SUN MOBILITY
Insurance and Claims Services Limited

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Ref : Chans advice/146

To: Transport Industry Operators

Cargo misdelivery summary Judgment (III)

Remember Chans advice/142 and Chans advice/145 that the High Court of Hong Kong held the forwarder liable for cargo misdelivery without production of original bills of lading? The Court of Appeal of Hong Kong issued a Judgment on 31/1/2013 dismissing the forwarder's applications for an extension of time to appeal. [HCMP 2366/2012 & HCMP 2367/2012]

The shippers claimed against the forwarder for damages for mis-delivery of various consignments of garments. The basis of the claim was that, on arrival of the goods in the USA, they were released by the forwarder to the buyer's customs broker without production of original bills of lading. By its Judgment handed down on 28/9/2012, the High Court entered summary judgment under O.14 in favour of the shippers against the forwarder.

The forwarder wished to appeal. However, a series of unfortunate events had dogged that intention.

(1) First, the forwarder's solicitor thought leave to appeal against the judgment in each action was required. However, by virtue of O.59 r.21(1)(a) and r.21(2)(a), that was not the case since the judgments under O.14 were judgments to which s. 14AA(1) of the High Court Ordinance (Cap. 4) does not apply.
(2) Secondly, mistakenly thinking the forwarder needed to apply for leave to appeal, the forwarder's solicitor in any event missed the 14-day time-limit for such an application. Instead of applying by summons for leave to appeal by 12/10/2012, the application was not made to the High Court until 15/10/2012.
(3) Thirdly, despite having been informed by the High Court's clerk that leave to appeal was not required, on 24/10/2012, the forwarder issued a summons in the Court of Appeal seeking an extension of time to apply for leave to appeal and leave to appeal.
(4) Fourthly, being a final judgment, the correct time-limit for filing a notice of appeal was in fact 28 days from the date of the Judgment, namely 26/10/2012. However, no notice of appeal was filed within that time-limit.

There were two applications by the forwarder before the Court of Appeal:

(1) First, summons dated 24/10/2012 seeking an extension of time to apply for leave to appeal and leave to appeal.
(2) Secondly, summons dated 28/11/2012 seeking (a) leave to withdraw the summons dated 24/10/2012 and (b) an extension of time to appeal against the Judgment.

The applications to withdraw the summonses dated 24/10/2012 were not opposed by the shippers but they asked for costs.

The remaining applications were for an extension of time to appeal. It was not in dispute that the delay was inexcusable and that it was therefore incumbent on the forwarder to demonstrate a real prospect of success on the merits of the intended appeals: see *Secretary for Justice v Hong Kong & Yaumati Ferry Co Ltd* [2001] 1 HKC 125 at p. 129I.

In contending that it met the necessary threshold for an extension of time, the forwarder relied on various grounds.

Defects in pleading in HCCL 21/2011

First, it was contended that there was a technical defect in the pleadings in HCCL 21/2011 in that the statement of truth in respect of the shipper's amended statement of claim, on which the summary judgment was based, was defective. The amended statement of claim, amended without leave pursuant to O.20 r.3, was dated 15/5/2012 and was accompanied by a statement of truth which reads:

> "I, Leung Wai Lim, Solicitor for the Plaintiff, believe that the amendment to the Statement of Claim made on 15th May 2012 are [sic] true."

That statement of truth followed immediately after the original statement of truth, in which the manager of the shipper asserted a belief that "the facts stated in this Statement of Claim are true" but which was deleted in the

amended statement of claim. It was said, on behalf of the forwarder, that this offended the rules (relevantly O.41A r.2, commented on in Hong Kong Civil Procedure 2013 Vol. 1 at Note 41A/2/3 on p. 823) and Practice Direction (namely PD 19.3).

Strictly, the new statement of truth should have asserted a belief in the truth of the facts stated in the amended statement of claim and not merely in the amendment to that pleading and the earlier statement of truth should not have been deleted. But the Court of Appeal did not agree that the defect was one which gave rise to a ground of appeal with any prospect of success. The court has the power under O.41A r.2(3) to direct that a pleading need not be verified by a statement of truth if it considers it is just to do so in a particular case. The High Court would have been fully justified in dispensing with the need for a fresh statement of truth. The facts stated in the original statement of claim had already been verified by a statement of truth (albeit that was wrongly deleted by the amendment) and the amendment to the statement of claim was of a minor clerical nature and was limited to correcting the number of bills of lading involved in the claim from 14 to 5. It made no difference to the substance of the underlying claim or the amount of the claim. Further, the court has power under O.2 r.2 to correct irregularities and the High Court would have been fully justified if, instead of dispensing with the need for a fresh statement of truth, he had permitted the application to proceed on a suitable undertaking of the shipper to make a further statement of truth in proper form in respect of the amended statement of claim.

It was then said, on behalf of the forwarder, that the shipper's O.14 summons was defective in that it sought "final judgment in this action against the forwarder for the amount claimed in the Statement of Claim with interest and costs" whereas in fact the application should have been for the amount claimed in the amended statement of claim.

