SUN MOBILITY
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To: Transport Industry Operators

Robbery

On 21/2/2008, the Hong Kong High Court held a forwarder and a road haulier liable for a mobile phone robbery case of US$1,638,360.

The claim arose from the theft, on 3/5/2004, of a consignment of 6,068 Samsung GSM mobile telephones whilst this consignment was en route from Hong Kong airport to the warehouse of the purchaser. The forwarder had been providing freight forwarding/carriage services to the Hong Kong buyer of these telephones for a number of years. The seller sold these telephones to the buyer at a unit price of US$270, and further that, under Cargo Insurance Policy No. 90394040000080 dated 30/4/2004, an insurer provided insurance cover for the shipment of telephones in a sum amounting to 110% of the total invoice value. The telephones were shipped by air from Korea to Hong Kong on 30/4/2004. The buyer had agreed with the forwarder to collect the telephones from the airport and to deliver them to the buyer's warehouse; in turn, the forwarder had subcontracted the actual collection and delivery of the shipment to the road haulier. On Friday 30/4/2004, a driver employed by the road haulier physically attended at the offices of the forwarder to receive instructions regarding the collection and physical delivery in Hong Kong of the telephones on Monday 3/5/2004. The driver then drove the road haulier's truck to a garage in order to permit certain repairs to take place, and a photocopy of the 'collection record' was left in the truck during the repair period over the weekend. On 3/5/2004 the driver drove the truck to Hong Kong airport and collected the telephones; he instructed his colleague, who otherwise should have accompanied him in the vehicle during the journey to the buyer's warehouse, to remain at the airport. The telephones never reached their destination. The driver claimed that, whilst driving from the airport en route to the warehouse along Ching Hong Road, he was threatened by a man wielding a knife. At the time it appeared that the windows of the vehicle were wound down and the doors were unlocked; the vehicle's central locking system apparently was broken, and had been for some time. As for any standing instructions which might have been in place regarding the method of collecting goods and making deliveries, the instructions the road haulier had given in 2000 did not include instructions as to the number of employees who were required to accompany a delivery, nor instructions as to the locking of the doors and windows of the relevant delivery vehicle. It was further claimed by the driver that he was forced to swallow some pills, which caused him to lose consciousness, and that when he regained consciousness the telephones were missing. In his third police interview record the driver admitted that the test result of his blood and urine sample contained no indication of the ingestion of any drugs, notwithstanding his story that he had been forced to swallow pills which caused him to lose consciousness. The stolen telephones had not been recovered, and the police made no arrests consequent upon this theft; in particular the driver himself neither was arrested nor charged with complicity in this event.

On or about 3/9/2004, the insurer of the telephones paid to the buyer the sum of US$1,802,196, which figure represented the amount payable under the policy as issued. The seller, buyer and insurer sued the forwarder and the road haulier in order to recoup the value of these stolen telephones, which claim was pleaded at 110% of the invoice price.

The Judge was persuaded to conclude that this was *not* simply an opportunistic theft, but that it was well planned and that the lorry carrying the mobile phones was intercepted by the robbers who knew - or at the very least had a well-founded anticipation - that the goods stored in the cartons on board the lorry were valuable mobile phones. The Judge further found that both the forwarder and road haulier were, respectively, bailee for reward and sub-bailee for reward, and in light of this conclusion, the issue of liability in this case could be decided by application of general principles relating to the liability of such bailees, and in particular in terms of the application of this burden of proof.

In principle a bailee for reward owes a duty to the bailor to return the bailed goods safely at the conclusion of the bailment relationship, and if the bailee fails to do so, he is liable for the loss of the goods *unless* he is able to prove that he exercised all due care for the goods : see, eg, British Road Services Ltd v. Arthur V Crutchley & Co Ltd [1968] 1 All ER 811; Richmond Metal Co v. Coales & Son [1970] 1 Ll Rep 423; Dense Billion Ltd v. Hui Tian-Sung and ors [1996] 2 HKLR 107; G Bosman (Transport) Ltd v. LKW Walter International Transportorganisation AG [2002] EWCA 850.

> In *Richmond Metal v. Coales & Son, op cit,* for example, a carrier had been engaged to deliver a high value cargo, which subsequently was hijacked in transit. The driver employed by the carrier was the sole witness to the hijack, and his evidence was wholly uncorroborated; moreover, he had a prior conviction for theft and previously had lost the contents of another truck. It was held by Mocatta J that the carrier had not discharged the burden of establishing the burden upon it, in particular on the facts that the copper scrap had been stolen without the negligence of the driver, one Cantwell, or that the loss had occurred by reason of a riot as defined by the relevant authorities, and accordingly judgment was given for the plaintiff.

> In *Dense Billion Limited v. Hui Tian-Sung & ors, op cit.,* the carrier in that case had been entrusted to carry a valuable consignment of silk fabric. The driver of the vehicle in question had decided to leave the truck unattended overnight, and the consignment was stolen during the night. The Court of Appeal held, *inter alia*, that the carrier was liable for the loss of the consignment as it had failed to discharge the burden of proving that it had exercised reasonable care of the consignment, and (applying British Road Services Ltd v. Crutchley & Co Ltd [1968] 1 All ER 811) that a bailee for reward could escape liability only by discharging the burden as to the taking of appropriate care or that his failure so to do was not causative of the loss. The court also held that if a bailee for reward should entrust the duty of care to his servant or agent, he is equally answerable for the acts or omissions of that servant or agent (applying Port Swettenham Authority v. Wu & Co Sdn Berhad [1979] AC 580.)

