SUN MOBILITY
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To: Transport Industry Operators

Cargo misdelivery & Uncollected cargo

In his Judgment dated 3/8/2005, Judge William Stone of the Hong Kong High Court dealt with two issues in one case: cargo misdelivery and uncollected cargo.

The case concerned a shipment of five containers containing luggage and bags from Xiamen to New York in October 2000. The shipper was an Hong Kong exporter. Since 1988 it had been manufacturing and selling, amongst other things, jute bags and luggage made of PVC material. These goods were manufactured at the shipper's factory in Fujian Province. In June 2000 the shipper sold such goods to an American buyer in New York. In order to ship the goods from Xiamen to New York, the shipper engaged the services of a freight forwarder. The forwarder was in fact part of an international group, with offices not only in Hong Kong, but also in Xiamen, New York and Los Angeles. Technically the group was in the trade as an 'NVOCC', that is, a 'non-vessel-operating common carrier'. The goods were loaded by the shipper in five containers which were loaded in Xiamen on board the vessel "Mare Africum" for the voyage to New York. Two bills of lading were issued to the shipper by the forwarder in Hong Kong ("Forwarder HK") covering the shipment of these five containers. Each of these bills of lading dated 22 October 2000 named the Consignee as 'To Order' and the Notify Party as '[the name of the buyer]'. The box marked 'For Delivery of Goods' specified that application be made to the forwarder in New York ("Forwarder NY"). "Mare Africum" arrived at New York on or about 20 November 2000.

However, there was an error on the part of Forwarder NY, the two containers were released to the buyer *absent* the tendering by the buyer of the relevant bill of lading, which would only have been sent to the buyer by the shipper upon the buyer's payment of the price of the goods. It seems that Forwarder NY was under the misapprehension that the buyer effectively had a month's post-delivery credit within which to produce the relevant bill of lading. In fact, the buyer never did so, because it never paid the shipper for these goods, and thus never was put into possession of the necessary bill. The other three containers never were claimed by the buyer, nor indeed by the shipper, and remained on the dockside until 22 December 2000, when they were removed from their place of storage and taken to the 'General Order' warehouse, whereafter the content of these three unclaimed containers was auctioned, on 28 June 2001, by the relevant US authority : the price obtained at auction for these goods was US$52,300.00, this money being used to defray the storage charges accumulated during the intervening period, together with the outstanding freight payable to the ocean carrier in respect of these three containers for the voyage from Xiamen to the United States. Thus, out of the five containers, two were misdelivered absent production of the bill of lading, and the remaining three went unclaimed, with the contents ultimately being disposed of by the US authorities. Accordingly, the shipper pursued its claim against Forwarder HK for the cargo value of US$91,175.08. *Prima facie*, if a carrier delivers goods to a Notify Party *absent* production of the bill of lading, it is liable for the damage to the shipper thus ensuing.

Forwarder HK insisted that this was the forwarder in Los Angeles ("Forwarder LA") bill of lading, although the bill did not say so in terms. The bill bore the heading of Forwarder LA, whilst at the bottom of the bill, the space for the signature bore the printed legend [the name of Forwarder LA], with immediately thereunder appearing the further legend 'As Agent for the Carrier'. Superimposed on top of the printed document was a chop which read 'For and on behalf of [the name of Forwarder HK], with therein a signature. The position was most unsatisfactory on the face of the bill. The Judge held that having signed it Forwarder HK must be bound thereunder, given the ambivalence on the face of the bill and in the absence of cogent evidence of agency on its part. The Judge rejected the argument that this was a Forwarder LA bill, and that liability, if established, should enure to that entity. On any basis Forwarder LA had nothing whatever to do with this case, and on the established matrix of facts was not involved in any way.

