

31 January 2013  
Ref : Chans advice/145

To: Transport Industry Operators

### Cargo misdelivery summary Judgment (II)

Remember Chans advice/142 dated 31/10/2012 that the High Court of Hong Kong held the forwarder liable for cargo misdelivery without production of original bills of lading? The High Court of Hong Kong issued another Judgment on 4/12/2012 dealing with the interest and costs. [HCCL 20/2011 & HCCL 21/2011]

#### Application

On 28/9/2012 the Judge handed down judgment in favour of the shippers granting their applications for summary judgment against the forwarder. Judgments had been entered against the forwarder as follows:

- (i) in HCCL 20 of 2011, US\$417,836.42, with interest from date of the writ to date of judgment at 1% above the US dollar prime rate from time to time;
- (ii) in HCCL 21 of 2011, US\$208,553.72, with interest from date of the writ to date of judgment at 1% above the US dollar prime rate from time to time.

In both cases, the Judge also made a costs order *nisi* that the forwarder should pay the shippers' costs of the action to be taxed if not agreed.

By summonses dated 12/10/2012, the shippers sought to vary the costs order *nisi* and ask for additional interest on the judgment sums pursuant to RHC Order 22 r 24. The application was made on the basis that by letters dated 7/5/2012, the shippers made sanctioned offers offering to accept US\$409,479.69 (in HCCL 20 of 2011) and US\$204,382.65 (in HCCL 21 of 2011) respectively, excluding interest and costs, to settle the actions. The forwarder had 28 days, ie up to 4/6/2012, to accept the sanctioned offers but it did not do so.

The shippers then asked for the following orders:

- (i) Interest on the judgment sums at 1% above the US dollar prime rate from 14/9/2011 to 4/6/2012;
- (ii) Enhanced interest on the judgment sums at 6% above the US dollar prime rate from 5/6/2012 until full payment;
- (iii) Costs on party and party basis and interest on those costs at judgment rate for the period from 14/9/ 2011 to 4/6/2012;
- (iv) Costs on indemnity basis and interest at 2% above judgment rate from 5/6/2012 until full payment. (For convenience the Judge called 5/6/2012 the "cut-off date").

#### Principles

The Judge set out Order 22 r 24 in full:

**"24. Costs and other consequences where plaintiff does better than he proposed in his sanctioned offer (Order 22, r 24)**

- (1) This rule applies where-
  - (a) a defendant is held liable for more than the proposals contained in a plaintiff's sanctioned offer; or
  - (b) the judgment against a defendant is more advantageous to the plaintiff than the proposals contained in a plaintiff's sanctioned offer.
- (2) The Court may order interest on the whole or part of any sum of money (excluding interest) awarded to the plaintiff at a rate not exceeding 10% above judgment rate for some or all of the period after the latest date on which the defendant could have accepted the offer without requiring the leave of the Court.
- (3) The Court may also order that the plaintiff is entitled to-
  - (a) his costs on the indemnity basis after the latest date on which the defendant could have accepted the offer without requiring the leave of the Court; and
  - (b) interest on those costs at a rate not exceeding 10% above judgment rate.
- (4) Where this rule applies, the Court shall make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.
- (5) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3), the Court shall take into account all the circumstances of the case including-
  - (a) the terms of any sanctioned offer;
  - (b) the stage in the proceedings at which any sanctioned offer was made;
  - (c) the information available to the parties at the time when the sanctioned offer was made; and
  - (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.

(6) The power of the Court under this rule is in addition to any other power it may have to award interest."

There was no dispute that the shippers' letters dated 7/5/2012 constituted sanctioned offers within the meaning of Order 22 r 5. The shippers undoubtedly did better than what was proposed in the sanctioned offers. The question the Judge had to decide was whether it was unjust to make an order under Order 22 r 24(2) and under r 24(3) (which, for convenience, the Judge called an "Additional Order"). In considering this question, the Judge was required to take into account all relevant circumstances of the case including the matters set out in Order 22 r 24(5).

### Submissions

The shippers relied on the fact that prior to commencing the actions, the forwarder (and its insurers) had been invited by letters dated 15/9/2011 to settle the shippers' claims, to which no substantive reply had been given. The shippers also relied on the fact that after issue of the writs, the forwarder refused to cooperate in agreeing to accept service of the writs in Hong Kong, even when its own bills of lading contained a Hong Kong law and jurisdiction clause. The shippers were thus put to the (unnecessary) expense of having to serve the writs out of jurisdiction, only to find that the forwarder appointed Hong Kong solicitors to acknowledge service.

In response, the forwarder's main point appeared to be that the sanctioned offer was "only" a "miserly discount" of 2% of the sums claimed. It was contended that the sanctioned offers were "nothing but an attempt of the Plaintiffs to seek a draconian costs order against the 2<sup>nd</sup> Defendant by pretending to have fulfilled Order 22 rule 24 of the Rules of High Court. Accordingly, the present applications ... are nothing but a sham." It was also argued that there was no requirement that it should cooperate in agreeing to accept service in Hong Kong, and the forwarder had not conducted the proceedings unreasonably or oppressively.

### Discussion

The Judge rejected the forwarder's arguments. Whether the discount offered was "miserly" or not is irrelevant; what matters under the rules is that the Plaintiff has done better than what it has offered: see *Huck v Robson* unrep [2002] EWCA Civ 398, 21 March 2002 (Tuckey LJ at §69-70; Schiemann LJ at §§76, 80). Once that criterion is satisfied, the Court should make an order under Order 22 r 24 unless it is unjust in the circumstances of the case to do so.

