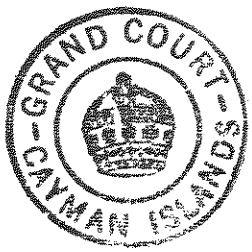
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 58/2013

BETWEEN:

WEAVERING MACRO FIXED INCOME FUND LIMITED (IN OFFICIAL LIQUIDATION)

PLAINTIFF



AND:

1. **ERNST & YOUNG CHARTERED ACCOUNTANTS (A FIRM)**

FIRST DEFENDANT

2. **ERNST & YOUNG LTD.**

SECOND DEFENDANT

3. **ERNST & YOUNG (A FIRM)**

THIRD DEFENDANT

Appearances: **Mr. James Thom Q.C. instructed by Mr. Michael Makridakis of Carey Olsen on behalf of the Plaintiff/Respondent**

Mr. Francis Fenwick Q.C. instructed by Mr. Michael Mulligan and Mr. Ben Hobden of Conyers Dill & Pearman on behalf of the Defendants/Applicants

Before: **The Hon. Mr. Justice Charles Quin**

Heard: **20th and 21st January 2014**

JUDGMENT

INTRODUCTION

1. This is the hearing of the Applicants'/Defendants' Summons issued on the 9th January 2014 to set aside my *ex parte* Order dated the 19th December 2013, extending the validity of the Writ of Summons filed in these proceedings on the 7th May 2013 until the 6th January 2014 pursuant to GCR O.6 r.8 and further, that service of the Writ in these proceedings be set aside pursuant to GCR O.12 r.8(1)(a).

2. The Defendants' Summons is grounded by the affidavit of Devika Parchment ("Ms. Parchment") – sworn on the 10th January 2014.

3. The Plaintiff relies on the first affidavit of Sophia Harrison ("Ms. Harrison") dated the 2nd December 2013 and a second sffidavit of Ms. Harrison dated the 14th January 2014.

4. I am grateful to the attorneys for both parties for their helpful agreed Case Memorandum which sets out the relevant background to the Defendants' application to strike out the extension of the validity of the Writ in these proceedings.

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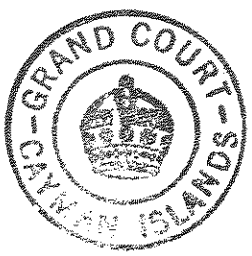
BACKGROUND

5. The Plaintiff was incorporated in the Cayman Islands on the 2nd April 2003. It traded as an open-ended investment fund from about August 2003 until March 2009. It entered liquidation on the 19th March 2009.

6. The Plaintiff's case is, in short, that a fraud was perpetrated by Magnus Peterson, a director and Chief Operating Officer of the Plaintiff's investment manager – Weavering Capital (UK) Limited ("WCUK"). Further, that Magnus Peterson's stepfather, Hans Ekstrom, and brother, Stefan Peterson, who were, at all material times, the directors of the Fund/Plaintiff, acted in deliberate breach of their fiduciary duties by consciously abstaining from carrying out their duty of oversight of the Plaintiff's affairs and thus failed to detect or prevent the fraud.

7. The Plaintiff alleges that Magnus Peterson dishonestly inflated the reported net asset value ("NAV") of the Fund by using sham transactions with a related party (which he also controlled), Weavering Capital Fund Limited ("WCF"). In particular it alleges that sham over-the-counter ("OTC") Interest Rate Swap ("IRS") transactions between WCF and the Fund were used to this end by creating a value for the Fund which was booked as an unrealised gain, which was effectively rolled into further IRS transactions between the parties such that the unrealised gain was never realised in the way of a payment by WCF to the Plaintiff. It is alleged that WCF was never in a position to make any such payments in any event.



8. The Plaintiff alleges that as a consequence of the dishonestly inflated NAV there was an increase in investment in the Fund with the result that the continuing surplus of investment proceeds over redemption payments assisted the Plaintiff to continue to appear solvent.

9. The Plaintiff retained the Defendants (it matters not for present purposes to distinguish between them) in relation to the audit of its financial statements for the periods ending 31st December 2004, 2005, 2006, and 2007.

10. The Plaintiff alleges that the Defendants acted dishonestly in relation to the audits of the financial statements for the periods ended 31st December 2005, 2006 and 2007. It alleges that three separate individuals employed by the Defendants acted dishonestly in respect of the three separate audits for the years ended 2005, 2006 and 2007. It also alleges that the Defendants acted in breach of contract and/or negligently as regards the audit.

