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To: Transport Industry Operators

**Road haulage cargo theft**

The District Court of Hong Kong issued a Judgment on 21/4/2011 dismissing a forwarder's cargo indemnity claim of US\$46,201.81 against a trucking company. [DCCJ 2092/2009]

On 22/10/2007, Hon Hai engaged the forwarder to transport 13 pallets of goods from its factory in Shenzhen to the Hong Kong International Airport. Of the 13 pallets of goods, 12 were to be delivered to another forwarder called NEC located at SuperTerminal No. 1 and the remaining one to another forwarder called KWE located in another part of the airport. According to the Hon Hai's Application Form issued to the forwarder on 22/10/2007, the 12 pallets were assigned 2 reference numbers, one of which was SEA-7AFA76. This was a reference to an invoice also dated 22/10/2007 bearing the same reference number ("the Invoice"). The Invoice was issued by Hon Hai to Sony and was in respect of an air shipment of 180 units of notebook computers to Frankfurt. The 180 units comprised of the following: (1) 36 units of Model 2NL-H at a unit price of US\$2,290.74, (2) 36 units of Model EGR-H at a unit price of US\$2,291.30 and (3) 108 units of Model GDE-H at a unit price of US\$2,290.17. According to the relevant packing list ("the Packing List"), the 180 units were to be stowed onto 5 pallets, each of 36 units. The 108 units of Model GDE-H were to be stowed on pallets numbered P01 to P03, the 36 units of Model 2NL-H on pallet numbered P04, and the 36 units of Model EGR-H on pallet numbered P05.

The forwarder was responsible of transporting all 13 pallets from Hon Hai's factory in Shenzhen to its own warehouse located in Tins Plaza in Tuen Mun. It did so using its own the Cross Border Truck. The forwarder engaged the trucking company to carry out the local leg of the transportation. The 13 pallets were transferred from the Cross Border Truck to the trucking company outside Tins Plaza for onward delivery to the airport. Of the 12 pallets delivered to NEC, NEC's warehouse operator refused to take delivery of 5 pallets, on the basis that the outward appearance of the pallet(s) revealed signs of having been tampered with. These 5 pallets were then kept at an area with surveillance camera ("the 5 Pallets"). On 23/10/2007, a joint inspection was carried out at which representatives from the trucking company, the forwarder, Sony and Hon Hai attended. During the course of the inspection, it was discovered that 2 out of the 5 Pallets contained, in part, boxes of distilled water instead of notebook computers.

Trucking company observed that the distilled water was of a PRC brand not usually available in Hong Kong but the Judge thought it was fair to say that this observation could only be described as an opinion of trucking company and there was insufficient evidence for the Judge to form a view one way or the other.

It was the forwarder's case that 20 notebook computers (10 units of Model EGR-H and 10 units of Model GDE-H) were missing. Although a report was made to the police, no charges had been laid against any person. The 20 notebook computers had not been recovered. The forwarder's evidence on liability came principally from Mr Kwok, who joined the forwarder in May 2006 but was in July 2007 promoted to an assistant to the manager. Mr Kwok's evidence could be summarized as follows:

- (1) On 22/10/2007 at around 11:30 a.m., he called Mr Chan (a staff of the trucking company) to inform him about the 13 pallets of notebook computers. He instructed Mr Chan to arrive at Tins Plaza between at between 10 to 11 pm.
- (2) Mr Chan, and Mr Yeung (the driver of the trucking company's truck bearing registration mark LY6660) arrived at Tins Plaza at around 10 p.m.
- (3) At around 11:30 p.m., the Cross Border Truck arrived at Tins Plaza. The driver used a special cutter to cut open the seal of the Cross Border Truck.

