensions of time to serve writs on defendants in Hong Kong

October 2019

## Some good news for defendants

### Takeaway point

In another recent high profile judgment, the High Court of Hong Kong has (in effect) sent out an important warning to plaintiffs who apply to the court for an extension of time in which to serve their writ on a defendant. On making such applications, plaintiffs must be very careful to discharge their continuing and important duty to be full and frank with the court – in particular, in the evidence filed in support of such applications, plaintiffs must specifically and clearly confirm the position regarding the limitation periods for different claims in the writ and whether any claim is time barred.

These issues arise particularly in the context of complex commercial litigation commenced by liquidators on behalf of companies in liquidation. General limitation periods provide for six years in which to commence a claim, beginning from when a cause of action accrues. A writ once issued is valid for one year. However, it is not unusual for liquidators to issue a “protective writ” before the expiry of the general limitation period and then to apply to extend the validity of the writ for a further year.

In such circumstances, parties on the receiving end of a writ commenced by plaintiff liquidators years after the events in question (for example, former officers, auditors or bankers of a company) should be on the lookout for whether the liquidators have discharged their onerous duties when applying to extend the validity of a writ – a failure to discharge those duties, particularly concerning confirmation of the correct status of the limitation periods for the different claims contained in the writ, leaves the writ liable to be set aside and the entirety of the proceedings liable to be dismissed.

### Summary

In *China Medical Technologies Inc (In Liquidation) v The Bank of East Asia Ltd*,<sup>1</sup> the High Court set aside an order that had extended the period in which the plaintiff liquidators had to serve a writ on the defendant bank. The court also set aside the service of the writ and dismissed the action.

The court’s judgment is significant and follows on from a similar judgment in another action commenced by the same plaintiff liquidators.<sup>2</sup> Taken together, both judgments suggest a closer scrutiny by the courts

### Any comments or queries?

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1. [2019] HKCFI 2143, 5 September 2019. At the time of writing, also see an application for permission to appeal, due to be heard on 14 November 2019.
2. *China Medical Technologies Inc v Bank of China (Hong Kong) Ltd* [2018] HKCFI 1395 (first instance) and [2019] HKCA 402 (an unsuccessful appeal – in respect of which permission to appeal to the Court of Final Appeal was refused: [2019] HKCA 735).

when considering *ex parte* (without notice) applications to extend the period in which a writ has to be served on a defendant.

## Background

It is not uncommon for plaintiffs to commence proceedings by writ but to delay service of the writ. The commencement of an action by the issue of a writ stops the limitation (time bar) period, during which a cause of action should be commenced. In Hong Kong, a writ once issued remains valid for service for one year including the day of issue (effectively, 364 days), during which it should be served on the defendant. There is provision in the court rules to extend the duration of a writ, provided that good reasons can be shown by evidence (in the form of a sworn statement) and provided that the court considers it should exercise its discretion to grant an extension based on the circumstances of each application.<sup>3</sup>

In *China Medical Technologies Inc*, the plaintiff's writ was issued on 2 December, 2014. On 30 November, 2015, the plaintiff applied to extend the validity of the writ. As is the norm, this was an *ex parte* application – that is, without notice to the defendant. On 7 December, 2015 the plaintiff obtained an *ex parte* order to extend the validity of the writ to until 2 December, 2016 (“the extension order”).

The evidence relied on by the plaintiff to support the extension of time included:

- that the liquidators needed more time to conduct their investigations into the company's affairs before they could determine what causes of action there were (if any) against the defendant
- the liquidators' application for the production of documents and examination of certain persons, pursuant to section 221 of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap. 32), had not yet been determined.

As it transpired, the judge determining the section 221 matter handed down his judgment on 15 December, 2015 – one week after the extension order was granted but (importantly) well before the writ was eventually served on 29 November, 2016 within the extended period.

The defendant applied to set aside the extension order on the basis that (among other things):

- there had been no good reason to extend the validity of the writ
- the plaintiff had not discharged its duty to be full and frank with regard to the application for the extension order. In particular, it appears that the plaintiff had misinformed the court as regards the expiry of limitation periods with respect to some claims in the writ and, therefore, the court had not been made aware that with respect to those claims a defence of limitation had already accrued – that is, the events in respect of which these claims were based had allegedly occurred more than six years before the commencement of the proceedings (2 December, 2014).

The defendant's application was opposed by the plaintiff. Addressing the points made by the defendant in support of its application, the plaintiff argued that (among other things):

- there had been a good reason to extend the validity of the writ. In particular, the need for more time to investigate matters and to await the outcome of the judgment with respect to the liquidators' application for the production of documents and examination of certain persons
- the failure to set out the correct position as regards an accrued limitation defence with respect to some claims was an unfortunate mistake but not one that was material; in the sense that the extension order had not deprived the defendant of relying on a limitation defence when it

3. Rules of the High Court, Order 6, rule 8 (“Duration and renewal of writ”).

came to filing its defence – the extension order could not extend the limitation period for a claim that had already expired.

