

To: Transport Industry Operators

**Cargo misdelivery summary Judgment**

The High Court of Hong Kong issued a summary Judgment on 28/9/2012 holding a forwarder liable for US\$626,389 plus costs and interest for misdelivery of cargoes without production of the original bills of lading. [HCCL 20/2011 & HCCL 21/2011]

The shippers Kai Min and Sino Trifone sold various garments to a US buyer Malcolm on "D/P" (document against payment) or "D/P at sight" terms. The shippers shipped the garments in Hong Kong pursuant to a number of bills of lading issued for and on behalf of a freight forwarder based in Los Angeles. The bills (14 in relation to Kai Min and 5 in respect of Sino Trifone) named the Kai Min and Sino Trifone as shipper; CIT Group (which was Malcolm's banker/financier) was named as consignee; and C-Air, the buyers' US custom broker, as Notify Party/Intermediate Consignee. Malcolm was also named as notifying party. The goods arrived at Los Angeles and were released to C-Air immediately upon arrival without presentation of the originals of the bills of lading. C-Air released the goods to Malcolm after clearing through US customs. Malcolm not having paid for the goods, the shippers commenced the legal actions for their mis-delivery.

The shippers sought summary judgment against the forwarder. The shippers contended that the forwarder, having released the goods without presentation of the original bills of lading, had no defence to their claims.

The forwarder argued that it had a credible defence to the claim. It was suggested that since the forwarder first handled the shippers' shipments to Malcolm (and another US buyer, San Simeon) from around December 2007 (in the case of Sino Trifone) and January 2008 (in the case of Kai Min), the arrangement had been that the goods would be released to Malcolm (and San Simeon) *notwithstanding that the original Bills of Lading for the relevant shipment was not ready for presentation*. According to the forwarder, the shippers authorised and consented to this practice.

In relation to Kai Min, in about January 2008, soon after the first shipments reached Los Angeles, Malcolm applied to the forwarder for the release of the goods, without having to present the original bills of lading. The forwarder then contacted Kai Min. The forwarder said that Kai Min without any hesitation told the forwarder that the forwarder could release the goods to Malcolm. The forwarder accordingly released the goods to C-Air, which was Malcolm's (and San Simeon's) custom broker. The forwarder said that the same practice was followed in over 80 subsequent shipments from Kai Min, and the goods were released to Malcolm without requiring the presentation of the original bills of lading, without the forwarder seeking specific instructions from Kai Min on any of those occasions.

Mr Eric Jones, a Vice-President of C-Air, provided an affidavit deposing to the same practice in the legal actions.

It was therefore said that Kai Min had authorised the release of the goods without the need to present the original bills of lading. Alternatively, it was said that by conduct the shippers had *waived its right to enforce the terms stipulated in the contract of carriage contained in or evidence by the Bill of Lading* or *acquiesced to the variation* of the terms of the carriage contract.

The forwarder described a similar practice in relation to Sino Trifone's shipments to Malcolm (and San Simeon). According to the forwarder, one Mr Warren Wong on behalf of Sino Trifone gave the forwarder the "go ahead" in a conversation that took place in about December 2007. Thereafter the forwarder followed the same practice for some 233 shipments from Sino Trifone. The forwarder also produced an email between Mr Wong and Malcolm dated 7/9/2007 to support the forwarder's claim.

However, the undisputed evidence showed that Sino Trifone was only incorporated in November 2009. In December 2007, Mr Wong was a director of another company Trilefone. Indeed, the email dated 7/9/2007 showed that Mr Wong was acting for Trilefone at the time.

The facts of the case in question were strikingly similar to those in *Star Line Traders Ltd v Transpac Container System Ltd* HCAJ 180 of 2008 (unrep, Reyes J, 4 September 2009). One of the grounds relied upon by the carrier in that case to oppose the shipper's application for summary judgment was that the shipper had acquiesced in the delivery of the cargoes without production of the relevant bills of lading because on 128 previous occasions goods had been released to the buyer without presentation of the original bills. It was argued that the shipper had actual or constructive knowledge of such deliveries without bills and had waived its right to object by not raising any complaints. Reyes J dealt with that argument in paragraph 7 of the judgment as follows:

"The argument is nonsense. Star Line (the shipper) denies knowledge of the past misdeliveries. But assume that it knew of them. I cannot see how knowledge of the past misdeliveries without making complaint can logically amount to a representation by Star Line that Transpac (the carrier) could in the future misdeliver goods without presentation of a Bill of Lading."

The forwarder argued that the case in question was distinguishable from *Star Line*. The forwarder argued that there was evidence showing that the shippers had *consented* to the release of the goods without presentation of the bills of lading.

The Judge disagreed. The evidence filed on behalf of the forwarder showed, at its highest, that Kai Min had consented to the first shipment being released without the original bills of lading. That could be due to a variety of reasons: for example, Kai Min might have already received payment from Malcolm but the original bills were still in transit. Further, even if Kai Min had consented to that shipment being released without presentation of the original bills of lading, it did not follow that it must have consented to subsequent deliveries without the original bills. It would appear that Malcolm (and San Simeon) must have honoured its payment obligations to Kai Min so that there was no need for Kai Min to make any complaint. But that could not amount to a representation to the forwarder that it could deliver future shipments without presentation of the original bills of lading.

In relation to Sino Trifone, there was not even evidence of consent. There was no evidence that Sino Trifone and Trilefone were connected. However, the forwarder argued that Mr Wong was the common link and the Judge could infer a continuing practice which followed him from Trilefone to Sino Trifone. The Judge was unable to accept that submission. There was nothing to show that what Mr Wong might have said to the forwarder in December 2007 could be attributed to Sino Trifone, when the latter was not incorporated until almost 2 years later. The Judge also noted that the email dated 7/9/2007 produced by the forwarder indicated that at the time, Mr Wong (on behalf of Trilefone) agreed to the release of the goods without presentation of the original bills of lading because Trilefone had received payment for the goods in question. That explained why Mr Wong (on behalf of Trilefone) was prepared to release the goods to Malcolm on that occasion.

But there was no evidence from the forwarder that either shippers had received payment in respect of the shipments in question.

In the Judge's view, the case in question was indistinguishable from *Star Line* which the Judge proposed to follow. Accordingly, in the Judge's judgment, the forwarder had failed to show any arguable defence to the shippers' claims. Judgment must be entered in favour of the shippers as claimed. Interest would be payable on the amounts claimed from the date of the writ to the date of judgment at 1% above US dollar prime rate from time to time. The Judge also made a costs order nisi that the shippers should have their costs of the actions and the summary judgment applications, to be taxed if not agreed with certificate for counsel for the hearing.

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

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