- (4) He and Mr Chan then inspected the 13 pallets together in the course of transferring them from the Cross Border Truck to LY6660. Such inspection was limited only to the outward appearance of the pallets. For each pallet, the contents were in fact packed inside a large cardboard box. The large cardboard boxes were then wrapped with transparent plastic materials and tightly strapped. Since Hon Hai prohibited the cardboard boxes from being opened, no one was in a position to tell what was packed inside the large cardboard boxes. However, he was of the opinion that the packaging of all 13 pallets was "handsome", in that the external plastic wrappings were crease free and tightly strapped.
- (5) The handover was completed at around midnight. Neither Mr Chan nor Mr Yeung raised any issue on the packaging of the 13 pallets. Mr Yeung then set off for the airport, unaccompanied by Mr Chan.
- (6) At 9:30 a.m. on 23/10/2007, he received a call from NEC informing him that NEC refused to accept 5 of the 12 pallets delivered. He was also requested by NEC to attend a joint inspection at 1 p.m.
- (7) At the joint inspection, he observed that the packaging of 3 of the 5 Pallets was no longer "handsome", in that there were signs that they had been tampered with since the plastic wrappings had become creased and the straps loosened. Upon opening the cardboard boxes, it was discovered that 20 notebook computers were missing (10 from each of 2 pallets) and instead 5 boxes of distilled water were found inside each of the 2 problematic cardboard boxes. A report was then made to the police.
- (8) He later learnt from the police that LY6660 broke down near the entrance of SuperTerminal No. 1, and as a result, the 13 pallets had to be transferred to another truck operated by the trucking company bearing registration mark CH6660 driven by Mr Leung.
- (9) He then made an appointment to meet with the trucking company and Mr Chan. The meeting took place on 23/10/2007 on the 3<sup>rd</sup> Floor of Tins Plaza. At the meeting no satisfactory explanation was provided by the trucking company and requests for any relevant documentary proof were not entertained by the trucking company. In fact, the trucking company stated that LY6660 broke down on the Tuen Mun highway, which was a rather different account from that given by Mr Chan which the forwarder learnt from the police.
- (10) He emphasized that the forwarder was never informed of the breakdown of LY6660 and the forwarder never provided a proper explanation as to why it took over 4 hours for the 13 pallets to arrive at the airport.
- (11) On 27/10/2007, the forwarder was informed by Hon Hai that another shipment handled by the trucking company suffered the same fate. In a shipment to Paris on 12/10/2007, 7 notebook computers went missing and cartons of distilled water was put in their place ("the Paris Incident"). The shipment to Paris was also handled by NEC and/or KWE.

The trucking company did not call any witness who was in a position to give direct evidence on how the 13 pallets were handed over by the forwarder and transported to the airport (eg. Mr Chan, Mr Yeung and/or Mr Leung). No proper explanation was proffered by the trucking company as to why this course was adopted. The following matters were set out in the trucking company's witness statement:

- (1) In the evening of 22/10/2007, Mr Chan received an order from the defendant. Mr Chan then arranged Mr Yeung to handle the matter by himself.
- (2) At the time of the handover, the doors to the Cross Border Truck was already opened and the seal broken.
- (3) Mr Yeung then delivered the goods to NEC but NEC refused to accept the goods. Mr Yeung then informed Mr Chan who then informed the forwarder.

However, the trucking company's evidence changed drastically during the course of the trial. A few notable examples were:

- (1) Both Mr Chan and Mr Yeung dealt with the forwarder's order on 22/10/2007.
- (2) During the handover, Mr Chan was also present at the scene.
- (3) On the way, LY6660 broke down and the 13 pallets were in fact transloaded onto CH6660 and delivered by Mr Leung.

The trucking company's witness statement did not contain any evidence as to what system it put in place to monitor the activity of its drivers. The trucking company gave evidence that only a rather lax system was put in place, in that the trucking company did not keep records of the personal particulars of all of its drivers (especially the casual drivers). Although the trucking company eventually gave evidence that it would remind its drivers to check the number of goods received, to stay with the goods and to deliver the goods on time, the Judge agreed with the forwarder that this part of the trucking company's evidence was unreliable.

The Judge accepted that there was no sufficient evidence before the Court that the trucking company had put in place any proper system to ensure the safe keeping of goods entrusted under its care or to guard against theft. For example, there was no proper system of monitoring the drivers' whereabouts. The Judge made a specific finding that the 13 pallets were transloaded from LY6660 to CH6660 and that the trucking company was at the material time a bailee for reward. The Judge's factual findings went to find that the outward appearance of 3 of the 12 pallets had changed from the time of the handover to when NEC refused to accept the 5 Pallets.

The parties accepted the following as being the applicable principles (*Samsung Electronics* (supra) §§52 to 57):

- (1) A bailee for reward owes a duty to the bailor return the bailed goods safely at the conclusion of the bailment relationship, and if the bailee fails to do so, he is liable for the loss of the goods unless he is able to prove that he exercised all due care for the goods.
- (2) A bailee for reward can only escape liability only by discharging the burden as to the taking of appropriate care of that his failure so to do was not causative of the loss.

The trucking company had clearly failed to demonstrate that it exercised all due care for the goods.

However, it seemed to the Judge that there was still a palpable missing link in the forwarder's case. There was no direct evidence as to what was packed into the cardboard boxes loaded onto the 13 pallets. In particular, it was accepted by Mr Kwok that no one was able to tell what was contained in the 13 pallets during the handover (ie. when the goods were bailed to the trucking company). The forwarder did not call the driver of the Cross Border Truck who might have been in position to give evidence as to what was packed inside the cardboard boxes. Nor did the forwarder call any witness from Hon Hai to give evidence.

