SUN MOBILITY
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To: Transport Industry Operators

Ship collision – security for costs

The Hong Kong High Court issued a decision on 31 May 2022 ordering a South Korean shipowner to provide a Hong Kong shipowner with security for costs in the amount of HK$600,000 in relation to a ship collision case that happened in Hong Kong during the super typhoon Hato in August 2017. [HCAJ 80-85/2019] [2022 HKCFI 1631]

Background facts

The Plaintiffs' (the South Korean shipowners) claims in this action arose out of a series of collisions between a number of vessels at the River Trade Terminal on 23 August 2017 including the "DCOC 3" and "DCOC 4" of the 1st Plaintiff, the "CHOSUK 9 HO" of the 2nd Plaintiff (together "**the Plaintiffs' vessels**"), and the "SAMBO DCM 1 HO" and "SAMBO DCM 2 HO" ("**the SAMBO barges**") of the Defendant (the Hong Kong shipowner).

On 22 August 2017, the SAMBO barges were moored at the River Trade Terminal (as were the Plaintiffs' and other vessels) for shelter under what the Hong Kong Observatory described as "Super" Typhoon Hato. It turned out to be one of the strongest typhoons to impact Hong Kong in the past 50 years which resulted in hoisting of typhoon signal no. 10 in the following morning, with winds persistently reaching hurricane force.

At about 11:50 hours, 2 bollards of the River Trade Terminal's berth no 19 which had secured the mooring ropes of the SAMBO barges suddenly broke/snapped from their position on the berth under the heavy weather. This caused the mooring ropes which had secured the SAMBO barges to the berth to slacken and eventually disengage from her berth. After the incident, it was found that all of the mooring ropes of the SAMBO barges were in sound condition and intact whereas those of the Plaintiffs' vessels had snapped due to strong winds and/or storm.

The Defendant said that there was no direct contact between any of the Plaintiffs' vessels and the SAMBO barges. The Plaintiffs said that there was. There was no dispute that the 2 bollards of River Trade Terminal had broken but there was dispute as to whether they were heavily rusted and corroded.

After a very detailed examination of all the barges' electronic tracking data, the single joint expert concluded in his report that it was the "SAMBO" barges which broke free first. They then drifted across the basin colliding into the others (including the Plaintiffs' vessels), which were at that point safely moored and secured. That in turn caused all these other barges to break free of their moorings and to collide with one another in a 'domino effect'. As a result of the incident, both the Plaintiffs' vessels and the SAMBO barges suffered damage and loss.

The Plaintiffs' claim against the Defendant was for negligence in failing to properly and securely moor to the dock at the River Trade Terminal, failing to give any warning of their approach and failing to take action to avoid the collision. The Plaintiffs' claims were in the sum of HK$6,049,471.12 and USD133,599.42, plus interest and costs. On 22 August 2019, the 1st Plaintiff issued 4 Writs of Summons and the 2nd Plaintiff issued 2 Writs of Summons against the Defendant for damage/loss arising from the incident.

The defence was one of no negligence and inevitable accident (ie could not have been prevented by the Defendant's exercise of reasonable care and ordinary skill in mooring). On 9 November 2020, the Defendant lodged a counterclaim against the Plaintiffs for damage sustained by the SAMBO barges in the incident. The Defendant's case was that the Plaintiffs failed to moor their vessels properly and failed to ensure that the mooring ropes were of a proper condition that could withstand heavy weather.

The Defendant made an application to the Court pursuant to Order 23 rule 1 for security for costs against the 2nd Plaintiff only in the sum of HK$1,067,500.

Legal principles

Where the Plaintiff is ordinarily resident out of the jurisdiction, the Court has discretion to order security for costs if, having regard to all the circumstances of the case, the Court thinks it just to do so: Order 23 rule 1, Rules of the High Court.

