



Failure to Launch: Cayman Court has “Scant Sympathy” for Plaintiff who did not Serve Writ in Time

Weaving Macro Fixed Income Fund Limited (In Official Liquidation) (the “Plaintiff”) was a Cayman investment fund which made headlines in 2009 when it emerged that the counterparty for its biggest trading position was controlled by the fund’s manager. An allegation that the fund’s NAV was artificially inflated due to a sham transaction with a related party has led to criminal proceedings in the UK, a civil claim by the Plaintiff against its administrator in Ireland, and separate proceedings before the Grand Court of the Cayman Islands against its directors and, in this case, against Ernst & Young (the “Defendants”).

The Plaintiff’s case against the Defendants is that they acted negligently or in breach of contract in auditing the Plaintiff’s financial statements which contained the alleged sham transactions in the period 2005 to 2007 resulting in losses of up to \$400 million. The Defendants deny the claim.

On 18 March 2014, Justice Quin of the Grand Court ruled that the Plaintiff should not be granted an extension of the period of validity of a Writ as they had not shown good reason for their failure to serve the Writ on the Defendants in the allotted time.

The parties entered into a series of standstill agreements during 2012 – a common device for claimants who are not yet ready, willing or able to pursue their claims but wish to protect them from becoming time-barred. A Writ was issued by the Plaintiff in November 2012 (the “November 2012 Writ”) and served on the Defendants’ attorneys in March 2013. However, the Defendant’s attorneys complained that by issuing the November 2012 Writ the Plaintiff had acted in breach of the relevant standstill agreement between the parties.

In August 2012 a hearing took place pursuant to GCR O.14(a) in relation to the question of construction of the relevant standstill agreement and whether the Plaintiff had acted in breach of that agreement by issuing the November 2012 Writ. In the meantime, however, the attorneys for the Plaintiff issued but did not serve a further (virtually identical) Writ of Summons dated 7 May 2013 (the “May 2013 Writ”) in order to protect their position should

the November 2012 Writ be struck down. The Plaintiff was successful on the issue of whether it had breached the standstill agreement; however, the Defendants later appealed that decision.

The rules of the Grand Court of the Cayman state that a Writ is valid for four months from the date of issue, however, the Court may order an extension of that time period in certain circumstances. In November 2013 the Plaintiff applied for an extension of the validity of the May 2013 Writ. While this was obviously after the expiry of the four month period, this extension was granted in December 2013 by Quin J on an *ex parte* basis. When the Defendants were subsequently served with the May 2013 Writ in January 2014 they applied to the Court for an order setting aside the extension of validity of the May 2013 Writ which had previously been granted to the Plaintiff.

The significance of this application was as follows: The appeal in relation to the standstill agreement meant that the Court of Appeal could ultimately strike down the November 2012 Writ which would leave the Plaintiff either entirely reliant on the May 2013 Writ or having to issue and serve yet another Writ. The May 2013 Writ preserved the Plaintiff's claim in respect of the 2006 audit carried out by the Defendant, but any Writ subsequently issued by the Plaintiff in respect of that audit would fall foul of the Cayman Limitation Law. The claim in respect of the 2006 audit was estimated by the Plaintiff to have a value of between \$50 million and \$200 million so the importance of the validity of the May 2013 Writ was clear.

The Plaintiff argued that it had consciously refrained from serving the May 2013 Writ in order to save time and expense as it may never have been necessary to serve it depending on the outcome of the dispute in relation to the standstill agreement. The Defendants argued that no attempt had been made by the Plaintiff to either serve the Writ within its period of validity or to engage with the Defendants or the Court during that period and, indeed, the attempt to save costs and time had proven to be misplaced given that a further hearing was necessitated.

Quin J stated that as a matter of Cayman law *"it is the duty of the plaintiff to serve the writ promptly. He should not dally for the period of its validity; if he does so and gets into difficulties as a result he will get scant sympathy."* An extension will only be granted where there is good reason for so doing such as where there is agreement between the parties or difficulty in finding or serving the Plaintiff. An application for an extension will involve the Court first enquiring as to whether such a good reason existed. If that is found to be the case the Court will then apply itself as to the question of whether judicial discretion should be exercised in favour of renewal having regard to all of the circumstances including the balance of prejudice or hardship.

Quin J concluded that the 'good reason' advanced by counsel for the Plaintiff (of saving costs and unnecessary pleadings) was, in fact, *"weak and of little substance"*. Given the size of the claim arising from the 2006 audit there was clearly a duty on the Plaintiff to serve the Writ promptly. The Plaintiff could have approached the Defendants within the period of validity to agree an extension or if that did not prove possible it could have served the Writ and sought a stay on proceedings. The Plaintiff did neither. Given that the Court's enquiry had not passed the first stage – i.e. no good reason for the grant of an extension had been found to exist on the facts – it was not necessary for the Court to examine whether the balance of prejudice or hardship was in favour of an extension. However, the Court did indicate that if such a finding had been necessary it would follow the strict approach of the English Courts whereby a Writ will not normally be renewed so as to deprive a Defendant of the benefit of a limitation period.

Having heard argument from both sides, Quin J therefore set aside his previous Order extending the validity of the May 2013 Writ.

Conclusion

The judgment of Quin J is a stark reminder and warning for practitioners of the importance of validity periods for service. Much as failure to issue a Writ promptly may deprive a Plaintiff of a claim due to the expiry of a limitation period, failure to serve a Writ on a Defendant in time can have similarly calamitous effects on a Plaintiff's ability to seek redress. In this case, the Plaintiff's liquidators now face the very real prospect of being unable to pursue any claims against the Defendants in respect of their audits for the years 2005 and 2006 when the sham transactions are alleged to have occurred.

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