There was another reason for rejecting Forwarder HK's claim that it was acting as agent for Forwarder LA. Forwarder HK had obtained judgment on its counterclaim pursuant to a hearing before Master Wee in

November 2002. Suit on that counterclaim was based on invoices issued by Forwarder HK to the shipper for, *inter alia*, ocean freight "by virtue of services rendered by Forwarder HK at the shipper's request", and the freight element of this claim was based upon shipment under bills of lading issued in like terms as the bills in the instant case. In other words, when Forwarder HK sued for monies owed by the shipper, it adopted the persona of carrier under the bills invoked in support of the claim, but when it was sued upon bills in like form, it affected the contrary position of agent for a foreign principal. Indeed, in the argument before Master Wee Forwarder HK had resisted the shipper's attempt to set-off the counterclaim sum against its own claim for damages, by reference to the well-established principle that freight cannot be the subject of set-off against any claim otherwise arising in terms of carriage of goods, an argument that could only have been mounted by Forwarder HK *qua* carrier. Accordingly, the Judge held that, having asserted the carrier's right to deny a set-off in terms of freight in instances of carriage under similar bills of lading, Forwarder HK was estopped from asserting that it was not the carrier in this case.

Forwarder HK argued that by reason of the pre-existing contractual arrangement between the shipper and the buyer, whereby the buyer had made a deposit / downpayment in respect of the goods within the two containers as were released, the shipper was not at liberty to resile from this pre-existing arrangement. When the Forwarder HK as the carrier lost the shipper's goods in the form of the two containers wrongfully released, the resultant quantum of claim should not be subject to the type of argument raised by Forwarder HK. Forwarder HK had nothing whatever to do with the pre-existing contractual relationship / dealings between the shipper and its buyer, and specific contractual arrangements. Moreover, it is trite law that the measure of damage in instances of conversion is the market value of the goods as at the date of such conversion – a rule which exists, in part at least, precisely to avoid the type of 'apportionment' argument. It followed that in terms of the shipper's first claim arising from the admitted misdelivery of the two containers, the Judge found in favour of the shipper against Forwarder HK in the sum claimed, US$41,952.90.

Regarding the three uncollected containers, the shipper said that it was left completely in the dark by Forwarder HK as to what had happened to the remaining three containers. The shipper said that at no time was it informed that substantial storage charges were accruing, and that it had relied upon assurances from Forwarder HK that Forwarder HK would satisfactorily resolve the position in respect of all five containers, and not thereby the two which had been misdelivered. Thus, the shipper's case was that, in breach of its obligations as bailee for reward, Forwarder HK had failed to inform it as to what was happening to its cargo until it was too late, and that had it been apprised of the true position the shipper would have been able to make arrangements to collect and dispose of the cargo, for which there clearly was an available market, as the subsequent auction of the contents demonstrated, wherein even on a 'fire sale' basis the goods had fetched US$52,300, which was slightly less than the projected sale price to the buyer of US$55,054.00. Forwarder HK firmly disputed this case. Whilst no documentation was ever sent to the shipper by Forwarder HK concerning the storage charges which had accrued subsequent to the arrival of these containers, Forwarder HK maintained that the shipper was notified of and was well aware of the position. Forwarder HK maintained that the shipper had made a hard commercial decision to leave these three containers – uncollected and unpaid for by the buyer and to seek to recover its loss by suit against the carrier.

An important factual issue within this debate, therefore, was whether, as Forwarder HK contended, the shipper in fact had been told of the position, and simply had chosen to do nothing.

