SUN MOBILITY
Insurance and Claims Services Limited

29 October 2009
Ref : Chans advice / 106

To: Transport Industry Operators

Strike out

On 7 / 9 / 2009, the Hong Kong High Court issued a Judgment (HCAJ177 / 2006) to strike out a cargo damage claim.

The claim related to a carriage of wire rods by sea from Nanjing to Liverpool in November 2004. It was alleged that the goods arrived at Liverpool rust-damaged and crushed as a result of a lack of proper care in the course of stowage or carriage. The owners of the cargo accordingly brought the action against the shipowners. The claim was worth about US$24,000. By agreement among the parties, the applicable limitation period was extended to November 2006. Within that extended period, a generally-endorsed Writ was issued in August 2006 and a sister ship of the vessel carrying the goods was arrested at around the same time. The shipowners provided security for the release of the arrested ship. Nothing then happened in the proceedings until December 2008 when by fax the cargo owners requested the shipowners to consent to an extension of time for the filing of a Statement of Claim. The fax did not include any draft Statement of Claim. On 25 / 3 / 2009 the cargo owners filed a Notice of Intention to Proceed. On 14 / 5 / 2009 the cargo owners applied to file a Statement of Claim out of time. The Summons did not include a draft of the proposed Statement of Claim. On 25 / 5 / 2009 the shipowners applied to strike out the claim for want of prosecution.

By agreement among the parties, the cargo owners were allowed to file a Statement of Claim without prejudice to the shipowners' contention that there had been inordinate delay. The thinking was that the filing of a Statement of Claim would at least allow everyone (including the Court) to know precisely what the cargo owners were seeking. A Statement of Claim was filed on 23 / 6 / 2009.

There had unquestionably been inordinate delay on the part of the cargo owners.

In shipping cases, because of the application of the Hague or Hague-Visby Rules, the normal period of limitation is one year. That is to enable a defendant to know what is being claimed against it as soon as possible, to make all necessary investigations, and to collect material evidence at the earliest possible opportunity. Otherwise, the volume of sea-related trade being enormous, the evidentiary trail in relation to a particular shipment will grow cold and it will be extremely difficult to determine just what happened in relation to any particular consignment.

The limitation period was extended by the agreement of the parties to November 2006. But that did not absolve the cargo owners from getting on with their case as soon as possible after service of their Writ in August 2006. The rationale for the usual one year limitation would continue to apply. This was especially so where the cargo owners had invoked Admiralty procedures to obtain security from the shipowners in relation to the claim. Unfortunately, contrary to that obligation the cargo owners did not advance the proceedings for over 2 years.

Under the present CJR regime, that would seem to the Judge to be sufficient cause to strike out the claim. In the absence of some compelling reason, it was contrary to the underlying objective in Order 1A, Rule 1(b) ("to ensure that a case is dealt with as expeditiously as is reasonably practicable") for a party to allow an action to languish for 2 years once the same had been commenced. The Judge was unable to see any compelling reason in this case. There simply was no excuse for such a long delay. It was suggested that the new CJR rules should not apply in the case in question, because the action was commenced long before CJR came into effect. But the Judge disagreed with that suggestion. The Court is bound to apply the rules as they are when a case is heard before it. There is no transitional provision in the rules mandating the Court to ignore the rules (including the underlying objectives) as they now are. It seemed to the Judge that

the cargo owners had only themselves to blame if they had delayed progressing their case to an extent that the applicable procedural rules changed in the interval.

But even under the old principles, it seemed to the Judge that this claim would be struck out.

First, it is an abuse of procedure to warehouse a case, that is to say, for a party to initiate proceedings and then do nothing about it while dealing with other matters. The cargo owners explained that, because the amount of claim was relatively modest, they tried to settle the claim by negotiation. That did not seem to the Judge to be a good excuse. By all means, one can negotiate a settlement or even engage in mediation to arrive at some resolution. But that cannot be at the expense of not doing anything in the Court proceedings for over 2 years. At some point, sooner rather than later, one has to say that enough is enough and get on with an action. The cargo owners' excuse of negotiation was an especially difficult one to maintain because from early on and thereafter repeatedly the shipowners indicated that they were not interested in any proposed settlement.

Second, it was said that the shipowners would not suffer prejudice. The Judge was unable to accept that. Over 2 years (or more if one took the time needed to get this matter to trial) memories were bound to dim. That was a substantial prejudice which could be assumed simply because of the passage of time. The shipowners, for example, might wish to adduce oral evidence on the way in which the relevant cargoes or cargoes of a similar nature were stowed on board a vessel during the relevant period. The more speedily this action was progressed, the earlier the shipowners could have taken steps to investigate such issues among crew members. If crew members had left the shipowners' employment, the easier it would be to trace the same for pertinent statements. It was argued that, because of the minimal amount involved, the trial was likely to be one on documents alone. Thus, it was contended that crew members were unlikely to have been called to give evidence in any event. That might or might not be the case. The point was that, because of the inordinate delay, the shipowners were deprived of the opportunity of fairly considering whether the amounts involved merited the calling of live evidence. In view of the passage of time, they might have little option but to proceed on paper alone if there was going to be a trial.

Third, it was said that the shipowners had only themselves to blame for not taking statements or making appropriate surveys. The Writ was issued in 2006 and there was pre-Writ correspondence from which the nature of the claim would have been apparent. The Judge did not think that such reasoning was fair. The shipowners were entitled to see how precisely the claim by the cargo owners was going to be put. In the absence of even a Statement of Claim, it was difficult to see why the shipowners were supposed to guess or infer from correspondence just what case they were supposed to meet. That Statement of Claim did not materialise until June 2009.

For the above reasons, whether one proceeded under the present rules or the former ones, the Judge did not believe that allowing the action to proceed would lead to the just resolution of this dispute in accordance with the substantive rights of the parties. The cargo owners' claim was accordingly struck out.

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

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

It goes without saying the economy is heading further south as 2009 sets sail into the second quarter.

Unrealistic it is to expect turnaround any time soon. Before we see the lights, we see rising number of E&O, uncollected cargo and completion of carriage claims. The global credit crunch has created chain effects leading to, forced or otherwise, found or unfounded, breach of contracts and obligations along the logistics chain. Our claims team are on full gear recently in dealing with those claims.

If you are in need of a cost effective service in defending claims lodged against you, SMIC is just a phone call away.