The plaintiff also argued that (in any event) the defendant had lost the right to challenge the extension order because it had submitted to the court’s jurisdiction or had waived any objection to the validity of the writ or its service. Among other things, the defendant appears to have formally acknowledged service of the writ, agreed to an extension of time for the plaintiff to serve its statement of claim and sought an extension of time in which to serve its defence, in the event that it chose to do so (rather than challenge service of the writ). In short, as is customary, the defendant and its lawyers appear to have kept their options open.

### Issue

The issue for the court’s determination was whether the extension order should be set aside and, in any event, whether the defendant had submitted to the jurisdiction.

### Decision

In a robust judgment, the court granted the defendant’s application to set aside the extension order. In so doing, the court also set aside service of the writ and dismissed the entirety of the court proceedings.

The judgment is heavily reliant on the similar judgment handed down previously by the court in another case, involving the same plaintiff but a different defendant bank, and on the Court of Appeal judgment in that case.<sup>4</sup>

In short, as with the previous judgment, the court found that there were no good reasons for the court to have extended the validity of the writ at the ex parte stage and there had been a material non-disclosure by the plaintiff such that it had failed to discharge its duty to be full and frank. The Court of Appeal

judgment in the other case was binding on the court and the facts were identical.<sup>5</sup>

### No good reasons

Applying the Court of Appeal judgment, the court agreed that the plaintiff had sufficient information to decide whether to proceed with its claim at the time that the extension order was granted (on 7 December, 2015). The fact that the plaintiff wanted more time to obtain further information (when it already had sufficient information) was not a good reason to extend the validity of the writ. Further, the liquidators’ outstanding “section 221” application was not relevant in assessing the viability of their claim against the defendant and, therefore, did not amount to a good reason.

### Material non-disclosure

Referring to the Court of Appeal judgment in the other case, the court considered an applicant’s continuing duty to give full and frank disclosure on an ex parte application. Importantly, the court noted that this duty continued as long as the proceedings remained on an ex parte basis – in this case, until service of the writ further to the extension order. Such a conclusion arose out of fairness generally to those defendants that were on the receiving end of an ex parte application to extend the validity of a writ because they were at a disadvantage until they could find out what had happened at the ex parte stage.

In this case, the plaintiff had misinformed the court as to a category of significant claims in the writ in respect of which the limitation period had already expired. By reference to the Court of Appeal judgment, the court emphasized the importance of plaintiffs (in this case the liquidators) clearly and comprehensively setting out the position regarding limitation periods when applying to extend the validity of writs. It was no excuse

4. *China Medical Technologies Inc v Bank of China (Hong Kong) Ltd* [2018] HKCFI 1395 (first instance) and [2019] HKCA 402.

5. [2019] HKCFI 2143, at paragraphs 4 and 9.

for a plaintiff to seek to justify its mistake by suggesting that it was in some way immaterial because (for example) the court granting the ex parte order to extend the validity of the writ would have still made the order in any event. That argument did not sit well with the court on a defendant's subsequent challenge to set aside the ex parte order.

#### No submission to jurisdiction

All the plaintiff's arguments to the effect that, in any event, the defendant had taken substantive steps in the action such that it had submitted to the jurisdiction of the court, or had waived any objection to the validity of the writ or its service, were firmly rejected.

It suffices to state that these arguments appeared to be without merit and the defendant had done no more than keep its options open and reserve its rights. Indeed, the defendant's strategy reflects the conventional thinking that a submission to the jurisdiction must be an unequivocal act.

#### Some comment

It is important to stress that there was no finding by the court that the plaintiff's conduct amounted to an abuse of process. The non-disclosure by the plaintiff may have been a genuine mistake, as was the case in the previous matter.<sup>6</sup>

However, taken together, the judgments in both cases (including, the Court of Appeal judgment) are an important development. For some time, there has been a general feeling that obtaining ex parte permission to extend the validity of a writ in Hong Kong

has been treated as more of a formality than an exception. Good reasons to extend the validity of a writ do not mean exceptional reasons – however, such an extension should not be the norm.

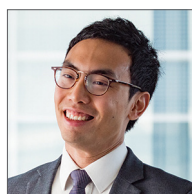
What amounts to a good reason is fact specific but could include (for example) an express agreement with a defendant that service of a writ be deferred or where a defendant is evading service. Where a plaintiff has sufficient information to commence court proceedings but chooses to delay in order to obtain more information, that is not a good reason to extend the validity of a writ.

Even where a good reason exists to extend the validity of a writ, the court must exercise a discretion – balancing, on the one hand, the prejudice to a plaintiff in not granting an extension and, on the other hand, the prejudice to a defendant in granting an extension. In this regard, the judgments in *China Medical Technologies Inc* are likely to serve as important precedents not just for lawyers and their clients but also for judicial officers (known as "masters") who handle day to day ex parte matters, such as applications to extend the validity of writs.

The court's clarification that the ex parte duty to be full and frank continues for the entirety of the period during which the proceedings remain on an ex parte basis is also significant. In this case, the duty continued to apply until service of the writ – the duty did not stop simply because an order on an ex parte basis had been made.



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6. *China Medical Technologies Inc v Bank of China (Hong Kong) Ltd* [2018] HKCFI 2007, 29 August 2018 ("Decision on costs").

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