Again, the Court of Appeal did not consider that this gave rise to a ground of appeal with any prospect of success. It was not a point raised before the High Court, nor in the draft grounds of appeal sought to be relied upon, and, in any event, it was a point devoid of any merit. Note 14/1/6 on p. 243 of the White Book reads:

> "*Amendment of statement of claim and summons* – If any defect in the statement of claim is discovered before issue of a summons, such issue should be delayed until after amendment has been effected thereto. In these circumstances, the summons, to avoid confusion, should refer to the 'amended' statement of claim.
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> If the defect is only discovered after issue and service of the summons, this should be corrected by using, if possible, the entitlement to effect an amendment to the statement of claim without leave under O.20, r.3 or by consent of the parties under O.20, r.12. If amendment to the statement of claim can thus be effected, then leave to amend the summons itself should thereafter be sought to refer to the 'amended' statement of claim unless that amendment is immaterial to the claim on which judgment is sought. …"

The O.14 summons in HCCL 21/2011 was issued on 15/5/2012, the same day the statement of claim was amended. The amendment to the statement of claim did not amend the amount of the claim, which remained the same in the amended statement of claim as before, namely US$208,553.72, and it was plainly immaterial to the claim on which judgment was sought. In any event, given the trivial nature of the technical defect, the High Court would have been fully justified in granting leave to the shipper at the hearing to amend the summons and to dispense with service, thereby curing any defect.

Defects in pleading in HCCL 20/2011

Next, it was contended that the O.14 summons in HCCL 20/2011 was defective in that it sought final judgment against the forwarder for the amount claimed in the Amended Statement of Claim with interest and costs. There was no amended statement of claim and so, it was said, the High Court was wrong to enter judgment on a non-existent pleading and with a pending amendment to the shipper's claim.

This was also a bad point and, in any event, not one taken below. Nor was it taken in the draft grounds of appeal sought to be relied upon. It was plain that the reference to an amended statement of claim in the summons was simply a clerical error. In this case too, the defect could have been cured in the manner described above. If anything, the mistake appeared to suggest that the amendment to the statement of claim in HCCL 21/2011 was effected before the issue of the O.14 summonses and that, by pure clerical error, reference was made to an amended statement of claim in the summons in HCCL 20/2011 rather than in the summons in HCCL 21/2011.

Error of law or fact?

Moving on from these unmeritorious and technical objections, the forwarder contended that the High Court ought to have held that there were real triable issues and so given leave to defend. It was said that there was evidence that the shippers gave their express consent to the forwarder to release cargoes to the end-buyer without production of the original bills of lading. For this reason, it was contended that the High Court erred in law in holding that the facts of the present case were "strikingly similar to those in *Star Line Traders Ltd v Transpac*

Container System Ltd HCAJ 180 of 2008 (unrep, Reyes J, 4/9/2009)" since that was a case which turned on acquiescence alone and not consent.

The High Court dealt squarely with this argument in the following paragraphs of its Judgment:

> "15. I disagree. The evidence filed on behalf of the 2nd Defendant shows, 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 does 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 2nd Defendant that it could deliver future shipments without presentation of the original bills of lading.
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> 16. In relation to Sino Trifone, there is not even evidence of consent. Mr Fan accepts that there is no evidence that Sino Trifone and Trilefone were connected. However, he argues that Mr Wong was the common link and I can infer a continuing practice which followed him from Trilefone to Sino Trifone. I am unable to accept that submission. There is nothing to show that what Mr Wong might have said to Mr So in December 2007 could be attributed to Sino Trifone, when the latter was not incorporated until almost 2 years later.
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> 17. I also note that the email dated 7 September 2007 produced by Mr So indicates 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 explains why Mr Wong (on behalf of Trilefone) was prepared to release the goods to Malcolm on that occasion. But there is no evidence from the 2nd Defendant that either Plaintiff had received payment in respect of the shipments in question."

Save in one respect, the Court of Appeal agreed with the High Court. The forwarder's evidence only went as far as alleging that the shippers had accepted the first shipment being released without production of the original bills of lading and not that they had agreed the practice alleged by the forwarder would apply to future transactions.

The exception related to the last clause of paragraph 16 because the High Court was mistaken in saying that the shipper in HCCL 21/2011 was not incorporated until almost 2 years after the date of the alleged conversation. Its certificate of incorporation showed that it was in fact incorporated on 6/11/2007 and so about a month before the alleged conversation.

The forwarder contended that this demonstrated that the Judgment was based on a wrong finding of fact and so it should not be allowed to stand.

The Court of Appeal did not agree with this contention. It was true that the High Court was mistaken about the timing of the conversation in relation to the incorporation of the shipper in HCCL 21/2011. However, this did not alter the fact that the forwarder's evidence about the alleged practice only related to the first shipment of goods and not future shipments. In any event, as the High Court rightly observed, the terms of the e-mail dated 7/9/2007 did not support the alleged practice for the reason stated in paragraph 17 of the Judgment.

For these reasons, the Court of Appeal was not satisfied that the forwarder had shown that the intended appeals enjoyed a real prospect of success and so the applications for an extension of time to appeal were dismissed. It was not disputed that the forwarder had to pay the shippers the costs of the summonses dated 24/10/2012 and 28/11/2012. The Court of Appeal proposed to conduct a gross sum assessment of those costs. On the broad brush basis appropriate to such assessment, the Court of Appeal summarily assessed the shippers' costs of the summonses dated 24/10/2012 and 28/11/2012 in the sum of HK$105,000. Such costs were to be paid by the forwarder to the shippers within 7 days of 31/1/2013.

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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