SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Road haulage cargo loss

On 1 / 2 / 2010, the Hong Kong District Court held a trucking company liable in a cargo short delivery case, and ordered the trucking company to pay the owner of the cargo the cargo value of US$24,499.80 plus interest and costs (on the indemnity basis). (DCCJ 3993 of 2008)

The cargo owner was the consignee of a consignment of goods ("the Cargo") which was to be delivered by the trucking company from Hong Kong to the cargo owner's premises in Xiamen in Mainland China. The Cargo consisted of 270 cartons of various electronic components. On 18 / 10 / 2007 the trucking company commenced the carriage of the Cargo from Hong Kong to Mainland China. Sometime on 19 / 10 / 2007, the Cargo was offloaded from the trucking company's truck on to another truck of a carrier in Mainland China ("the PRC Carrier") who was responsible for the onward journey to Xiamen. The Cargo reached the cargo owner's premises on 22 / 10 / 2007.

The trucking company received instructions to deliver the Cargo not from the cargo owner directly but from another company called 上海台驊貨運代理有限公司 ("Xiamen Forwarder") with whom the trucking company had signed an agreement in Chinese dated 10 / 5 / 2006 and entitled "貨物運輸合同" ("the Chinese Contract"), whereby the trucking company agreed to deliver goods as instructed by Xiamen Forwarder from Hong Kong to the cargo owner's premises in Xiamen, on a regular basis.

After the Cargo arrived on 22 / 10 / 2007, the cargo owner notified Xiamen Forwarder by email on 24 / 10 / 2007 that there was a short delivery in that one carton of goods was missing ("the Goods"), which email was then forwarded to the trucking company. The cargo owner had previously taken out an insurance policy ("the Insurance Policy") in respect of the Cargo with an insurer ("the Insurer"), who indemnified the cargo owner for its loss. On 11 / 9 / 2008, the Insurer issued the Writ in the name of the cargo owner claiming for damages against the trucking company for the loss suffered as a result of the short delivery. Subsequently the Statement of Claim, Defence and Reply were filed by the parties. On 21 / 10 / 2009, the cargo owner took out the summons under O.14 for summary judgment against the trucking company. There was no dispute between the parties as to the amount of damages, being the invoiced value of the Goods, i.e. US$24,499.80. The trucking company also accepted that the tucking company was the bailee of the Cargo.

The trucking company's starting point was that a bailee had an insurable interest in the subject matter of the bailment. Therefore, where the bailor (the cargo owner) insured the goods, the bailee (the trucking company) might qualify as a co-insured of the bailor. In that event, the insurer was not entitled to sue the bailee, as an insurer could not sue one co-insured in the name of another. The trucking company advanced the proposition that it was a general legal principle that an insurance policy, though taken out by the bailor, enures for the benefit of both the bailor and the bailee, and the insurer was precluded from exercising its right of subrogation against the bailee.

However, in the case in question, only the cargo owner was named as the insured party under the Insurance Policy, and not the trucking company. The cargo owner submitted that the insurance policy was clearly not intended to benefit the trucking company. The cargo owner relied on Clause IV.1 of the Insurance Policy whereby the insured party was obliged, should the carrier or bailee be responsible for any short delivery or damage, to lodge a claim with such responsible parties in writing. The cargo owner also referred to Clauses 5, 6, 9.2.2, 10.2.2 of the Chinese Contract whereby the trucking company agreed to bear responsibility for any short delivery, loss or damage to the goods to be delivered by the trucking company.

This "general legal principle", if it existed, and even if it were made subject to the parties' contrary intention, would not accord with commercial reality where parties are free to come to an agreement over the allocation of risks and the incidence of liabilities, which inevitably has an influence on the parties' decision whether to obtain insurance cover and as to who should benefit from the insurance. Nowhere can one find support for the general proposition that whenever a party (such as a bailor) takes out an insurance policy, that insurance cover would, without more, enure to the benefit of another party (such as a bailee) having an insurable interest in the subject matter of the insurance. There was on the evidence clearly no mutual intention between the cargo owner and the trucking company or anyone on its behalf that any insurance taken out by the cargo owner should benefit the trucking comapny. On the contrary, both the Chinese Contract and the Insurance Policy, far from exonerating the trucking company from liability, clearly envisaged that the trucking company as carrier or bailee of the goods was to be liable for any loss and damage sustained in the course of delivery. For these reasons, the Judge found that the evidence did not raise any triable issue as to whether or not the insurance cover was intended to benefit the trucking company. The cargo owner was clearly entitled to sue the trucking company in the circumstances of the case in question, and so was the subrogated Insurer.

The trucking company's second argument was that since the Cargo arrived at the cargo owner's premises on 22/10/2007 but the cargo owner did not report the alleged short delivery until 24/10/2007, there must be a triable issue as to whether the Goods were lost in transit, or after delivery.