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11. The claim is denied in full by the Defendants. The Defendants also assert a counterclaim arising out of Letters of Representation signed by the directors of the Plaintiff, which they contend extinguishes the claim by circuity of action.

12. The Plaintiff alleges that had the Defendants not produced dishonest audit reports then the (allegedly) true NAV position of the Plaintiff would have been revealed and it would, as a result, have entered into liquidation sooner, avoiding, it is said, losses of (depending on which version of the case is considered) anything up to something like US$400 million.

13. The Defendants dispute causation, loss and damage – both in law and on the facts.

14. For present purposes a more detailed list of the issues which arise in the proceedings is unnecessary.

15. The Plaintiff has also brought proceedings in this Court against its directors (Messrs. Peterson and Ekstrom) and is also pursuing proceedings against the Administrator of the Fund, BNY Mellon Investment Servicing (International) Limited ("PNC").

16. The parties entered into Standstill Deeds dated the 9th May, 20th July, 12th September and 21st October 2012.

17. The proceedings were commenced by the Plaintiff by a Writ of Summons issued on the 30th November 2012 (the "First Writ"). In Cause Number FSD 160/2012 (CQJ) the First Writ was issued by the Court at a time prior to 5 p.m. on the 30th November 2012. The Writ was served on the 26th March 2013 by service on Conyers Dill & Pearman ("Conyers") – the latter having confirmed that they were instructed to accept service earlier that day. In doing so Conyers reserved the rights and position of the Defendants.

18. By a Second Letter on the 2nd April 2013 Conyers asserted that, by issuing the First Writ before 5 p.m. on the 30th November 2012, the Plaintiff had acted in breach of the terms of the Standstill Deeds.

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19. By letter dated the 5th April 2013 Ogier[1], among other things, agreed that the First Writ was issued before 5 p.m. on the 30th November 2012, but denied that the Plaintiff had, thereby, acted in breach of the Standstill Deeds.

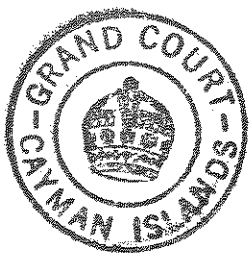
20. On the 7th May 2013 the Plaintiff filed a further Writ of Summons (the "Second Writ") in Cause Number FSD 58/2013 (CQJ) which is in identical terms to the First Writ.

21. On the 8th and 9th August 2013 a hearing took place in FSD 160 of 2012 – the First Writ – pursuant to GCR O.14(a) to address the issue of construction of the Standstill Deed dated the 21st October 2012 and whether in issuing the First Writ before 5 p.m. on the 30th November 2012 the Plaintiff had acted in breach of the terms of that Standstill Deed.

22. On the 2nd October 2013 the Grand Court handed down a judgment in favour of the Plaintiff – finding that service of the First Writ before 5 p.m. on the 30th November 2012 was not a breach of the terms of the Standstill Deed.

23. On the 17th October 2013 the Defendants applied for leave to appeal the judgment of the Grand Court dated the 2nd October 2013.

24. On the 4th November 2013 the Plaintiff issued a Summons in FSD 58 of 2013 – the Second Writ – for, amongst other things, extension of the validity of the Second Writ to the 6th January 2014 pursuant to GCR O.6 r.8.



[1] The Plaintiff's former attorneys

25. On the 19th December 2013 the Plaintiff's Summons in FSD 58 of 2013 was heard ex parte and I ordered that the validity of the Second Writ be extended to the 6th January 2014.

26. On the 3rd January 2014 the Second Writ was served on the offices of Conyers who were instructed to accept service on behalf of the Defendants.

27. On the 9th January 2014 the Defendants filed the Summons which is the subject of this hearing – seeking to set aside the extension of the validity of the Second Writ.

28. On the 20th January 2014 the Defendants obtained leave to appeal to the Court of Appeal against the Grand Court judgment in Cause FSD 160 of 2012 dated the 2nd October 2013, which decided that service of the First Writ before 5 p.m. on the 30th November 2012 was not a breach of the terms of the Standstill Deed.

29. In relation to the Defendants' Appeal against the judgment of the Court dated the 2nd October 2013, there are three possible outcomes:

(a) The appeal could be dismissed;

(b) The Plaintiff's claim in relation to the 2005 audit could be struck out leaving only the claims in relation to the 2006 and 2007 audit;

(c) The Court of Appeal could order the First Writ struck out in its entirety.

