DCPI 2776/2019

[2021] HKDC 524

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2776 OF 2019

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BETWEEN

TSO YUET KUK Plaintiff

and

SURE FAMOUS LIMITED 1st Defendant

(確達有限公司) (Company No.0738161)

KUM SHING (K.F.) CONSTRUCTION 2nd Defendant

COMPANY LIMITED

\_\_\_\_\_\_\_\_\_\_\_\_

Before: Master Matthew Leung in Chambers (Open to Public)

Date of Hearing: 28 April 2021

Date of Decision: 14 May 2021

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| D E C I S I O N |

1. By an Order dated 16 October 2020 (“**the said Order**”), the validity of the Writ of Summons of the Action was extended for 6 months from the date of its expiry. This is the 1st and 2nd Defendants’ application to set aside the said Order and to dismiss the whole Action against the 1st and 2nd Defendants.

**Procedural history**

1. The Writ of Summons was issued on 21 August 2019 in respect of an accident occurred to the Plaintiff on 8 September 2016 in a construction site located at Tin Ping Estate when the Plaintiff sustained injuries over her right middle and right ring fingers in the course of her employment (“**the Accident**”). The Plaintiff pleaded that the Accident was caused by the negligence and/or breach of contract of employment and/or breach of statutory duty of the 1st and 2nd Defendants.
2. By an *ex-parte* Summons filed by the Plaintiff on 15 October 2020, the Plaintiff sought leave to extend the validity of the Writ of Summons for 6 months from the date of its expiry. In support of the *ex-parte* Summons, the Plaintiff’s Solicitors filed the Affirmation of Yam Lok Ping affirmed on 15 October 2020 (“**the Affirmation**”) stating *inter alia* the following:
3. The Plaintiff did not serve the Writ before 21 August 2020 because the 1st Defendant was dissolved on 27 December 2019 and was not restored to the Companies Register until late September 2020.
4. On 21 January 2020, Messrs Hastings & Co. (“**Hastings**”), Solicitors for the 1st and 2nd Defendants, informed the Plaintiff’s Solicitors in writing that the 1st Defendant had been dissolved and the proceedings could not proceed unless the 1st Defendant has been reinstated.
5. The Plaintiff’s Solicitors conducted a company search on 24 January 2020 and confirmed that the 1st Defendant applied for deregistration on 27 July 2019, and with notice of deregistration being gazette on 27 December 2019.
6. The Plaintiff then commenced proceedings for the restoration of the 1st Defendant to the Companies Register, and eventually Ng J of the Court of First Instance made an Order on 29 July 2020 that the 1st Defendant be restored to the Companies Register. After completing the procedure, the 1st Defendant was restored in late September 2020.
7. By the time the 1st Defendant was restored in late September 2020, the validity of the Writ had expired on 21 August 2020. Therefore, the Plaintiff asked for an extension of the validity of the Writ in the *ex-parte* Summons.
8. Having considered the *ex-parte* Summons and the supporting affirmation, I allowed the application on 16 October 2020 and extended the validity of the Writ of Summons by 6 months as per the said Order.

**The Defendants’ submissions**

1. Mr Victor Gidwani, Counsel for the 1st and 2nd Defendants, submitted in his written submissions that the Plaintiff’s Solicitors ought to have known that on 6 September 2019, a Gazette Notice was published in respect of the deregistration of the 1st Defendant pursuant to section 751(1) of the Companies Ordinance and objections could have been raised within 3 months. Even after the Plaintiff and the Plaintiff’s Solicitors had indisputable actual knowledge on either 21 or 24 January 2020, there was unreasonable delay on the Plaintiff’s part to serve the Writ. There was no good reason to extend the validity of the Writ of Summons.
2. Mr Gidwani further argued in his written submissions that the Plaintiff failed to explain *inter alia* the following in the Affirmation:
3. Why the Writ could not be served on the 2nd Defendant, regardless of the status of the 1st Defendant?
4. Why the Plaintiff could not apply for restoration of the 1st Defendant before the Writ expired and hence be able to serve the Writ on the 1st Defendant in time?
5. Why the Plaintiff did not apply for extension of the Writ before its expiry?
6. Mr Gidwani advanced further that even if the Order extending the Writ is not to be set aside, the Action as against the 2nd Defendant should be dismissed as there was no reason at all why the Writ was not served on the 2nd Defendant.
7. At the substantive hearing, Mr Gidwani accepted that the Plaintiff and the Plaintiff’s Solicitors did have actual knowledge about the 1st Defendant’s situation on 24 January 2020. He focused his argument on the absence of good reason to extend the validity of the Writ because the Plaintiff should have more than sufficient time in the period between 24 January 2020 and August 2020 (i.e. before the expiry of the validity of the Writ) to serve the Writ. Further, the Writ was issued on 21 August 2019 while the 1st Defendant was deregistered on 27 December 2019. There is no reason why the Plaintiff could not have served the Writ together with the Statement of Claim and Statement of Damages before the 1st Defendant was deregistered.

