SMIC SUN MOBILITY
Insurance and Claims Services Limited

27 February 2007
Ref : Chans advice / 74

To: Transport Industry Operators

Regular default judgment

In its Judgment of 21 / 11 / 2006, the Hong Kong District Court held that a shipping company was not allowed to set aside a default judgment obtained by the cargo owner of a shipment of frozen squids.

The Plaintiffs were the shipper and the receiver of a cargo of frozen squids carried by sea from Ningbo in China to Nagoya in Japan on board the vessel "Xiang Xing" pursuant to a contract of carriage contained or evidenced by a bill of lading numbered 8NGBN03A5975 dated 27 / 8 / 2005 which was issued by the shipping company as carrier. Upon delivery to the receiver in Japan, the said cargo was found to be damaged in that it had defrosted during the course of carriage from Ningbo to Nagoya. A full surveyor's report was commissioned by the cargo insurers. This was the only surveyor's report available. The shipping company had not attended or joined in this survey.

The shipping company applied for a stay of proceedings after filing an Acknowledgment of Service on receipt of the Plaintiffs' Writ of Summons, and before that the shipping company had twice applied for extension of time to file its defence. The shipping company applied for a stay of proceedings relying on an exclusive jurisdiction clause in its bill of lading and intended to stop the Plaintiffs' action in Hong Kong and argued that the case should be heard in a Maritime Court in Mainland China. The Court dismissed the shipping company's application on 4 / 8 / 2006. There was no appeal. The shipping company did not file a Defence after the dismissal of the said application. It did not seek the Plaintiffs' consent or apply to the Court for further extension of time to file its defence. The time extended for the shipping company to file its defence on 10 / 4 / 2006 had long expired. Judgment in default of Defence was entered against the shipping company on 15 / 8 / 2006. Accordingly, the default judgment dated 15 / 8 / 2006 was a regular judgment.

The shipping company applied by Summons dated 18 / 8 / 2006 to set aside the Default Judgment dated 15 / 8 / 2006 obtained by the Plaintiffs against the shipping company in consequence of the shipping company's failure to file and serve a Defence within the time as extended by a Consent Order dated 30 / 3 / 2006. The time extended for the shipping company to file its Defence was 10 / 4 / 2006. The shipping company applied to set aside the Default Judgment on the ground that the shipping company had a good defence on the merits. The Plaintiffs opposed this application.

To set aside a default judgment regularly entered, the burden on the shipping company was substantial and the shipping company had to show not just an arguable defence but that it had a real prospect of success. The shipping company had to satisfy the Court that its case and the evidence which it adduced in support thereof was potentially credible and carried some degree of conviction. The Court had to, therefore, form a provisional view of the probable outcome of the action.

The shipping company's proposed or draft defence appeared to rely mainly on the terms and conditions set out on the reverse side of the bill of lading. The exemption clauses relied on were

Clauses 9(4)(d), 12(a) & 12(c), and 18(2). The shipping company also contended that it *"may well be possible, therefore, that the cargo was damaged even prior to loading onto the ship"*, and the shipping company also argued that the Plaintiffs had not provided any evidence to show that the shipping company had done anything wrong which caused damage to the cargo.

The cargo underwriter appointed a surveyor to look into the pre-shipment process and to find out if pre-shipment damage to the said cargo could occur at this stage. This was the "Huada Investigation report". Again this was the only surveyor's report for the pre-shipment stage. The surveyor found that the chance of damage to the said cargo at this pre-shipment stage was minimal.

The Plaintiffs and the shipping company argued on who had the burden of proof. At common law, the party seeking to rely on an exemption clause would bear the burden of proof. The shipping company would have to show that the circumstances on which they relied on the exemption clauses had arisen. The shipping company should not put forward submission that amounted to mere supposition to establish its defence and it should not rely on that to show a real prospect of success in its defence.