30. It was common knowledge between the parties during the hearing on the 8th and 9th August 2013 (pursuant to the GCR O.14(a)) that the Second Writ was a protective Writ to preserve the Plaintiff's claim in relation to the 2006 and 2007 audits.

31. On the 19th December 2013 I acceded to the *ex parte* application brought by the Plaintiff and extended the validity of the Writ of Summons filed in these proceedings on the 7th May 2013 until the 6th January 2014 pursuant to GCR O.6 r.8. The Plaintiff's application was grounded by the first affidavit of Ms. Harrison filed on the 3rd December 2013. In her affidavit Ms. Harrison stated at paragraph 17: "*The reason for not serving the Second Writ in the present case was to avoid incurring costs on service and in subsequent proceedings which would have been unnecessary if the Plaintiff had won the O.14A Summons (as it did) and the Defendants had accepted the decision (which they did not.)*."

32. In my Extempore Ruling dated the 19th December 2013 I found that the Plaintiff's application was a Category (3) application, pursuant to the judgment of the House of Lords in ***Kleinwort Benson Ltd. v. Barbrak Ltd., The Myrto*** (No.3) 1987 A.C. 597.

I found, on the evidence before me, that the Plaintiff had given good reason for the renewal of the Second Writ and relied on the Summary of Principles provided by Ord.6, r.8 of the Rules of the Supreme Court 1999 (applicable by reference to the Grand Court Rules, which are based upon them) and I held that:

> "*the saving of unnecessary proceedings and costs can amount to a good reason for extending the validity of the Writ.*"

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Furthermore I stated that I did take into account the balance of prejudice or balance of hardship and, in my view, the balance weighed, on the 19th December 2013, in the Plaintiff's favour.

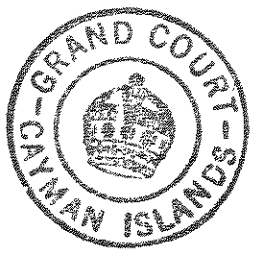
Finally, in my Extempore Ruling I concluded:

> *"Of course, if I am wrong with this decision the Defendants can apply to set it aside."*

POSITION OF THE DEFENDANTS/APPLICANTS

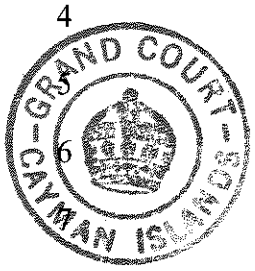
33. The Defendants rely upon the affidavit of Ms. Parchment sworn on the 10th January 2014 in support of their application to set aside service of the Writ of Summons dated the 7th May 2013, and further to set aside the Order of the 19th December 2013 extending the validity of the Writ on the grounds that the validity of the Writ expired on or about the 6th September 2013 and there was no good reason for the extension of the validity of the Writ to be granted.

34. Ms. Parchment makes her affidavit to address two factual issues, namely that, the Plaintiff contended, and the Court accepted, on the ex parte application, that there was a good reason to extend the validity of the Writ, in that, the Plaintiff had chosen not to serve the Writ within its period of the validity (or apply to seek an extension within that period) in order to save Court time and costs.



35. The Defendants maintain that two factual issues arise and they are as follows:

(a) The Plaintiff made no attempts to engage with the Defendants prior to the expiry of the validity of the Writ as to alternative means of preserving its position in a cost effective manner. Ms. Parchment avers that, in particular, the Plaintiff did not seek the agreement of the Defendants to either an extension of the validity of the Writ or to the Writ being served within its period of validity and for the proceedings to then be stayed. Ms. Parchment highlights the fact that correspondence between the parties' attorneys only commenced after the Validity of the Second Writ had expired.



(b) Ms. Parchment avers that it is inaccurate to suggest that, by deciding not to serve the Writ within its period of validity the Plaintiff had saved costs and Court time. Ms. Parchment further avers that, on the contrary, by acting as it has, costs have increased and Court time has been used unnecessarily.