**The Plaintiff’s submissions**

1. Ms Julia Lau, Counsel for the Plaintiff, submitted that before issuing the Writ of Summons on 21 August 2019, the Plaintiff’s Solicitors had already obtained the latest company search of the 1st Defendant on 19 August 2019 which showed that the 1st Defendant was still on the register. The Plaintiff’s Solicitors had done what they could but did not know about the 1st Defendant’s application to have itself deregistered.
2. Further, the letter issued by Hastings dated 30 August 2019 stated that they had instructions to accept service on behalf of the 1st Defendant without mentioning that the 1st Defendant was in the course of applying for deregistration. Nor did Hastings inform the Plaintiff’s Solicitors in their reply letter dated 10 January 2020 that the 1st Defendant had been dissolved.
3. The Plaintiff further submitted that there was a common understanding and agreement of the parties since 21 January 2020 that the present proceedings was not to be proceeded with until after the restoration of the 1st Defendant was completed. It was on that common understanding that the Writ was not served on the 2nd Defendant.

**The law**

1. Order 6, rule 8(2) of the Rules of the District Court governs the renewal of the writ as follows:

“(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.”

1. In ***Chow Ching Man v Sun Wah Ornament Manufactory Ltd*** [1996] 2 HKLR 338 at 344 B, Bokhary JA (as he then was) reiterated the legal principle as follows:

“It is clear from the decisions of the House of Lords in ***Kleinwort Benson Ltd. v. Barbrak Ltd.*** [1987] AC 597, ***Waddon v. Whitecroft Scovell Ltd.*** [1988] 1 WLR 309 and ***Baly v. Barrett*** [1988] NI 368 that Order 6, r 8(2) is to be construed so that the discretion to extend the validity of a writ does not arise unless the plaintiff first establishes matters amounting to good reason for extension or at least capable of so amounting; and that matters such as the balance of hardship only fall to be considered if the discretion to extend arises in the first place.”

1. There are 3 categories of situations to be considered:-
2. Category 1 were cases in which a plaintiff applied for extension of a writ within the period of its validity and before the expiry of the limitation period for the causes of action pleaded.
3. Category 2 were cases in which a plaintiff applied for an extension before expiry of a writ's validity but after expiry of the operative limitation period of the causes of action pleaded.
4. Category 3 were cases in which a plaintiff applied for an extension after expiry of the writ and the operative limitation period.
5. Mr Gidwani stated in the written submissions that the present case fell into category (2) situation, while at the hearing, he submitted that category (3) should be more appropriate. In category (3) cases, it is not possible for the plaintiff to serve the writ effectively unless its validity is first retrospectively extended. In this category, at the time when the extension application is made, a defendant on whom the writ has not been served has an accrued right of limitation.
6. Mr Gidwani reminded me that, as decided in ***Chow Ching Man***, cases cannot be decided on sympathy alone, and it is necessary to look at the law. Whether or not a reason is a good one is a question which falls to be determined by a court of law administering justice. Relying on the case of ***Sealegend Holdings Ltd v China Taiping Insurance (HK) Co Ltd*** [2013] 4 HKLRD 508, Mr Gidwani submitted that the law concerning the validity of a writ was no mere formal procedural rule, and finality to litigation should be protected. The interest of the professional insurer should also be protected as much as the interest of any other litigant.