Application of the legal principles

On the facts of this case, there were reasons for making an order for security for costs:

(i) The 2nd Plaintiff was a company incorporated in and had an address in South Korea.
(ii) There is no reciprocal arrangement between Hong Kong and South Korea for the enforcement of judgments under the Foreign (Reciprocal Enforcement) Ordinance, Cap 319. South Korea is also not a jurisdiction which has a common law system.
(iii) If the Defendant succeeded and got an order for its costs, it was not in the spirit of justice that it had to incur substantial costs and delay to go to a foreign country to enforce the order.
(iv) The 2nd Plaintiff was unlikely to have any assets of a fixed and permanent nature within Hong Kong against which an order for costs could be enforced.

The Plaintiffs objected to the provision of security on the following grounds:

(1) Jurisdiction ground;
(2) Merits ground;
(3) Delay ground; and
(4) Quantum ground.

Jurisdiction ground

It was not disputed that the 1st Plaintiff's vessels, "DCOC 3" and "DCOC 4" remained in the jurisdiction of Hong Kong and could be arrested.

The 2nd Plaintiff's barge "CHOSUK 9 HO" was no longer in the jurisdiction of Hong Kong and could not be arrested in Hong Kong. Accordingly, the jurisdiction ground did not apply to the 2nd Plaintiff.

Merits ground

It is well established that the Court should not go into the merits of each party's case at this stage unless it can be demonstrated that there is a high degree of probability of success: *Hong Kong Civil Procedure 2022*, Volume 1, §23/3/3.

The Plaintiffs submitted that the merits were strongly in their favour. On the question of liability, whose vessels broke free first and hit the other vessels was the decisive factor. It was the SAMBO barges who first broke free and hit the other moored vessels. The expert report showed that the Plaintiffs' vessels were moored and stationary before the collision. The defence was without merit. If the inevitable accident defence was successful, none of the parties to this action would have proved their claims. The Defendant's counterclaim therefore inherently contradicted its defence and was bound to fail. Further, there was no positive case of negligence and the case of negligence seemed not to be pursued by the Defendant.

The Judge was unable to agree with the Plaintiffs. The inevitable accident defence was a complete defence. There were costs of the defence to secure. Further, the fact that it was the SAMBO barges

which moved first did not necessarily show that the Defendant was negligent or affect the defence of inevitable accident. The relevant issue was how or why they moved and broke free of the moorings.

The facts are that the mooring ropes of the Plaintiffs' vessels had snapped whilst those of the SAMBO barges did not; and the bollards of the River Trade Terminal had broken. The joint expert was unable to state whether the mooring arrangement was suitable or not. There were also disputes of facts, including whether there was direct contact between the Plaintiffs' vessels and the SAMBO charges, and whether the bollard was rusted and corroded. Having considered the submission of both parties, the Judge was of the view that the Plaintiffs had an arguable claim on the merits and the Defendant had an arguable defence and counterclaim.

Delay

The Plaintiffs submitted that it had been obvious from the very beginning that the 2nd Plaintiff was a South Korean company. And yet the Defendant's application for security for costs was only made about 15 months after the exchange of the Preliminary Acts, 11 months after the case management conference, and shortly after the Plaintiffs sought to set down for trial. The Plaintiffs submitted that the Defendant's present application was a tactic to delay the just and efficient disposal of these actions. The Defendant had abused the process of the Court.

The Judge found there to be delay but it was not so gross as to justify denying the Defendant security. The action in question had not yet been set down for trial.

Quantum

The Plaintiffs commented that the quantum of security sought in the amount of HK$1,067,500 was unjustified and not properly supported. It was not proportionate to the principal claim that the 2nd Plaintiff made against the Defendant in the amount of US$133,599.42 (equivalent to about HK$1,042,075.48).

The Judge was unable to see what support was required of the Defendant. The security sought was of necessity based on estimates and the complexity (of lack of it) of a case. The Judge agreed that the hourly rates of the 2 fee earners of the Defendant's firm of solicitors departed from the usual rates on party-and-party basis and should be adjusted downwards. The Judge agreed that the security for costs sought was disproportionate to the 2nd Plaintiff's claim.

Conclusion

Considering all the factors above, the Judge was of the view that it was just to order security in the amount of HK$600,000 to cover the Defendant's costs. The 2nd Plaintiff was to provide the security within 28 days of the handing down of this decision.

Please feel free to contact us if you have any questions or you would like to have a copy of the decision.

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