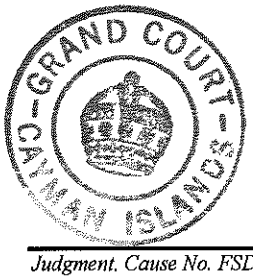
36. In relation to the first factual issue the Defendants contend that if the Plaintiff had sought to proceed in a cost effective manner whilst also protecting its position with regard to the Second Writ, then the Plaintiff should have approached the Defendants with a view to agreeing, either, (a) an extension of time for service of the Writ; or (b) that the Writ be served within its initial period of validity and that, thereafter, the proceedings be stayed by consent, pending determination of the Appeal in FSD 160/2012 on the O.14(a) Summons. Ms. Parchment states that this would have entailed the Plaintiff's attorneys writing to the Defendants' attorneys and, either filing a Consent Order, or, failing that, applying to the Court for an Order after service of the Second Writ. Ms. Parchment avers that the Plaintiff did

not engage with the Defendants' attorneys and allowed the validity of the Second Writ to expire. Also on the first issue Ms. Parchment states in her affidavit that the Second Writ was issued in order to protect the Plaintiff's claim in relation to the 2006 audit which, as pleaded, is worth something in the region of US$50 million to US$200 million. Ms. Parchment states that, simply put, the Plaintiff took the conscious decision not to serve the Writ and thereby run the risk of having to seek an extension of the validity of the Writ in order to save costs which were, in effect, *de minimis*.

37. In relation to the second factual issue, Ms. Parchment avers that it is difficult to see what costs have been saved. The Plaintiff could simply have gone ahead with the consensual approach and it was open to the Plaintiff to serve the Second Writ and then apply to the Court for a stay. This course would have required the minimal cost of service to be incurred in seeking a stay from the Court.

38. The Defendants contend that the consequences of allowing the Writ to expire means that the Plaintiff's chosen course of action to file its *inter partes* application and then to make an *ex parte* application to extend the validity of the Writ has incurred more costs. The Defendants maintain that the Plaintiffs must have realised that any application for an extension after the Writ had expired was going to meet with a later application by the Defendants to set aside the extension.

39. Accordingly, the Defendants submit:



i. The Plaintiff's claim in relation to the 2006 audit was not statute-barred at the time the Second Writ was issued, but all causes of action pleaded by the Plaintiff with respect to the 2006 audit became statute

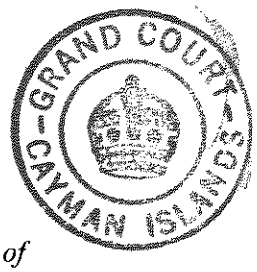
barred in the period after the Second Writ was issued from within its initial 4- month period of validity.

ii. No attempt was made by the Plaintiff to serve the Second Writ and it was not served within its initial period of validity.

iii. No attempt was made by the Plaintiff to approach or engage with the Defendants with a view to agreeing a consensual way forward as regards service of the Second Writ within the initial period of validity of that Writ.

iv. No application to extend the validity of the Second Writ was made within its initial period of validity or immediately following either the Court giving its judgment on the O.14A Summons in FSD 160/12 or the Defendants issuing their Summons for Leave to Appeal.

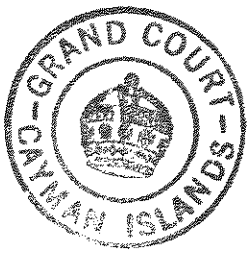
v. The only reason given for not serving the Second Writ within its initial period of validity is that a conscious decision not to serve was taken in order to save costs and Court time.



40. GCR O.6 r.8 provides follows:

> "8. (1) *For the purpose of service, a writ (other than an office copy of a writ) is valid in the first instance –*
>
> *(a) Where leave to serve the writ out of the jurisdiction is required under Order 11, for 6 months; and*
>
> *(b) In any other case, for 4 months,*
>
> *Beginning with the date of its issue ....*

(2) *Subject to paragraph (3), 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 4 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.*



(3) *Where the Court is satisfied on an application under paragraph (2) that, despite the making of all reasonable efforts, it may not be possible to serve the writ within 4 months, the Court may, if it thinks fit, extend the validity of the writ for such period, not exceeding 12 months, as the Court may specify.*"

41. So far as it is relevant this rule is identical to Ord. 6, r.8 of the Rules of the Supreme Court 1999.

42. In ***Kleinwort Benson Ltd. v. Barbrak Ltd., The Myrto*** at letter H on page 615 to letter A on page 616 Lord Brandon defined three categories of cases where questions of limitation may arise on an application for extension of the validity of a writ:

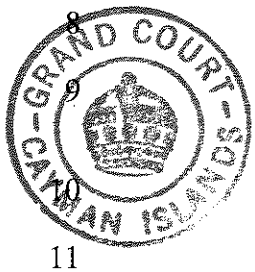
i. *Category (1): The application is made when the Writ is valid and before the limitation period has expired;*

ii. *Category(2): The application is made when the Writ is valid but after the limitation period has expired;*

iii. *Category (3): The application is made when the Writ has ceased to be valid and after the limitation period has expired.*

In Category (1) or (2) cases the Writ is still valid at the date of the application for the extension of its validity. In a Category (3) case the Applicant needs to persuade the Court that there is a good reason to allow the application to be made after the expiry of the validity of the Writ.