The email correspondence from 24 to 26/10/2007 exchanged among the cargo owner, Xiamen Forwarder and the trucking company showed that at 9.10 a.m. on 24/10/2007, the cargo owner informed Xiamen Forwarder that the Goods were missing. Xiamen Forwarder then notified the trucking company. In due course, the cargo owner requested a confirmation of the short delivery from the trucking company, for the purpose of the cargo owner's insurance claim, whereupon the trucking company made a statement on 25/10/2007 ("the 1st Declaration"), confirming that it had received the Cargo for delivery to the cargo owner, that the Cargo went through customs, and that after the Cargo reached the cargo owner's premises, the Goods were found missing after the cargo owner took stock of the Cargo. Afterwards, Xiamen Forwarder requested the trucking company to include in its statement a confirmation that the Goods were lost in the course of the trucking company's delivery. The trucking company then made another statement, on 26/10/2007 ("the 2nd Declaration"), in terms almost identical to the 1st Declaration, save that at the end of it was an additional statement that the trucking company believed that the Goods were lost during customs inspection. The additional statement, taken at face value, could amount to an admission that the Goods were lost during the course of delivery.

The trucking company explained that it made the 2nd Declaration because in order to keep Xiamen Forwarder's business, it tried to accommodate the request. As the Goods were lost while they were out of the immediate control of the trucking company, it could only make the statement that it was believed that the Goods were lost during customs inspection.

What was clear was that there was no evidence of the cargo owner having signed or acknowledged receipt of the full quantity of the Cargo.

In the circumstances, as neither party insisted on an immediate inspection or tally of the Cargo, the Judge was of the view that the cargo owner was entitled to a reasonable opportunity to examine the Cargo and the quantity thereof after arrival, and that the cargo owner's report of the shortage at 9.10 p.m. on 24/10/2007 was made within a reasonable time.

Against the cargo owner's evidence that the Goods were missing from the Cargo, there was, on the other hand, no evidence from the trucking company that it did deliver the full quantity to the cargo owner. Indeed nowhere in the trucking company's Defence or affirmation was there any positive assertion (let alone other supporting evidence) that the full quantity was in fact delivered to the cargo owner. It should also be noted that the Cargo was offloaded from the trucking company's own truck on to the PRC Carrier's truck. There was a striking lack of evidence from the trucking company or from the PRC Carrier in respect of the second part of the carriage, undertaken by the PRC Carrier, up to the arrival of the Cargo at the cargo owner's premises. No evidence had been adduced from the PRC Carrier that the full quantity was delivered to the cargo owner.

The Judge would also add that throughout the email correspondence from 24 to 26/10/2007, i.e. immediately after the report of short delivery, there was no suggestion from the trucking company that

the full quantity had in fact been delivered to the cargo owner. Nor did the trucking company query whether the Goods might have been lost while they were in the possession of the cargo owner. In conclusion, there was, on the state of the evidence adduced, no triable issue as to whether the Goods were lost in the course of delivery.

Where goods have been lost or damaged in the course of delivery, the burden is on the bailee to show that the loss or damage was not caused by any failure on his part to take reasonable care. He is also answerable to the bailor for acts or omissions on the part of a sub-bailee including an independent contractor to whom he has entrusted responsibility for the goods: *Samsung Electronics Ltd v J & C Cargo Services Co Ltd* [2008] 2 HKLRD 243. As the Judge mentioned above, there was no evidence adduced on behalf of the trucking company covering the part of the delivery or journey undertaken by the PRC Carrier. The trucking company had failed to discharge the onus of proof.

The Judge gave judgment to the cargo owner in the sum of US$24,499.80, with interest thereon at US Dollar prime rate plus 1% from the date of the writ to the date of judgment. At that point, the cargo owner handed up a copy of a "sanctioned offer" dated 22/10/2009, made pursuant to O.22 Rule 2 of the Rules of the District Court, that the cargo owner would accept a sum of $150,000 (inclusive of interest) in full and final settlement of the action. Since the trucking company had been held liable for more than the cargo owner's offer, the cargo owner asked for interest on the judgment sum at 10% above the judgment rate, costs on an indemnity basis, from 20/11/2009 onwards, i.e. after the expiry of the period for acceptance of the offer without leave, and interest on those costs at 10% above judgment rate.

The trucking company accepted that the offer was a sanctioned offer within the meaning of O.22. The trucking company submitted that the offer was made relatively late, as the O.14 application was due to be heard in early February 2010, and the cargo owner's offer made a very small discount from the amount actually claimed. The trucking company also said that it was a small family-size business, earning very little for the transaction in question, while being exposed to a disproportionately large claim.

The Judge understood the trucking company's predicament, but unfortunately it had to take the consequences of having been beaten by a sanctioned offer which it had declined to accept. The types of order being asked for by the cargo owner had to be made unless the court considered it unjust to do so. The offer in this case was made well before the hearing date, giving ample time to the trucking company to consider it properly. The offer also included a discount of over 20%, a not insignificant amount. In the circumstances, and in the exercise of the Judge's discretion, the Judge ordered interest on the damages at USD prime rate plus 1% from the date of the writ to 19/11/2009, and interest at judgment rate plus 2% from 20/11/2009 until judgment, and thereafter at judgment rate. The Judge also ordered costs from 20/11/2009 to be paid by the trucking company on the indemnity basis, and interest on those costs at 2% above judgment rate.

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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Thanks to the colossal injections by worldwide governments, the fourth quarter of 2009 imparted some hope as we saw both seafreight and airfreight cargo rush in the last quarter created temporary space shortage. Whether the robust trend will continue is uncertain as worldwide governments are not in unison in their fiscal policies. The "visible" hand will still haunt the economy in 2010.

During time of uncertainty, we believe the number of E&O, uncollected cargo and completion of carriage claims will be unabated. If you need a cost effective professional service to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.