**Discussions**

**(a) Was there any good reason for extending the validity of the Writ?**

1. Mr Gidwani argued in the written submissions that the Plaintiff’s Solicitors ought to have known about the application for the deregistration of the 1st Defendant under the Gazette Notice on 6 September 2019. At the substantive hearing, the Court raised the issue with Mr Gidwani as to the legal effect of the Gazette Notice and whether there were any legal authorities to support the contention that the Plaintiff should have constructive knowledge. Mr Gidwani admitted that he could not find any authority in this regard. After all, he accepted that the Plaintiff should be fixed with actual knowledge about the deregistration on 24 January 2020 when the Plaintiff’s Solicitors conducted a company search which confirmed the deregistration of the 1st Defendant.
2. Mr Gidwani argued that there were 2 periods of unreasonable lapses of time: (1) the Plaintiff waited from January 2020 to 29 July 2020 to obtain an order to restore the 1st Defendant, and (2) the Plaintiff took out the ex parte summons to extend the Writ on 15 October 2020 while the restoration order was sealed on 31 July 2020.
3. I will deal with each of the said periods in turn.

**(i) From January to 29 July 2020**

1. Ms Lau submitted on behalf of the Plaintiff that because of COVID-19, the General Adjourned Period (“**GAP**”) of the Judiciary started on 29 January 2020 and was extended on a few occasions until 3 May 2020. Further, it was not until 29 May 2020 that the Plaintiff’s Legal Aid Certificate was extended to cover the proceedings to restore the 1st Defendant. The Originating Summons under HCMP 762/2020 was issued on 3 June 2020. Consent Summons was made on 24 July 2020 resulting in the restoration order awarded by Ng J of the Court of First Instance on 29 July 2020.
2. In reply, Mr Gidwani contended that the Plaintiff, in the absence of good reason, had waited until 12 May 2020 to apply to the Director of Legal Aid to extend the certificate. It appears that no steps were taken between January 2020 and 12 May 2020. Moreover, the Plaintiff could have filed the application to commence the miscellaneous proceedings to restore the 1st Defendant in mid-March 2020.
3. In this connection, I have the following observations.
4. The first paragraph of the letter issued by the Plaintiff’s Solicitors to the Director of Legal Aid on 12 May 2020 stated that “[w]e thank you for your letter to us dated 6th May 2020 and enclose herewith copy of the aided client’s consent to incur unusual expenditure dated today for your perusal. As referred to in our letter to you dated 7th April 2020, we shall be grateful if you will kindly reimburse us a sum of $1,041 that we have paid for medical report fees as soon as possible.”[[1]](#footnote-1) It transpires that there were correspondence and communications between the Plaintiff’s Solicitors and the Director of Legal Aid prior to 12 May 2020. There is no evidence to suggest that the Plaintiff’s Solicitors chose to sit back and let the time go by.
5. Mr Gidwani argued that there was nothing to prevent the Plaintiff’s Solicitors from writing to the Court asking for an urgent application for the restoration of the 1st Defendant during the GAP. Whilst there was special arrangement for the High Court Registry to implement enhanced measures during the GAP, I accept Ms Lau’s submissions that application for restoration of de-registered company did not fall into the specified categories of the urgent applications under the notice issued by the Judiciary. I am of the view that it would not be realistic to require the Plaintiff’s Solicitors to file any urgent application for restoration of the 1st Defendant during the GAP.
6. The Plaintiff’s Legal Aid Certificate was extended to cover the proceedings to restore the 1st Defendant on 29 May 2020. The Originating Summons under HCMP 762/2020 was issued on 3 June 2020. Bearing in mind that the extension of the Legal Aid Certificate and the implementation of the GAP were beyond the Plaintiff’s Solicitors’ control, I am satisfied that the Plaintiff’s Solicitors had been prosecuting this action at a reasonable pace after they had actual knowledge about the de-registration of the 1st Defendant in January 2020.
7. **From July to October 2020**
8. The Plaintiff submitted that, notwithstanding the fact that the restoration order was sealed on 31 July 2020, the 1st Defendant could only be restored to the Companies Register upon payment of the costs to the Registrar of Companies. In this regard, the relevant chronology is as follows:
9. By the Order of Ng J dated 29 July 2020, the 1st Defendant be restored to the Companies Register. Paragraph 6 of the Order required the Plaintiff to pay the costs of the Registrar of Companies in the sum of $5,000 through the Director of Legal Aid being the agreed costs and disbursements in lieu of taxation.[[2]](#footnote-2)
10. The Plaintiff’s Solicitors wrote to the Director of Legal Aid on 6 August 2020 and 8 September 2020 asking for payment of the said costs.[[3]](#footnote-3)
11. The Directors of Legal Aid had been arranging payment of costs since 12 August 2020. Time was taken for the Director of Legal Aid and the Treasury to arrange payment of the costs under the special work arrangement due to COVID-19.[[4]](#footnote-4) In her written submissions, Ms Lau stated that the delay in the Legal Aid Department in the process should not be ignored. That said, Ms Lau indicated at the hearing that it was never the intention of the Plaintiff to lay blame on the Director of Legal Aid.
12. Eventually, payment was made to the Registrar of Companies on 22 September 2020.[[5]](#footnote-5) On 30 September 2020, the Plaintiff’s Solicitors conducted company search to confirm that the 1st Defendant was on the register. The *ex-parte* Summons was filed on 15 October 2020.
13. The chronology of events reveals that the Plaintiff’s Solicitors have taken reasonable steps in the application for the restoration of the 1st Defendant and in the *ex-parte* Summons to extend the validity of the Writ. There is nothing to suggest that the failure to serve the writ was the result of a choice or any deliberate non-compliance on the part of the Plaintiff.
14. **The 3-month period immediately after the issuance of the Writ**
15. The Defendants also argued that the Plaintiff should have served the Writ together with the Statement of Claim and Statement of Damages within the 3-month period immediately after the issuance of the Writ.
16. Ms Lau drew my attention to *inter alia* letters issued by Hastings dated 10 January 2020 and by the Plaintiff’s Solicitors dated 24 January 2020 which showed that the Solicitors for the parties were still exchanging evidence on liability and quantum. It would be pre-mature, as argued by Ms Lau, for the Plaintiff to prepare the Statement of Claim and Statement of Damages even in January 2020, not to mention the 3-month period immediately after the issuance of the Writ.
17. The letter issued by Hastings dated 10 January 2020 was made in response to the Plaintiff’s Solicitors’ letter dated 6 January 2020 seeking discovery of various documentary evidence. By that letter (i.e. letter dated 10 January 2020), Hastings provided to the Plaintiff’s Solicitors copies of the wages records of the Plaintiff and comparable workers, and confirmed that they did not have any written employment contract, witness statements, photos or any accident reports.[[6]](#footnote-6)
18. By the letter from the Plaintiff’s Solicitors dated 24 January 2020, the Plaintiff’s Solicitors provided Hastings with copies of the Summons issued against the 1st Defendant under FLS 3046-3048/2017, brief facts and the transcripts of the hearing. The letter also dealt with various issues on medical records, joint medical examination, and the evidence on earnings of the Plaintiff.[[7]](#footnote-7)
19. Having considered the relevant correspondence and the related documents, I accept Ms Lau’s submissions. This is not a case in which the Plaintiff or the Plaintiff’s Solicitors chose to withhold or delay service. Active steps have been taken after the issuance of the Writ on the Plaintiff’s part.
20. Ms Lau submitted that the deregistration of the 1st Defendant was not foreseeable by the Plaintiff at the time when the Writ was issued. The application for extension of the Legal Aid Certificate to cover the application for restoration, the unprecedented COVID-19 situation in Hong Kong, and the application for payment of costs by the Legal Aid Department to the Registrar of Companies were beyond the Plaintiff’s control. Ms Lau argued that this case is exceptional and unforeseeable, and these are good reasons for extending the validity of the Writ.
21. There must be “good reason” to justify the exercise of a discretion to extend the validity of a writ beyond the appropriate period allowed for its service but “exceptional circumstances” or “perfect reasons” are not required. It is not possible to define or circumscribe what is a good reason. Whether a reason is good or bad depends on the circumstances of the case. Having considered all the circumstances, I accept that those reasons as identified by Ms Lau are good reasons to justify the exercise of a discretion to extend the validity of the Writ of Summons.