43. Although in ***Kleinwort Benson Ltd. v. Barbrak Ltd., The Myrto*** there were exceptional circumstances, it is uncontroversial that the Court has to find good reason for an extension and it is accepted that there are no limits on what may constitute good reason.



In ***Kleinwort Benson Ltd. v. Barbrak Ltd., The Myrto*** Lord Brandon found at page 624 C:

> *"Put shortly the good reason was the saving of unnecessary proceedings and costs achieved without any prejudice to the Respondents."*

44. Leading counsel Mr. Thom Q.C. for the Plaintiff frankly concedes in his submissions:

> *"It would be wrong for the Fund to argue that the saving of costs achieved without prejudice to the other side will always justify the extension of the validity of a Writ; The matter is always to be considered on the basis of all the facts..."*

45. As this is an *inter partes* hearing, the Court has the benefit of the Defendants' affidavit evidence and the full written submissions of leading counsel for the Defendants.

46. Put succinctly, the Plaintiff relies on the two points which Lord Brandon found in ***Kleinwort Benson Ltd. v. Barbrak Ltd., The Myrto*** – that is (1) saving costs and (2) absence of prejudice. Accordingly, the Plaintiff submits that the reason for not serving the Second Writ was to avoid incurring costs on service and subsequent proceedings which would have been unnecessary had the Plaintiff won the O.14A Summons.

47. The Plaintiff's case as set out in the affidavit of Ms. Harrison and in its Skeleton Argument is that the Second Writ was issued purely as a protective measure, and whether it is necessary or redundant is not yet known. Leading counsel, Mr. Thom Q.C., frankly concedes that the Second Writ could have been served during its period of initial validity, in which case an extension would not have been necessary. The Plaintiff's former attorneys chose not to serve the Second Writ in these proceedings before its initial period of validity expired because they wished to save costs and time being spent on something which might have eventually proved to have been completely unnecessary.

48. On the question of balance of hardship the Plaintiff's position is that the Defendants have not been prejudiced in their conduct of these proceedings by the delay in service other than the technical prejudice of having been deprived of a limitation defence.

49. In ***Battersby v. Anglo American Oil Company Limited*** [1945] KB 23 Lord Goddard, on the question of extending the validity of a Writ stated at pages 32-33:

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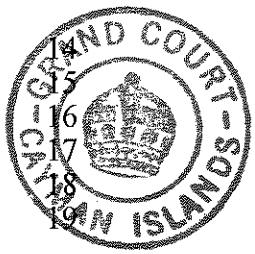
> *"It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the Court is satisfied that good reasons appear to excuse the delay in service. .... The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others. But ordinarily it is not a good reason that the Plaintiff desires to hold up the proceedings while some other case is tried or to await some future development."*

50. In ***Chappel v. Cooper*** (C.A.) [1980] 1 W.L.R. 958 Lord Justice Roskill (as he then was) stated at letter E on page 965:



> *"It has long been the law, and the law was authoritatively stated by Megaw J. in **Heaven v. Road and Rail Wagons Ltd** [1965] 2 Q.B. 355, that in general in the absence of good or sufficient reason the court will not exercise its discretion in favour of the renewal of a writ after the period allowed for service has expired if the effect of doing so will be to deprive the Defendant of the benefit of a limitation period which had accrued."*

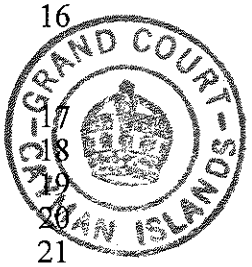
Despite the introduction of the 1975 Limitation Act Lord Justice Roskill stated at letter D on page 967:

> *"The principles upon which extensions of time for the service of a writ beyond the initial 12 months can be granted had long been laid down. Those principles seem to me to remain unaffected. Accordingly, if a Plaintiff who has failed timeouslsy to issue and serve his writ wishes to obtain an extension under Ord.6, r.8 he must comply with the principles and the practice under which the court grants such extensions. If he cannot do so, and also cannot avail himself of the benefits and privileges extended by the 1975 Act that is his misfortune and he must look for redress elsewhere than to the proposed defendant, if indeed such other redress is open to him."*