The Judge noted that in *Huck v Robson*, Tuckey LJ said at §71 that:

"... if it was self-evident that the offer made was merely a tactical step designed to secure the benefit of the incentives provided by the Rule (eg an offer to settle for 99.9% of the full value of the claim) I would agree with Jonathan Parker LJ [who was in the minority in that case] that the judge would have a discretion to refuse indemnity costs."

The Judge was, however, unable to describe the shippers' sanctioned offers as a "mere tactical step" in the sense referred to by Jonathan Parker LJ and Tuckey LJ. *Huck v Robson* was a traffic accident case and in that type of cases issues of contributory negligence often arise, making it uncertain as to the extent of the parties' respective responsibility for the accident. Thus making a sanctioned offer of the kind described by Tuckey LJ might be seen as a tactical move. The case in question, on the other hand, was what might be called a "mis-delivery" case and claimants in such cases were often, and justifiably, confident of success if the carrier had delivered the goods without production of the original bills of lading. The Judge did not see why the shippers should not offer a small discount in this type of case to reflect their reasonably justified confidence in the strength of their claims.

The Judge also rejected the forwarder's argument that it would be unjust to make an order under Order 22 r 24 where the offeree had contested the claims in a normal way. In the Judge's view, that fact alone did not make it unjust to make an Additional Order. Nor was there anything under any of the four matters set out in Order 22 r 24(5) that pointed to it being unjust to make an Additional Order.

On the other hand, while the Judge could take into account the forwarder's failure to make any offer of settlement, and its failure to cooperate in submitting to jurisdiction, in the Judge's view those matters added little in the circumstances of this case.

The Judge had therefore come to the view that an Additional Order should be made in this case.

### Enhanced Interest

As is well known, the normal commercial rate is 1% above prime rate: *Hong Kong Civil Procedure 2012* vol 1 para 6/L/11. The shippers had not explained why additional interest should be awarded at 6% above prime, nor had the forwarder suggested any other rate.

The Judge thought this was a matter of the court's broad discretion. In the Judge's view 6% above the prevailing US dollar prime rate was an appropriate uplift.

### Indemnity Costs

The Judge saw no reason why he should not make an order under Order 22 r 24 (3) (a) that the shipper's costs from 5/6/2012 onwards should be paid by the forwarder on an indemnity basis.

Nor was there any reason why the Judge should not make an order under Order 22 r 24 (3) (b) that interest should be payable on those costs. As to the rate of interest on costs, the shippers asked for 2% above judgment rate without explaining why that rate was proposed, or whether this rate would be substantially different from the enhanced rate the Judge proposed to order in respect of the judgment sums. Since an order for costs was considered a judgment debt, the Judge could see an argument that any interest payable on costs should be based on the judgment rate. On the other hand, in Order 22 r 24 (2) and r 24(3)(b), the same maximum rate of 10% above judgment rate is used, and the Judge could also see an argument that normally the enhanced rate of interest under r 24(2) and interest on costs under r 24(3)(b) should be the same rate. As the matter had not been the subject of argument, in the absence of any material that would assist the Judge, the Judge would make an order that interest on costs should be payable at a rate which is the lower of (i) 6% above US dollar prime from time to time or (ii) 2% above judgment rate. In principle the shippers should have interest on each item of costs from the dates on which work was done or incurred: see *McPhilemy v Times Newspapers Ltd (No 2)* [2002] 1 WLR 934 at §23. But that would be overly complicated. In *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273 at §18, Johnson Lam J (as his Lordship then was) adopted a “simplified process” by ordering that interest would be payable on all items of costs at half the rate which would otherwise have been ordered, with interest starting to run from the “cut-off” date on all the items. The Judge would propose to adopt the same approach in the case in question.

Finally, the shippers asked for the enhanced interest under Order 22 r 24(2) to apply from the cut-off date *until full payment*. The same applied to interest payable on indemnity costs under Order 22 r 24(3)(b). Neither party addressed me on whether I could make the orders in this form, ie, beyond date of judgment. In *McPhilemy v Times Newspapers*, Chadwick LJ (with whom Longmore and Simon Brown LJ agreed) observed that the Court probably does not have jurisdiction under Rule 36.21 of the English CPR (the equivalent of our Order 22 r 24) to award enhanced rate of interest under Order 22 r 24(2) or interest on costs under Order 22 r 24(3) after judgment. I am not aware of this point having been considered in any subsequent UK or Hong Kong case. The Judge was not satisfied he had jurisdiction to order enhanced interest or interest on costs under Order 22 r 24 (2) and (3) after judgment.

#### Costs of the application

As the shippers were substantially successful in its application, the Judge saw no reason why it should not have its costs.

The shippers asked for its costs of the application on an indemnity basis. The forwarder had not responded to this request.

In *Golden Eagle International*, Lam J (having ordered the costs of the application for additional interest and costs on a higher scale to the plaintiff) observed in §50 that his Lordship saw no reason why the sanction under Order 22 r 24 should not apply to those costs. His Lordship therefore ordered the costs of the application to be taxed on the indemnity scale with interest in the same manner as other costs incurred after the cut-off date. The Judge would respectfully follow the same approach.

#### Order

The Judge therefore ordered in each action that:

- (i) interest should be payable on the judgment sum at 6% above the US dollar prime rate from 5/6/2012 until judgment, and thereafter at judgment rate;
- (ii) the forwarder should pay the shippers’ costs on indemnity basis with interest thereon at half the lower of (i) 6% above the US dollar prime rate from time to time, or (ii) 2% above judgment rate, from 5/6/2012 until judgment, and thereafter at judgment rate.

The Judge also ordered that the shippers should have their costs of the application, to be taxed if not agreed on an indemnity basis. For the avoidance of doubt, no interest is payable on such costs other than by way of judgment debt.

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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