**(b) Was there any delay in serving the Writ on the 2nd Defendant**

1. Mr Gidwani submitted that while the restoration application of the 1st Defendant was pending, there was nothing to prevent the Plaintiff from serving the Writ on the 2nd Defendant. Ms Lau however contended that there was a common understanding between the parties that the whole action was not to proceed with pending the restoration of the 1st Defendant.
2. In fact, there was no written agreement between the parties to the effect that the action should not proceed pending the application to restore the 1st Defendant in the Companies Register. In this connection, one has to take a closer look at the correspondence between the parties.
3. By a letter dated 11 February 2019, Hastings wrote to the Plaintiff’s Solicitors stating that they had instructions to accept service on behalf of the intended Defendants.[[8]](#footnote-8)
4. By another letter dated 30 August 2019, Hastings confirmed with the Plaintiff’s Solicitors that they had instructions to accept service on behalf of Sure Famous Limited (i.e. the 1st Defendant) and Kum Shing (K. F.) Construction Company Limited.[[9]](#footnote-9)
5. Hastings issued another letter dated 10 January 2020 confirming inter alia that they would engage Dr Peter Ko for the joint orthopaedic examination. As for the proposed psychiatric examination, they asked the Plaintiff to disclose the updated medical report from Castle Peak Hospital and the relevant medical records for their consideration.[[10]](#footnote-10)
6. On 21 January 2020, Hastings informed the Plaintiff’s Solicitors that Sure Famous Limited has been dissolved and that the action cannot proceed until the Plaintiff’s Solicitors have re-instated the company.[[11]](#footnote-11)
7. By a letter dated 19 March 2020, Hastings informed the Plaintiff’s Solicitors that they could not act for Sure Famous Limited (the 1st Defendant) as it had been dissolved. Hastings proposed to re-fix the date of the joint medical examination (fixed for 24 April 2020) after leave has been obtained by the Plaintiff to reinstate the 1st Defendant.[[12]](#footnote-12)
8. The Plaintiff’s Solicitors wrote to Hastings on 24 August 2020 attaching a copy of the Order for the restoration of the 1st Defendant to the Companies Register. The Plaintiff’s Solicitors asked whether Hastings had any instructions to act for the 1st Defendant and to accept service.[[13]](#footnote-13)
9. In reply, Hastings wrote to the Plaintiff’s Solicitors on 31 August 2021 that the Order had to be registered in order to take effect. Hastings stated that “If you do serve the Writ now, we can only act for Kum Shing (K. F.) Construction Company Limited.” They also asked the Plaintiff’s Solicitors to consider writing to the Court to seek an adjournment of the Checklist Review Hearing pending the restoration of Sure Famous Limited.[[14]](#footnote-14)
10. On 9 September 2020, Hastings wrote to the Plaintiff’s Solicitors saying that the Writ had expired and as such, the Plaintiff had to obtained prior leave form the Court to extend the validity before they could accept service on behalf of the 1st and 2nd Defendants.[[15]](#footnote-15)
11. Hastings’ suggestion to postpone the joint medical examination and the Checklist Review Hearing must be made for a purpose. If they expected that the case can be proceeded with against the 2nd Defendant without waiting for the restoration of the 1st Defendant, it would not be necessary for the joint medical examination to be postponed and the Checklist Review Hearing adjourned. I make this observation bearing in mind that it was Hastings who took the initiative to suggest that the joint medical examination originally fixed for 24 April 2020 be re-fixed after leave to restore the 1st Defendant has been obtained. Whilst the suggestion of postponing the joint medical examination alone may not be determinative, but it was again Hastings who took the initiative to suggest to seek an adjournment of the Checklist Review Hearing fixed for 3 September 2020.
12. In this regard, para. 6/8/5 of the Hong Kong Civil Procedure, 2021 stated *inter alia* that ‘sufficient or good reason justifying the exercise of discretion to extend the validity of the writ might well arise “where there has been an agreement between the parties, express or implied, to defer service of the writ; or where the delay in the application to extend the validity of the writ has been induced, or contributed to, by the words or conduct of the defendant or his representatives; or, perhaps, where the defendant has evaded service or, for other reasons without the plaintiff ’s fault, the writ could not have been served earlier even if the application had been made and granted earlier” (per Megaw J in ***Heaven v Road and Rail Wagons Ltd*** [1965] 2 Q.B. 355, 365; ***Krohn & Co. Import/ Export gmbH & Co. KG v Oak Steamship Co. Ltd*** [1982] H.K.C. 353).’
13. Based on the above, I accept the Plaintiff’s submissions that there was a common understanding not to proceed with the case pending the restoration of the 1st Defendant. There was no delay on the Plaintiff’s part to serve the Writ on the 2nd Defendant. In the circumstances, there is good reason to extend the validity of the Writ so far as the 2nd Defendant is concerned.
14. **Any material non-disclosures on the Plaintiff’s part?**
15. The application to extend the writ is made *ex parte*. It is incumbent upon the Plaintiff to make full and frank disclosure of all material facts relevant to the exercise of the Master’s discretion. For information to be material, it must be something which would have affected the Master’s decision on the application. It is a matter relevant to the weighing operation which the court has to make.  It is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one.
16. In deciding whether there was any material non-disclosure, the court adopts a four-limb test:
17. Was there non-disclosure of facts?
18. Were the facts not disclosed material?
19. Was the non-disclosure innocent?
20. If there was material non-disclosure, should the court nevertheless exercise its discretion not to discharge the ex parte order?
21. Whilst the Plaintiff did set out briefly the steps taken upon knowledge of the deregistration of the 1st Defendant that led to the application for the restoration of the 1st Defendant, it is true that there was no mention in the affirmation in support of the extension of the validity of writ of the following, namely, why the Writ could not be served on the 2nd Defendant, what had happened between the date on which the Plaintiff’s Solicitors conducted a company search on 24 January 2020 and the Order of Ng J on 29 July 2020, and why the Plaintiff did not apply for extension of the Writ before its expiry.
22. Reliance was placed by Ms Lau on the case of ***Securities and Futures Commission v A***, HCMP 1407/2007 (unreported, 29 November 2007) in which Kwan J (as she then was) stated the following:

“41.  The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or its relevance was not perceived, is an important consideration whether the ex parte order should be discharged, although it is not decisive (***Brink’s Mat Ltd v Elcombe & Ors*** [1988] 1 WLR 1350 at 1357D, per Ralph Gibson LJ). In practice it would be extremely difficult for a defendant applying for discharge to show that the matters which were not disclosed were the subject of a decision not to disclose made in circumstances where it was appreciated there should have been disclosure.  In the majority of cases, the matter has to be approached on the basis of considering the quality of the material which was not disclosed without making any final decision whether or not there has been bad faith in the failure to disclose (***Behbehani v Salem*** [1989] 2 All ER 143 at 149a to b, per Woolf LJ).

42.  Even if it is established there was material non-disclosure which justifies discharge of the ex parte order, the court has a discretion to continue the order or make a new order on terms.  The court must assess the degree and extent of the culpability, the importance and significance to the outcome of the application of the matters which were not disclosed, and whether the punishment of discharging the ex parte order would be out of proportion to the failure of the applicant to make full and frank disclosure (***Brink’s Mat Ltd****, supra.* at 1359B to F, per Slade LJ; ***Behbehani v Salem****, supra*. at 149g; ***Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne*** [1996] 1 Lloyd’s Report 485 at 492, per Waller J; ***Director of the Serious Fraud Office v A****, supra.* at paragraph 18).”

1. Having considered all the circumstances, I am of the view that there was material non-disclosure on the Plaintiff’s part, but I agree with Ms Lau that the omission in the Plaintiff’s affirmation was innocent in the sense that its relevance was not perceived for the present purpose. In any case, all the available information has been placed before the Court in the present application, and having considered the same, I am of the view that there are good reasons to justify the exercise of the discretion to extend the validity of the writ. After all, the Court still retains the discretion to allow the order to continue in light of the evidence provided in the present application.
2. **Exercise of discretion**
3. If the court is satisfied that there is good reason, it should proceed to decide whether or not to exercise its discretion in favour of renewal by considering all the circumstances of the case including the balance of prejudice or hardship (e.g. that the plaintiff might be left without remedy or that the defendant may suffer as a result of long delay).
4. There is no doubt that the 1st and 2nd Defendants were aware of the Accident. Evidence is also clear that they were aware of the intended common law claim when they instructed Hastings to accept service as per Hastings’ letter to the Plaintiff’s Solicitors on 11 February 2019. There is no evidence that the 1st and 2nd Defendants are not in a position to make their own investigations and look into the matter on liability/defence to the claim.
5. On the other hand, if the validity of the Writ of Summons was not extended, the Plaintiff would lose the right to sue the 1st and 2nd Defendants altogether.
6. Taking into account all the circumstances, it is just and appropriate to exercise the discretion in favour of the Plaintiff to extend the validity of the Writ of Summons. Accordingly, the 1st and 2nd Defendants’ Summons dated 11 December 2020 should be dismissed.