51. In ***Waddon v. Whitecroft Scovell Ltd.*** [1998] 1 W.L.R. 309 Lord Brandon stated at letter H on page 313:

"In Kleinwort Benson's case the House, after reviewing a long line of authorities on the present R.S.C. Ord.6, r. 8 and its predecessor, laid down the following principles as applicable to the exercise of the court's discretion on an application for extension of the validity of a writ in cases where questions of limitation of action are involved. (1) On the true construction of Ord.6, r.8 the power to extend the validity of a writ should only be exercised for good reason. (2) The question whether such good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting service of the writ may well constitute good reason but it is not the only matter which is capable of doing so. (3) The balance of hardship between the parties can be a relevant matter to be taken into account in the exercise of the discretion. (4) the discretion is that of the Judge and his exercise of it should not be interfered with by an appellate court except on special grounds, the nature of which is well established."

Furthermore, at pages 317 and 318 Lord Brandon added:



"This House was not saying that balance of hardship could of itself constitute good reason for extending the validity of a writ. What it was saying was that, where there were matters which could, potentially at least, constitute good reasons for extension, balance of hardship might be a relevant consideration in deciding whether an extension should be granted or refused."

52. The best summary of principles can be found at Ord.6, r.8(6) of the Rules of the Supreme Court 1999. I can do no better than to set out this summary of principles in its entirety. I regard them as representing the law in relation to this issue in the Cayman Islands:

***"6/8/6 Summary of principles** – There is a large number of cases on this topic cited in these notes. Reference should be made, in particular, to **Kleinwort Benson Ltd. v. Barbrak Ltd. The Myrto** (No. 3) [1987] A.C. 597 2 All E,R, 289; 2 W.L.R. 1053, HL, in which the authorities and the principles were reviewed by the House of Lords, and to Waddon v, Whitecroft-Scovill Ltd. [1988] 1 W.L.R. 309 [1988] 1 All E.R. 996, HL, where the House of Lords considered and applied the principles in a more common factual context. There is nothing in the least revolutionary, however, about the decision of the House of Lords in the Kleinwort Benson case. On the contrary, it approves, with one exception, a long series of earlier decisions of the Court of Appeal and of judges at first instance. The principles to be deduced from the cases may be set out shortly as follows:*

(1) *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.*

(2) *Accordingly there must always be a good reason for the grant of an extension. This is so even if the application is made during the validity of writ and before the expiry of the limitation period; the later the application is made, the better must be the reason.*

(3) *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. Normally the showing of good reason for failure to serve the writ during its original period of validity will be a necessary step to establishing good reason for the grant of an extension. (**Waddon v, Whitecroft-Scovill Ltd.** [1988] 1 W.L.R. 309 [1988] 1 All E.R. 996, HL).*

(4) *Examples of reasons which have been held to be good are:*

(a) a clear agreement with the defendant that service of the writ be deferred;

(b) impossibility or great difficulty in finding or serving the defendant, more particularly if he is evading service.

(5) *Examples of reasons which have been held to be bad are:*

*(a) that negotiations are proceeding. In the absence of an actual agreement that service be deferred, it is both incorrect and dangerous to defer service in the hope that negotiations will succeed; too often the writ is forgotten until after the limitation period has elapsed; offers may then be withdrawn and the plaintiff left without remedy save against his solicitors (see **The Mouna** [1991] 2 Lloyd's Rep. 221);*

*(b) that legal aid is awaited (see **Baker v. Bowketts Cakes Ltd** [1966] 1 W.L.R. 861; [1966] 2 All E.R. 290 CA and **Stevens v. Services Window and General Cleaning Ltd.** [1967] 1 Q.B. 359; 1 All E.R. 984). This is not to say that delays caused by the operation of the legal aid system should never be taken into account. Delay caused by a failure of the legal aid authorities to act, or act reasonably may constitute good reason. Delay caused by the failure of the plaintiff or his solicitors to act timeously in applying for legal aid, or for the removal of a legal aid restriction will not constitute good reason (**Waddon v, Whitecroft-Scovill Ltd.** [1988] 1 W.L.R. 309; [1988] 1 All E.R. 996, HL);*

(c) that there is difficulty in tracing witnesses or obtaining expert or other evidence. ....And this is so

