

CA on appeal from Commercial Court (Mr Justice Colman) before Waite LJ; Saville LJ; Otton LJ. 3rd October 1996.

LORD JUSTICE WAITE: Lord Justice Saville will give the first judgment.

LORD JUSTICE SAVILLE:

1. On 10th August 1995 the cargo owners issued a writ claiming damages against both the disponent and the registered owners of the motor vessel "Meloi" in respect of a cargo of deformed steel bars carried by the vessel from Yuzhny to Huangpu between May and August 1994. The claim against the disponent owners has been referred to arbitration but the registered owners refused to accept that they were bound by any arbitration agreement. They also refused to accept service of the writ. Accordingly, the cargo owners applied for leave to issue and serve on the registered owners in Malta a concurrent writ and, having taken advice from Maltese lawyers about the time it would take to serve the writ there, also applied to extend the validity of the writ for six months. These applications were granted by Mr Justice Waller, as he then was, in December 1995. The cargo owners through their lawyers then set about the process of arranging for the service of the writ, which in the case of Malta has to be done through diplomatic channels and the courts in that country.
2. The six-month period of extension expired on 10th June 1996. The writ was not in fact served on the registered owners until 14th August 1996. Even then there remained a question whether it had been properly served.
3. At the beginning of September the cargo owners applied to the court to renew the writ by some nine weeks, so as to cover the period between its expiry and its service, or for a further 12 months, to cover the possibility that the service was defective and would have to be re-done anyway, or to order that the service on 14th August be treated as regular and valid. In an affidavit sworn in support of this application it was said that the cargo owners, through their London lawyers, had appointed the local lawyers to monitor the progress of the writ through the various diplomatic and judicial stages required under Maltese law and "advise us [that is to say, the London lawyers] in this respect".
4. What this first affidavit did not explain was why no application was made before the expiry of the writ to seek a further renewal. When the matter came before the commercial judge he drew attention to this lacuna, whereupon the cargo owners filed a further affidavit sworn by a member of their London lawyers. The matter came before Mr Justice Colman as the commercial judge a few days later. On this occasion the judge, according to the note we have of his judgment, pointed out, perfectly correctly of course, that when an application is made to renew a writ after its expiry and also after the expiry of the Hague Rules limitation period (which, of course, is the position here), the applicant has to provide among other things a satisfactory explanation for not applying for an extension before the expiry of the writ; see *Kleinwort Benson* [1987] A.C. 616A. The judge concluded that there was no satisfactory explanation and refused the application. He also refused an application for substituted service. This latter application was based on an attempt to serve the occupier of the registered address of the registered owners in March 1996. That attempt, it seems clear from the material before us, was not effective service since the people at that address - apparently a firm of lawyers - refused to acknowledge receipt of the writ.
5. These applications have now been renewed before us. Mr Joseph, on behalf of the cargo owners, placed great and indeed central reliance upon an assertion in the material, which I am wholly prepared to accept for the purposes of the argument, that the delay in service in Malta was caused by what Mr Joseph describes in his skeleton argument as key errors on the part of the officials connected with the Maltese courts. However, it remains the fact that neither the London solicitors for the cargo owners nor, it would seem, the local lawyers they employed in Malta actually knew whether or not service had been properly effected in due time until late in August.
6. On 3rd June the London lawyers had faxed the Maltese lawyers asking for an update on the monitoring of the documents relating to the service of the proceedings. To my mind, therefore, at this stage - that is to say a few days before the expiry of the validity of the writ - it cannot seriously be suggested that the London lawyers reasonably believed that service had been effected; for, had that belief been held, the fax is inexplicable. In truth, it seems to me, they simply did not know. There was no reply to this fax, but no explanation has been offered as to why the matter was not further chased up before the expiry date. I am bound to say that the most charitable construction one can put on the ensuing silence is that, given the London lawyers put their minds to the matter, they concluded they could proceed on the basis that no news was good news.
7. Mr Justice Colman in his judgment categorised this state of affairs as not being a satisfactory explanation for the purpose of supporting an application to renew the writ after its expiry. I can only say that I entirely agree.
8. Mr Joseph drew our attention to another case concerned with extension after expiry, namely *Ward-Lee v. Lineham* [1993] 1 W.L.R. 754. I have received no assistance from that case. The facts and circumstances were very different and all one can say is that in that case the court in those circumstances concluded that a satisfactory explanation had been forthcoming. I can find nothing in that case that purports to set out any particular principle applicable to the circumstances of the case with which we are concerned.
9. There remains this application to treat the attempt to serve in March on the registered address of the registered owners as validated by the court by way of substituted service. Again I respectfully agree with Mr Justice Colman for the reasons he stated, that such an application is misconceived. As the judge put it, the problem sought to be solved is not the non-existence of the means of service but the availability of a continuously valid writ whereby

the means of service could be operated. Those means were eventually defective. The defects could have been corrected by an extension of time but they were not. In these circumstances, as the judge said, the purported service cannot be treated as valid service; in other words substituted service orders are not there to be used when the position has arisen because the applicant has failed properly to utilise the ordinary method by obtaining an extension of time.

10. For these reasons I would refuse these renewed applications.

LORD JUSTICE OTTON: I agree.

LORD JUSTICE WAITE: I also agree.

MR DAVID JOSEPH (instructed by Messrs Holman Fenwick & Willan, London EC3N 3AL) appeared on behalf of the Applicant.
THE RESPONDENT did not appear and was not represented.