

To: Transport Industry Operators

## **Strike out for want of prosecution**

By an order made on 16/11/2001, Judge Andrew Chung of the High Court of the Hong Kong Special Administrative Region struck out 2 legal proceedings relating to cargo misdelivery for want (i.e. absence) of prosecution.

In 1995, the 2 Plaintiffs as the owners and shippers of 8 lots of goods asked the Defendant as the bailee and carrier to ship the goods to Spain. According to the Defendant, it only acted as an agent of the carrier and issued 8 Bills of Lading of the carrier to the Plaintiffs.

The Plaintiffs alleged that the Defendant misdelivered the goods to an unknown third party. According to the Defendant, the goods were delivered in Spain to the notified party named in the Bills of Lading in January, April, May, June and July 1995 respectively. The Defendant claimed that the Plaintiffs had sent 5 fax messages to the notified party giving instructions that the goods were to be delivered to the notified party. The carrier's agent in Spain released the goods to the notified party after the latter had handed over the 5 fax messages.

The Plaintiffs sued the Defendant and its shareholders and directors and issued 2 writs in December 1995 and June 1996 respectively. The pleadings (i.e. the service of Statement of Claims, Statement of Defence and Reply etc.) were deemed to have been closed in May and July 1997 respectively. The legal proceedings then went to sleep until the Plaintiffs wanted to proceed with the actions again in July 2001. The period of delay was about 4 years. The Judge held that such was an inordinate delay.

The Plaintiffs explained that there had been changes in the solicitors within the firm of the Plaintiffs' solicitors and that the Plaintiffs had been suing their insurer in Hong Kong in "parallel" legal proceedings and that there had been "without prejudice" negotiation with the insurer in the hope of settling those legal proceedings. However, the Judge did not find any of the reasons to be valid. He considered the inordinate delay was inexcusable. He concluded that the main reason for the delay was that the Plaintiffs and their legal advisers had made a conscious decision to "warehouse" these 2 actions. There had been a wholesale failure to comply with the Rules of the High Court. The Court found such contumelious conduct of the Plaintiffs had amounted to an abuse of the court's process.

In *Grovit v Doctor* [1997] 1 WLR 640, the House of Lords found it objectionable for litigants to commence and to continue litigation which he had no intention to bring to a conclusion. According to Judge Andrew Chung's understanding, such included cases where there was no definite intention to do so e.g. by issuing what was commonly known as a "protective" writ, a litigant would have in mind to continue that litigation should the need arise. The Judge agreed that the length of and the excuses given for the delay justified an inference that the writs were "protective" in nature. Hence, these actions fell within the type referred to in *Grovit v Doctor* and were an abuse of the court's process.

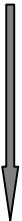
Having come to the conclusion that the Plaintiffs' conduct had amounted to an abuse of the court's process, the actions had to be struck out without considering if the delay caused substantial prejudice to the Defendant or if there was real risk that a fair trial was impossible. However, for completeness, the Judge also considered these 2 issues. Since about July 2000, the Defendant's relationship with the carrier's Spanish agent had deteriorated and the witnesses in the agent had indicated they would not co-operate as a result. The notified party, when contacted recently, also claimed no recollection of the events and refused to co-operate. Moreover, the Judge did not consider the law required a Defendant to take positive steps to prevent substantial prejudice from arising e.g. by obtaining witness statement. Accordingly, the Judge also found these 2 issues in favour of the Defendant.

We recommend that the Rules of the High Court have to be closely followed and complied with. Otherwise, Plaintiff will have to run the risk that its legal action may be struck out for want of prosecution. Please feel free to contact us should you have any questions or you want to have a copy of the Judgment.

Simon Chan and Richard Chan

A normal claim cycle is like the following:-

Cargo damaged/lost. Potential claim is imminent.



~~Worry starts. Where does the company stand? What should be the most appropriate next step? Is a survey required? What surveyor? How to respond to a claim notification from client? Should the claim be reported to my insurer? What documents to gather? What are the key aspects to look for to protect the company's interest? Could I pass the ball down the line? Do I forget to hold someone responsible? Should a time extension be granted? What should be an appropriate claim handling strategy? Who monitors the claim progress? Who does the co-ordination with my insurer ensuring the company's interests is not prejudiced? When would the company get reimbursed for a valid claim?~~

Report the claims to Sun Hing and you are worry free. Your Claims Handling could never be easier!

Professional risk management consultants take care of your worry and trouble (deleted above) in case of a claim, even if you do not carry liability insurance - Feel Free to discuss your needs with Simon or Richard.

We could be either your insurance broker, or claims consultant, or both.