

27 January 2006
Ref : Chans advice/61

To: Transport Industry Operators

Irregular default judgment

Can an irregular default judgment be set aside? The High Court of Hong Kong said yes in its Judgment (HCA 2660/2004) of 26/7/2005.

The case concerned a forwarder suing a cargo owner for outstanding freight and related charges for logistic services in the amount of HK\$1,419,996.86.

The writ of summons was served on the cargo owner by hand at its registered office on 24/11/2004. Time for filing the acknowledgement of service expired on 8/12/2004. The cargo owner only filed its acknowledgement of service on 16/12/2004. Default judgment was entered on 17/12/2004. On 21/12/2004, the forwarder notified the cargo owner that default judgment had been entered. On the same day, the cargo owner requested for setting aside of the judgment but the forwarder declined the request. On 29/12/2004, the forwarder wrote the cargo owner and asserted that the cargo owner had ceased business. On 18/1/2005, the forwarder petitioned for the cargo owner's winding-up. The cargo owner only issued a summons to set aside the default judgment on 12/3/2005.

There was no dispute that the default judgment was irregular as the acknowledgement of service had already been filed before judgment was entered. According to the unreported judgment in *Kwan Tat Chung v Ho Cheuk Kwan trading as Fat Fai Engineering Company and Others*, HCPI381/2002, Suffiad J held that an acknowledgement of service filed after the prescribed time was still a valid acknowledgement and a default judgment, which was entered after that and on the basis of no notice of intention to defend having been given, was irregular. The Court agreed with the reasoning and conclusion of Suffiad J in that case and applied the same to this case.

The Court was bound by the Court of Appeal's decision in *Po Kwong Marble Factory Limited v Wah Yee Decoration Company Limited* [1996] 4 HKC 157. It therefore should set aside the default judgement without considering the merit of the defence, but it had a wide discretion to impose terms upon setting aside the judgment having regard to the cargo owner's conduct.

The writ was served on the cargo owner at its registered office by hand on 24/11/2004. However, the cargo owner by an amended Form AR1 Notification of Registered Office filed with the Companies Registry on 23/12/2004 notified the Registry that it had changed its registered office to the address of its solicitors on 25/9/2004. This retrospective notification was contrary to an earlier notification by another Form AR1 filed at the beginning of December 2004. The amended Form AR1 was also filed well outside the 14 day period stipulated in section 92(2) of the Companies Ordinance. There was grave doubt about the truthfulness of this retrospective notification of change of registered office on 25/9/2004 because when the writ was served on 24/11/2004, the cargo owner was still operating at its original registered office.

The cargo owner also ceased operation and became unreachable at its phone and fax numbers. Its original registered office was being occupied by one Hobby Zone Company. A search at the Companies Registry showed that Hobby Zone Company was owned and controlled by the very same group of people who owned and controlled the cargo owner. The physical existence of the cargo owner thus appeared to have ceased.

Furthermore, despite of its awareness since 21/12/2004 that there was the default judgment, the application to set it aside was not taken out until 12/3/2005, when the petition for its winding-up was to be heard 11 days later.

All these suggested that the cargo owner was taking steps to manufacture a case of defective service and to avoid execution of the judgment. The Court would thus echo the statement of Bokhary J (as he then was) in *Po Kwong Marble* at 162 E to F:

"Here, there is a very real risk - suggested by the defendant company's strange way of doing things - that any judgment which the plaintiff company may ultimately obtain would be an empty one if we do not guard against that."

The Court also said that if the cargo owner should have filed the acknowledgement of service in time, the forwarder would not have applied for the default judgment and would have gone very far with its application for summary judgment by the middle of March 2005. Alternatively, if the cargo owner should have taken out the summons to set aside the judgment at the end of December 2004, that application would have been disposed of a few months ago. The cargo owner's delay in taking out this summons thus caused a prejudice to the forwarder, particularly in the light of the forwarder's petition to wind-up the cargo owner and the effect of section 266 of the Companies Ordinance on fraudulent preference. In the light of these matters, the Court would therefore set aside the judgment on terms.

The Court ordered that on condition that the cargo owner should pay the judgment sum of HK\$1,419,996.86 into court on or before 18/8/2005, the judgment should be set aside and the cargo owner be given leave to defend this action.

After delivering the judgment, the Court was shown a letter from the forwarder's solicitors to the cargo owner's solicitors which was marked "without prejudice save as to costs". The letter read,

"Our client is agreeable to have the default judgment dated 17/12/2004 set aside and giving leave to your client to file a defence by consent on condition that your client do pay the principal judgment debt in the sum of HK\$1,419,996.86 into court."

That proposal turned out to accord with the Court's order. The Court found that this proposal, if accepted, should have disposed of the summons without the need to exchange affidavits and to prepare for the hearing. Since this proposal, which was sensibly made, was not taken up, the Court, in order to reflect its attitude towards a sensible proposal, ordered that even if the cargo owner should comply with the payment condition as ordered, the cargo owner still had to pay the forwarder's costs for this application.

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

Simon Chan
Director
E-mail: simonchan@sun-mobility.com

Richard Chan
Director
E-mail: richardchan@sun-mobility.com

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: :2866 7096

E-mail: gm@sun-mobility.com Website: www.sun-mobility.com

 A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

Multi-modal transportation involves far more complicated liability regime than port-to-port or airport-to-airport carriage. Pure international sea or air transport often affords better protection by international conventions. Conversely, multi-modal transport entails a variety of operational risk elements on top when the cargo is in-transit warehouse and during overland delivery. Fortunately, these risks are controllable but not without deliberate efforts. Sun-Mobility is the popular risk managers of many multi-modal operators providing professional assistance in liability insurance, contract advice, claims handling, and as a matter of fact risk consultant for their staff around-the-clock.