SUN MOBILITY
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To: Transport Industry Operators

False trade description goods

On 27 September 2007, the Hong Kong Court of Appeal held a ship agent not guilty of importing goods to which a false trade description was applied. The case was about a shipment of water dispensers from Beijiao to Inchon with transshipment at Hong Kong in July 2005.

On 10 July 2005, customs officials boarded the "Hui Xin Hui 28" (a river trade vessel) at the Western Quarantine and Immigration Anchorage. That vessel had arrived in Hong Kong from Beijiao (near Shunde). On board, there were found two sealed containers each with 420 cartons of water dispensers. The cartons contained on their face the words "Made in Korea" and the water dispensers themselves also bore this statement on labels. When the containers were opened, the cartons stuffed in the front row all had blue adhesive tape covering the words "Made in Korea". The cargo manifest for this shipment named as the consignee Xianggang Meide Household Electrical Appliances Limited. This was said to be a non-existent company. The ship agent, however, did not have sight of this manifest and so was unaware that the consignee was this non-existent entity. The ship agent and a feeder company were charged with the section 12(1) offence of the Trade Descriptions Ordinance, Cap.362 ("the TDO"). That provision states:

"**12. Prohibited import and export of certain goods**

(1) Subject to section 13, no person shall import or export any goods to which a false trade description or forged trade mark is applied.

(2) Any person who imports or exports any goods contrary to subsection (1) commits an offence unless he proves that –

(a) he did not know, had no reason to suspect and could not with reasonable diligence have found out that the goods are goods to which a false trade description or forged trade mark is applied; or

(b) the goods are not intended for trade or business.

(3) This section shall not apply to any goods in transit."

The section 24A(1) of the TDO states:

"**24A. Rule of evidence regarding imported goods**

(1) In any prosecution for an offence under this Ordinance in respect of the import of goods to which a false trade description of the place of manufacture, production, processing or reconditioning is applied, evidence that the goods were imported from a place shall be prima facie evidence that the goods were manufactured, produced, processed or reconditioned, as the case may be, in such place.

…"

On 24 January 2006, the ship agent was, together with the feeder company, convicted in the Magistrates Court and fined $12,000. The ship agent appealed pursuant to section 113 of the Magistrates Ordinance, Cap.227. On 18 May 2006, Waung J (in the Court of First Instance) referred the appeal to be heard by the Court of Appeal under section 118(1)(d) of the Magistrates Ordinance.

The ship agent's job was to arrange the carriage of goods by sea. Its Guangzhou office first received instructions from a freight forwarder to arrange the shipment of water dispensers from Beijiao to Inchon in Korea. The ship agent had dealt previously with the forwarder without incident. The ship agent in turn instructed the feeder company to deliver two empty containers to be stuffed and sealed by the shipper at the place specified by the forwarder. Neither the ship agent nor the feeder company was instructed to have any part in stuffing of the containers or in supervising the loading of the same. As there was no direct route from Beijiao to Inchon, the containers had first to be sent to Hong Kong where they would be transshipped on an ocean going vessel to Korea. This arrangement could be seen from the shipping order that was prepared by the forwarder (using the ship agent's standard form). In it, the forwarder was described as the shipper, the consignee was named as Joo Sung Sea and Air Freight Company Limited. The port of loading was stated to be Beijiao and the final destination, Inchon. The carriage was stated to be "CY-CY" (container yard at loadport to container yard at the port of destination). The named vessel was the "Jubilee Glory" (this being the vessel from Hong Kong to Inchon). If the carriage of the two containers had fully materialized, a bill of lading covering the carriage would have

been issued. The Court had been provided with a sample of such bill of lading (which would have been issued by Heung-A Shipping Company Limited). Clause 11 on the reverse of the bill of lading stated:

"11. CONTAINER PACKED BY MERCHANT. If the cargo received by the Carrier is container(s) into which contents have been packed by or on behalf of the Merchant, (1) this Bill of Lading is prima facie evidence of the receipt only of the number of container(s) as shown on the face hereof, and the order and condition of the contents and any particulars thereof (including marks and numbers, number and kind of packages or parcels, description, quality, quantity, gauge, weight, measure, nature, kind and value) are unknown to the Carrier, who accepts no responsibility in respect thereof and (2) the Merchant warrants that the storage of the contents of container(s) and their closing and lashing are safe and proper and also warrants that the container(s) and contents thereof are suitable for handling and carriage in accordance with the terms hereof including Article 15, in the event of the Merchant's breach of said warranties, the carrier shall not be responsible for any loss of or damage to or in connection with the Goods resulting from said breach and the Merchant shall be liable for loss of or damage to any other property, or for personal injury or the consequences of any other accident or events whatsoever and shall indemnify the carrier against any kind of loss or liability suffered or incurred by the Carrier on account of the said accidents or events, and (3) the Merchant shall inspect the container(s) when the same are furnished by or on behalf of the carrier, and they shall be deemed to have been accepted by the Merchant as being sound and suitable condition for the purpose of the transport contracted herein, unless he gives notice to the contrary in writing to the Carrier and (4) if the container(s) are delivered by the Carrier with seals intact, such delivery shall be deemed as full and complete performance of the Carrier's obligation hereunder and the Carrier shall not be liable for any loss of or damage to the contents of the container(s), and (5) the carrier shall be at liberty to open the container(s) and to inspect the contents of the container(s) without notice to the Merchant at such time and place as the Carrier may deem necessary and all expenses incurred shall be borne by the Merchant, in case the seals of container(s) are broken by the customs or other Authorities for inspection of the contents of the said container(s), the Carrier shall not be liable for any loss, damage, expenses or any other consequences arising or resulting therefrom."

Given this clause and the "CY-CY" terms of the carriage, the stuffing of the containers was entirely the responsibility of the shipper; in other words, the containers were under "shipper's load, count and seal". This is fairly standard in arrangements for carriage of goods by sea. One of the effects of Clause 11 was that if the seal on a container was not broken during that part of the carriage undertaken by a sea carrier, the delivery of the container would be deemed to be full and proper performance of the contract of carriage. The containers were first to be shipped to Hong Kong before transshipment to Inchon. For this purpose, a bill of lading was prepared by the feeder company covering the carriage from Beijiao to Hong Kong. The shipper was named as "Foshan City Meide Household Electrical Appliances Limited (the named consignor in the cargo manifest), the consignee was the ship agent. On its face, the bill of lading also stated that the two containers of water dispensers would be carried from Beijiao to Hong Kong on board the "Hui Yin Hui 28" where they would be transshipped on board the "Jubilee Glory" onwards to Inchon.

The Court would like to underline in particular two points. First, the role of the ship agent in the carriage in question was quite typical of that of shipping agents the world over, not just Hong Kong. Shipping agents are instructed (often by freight forwarders or other shipping agents) to make the necessary arrangements (or a part of the arrangements) for the carriage of goods by sea. Normally, shipping agents will not in the absence of a specific contractual obligation have any responsibility for the loading, supervision of loading, inspection of goods or stuffing and sealing of containerized cargoes. One of the legal questions that arose in the case in question was whether the TDO might impose such a duty.

Secondly, and this would be relevant when the Court considered the issue of reasonable diligence, it was perhaps useful to summarize just what was the ship agent's state of knowledge regarding the two containers:

(1) From the initial instructions to arrange carriage, the ship agent was aware of the involvement of the forwarder, a company it had dealt with previously.

(2) From the shipping order, the ship agent was aware that the relevant cargo comprised two containers of water dispensers to be sent from Beijiao to Inchon, that the shipping arrangement was to be "CY-CY" and of the involvement of another freight forwarder, Joo Sung Sea and Air Freight Company Limited.

(3) From the bill of lading issued by the feeder company, the ship agent would in addition have been aware of the fact that the goods were to be transshipped in Hong Kong before on carriage to Inchon. The consignor was named as Foshan City Meide Household Electrical Appliances Limited (apparently a well-known company in the Mainland).

(4) The ship agent was not aware that the water dispensers were said to have been manufactured in Korea.

The intention behind section 12 of the TDO is clear : to combat the problems of goods bearing false trade descriptions or forged trade marks both in Hong Kong and worldwide. The language used in section 12 to attach liability is for this reason deliberately wide, but the available defences are narrow. For example:

(1) The definition of "import" in section 2(1) means "to bring, or cause to be brought, into Hong Kong". This would include many different persons who may have a responsibility in bringing goods or causing goods to be brought into Hong Kong. There is no doubt that shipping agents are included within this definition.

(2) Section 24A of the TDO creates a statutory presumption in favour of the prosecution regarding false trade descriptions of the place of manufacture, production, processing or reconditioning. This provision had the effect of providing prima facie evidence that the water dispensers were manufactured in the Mainland.

(3) Section 12 provides two possible defences. One is the section 12(2). The other is set out in section 12(3) in respect of "goods in transit". It might be thought that this defence might have been open to the ship agent since the containers were afterall destined for Korea, Hong Kong being merely the port of transshipment. However, the definition of this term in section 2(1) is narrow:

"'goods in transit' means goods which -

(a) are brought into Hong Kong solely for the purpose of taking them out of Hong Kong; and

(b) remain at all times in or on the vessel or aircraft in or on which they are brought into Hong Kong;

'import' means to bring, or cause to be brought, into Hong Kong."

This definition was clearly inappropriate in the case in question since it was intended that the containers would at some stage be offloaded in Hong Kong and then loaded onto the ocean going vessel bound for Korea. They would therefore not have remained "at all times" on board the river trade vessel that brought them into Hong Kong from Beijiao. It was probably because the containers were on board the "Hui Xin Hui 28" when the inspection took place (and not yet offloaded in Hong Kong) that the ship agent and the feeder company were charged with an attempted import into Hong Kong.

The other defence identified in section 12 is the reasonable diligence defence. There are three elements of this defence that have to be made out (as far as an accused is concerned, on the balance of probabilities):

(1) The importer or exporter must have no actual knowledge that the relevant goods bore a false trade description or a forged trademark;

(2) The importer or exporter must have no reason to suspect either; and

(3) The importer or exporter could not with reasonable diligence have found out that the goods had a false trade description or forged trademark.

All three elements must be made out before the defence is available. It is therefore not enough for an importer or exporter simply to demonstrate that there was no actual knowledge or suspicion on his or her part. It must also be shown that with the exercise of reasonable diligence, any false trade description or forgery could not have been discovered. It is this third element that often causes the most difficulty in application in practice.

The following observations can be made regarding this third element:

(1) It is important to bear in mind that the requirement is to demonstrate "reasonable diligence", not 'due diligence' or 'all due diligence'. The use of the word "reasonable" connotes an objective test and requires the court to examine just what could reasonably have been expected of the importer or exporter in the circumstances to find out about the description or trademark of the goods. The inquiries is therefore : what could the importer or exporter have been reasonably expected to have done in the circumstances?

(2) It is this objective test that is relevant rather than what an importer or exporter in any given case has actually done. Conceptually, what an importer or exporter has actually done will not assist him if he could or ought reasonably have done more; equally, even if nothing has been done, an accused may escape liability where the exercise of reasonable diligence would not have resulted in the discovery of the use of false trade descriptions or forged trademarks. The test is subjective only in that one must of course look at the particular circumstances of the accused.

(3) The Court had found of great assistance the analysis of this statutory provision by Stock J (now Stock JA) in R v Mulitex (Exports) Ltd [1996] 4 HKC 422. There, Stock J was concerned with the reasonable diligence defence in the context of a Hong Kong buyer of goods (toothbrushes) from the Mainland. The goods contained a false description of having been manufactured in Thailand when they were not. The Court agreed with the following statement of principle at 430I-431A:

"... it is 'not the doing of everything possible, but the doing of that which, under ordinary circumstances, and having regard to expense and difficulty, can reasonably be required.' (See *Dear v Richards,The Europa* (1863) 2 Moo PCCNS 1, 15 ER 803). As I commented in *R v Chan Kim* Fai (MA 982/93, unreported), what are reasonable steps, and what is reasonable diligence will vary with the facts and with the legislative context in which those words appear."

In *Mulitex*, Stock J found that there was a positive duty on buyers of goods in Hong Kong to take steps to ensure that goods were genuine. In the case in question, the Magistrate interpreted what was said as being of universal application, namely, that it was incumbent on all persons coming into contact with goods to check that they were not false. With respect, all that Stock J was doing was to hold that in the circumstances of the case before him (dealing with a buyer of goods from the Mainland), that obligation was appropriate.

On appeal, the ship agent advanced three main arguments to suggest that the Magistrate had erred:

(1) There was insufficient evidence that the relevant goods were manufactured in the Mainland and therefore of the fact that the description of their being made in Korea was false.

(2) The ship agent was entitled to succeed on the reasonable diligence defence.

(3) In any event, the ship agent was but an innocent agent and therefore should be treated as an aider or abetter. As such, liability could not arise unless the requisite knowledge was proved (in this case, of the falsity of the trade description).

The first and third arguments could be disposed of shortly. The relevant goods should be presumed to have been manufactured in the Mainland: - see section 24A(1) of the TDO. There was no evidence to suggest the contrary. The ship agent faintly suggested that the water dispensers could have been made in Korea, found their way to the Mainland and then shipped from Beijiao. There was simply no evidence to support this. The innocent agent

argument did not apply either. The ship agent was not an aider or abetter. By reason of the wide definition of the word "import", the ship agent was an importer for the purposes of the Ordinance.

This left the reasonable diligence defence. In the Court's judgment, this was open to the ship agent and ought, in the circumstances of the case in question, have provided a valid defence:

(1) It was not in dispute that the ship agent did not have either actual knowledge or suspicion that the two containers carried goods that bore or might bear a forged trade description or forged trademark.

(2) In the normal course of a shipping agent's duties, it is not concerned with the goods at all other than as relate to their actual carriage, delivery or freight. The shipping agent is not concerned with the identity of the consignor or consignee, the quality of the goods (he may be concerned with the condition of the goods on shipment but not beyond this) or even what the goods are. Another way of testing this is to ask whether normally, a shipping agent would be contacting the consignor or consignee about the goods being carried other than as relate to their carriage, delivery or questions of freight. The shipping agent may have an involvement in the loading or packing of the goods but only if it has a specific contractual responsibility in these respects.

(3) Of course, where a shipping agent becomes aware of or suspects certain facts about the goods arranged to be carried, then he may have to take action. For example, if the shipping agent knows or suspects that the relevant goods may be illegal or dangerous, then he would be expected to make the necessary inquiries to deal with these situations. In the context of the TDO, the Court think it incumbent on shipping agents to bear in mind this Ordinance so that where there may be indications that the goods that are carried may bear a false trade description or false trademark, it will be reasonable to expect them to make further inquires or take further action. This is reasonable in view of the fact that they are importers or exporters as defined in the TDO. As to what these inquiries or actions might be, this will of course depend on the circumstances. Where there are indications along the lines just described, it will not do for the shipping agent simply to make no inquiries or take no action at all. However, the Court thinks it really to be asking too much to expect shipping agents to embark on an extensive inquiry (which would likely be out of all proportion to the remuneration they receive) when there are no indications that there has been any infringement of the TDO.

(4) In the case in question, there were in the Court's view no indications that the relevant goods might have had false trade descriptions, forged trademarks or indeed have any other suspicious features. The state of knowledge of the ship agent would not indicate there were any suspicious features at all to put it on alert. This being the case, there was nothing in the normal course of its duties that would have required the ship agent to make further inquiries or take some other action in relation to the goods.

(5) The Magistrate was of the view that there were sufficient indications at least to arouse suspicion. He pointed to the fact that the ship agent was not familiar with the consignor of the goods. It was difficult to see why this should be itself a suspicious factor. Then he pointed to the fact that the consignee was a non-existent company with whom neither the ship agent nor the feeder company had had any previous dealings. He was of the view that the ship agent should therefore have made inquires about the goods. Even if this was a relevant factor, the ship agent had no knowledge of the manifest and therefore no knowledge of the fact that the consignee was the apparently non-existent entity.

(6) The Magistrate also held that in any event the ship agent did not carry out any inspection whether at loading or in Hong Kong. If it had, it would have seen the way that the cartons in the front row of the containers were packed. This would also have aroused suspicion. The Court agreed that if such inspection had taken place, suspicions might well have been aroused. However, the Court questioned why the ship agent would or should have inspected at either of these locations at all. Shipping agents in the normal course of things will not inspect or supervise the goods at loading. In the case in question, the shipper of the goods had the responsibility for loading. In Hong Kong, inspection by the ship agent (or indeed anyone else) would have required the breaking of the seals in the containers in order to carry out any inspection. There was no reason to do this. And, it is right to emphasize, it would not be expected or desirable for carriers or shipping agents to break the seals of containerized cargoes for no reason. The Court have already referred to the effects of this as far as carriers are concerned.

For these reasons, the Court was of the view that the Magistrate erred and that the conviction must therefore be set aside and the appeal allowed.

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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