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even in building cases (see Portico Housing Association v. Brian Moorehead and Partners (1985) 1 Const.L.J., CA);

(d) carelessness;

*(e) that plaintiff trustees wished to make an application to the Court for a Beddoe Order (to safeguard their position as to costs) (**Dagnell v. J.L. Freedman & Co.** [1993] 1 W.L.R. 388 [1993] 2 All E.R. 161, HL).*

*(f) the need perceived by the plaintiff's solicitors to serve a statement of claim with the writ (**De Pina v. MS/. "BIRKA" Beutler Shiffahts KG** [1996] 1 Lloyd's Rep. 31 followed in **Binning Bros v. Thomas Eggar Verrall Bowles** [1998 1 All E.R. 409).*

*(6) The application for renewal should ordinarily be made before the writ has expired. The court has power to permit a later application but it must be made within the appropriate period of the first expiry. The laxer practice of allowing two or more successive renewals to bring the writ up to date is no longer available since **Chappell v. Cooper** [1980] 1 W.L.R. 958; 2 All E.R. 463 CA, and see **Singh (Joginder) v. Duport Harper Foundries Ltd** [1994] 1 W.L.R. 769, and para. 6/8/12 below.*

*(7) A writ will not normally be renewed so as to deprive the defendant of the accrued benefit of a limitation period. The strict view taken in **Heaven v. Road and Rail Wagons Ltd** [1965] 2 Q.B. 355; [1965] 2 All E.R. 409 was approved by the Court of Appeal in **Chappell v. Cooper** (above), but must be read in the light of the decision of the House of Lords in **Kleinwort Benson Ltd v. Barbrak Ltd, The Myrto** (No. 3) [1987] A.C. 597; [1987] 2 W.L.R. 1053; [1987] 2 All E.R. 289. Possible exceptions are the good reasons in 4 (a) or (b), above, or very sharp practice by the defendants which has deceived the plaintiff into inactivity.*

(8) Where application for renewal is made after the writ has expired and after the expiry of a relevant period of limitation the applicant must not only show good reason for the renewal, but must give a satisfactory explanation for his failure to apply for renewal before the validity of the writ expired.

*(9) The decision whether an extension to the validity of a writ should be allowed or disallowed is a matter for the discretion of the court dealing with the application. **Jones v. Jones** [1970] 2 Q.B. 576; [1970] 3 All E.R. 47, CA shows that in exercising discretion the judge is entitled to have regard to the balance of hardship. The exercise of discretion, however, follows upon the showing of good reason by the applicant. Hardship to the applicant if the extension is disallowed is not a substitute for good reason (see **Waddon v. Whitecroft-Scovill** Ltd [1988] 1 W.L.R. 309; [1988] 1 All E.R. 996, HL).*

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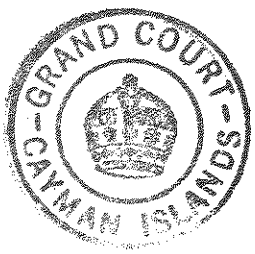
*Applications involve a two stage enquiry. At stage 1 the court must be satisfied that there was a good reason to extend time, and also that the plaintiff had given a satisfactory explanation for his failure to apply before the validity expired. If the court was so satisfied then it should proceed to stage II and 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. The two stages should not be treated as watertight compartments and matters which may be relevant at one stage may be relevant at the other (**Lewis v. Harewood** (1996) The Times, March 11, explaining the criteria in **Kleinwort Benson Ltd v. Barbrak Ltd** and guidelines given in **Ward-Lee v. Lineham** [1993] 1 W.L.R. 754. The court must consider in all cases, even where the limitation period has not expired and the application is made before the initial period of validity has expired whether there was good reason for not serving the writ before the expiry of that period before moving on to the second stage of considering whether there was good reason to extend the validity. The test was the same whether the limitation period expired or not though the court might apply the test with less rigour where the limitation period had not expired **Binning Bros v. Thomas Eggar Verrall Bowles** [1998 1 All E.R. 409).*

(10) Where a plaintiff is faced with the sort of difficulty categorized in paragraph (5) of this note or for any other reason wishes to delay the action the proper and prudent course is to serve the writ and to apply to the defendant for an extension of time to serve the statement of claim or, failing agreement with the defendant, to apply to the court."