Forwarder HK asserted that subsequent to the misdelivery of the two containers, there had been a meeting on 20 December 2000 in the Forwarder NY office between the shipper and Forwarder NY. The Judge held that it was very likely that in fact there was such a meeting in New York, as Forwarder HK maintained. The Judge rejected the argument of the shipper that it was left with no knowledge of what had become of these three containers. It was inconceivable that the shipper would have permitted the situation to have developed in which the shipper had and continued to have no knowledge of what had happened to goods which, after arrival, the buyer had shown no interest in collecting. The shipper’s anger and frustration at the wrongful release of the two containers was evident on the papers. The Judge was unable to accept the proposition that the shipper remained unaware of the position with regard to the remaining three uncollected containers. Accordingly, whilst there was no documentation before the court indicating formal notification to the shipper of the arrival of the three containers or the expiry of the free storage period and / or the nature of the charges accruing, the Judge did not accept that the shipper was ignorant of the true position. To the contrary, on the probabilities the Judge found that the shipper was well aware of the situation. Having lost the buyer whom, having obtained the first two containers, evidently was not interested in collecting the other three, the shipper was unwilling, in the absence of locating a convenient alternative purchaser, to pay the accumulated storage charges referable to these three containers; had a satisfactory buyer emerged for

these uncollected goods, so that a commercially satisfactory result could have been obtained, it was not suggested that there would have been any difficulty in securing the release from G.O. of these containers upon payment of the outstanding charges. Accordingly, the Judge held that the plaintiff elected to let the situation remain as it was in terms of the three uncollected containers, and to pursue its claim against the carrier in terms of all five containers. Arguably there was some initial delay by Forwarder HK in relaying the position with regard to the containers, but this did not justify the attempt by the shipper to elevate this fact into a full-blown claim for compensation for the entire loss of these goods.

Forwarder HK also submitted that under the provisions of the relevant bill of lading the responsibility of the carrier clearly had terminated, with the notification to the buyer, the Notify Party, of the arrival of the goods. Forwarder HK relied on Clause 22 of the bill of lading, entitled 'Loading and Discharge', which provided that if the Merchant or his Assign was not ready to take delivery of the goods upon discharge, the Carrier was at liberty to discharge into warehouses "all at the risk and expense of the Merchant, such discharge to constitute a true fulfillment of the contract"; and further on Clause 21, entitled 'Notification and Delivery', which provided that the Carrier was entitled to call on the Merchant to take delivery, and that if such was not taken the Carrier was to be entitled to store the goods "at the sole risk of the Merchant", whereupon "the liability of the Carrier in respect of the Goods ... shall wholly cease", and that "such storage shall constitute due delivery under this Bill of Lading". In addition, Clause 10 of the bill of lading clarified that the defences and limits of liability in the bill should apply to any action against the Carrier in contract or in tort, whilst the limits of the Carrier's responsibility was laid down in Clause 4 : "The Carrier shall be liable for loss and damage to the Goods occurring between the time of receipt and the time of delivery". The Judge accepted these submissions. In the Judge's view, it was not open to the shipper to argue that these goods had remained undelivered, and that the carrier's liability remained extant and, in effect, open-ended. Notification of the arrival of these containers was given to the buyer, the Notify Party under the bill of lading, and the Judge accepted the evidence that during a telephone conversation shortly after 3 December 2000, Forwarder NY told the shipper that the other three containers would have to be auctioned if there were no customs clearance, and that in turn the shipper had said that it would try to find another buyer. Therefore, the Judge rejected the shipper's arguments to attach liability to Forwarder HK for these three containers. Notwithstanding the curious (and largely unexplained) absence of documentation from Forwarder HK directly appraising the shipper of the position, and thus arguably constituting a technical breach of the bailee's duty, the Judge discerned no causative relevance within such omission. The Judge found that the shipper knew of the situation, and further that as a matter of contract the goods had been 'delivered' under the terms of the bill of lading. In these circumstances the Judge was unable to see how or why Forwarder HK should be visited with the consequence of a decision by the shipper simply to leave the containers where they were in the absence of locating another buyer for these uncollected goods. Accordingly, the shipper's second claim in terms of the three undelivered containers was dismissed.

Judgment was entered for the shipper against Forwarder HK in the sum of US$41,952.90 with interest to run from 1 December 2000 to the date of judgment at the rate of 2% over US dollar prime rate, and thereafter at the judgment rate until payment. The Judge further made an order that the costs of this action were to be to the plaintiff, to be taxed if not agreed.

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

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