The forwarder submitted that reliance should be placed on the documentation generated, namely the Application Form, the Invoice and the Packing List (collectively "the Documentation"). The forwarder submitted that the Documentation all contained consistent information. The forwarder further contended that since the trucking company did not challenge the accuracy of the information contained therein, trucking company therefore assumed the responsibility as bailee of the goods stated in the Documentation. The Judge did not agree with the forwarder's submissions. The Documentation as was generated were transactional documents. One would have thought that the information contained therein would necessarily be internally consistent as between the various documents. It was important to note that, since there was no *viva voce* (and firsthand) evidence in respect of what was packed into the cardboard boxes, the Documentation was not used as corroborating documentary evidence, but as the sole evidence as to what was in fact packed into the cardboard boxes.

The forwarder was inviting the Judge to ascribe to the Documentation a probative value similar to that of, for example and in an applicable situation, a bill of lading. The probative effect of a bill of lading is explained in *Goode on Commercial Law*, 4<sup>th</sup> Ed at page 1165:

*"Both at common law and under the Hague-Visby Rules signature of the bill of lading showing shipment or receipt for shipment constitutes prima face evidence in favour of the shipper, and conclusive evidence in favour of a transferee, as to the fact, time, and place of shipment, and as to the leading marks the number, quantity or weight and the apparent order and condition of the goods as stated in the bill."*

The forwarder was unable to provide any authority in support of its proposition, especially in the circumstances where none of the documents relied upon was issued by the trucking company. The Judge declined to accede to the forwarder's invitation.

However, the Judge had given the Documentation the requisite consideration enjoined upon him by section 49 of the Evidence Ordinance Cap. 8 (*Aqua-Leisure Industries Inc & Anor v Aqua Splash Ltd* [2003] 1 HKLRD 156 §§30 to 33). The Judge was not satisfied that significant weight should be attached to the Documentation as proof of what was packed into the cardboard boxes.

It seemed to the Judge that the forwarder was in reality asking the Court to draw all necessary inferences in its favour, based on the fact that the packaging of 3 of the 5 Pallets not accepted by NEC appeared to have been tampered with. However, it seemed to the Judge quite clear that the outward appearance of the packaging was inconclusive. First, the evidence of Mr Kwok was the 3 of the 5 Pallets appeared to have

been tampered with. However, the loss of the notebook computers only related to 2 of the 5 Pallets. Second, in relation to the Paris Incident, the loss of the notebook computers was only discovered in Paris (and similarly boxes of distilled water were found instead). The shipment to Paris was also handled by NEC and/or KWE. The logical inference to be drawn was that there was nothing untoward in relation to the outward packaging of that shipment.

On the evidence as led, the Judge was not satisfied that the forwarder had discharged its burden of proving, on the balance of probabilities, that 180 units of notebook computers were handed over to the plaintiff. It was not beyond peradventure that boxes of distilled water were already placed inside the cardboard boxes in the PRC, perhaps even by staff at Hon Hai's factory in Shenzhen.

For all the above reasons, the Judge dismissed the forwarder's claim.

Had the Judge found for the forwarder on its claim, the Judge would have dealt with the issue of *quantum* as follows. The unit prices Hon Hai was to paid by Sony for Model EGR-H and Model GDE-H were respectively US\$2,291.30 and US\$2,290.17 (on FOB basis). 10 units of each of the 2 models went missing. The value of the missing notebooks was therefore US\$45,814.70. On 12/12/2007, Hon Hai issued an invoice to the forwarder claiming US\$45,814.71 (for loss of the 20 notebooks) and US\$387.10 (for freight) totalling US\$46,201.81. On 16/4/2008, Hon Hai issued a debit memo in the sum of \$360,374 (ie. round figure of US\$46,201.81 x 7.8). The sum of \$360,374 had been deducted from sums the forwarder ought to have received from Hon Hai. In other words, the forwarder settled its liability it thought it owed to Hon Hai and the forwarder sought to recover the sum of \$360,374 from the trucking company.

*P&O Developments Ltd v The Guy's and St Thomas' National Health Service Trust* (1998) 62 ConLR 38 is authority for the proposition that (1) a settlement between two parties, however reasonable it may be from the point of view of those parties (in this case Hon Hai and the forwarder), cannot determine a third party's (the trucking company's) liability to one of the settling parties (the forwarder) and (2) the claiming party (the forwarder) must establish a *prima facie* case that the settlement was a reasonable one. The forwarder was not able to explain how the freight component was calculated, and in the circumstances, the Judge was of the view that the forwarder had failed to show that the freight component was reasonable, despite the forwarder's submission to the contrary. Therefore, had the Judge found for the forwarder on the indemnity claim, the Judge would have only allowed the sum of [US\$45,814.70 x 7.8 =] \$357,354.66.

The Judge entered judgment in favour of the trucking company.

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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