Nor is the obligation of the bailee for reward to take reasonable care of the goods the subject of the bailment extinguished by the mere fact of sub-bailment: see Gilchrist Watt and Sanderson Pty Ltd v. York Products Ltd [1970] 3 All ER 61.

Further, absent a direct employment situation, utilisation by the bailee for reward of an independent contractor, which then acts negligently or in breach of contract, does *not* suffice to avoid liability on the part of the bailee; thus in *British Road Services v. Crutchely & Co Ltd., op cit.*, Lord Pearson observed (at 820D).

> In *G Bosman, op cit*., the security company which was found to be the immediate cause of the loss had been engaged by independent contractors of the initial bailee, but notwithstanding absence of direct nexus between bailee and the entity whose direct negligence was the immediate cause of the loss, the Court of Appeal nevertheless held that the bailee was responsible for the acts and omissions of the security company.

British Road Services, op cit., also has been followed in Hong Kong in Always Win v. Autofit Limited, HCA 10735 of 1993, decision dated 28/3/1995, in which Cheung J (as he then was) stated (at page 12):

> "The emphasis of Lord Pearson and Sachs LJ was that to give efficacy to the contract between bailor and bailee, the bailee must be responsible for the goods and it cannot escape responsibility by delegating that responsibility to someone else".

The principle that a bailee for reward is liable for the acts and omissions of an independent contractor to whom responsibility for the goods has been entrusted is well-established; moreover, the obligation to exercise all reasonable care to avoid loss or damage of the bailed goods includes taking appropriate steps to ensure that the goods were not stolen by employees: see Transmotors Ltd v. Robertson, Buckley & Co Ltd [1970] 1 Lloyd's Rep 224.

Failure to take such steps results in breach of the primary duty owed to the bailor, and the bailee also will be liable for the acts of a servant or agent if the goods are found to have been stolen as the result of participation in such theft by a servant or agent : see *Morris v. C W Martin & Sons Ltd* [1966] 1 QB 716, wherein it was held that the bailee is answerable for all the acts or omissions, including causatively careless and dishonest acts, of such servant or agent. This decision was approved by the Privy Council in *Port Swettenham Authority,op cit*, and has been applied in Hong Kong in Bewise Motors Co Ltd v. Hoi Kong Container Services Co Ltd[1997] HKLR 986.

The available evidence before the Judge regarding the circumstances of this robbery revealed a signal lack of precaution and care for the safety of these goods on the part of the driver employed by the road haulier. Putting to one side the somewhat dubious account of events as given in the driver's police statements, the Judge found that the most basic precautions were *not* taken to prevent theft. Even taking the driver's account to the police at

face value (which, if the Judge might say so, required a certain suspension of disbelief), the intruder entered the vehicle by the left front passenger door at a time when the vehicle's windows were wound down and the doors unlocked; moreover, the central locking system of the vehicle appeared to have been broken and in need of repair since mid-February 2004, and that no steps had been taken to remedy the problem; it was also clear that the passenger door could have been locked manually, so that if the driver had taken the basic and most obvious precaution of so doing, on his case the robbery would not have happened, since the robber would not have been able to gain access to the truck's cab. From that which the driver told the police it seemed that he had told employees of another company that the central locking system of the truck was broken, whilst the fact that this truck was left for repair over the weekend (albeit apparently not for repair to the locking system) with a copy of the relevant extract from the 'job book' left on the front seat; additionally no explanation had been given as to why in any event the driver had instructed his colleague not to accompany him on the fateful journey, and both were matters which not only served to stimulate suspicion but which also indicated an alarming degree of carelessness, which ultimately bore fruit in the robbery as ensured. On such evidence was available in terms of the circumstances of this robbery, the Judge concluded that neither the forwarder nor the road haulier had been able successfully to discharge the burden placed upon them of demonstrating that all reasonable care was taken of this consignment of telephones.

The plaintiffs had succeeded in the action in terms of establishing liability for the loss on the part of the forwarder and road haulier, and the Judge so held. The amount claimed represents 110% of the invoice value of the stolen telephones. The position was that in September 2004, the insurer paid to the buyer / consignee thereof, the sum of US$1,802,196, representing the amount payable under the relevant policy, namely 110% of invoice value. The insurer submitted that this amount was incurred directly from the loss of the telephones, which loss was caused by the failure of the forwarder and road haulier to take proper care of the consignment of telephones, and thus that this was the amount for which judgment should be entered against the forwarder and road haulier. The Judge did not agree. The Judge failed to see why an amount in excess of the invoice value of the telephones should be visited upon the forwarder and road haulier simply by reason of the fact that this apparently was the manner in which these goods were chosen to be insured. Accordingly, the amount of the judgment should be US$1,638,360, which represented the loss of 6,068 units at US$270 per unit.

As to which of the plaintiffs should be the judgment creditor, it seemed to the Judge that this should be the insurer which already had indemnified the buyer and thus it was the insurer which ultimately had borne this loss.

The Judge made the following order:

(1) there was to be judgment for the insurer against each of the forwarder and the road haulier in the sum of US$1,638,360;
(2) interest was to run on the said sum from the date of payment by the insurer to the buyer until the date of judgment herein at the rate of 1% over US dollar prime rate from time to time prevailing, and thereafter on the principal sum of US$1,638,360 at the judgment rate from time to time prevailing until payment;
(3) there was to be an order *nisi* as to costs against the forwarder and the road haulier in favour of the plaintiffs, such costs to be taxed if not agreed.

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

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