**Costs**

1. The parties agreed that costs should follow the event. Given my ruling that the 1st and 2nd Defendants’ Summons be dismissed, there is no reason why the Plaintiff’s costs should not be borne by the 1st and 2nd Defendants.
2. Summons was taken out by the Plaintiff on 16 March 2021 for leave to file and serve supplemental affirmation in opposition. The Summons was not opposed by the 1st and 2nd Defendants save and except the issue of costs. Leave was granted in terms of the Summons on 29 March 2021 leaving costs to be determined at the substantive hearing.
3. The 1st and 2nd Defendants asked for costs of the Summons while the Plaintiff submitted that the affirmation was made in response to the issues raised in the written submissions of the 1st and 2nd Defendants, and therefore costs should be in the cause of the 1st and 2nd Defendants’ Summons dated 11 December 2020.
4. The supplemental affirmation dealt with broadly speaking two issues, namely why the Writ was not served on the 2nd Defendant before expiry of the validity period, and why payment of costs to the Registrar of Companies could not have been made earlier. I consider that those two issues should have been covered in the first affirmation in opposition. The costs of the Summons could have been saved had the Plaintiff’s Solicitors set out all the details of the relevant facts and chronology in the first affirmation in opposition. In the circumstances, the costs of the Summons should be paid by the Plaintiff to the 1st and 2nd Defendants.

**Conclusion**

1. The following order and directions are hereby made:
2. The 1st and 2nd Defendants’ Summons dated 11 December 2020 be dismissed.
3. The Plaintiff shall file and serve the Statement of Claim, Statement of Damages, and the medical reports within the meaning of Order 18, rule 12(1C) of the Rules of the District Court within 28 days from the date hereof.
4. The 1st and 2nd Defendants shall file and serve their Defence within 28 days thereafter.
5. The Plaintiff shall file and serve the Reply, if so advised, within 28 days thereafter.
6. The Checklist Review Hearing be adjourned to 17 September 2021 at 9:30 a.m. in Court No. 17 for further case management directions.
7. The parties do file and serve up-to-date P.I. questionnaires at least 14 days prior to the adjourned hearing, and any consent summons seeking agreed directions at least 7 days prior to the adjourned hearing.
8. The Solicitors for the Plaintiff shall send a copy of this Order to the Legal Aid Counsel in charge of this case to ensure that there is no delay in compliance with these directions due to late assignment of Counsel or late issuance of appropriate certificate or otherwise.
9. There be costs order *nisi* that:
10. Costs of the Plaintiff’s Summons dated 16 March 2021 be paid by the Plaintiff to the 1st and 2nd Defendants to be taxed if not agreed in any event.
11. Subject to the preceding paragraph, costs of the 1st and 2nd Defendants’ Summons dated 11 December 2020 and the costs of the substantive hearing on 28 April 2021 be paid by the 1st and 2nd Defendants to the Plaintiff with certificate for counsel, to be taxed if not agreed in any event.
12. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
13. Liberty to apply.
14. Last but not least, I thank both counsel for their helpful assistance.

(Matthew Leung)

Master of the District Court

Ms Julia Lau, instructed by Vincent T.K. Cheung, Yap & Co., assigned by the Director of Legal Aid, for the Plaintiff

Mr Victor Gidwani, instructed by Hastings & Co, for the 1st and 2nd Defendants

1. See §1 of the Letter dated 12 May 2020 [HB:193]. [↑](#footnote-ref-1)
2. See page 3 of the Order of Ng J dated 29 July 2020 [HB:112]. [↑](#footnote-ref-2)
3. [HB:135-137]. [↑](#footnote-ref-3)
4. See §25 of the 2nd Affirmation of Yam Lok Ping [HB:159]. [↑](#footnote-ref-4)
5. See letter from the Director of Legal Aid to the Plaintiff’s Solicitors dated 22 September 2020 [HB:139]. [↑](#footnote-ref-5)
6. [HB:96-97]. [↑](#footnote-ref-6)
7. [HB:99-100]. [↑](#footnote-ref-7)
8. [HB:94]. [↑](#footnote-ref-8)
9. [HB:95]. [↑](#footnote-ref-9)
10. [HB:96-97]. [↑](#footnote-ref-10)
11. [HB:98]. [↑](#footnote-ref-11)
12. [HB:107]. [↑](#footnote-ref-12)
13. [HB:109]. [↑](#footnote-ref-13)
14. [HB:124]. [↑](#footnote-ref-14)
15. [HB:125]. [↑](#footnote-ref-15)