53. Having reviewed the affidavits filed on behalf of the parties, read the Skeleton Arguments and, heard the submissions of both leading counsel, it is clear that the exceptional circumstances such as those that existed in ***Kleinwort Benson Ltd v. Barbrak Ltd*** do not exist in this case. Furthermore, unlike this case, the Defendants in ***Kleinwort Benson Ltd v. Barbrak Ltd*** had no defence to the claims against them and there was no question of the delay having prejudiced the Defendants. In ***Kleinwort Benson Ltd v. Barbrak Ltd*** the Plaintiff's action in not serving the Writ had saved considerable costs, given that the Plaintiff there was seeking to recover a proportionate share of just £161,000.00 from over 160 individual defendants.

54. The Defendants' leading counsel highlights the fact that the Statement of Claim in this case is of a most serious kind, in that, it alleges, not only gross negligence but deceit on the part of the three Defendants. Mr. Fenwick Q.C. submits that when the Writ was not served, the Defendants, not unsurprisingly, and justifiably, were entitled to proceed on the basis that the Second Writ was not to be pursued once its initial period of validity had expired.

55. It is common ground that my Order of the 19th December 2013 granting the extension of time for the validity of the Second Writ deprives the Defendants of an accrued limitation defence in relation to the claim for the 2006 audit.

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56. I have considered carefully my Extempore Ruling of the 19th December 2013 and I have to acknowledge that I erred both on my analysis of the facts and on the principles to be applied. My only further comment is that I believe that by refusing the application in December 2013 I exaggerated the issue of leaving the Plaintiff with no remedy at all in relation to its claim on the 2006 audit.

Having reviewed the further evidence filed on behalf of the Applicant Defendants and the Plaintiff, and their respective submissions I have decided to accede to the Defendants' Summons and set aside my own Order dated the 19th December 2013.

57. It was the duty of the Plaintiff to serve the Second Writ in these proceedings promptly. The first principle in the summary provided by the learned authors of the 1999 White Book states:

> *"The Plaintiff 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."*

58. The claim that the decision by the Plaintiff's former attorneys not to serve the Writ was to save costs and unnecessary proceedings looks, on careful consideration of all the facts, to be weak and of little substance. The claim for the 2006 audit amounts on the Plaintiff's own case to somewhere between $50 million to $200 million, which is a very significant claim in any jurisdiction. In these circumstances it was clearly the duty of the Plaintiff to serve the Writ promptly.

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59. I agree with the Defendants' leading counsel that the Plaintiff should either have approached the Defendants to reach an agreement about serving the Second Writ, or, if no agreement could have been reached, simply serve it and then apply to the Court for a stay. Any Court would have been sympathetic to such an application.

60. The Defendants issued their Summons seeking leave to appeal on the 17th October 2013 and, even at that stage the Plaintiff did not take immediate steps to apply to extend the Second Writ. There is further evidence to suggest that, as early as the 2nd October 2013, the Plaintiff would have known that the Defendants intended to apply for leave to appeal and therefore ought to have anticipated the appeal and acted accordingly.

61. I also agree with leading counsel for the Defendants that the decision by the Plaintiff's former attorneys not to serve the Second Writ within the period of its validity has only led to greater costs and further delay.

62. On further reflection and on careful analysis of all the facts and the submissions of both leading counsel I do not find that the reason the Plaintiff's former attorneys chose not to serve the Second Writ before its initial period of validity expired which was that it wished to save costs and time spent on something which might eventually prove to be completely unnecessary to be a good reason. It is not a satisfactory explanation for the failure to apply for an extension before the validity of the Second Writ expired and in all the circumstances it is not a good reason for this Court to extend time. Having come to this view it is not necessary for me to proceed to stage II and consider the balance of prejudice or hardship. However, for the avoidance of doubt, I would follow the strict view taken in ***Heaven v. Road and***

Rail Wagons Ltd by Justice Megaw (as he then was) and later approved by the Court of Appeal in ***Chappell v. Cooper*** that a Writ will not normally be renewed so as to deprive the Defendant of the accrued benefit of a limitation period.

63. It is possible that the Defendants' appeal on the O.14A Ruling may be unsuccessful. However, even though the outcome is uncertain, where the Plaintiff is faced with that uncertainty, the proper and prudent course in this case was to serve the Second Writ and to apply to the Defendants for an extension of time to serve the Statement of Claim, or, failing agreement with the Defendants, to apply to the Court.

64. Accordingly, for all the above reasons, I set aside my Order of the 19th December 2013.

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Dated this the 18th March 2014

Honourable Mr. Justice Charles Quin
Judge of the Grand Court