To rely on Clause 9.4 (d), the shipping company had to show that the damage to the cargo was caused by Plaintiffs' fault in handling, loading, stowing or the unloading. Nothing in the evidence suggested that the Plaintiffs were at fault. To rely on Clauses 12(a) and 12(c), the shipping company had to adduce evidence to show that the damage to the cargo arose as a result of the negligence of the Plaintiffs' filling, packing, or stowing the container, or as a result of a defect in the container which would have been discovered upon reasonable inspection by the Plaintiffs. Indeed the surveyor in Japan concluded that *"From what we had surveyed, we are of the opinion that : (1) the deterioration damage to the cargo was caused by insufficient freezing due to rise of temperature throughout the ocean voyage; (2) the rise of temperature was caused by the derangement or stoppage of refrigeration machinery; ……"* The surveyor opined that the damage was caused by stoppage/insufficiency of refrigeration in the course of the voyage. This was based on evidence that they had found in their survey. When they inspected the condition of the cargo, they found that "*most of the cartoons were stuck slightly to each other, showing that they had once been unfrozen and then frozen again, and some of them were found to be wet excessively"*. And *"the pieces of sliced meat contained were found to be stuck to each other in a block state, showing the same process as stated above"*. For Clause 18.2 to apply, the shipping company had to show that the damage was a result of mechanical breakdown or derangement of the container. The surveyor's report could only say that the temperature had risen at some stage of the voyage at sea causing the cargo to defrost and refreeze but the cause was not explained. The shipping company would be expected to show that it had exercised due diligence to ensure that the container was maintained in an efficient state. The shipping company had not attempted to show that it had discharged its duty to exercise due diligence with regular inspection, testing and maintenance. No maintenance record was shown and nothing was mentioned of its maintenance procedure.

This was a case of bailment where the burden of proof was shifted to the bailee when goods were injured or lost while in the possession of the bailee. The bailee must prove either that he took the appropriate care of them or that his failure to do so did not contribute to the loss.

The damage to the cargo of frozen squids had been shown most unlikely to have been caused before shipment. The shipping company's contention that it might have was clearly insufficient to amount to an arguable defence that had any real prospect of success in a trial. No contention was made that the damage occurred after the shipment arrived in Nagoya. Notice of damage was promptly given when the damage was discovered. The damage was shown to have occurred during the sea voyage and the shipping company had not adduced any evidence to show that it was not at fault. This was not a case, as the shipping company argued, that depended on whose evidence the Court would accept, or that the Court would not be able at this stage to form a provisional view of the probable

outcome of the case. The shipping company had therefore failed to satisfy the Court that its case and the limited evidence it had adduced in support was potentially credible and carried some degree of conviction.

The shipping company also argued that the reason for its default to file its defence in time was due to the mistake of its solicitors and the shipping company should not be penalised for that. It was hard to understand why the shipping company despite having ample time and opportunities to file a defence had not done so. The attempt to stay the proceedings in Hong Kong court was probably ill conceived because when the shipping company applied for time extension to file its defence, the shipping comapny had already submitted itself to the jurisdiction of Hong Kong court. When it became known that the application to stay proceedings failed on 4/8/2006, the defence had to be promptly filed and served, and not left to the very last minute. The Court would agree that ignorance of the law could never be a good excuse. The shipping company would have known that its application to stay the proceedings had failed on 4/8/2006. There was no appeal against the Court's decision. There was simply no reason why the shipping company did not file and serve its defence promptly. Nothing was done for 10 days and the Plaintiffs entered judgment in default. The Court took the view that the shipping company itself would be at fault not to ensure its Defence was filed and served as soon as the stay of proceedings failed. The default judgment entered against the shipping company appeared justifiable as the shipping company had not really shown an arguable defence. It would be open to the shipping company to take legal advice on any recourse against its own legal adviser.

The default judgment was a regular judgment and the shipping company had not shown any acceptable reason why it did not file its defence within time or at any time before the Plaintiffs sought to enter judgment in default. The Plaintiffs in these circumstances were not obliged to warn them that default judgment would be entered. The shipping company had not shown it had an arguable defence with a real prospect of success at the trial. In the circumstances, the shipping company's application to set aside the default judgment was dismissed with costs to the Plaintiffs.

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
CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS
