SMIC SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Unless order

The Hong Kong High Court issued a Judgment on 22/11/2013 concerning an unless order in relation to a freight forwarder's claims for outstanding freight charges of HK$4,427,336. [HCA 1755/2011]

The forwarder sued Natural Dairy in October 2011 for outstanding freight and related charges of approximately $4.4 million in respect of 67 invoices issued from May to September 2011. There was no written contract between the parties. The forwarder alleged that the contract was made orally at various meetings held between February and April 2011, evidenced by or to be inferred from correspondence spanning a period of 11 months from November 2010 to September 2011, quotations and invoices and payments by or for Natural Dairy and/or was to be inferred or implied from previous dealings. Natural Dairy's defence was that it was not the contracting party. The meetings were attended not only by Natural Dairy but also by UBNZ (Natural Dairy's supplier). The defence was that the contract was made between the forwarder and UBNZ, with Natural Dairy only being responsible for "extra charges". After the close pleadings, the action was stayed for about 7½ months pending mediation. That process failed on 8/2/2013.

Pursuant to an order made prior to the stay, the parties were to file and serve their respective lists of documents within 28 days of the termination of the mediation, i.e. by 8/3/2013. Following the failed mediation, in early March, several days before the deadline for lists to be exchanged, the parties were engaged in settlement discussions. In view of those discussions, the parties agreed to apply for a 14 day adjournment by consent, with the new deadline being 22/3/2013. While the forwarder produced its list on 22/3/2013, Natural Dairy applied by summons on that day for a 14 day extension. The forwarder's response was a summons for an unless order returnable on the same day as Natural Dairy's application.

On 2/4/2013 Master Levy ordered that "unless" Natural Dairy filed and served its list on or before 16/4/2013, the forwarder shall be at liberty to apply for judgment against Natural Dairy together with interest and costs ("the April order"). The forwarder's application for an unless order was allowed to be withdrawn.

On the following day Natural Dairy terminated the engagement of its former solicitors who however were not able to come off the record until 17/4/2013, the day after the deadline for Natural Dairy to lodge its list. As a result, Natural Dairy whose director had endeavoured to prepare a list ("the 1st list") was unable to file it although a copy was delivered to the forwarder's solicitors before the deadline. On 17/4/2013, a document with identical contents except for an amended back sheet ("the 2nd list") was received by the forwarder's solicitors. It was accepted that the 1st and 2nd lists were deficient and non-compliant.

The forwarder lost no time in taking out a judgment summons which it did on 29/4/2013.

Natural Dairy engaged its new solicitors on 3/5/2013. Their request to the forwarder for time (30 days) to review the documents and to prepare the list was refused.

Natural Dairy's solicitors then prepared a list ("the 3rd list") that was exhibited (as exhibit YWTAW-1) to the affirmation of Abraham Yung filed on 9/5/2013, the day after they filed their notice to act. The 3rd list was not formally filed as Natural Dairy's list until 21/8/2013.

Initially, Natural Dairy had opposed the judgment summons by filing Mr Yung's affirmation only. On 18/7/2013, out of an abundance of caution, Natural Dairy took out a relief summons. That summons and the forwarder's judgment summons were heard together on 31/7/2013 and 20/8/2013, culminating in the August order. At the hearings in July and August, the master appeared to have proceeded on the basis that the April order was an unless order, noting that Natural Dairy was 2½ months late in applying for relief from sanction.

But that would be correct only if the April order were a conventional unless order, namely, the type of order described in paragraph 2 of Practice Direction 16.5, triggering 0.2, r.4.

The April order's terms were unusual. Although the expression "unless" formed part of the order, on analysis, the April order was not an "unless" order as it is normally understood.

In pertinent part, Practice Direction 16.5 reads:

> "2. The common form of peremptory order known as an 'unless' order should prescribe the period within which an act is to be done, failing which the ordered consequences will follow.
> …
> 3. The other form of peremptory order in common use does not carry within its wording the sanction for disobedience …
> An order of this nature is only preliminary to an 'unless' order and on disobedience a supplementary order in 'unless' form, setting out the sanction, should be obtained. Until then the earlier order cannot be enforced."

So when a party fails to perform what has been ordered by a conventional unless order within the time prescribed, the sanction specified in the order automatically takes effect unless within 14 days of the failure the *party in default* applies and obtains relief from the court: see *Daimler AG v Leiduck* [2012] 3 HKLRD 119 at §47; O. 2, r. 4.

The so-called sanction in the April order did not have automatic effect. Nothing would happen unless and until the party *not* in default made a further court application *and* obtained a further order. The sanction or punishment for non-compliance was thus not automatic.

In the Judge's view, when, even at face value, the April order was not a conventional unless order, it would be incumbent on the court to take into account its true effect and, if necessary, all relevant facts that led to the making of the April order.

Its effect put into question the premise that the forwarder must be entitled to enter judgment for non-compliance with the April order once it made the application required. But was the application to be a mere formality? Had that been the intended effect, there would have been no reason for a conventional unless order not to have been made in the first place. The fact that the master allowed the forwarder's summons for an unless order to be withdrawn reinforced the view that the order made was not a conventional unless order.

In the Judge's view, it would be wrong to approach the judgment summons on the basis that, *prima facie,* the forwarder was entitled to enter judgment. To do so would be to give the April order an effect that could not have been intended. Otherwise there would have been no reason for the master to have eschewed a conventional unless order.

That conclusion rendered relevant the material events that led to the making of the April order. Critically, the time summons culminating in the April order was Natural Dairy's first request. There had been no prior breach. Prior to the time summons there had been no breach on the part of Natural Dairy, the extension to 22/3/2013 was by consent of the parties as earlier explained. Non-compliance with the consent order of 8/3/2013 was the first occasion Natural Dairy had breached an order of the court and, of itself, would not have warranted a conventional unless order because there had been no history of failure to comply with court orders.

The judgment summons was supported by two affirmations of the forwarder. The first complained about the failure of Natural Dairy to comply with the April order and the fact that the 1st list received by the forwarder before the deadline had been prepared by a director of Natural Dairy without first obtaining the leave of the court. The complaints were technical in nature. The forwarder's 2nd affirmation filed on 24/5/2013 was that all three of Natural Dairy's lists bore a striking resemblance to the forwarder's list and were improper and/or grossly insufficient and illusory. It was said that Natural Dairy's lists were organized and described in the same manner as the forwarder's list. In short, the complaint was that there had been extensive, if not wholesale, copying of the forwarder's list rendering Natural Dairy's lists illusory.

As regards the 3rd list, it was accepted that what appeared under the heading "(D) Other Documents" comprising 7 items or categories of documents was not copied from the forwarder's list.

In its written submissions and orally at the hearing the forwarder took a number of new points. First, it criticized the absence in the 3rd list of any written or e-mail communications between Natural Dairy (or its subsidiaries) and UBNZ. It was said that if the defence advanced had any validity, Natural Dairy would have in its possession "extensive communications" forwarding the forwarder's invoices to UBNZ and discussing

which should be classified as "freight charges" and which as "extra charges". Next the forwarder criticised Natural Dairy's failure to disclose documents unfavourable to its defence but plainly in its possession, custody and power. The documents referred to included, *inter alia*, two affidavits, one said to have been made by Natural Dairy's chief marketing officer, a Mr Shum and the other by a director of NZ Dairy, said to be the defendant's associated company. It was strenuously urged upon the court that those matters demonstrated that Natural Dairy was deliberately acting in breach of its discovery obligations and they were circumstances from which continuing non-compliance could be inferred.

The difficulty with the new points made was that they were not made in the forwarder's affirmations. As a result, Natural Dairy had not had the opportunity to respond to them. While Natural Dairy attempted to proffer oral explanations at the hearing regarding the two specific instances mentioned (i.e. absence of written communications between the defendant and UBNZ and the failure to disclose the affidavits), the court simply could not begin to go into the merits or otherwise of the new complaints, absent any proper evidentiary basis. Accordingly, they must be disregarded for the purposes in question.

Extensive copying of the forwarder's list was a major complaint. On that issue, what Natural Dairy had done was not what ought to have been done under the rules. It was probable that given the circumstances in which it found itself, having dispensed with the services of its solicitors without first securing a replacement firm and the fact that there was a vast amount of common documents (i.e. *inter partes* correspondence and commercial documents passing between the parties), Natural Dairy decided to take a 'shortcut'. It was a layman's attempt to meet the deadline only to find that the 1st list could not be filed because the former solicitors were still on the record. In any event, the 1st list was non-compliant.

Natural Dairy's unorthodox conduct which had been a source of intense irritation to the forwarder could not be condoned. In so far as what was copied comprised common documents, no real prejudice could have been caused.

Paragraph 2 of the August order reads:

> "The Defendant be relieved from the sanction imposed by the Order of Master Levy herein dated 2 April 2013 for failure to file and serve its List of Documents by 4:00 pm on 16 April 2013 on the condition that the Defendant do make a payment into Court in the sum of HK$4,427,336 which sum shall be paid by 4 instalments as follows: …"

It is apparent from those terms that the master's order was premised on the basis that there was an automatic sanction for breach of the April order. The condition imposed was the price Natural Dairy had to pay for relief. But as the premise upon which the order was based was false, the appropriateness of the condition must be called into question.

Order 2, rule 3 (1) empowers the court to order a party to pay a sum of money into court where that party has, without good reason, failed to comply with a court order.

Natural Dairy did fail to comply with the April order under which it was required to file its list by 16/4/2013. Disregarding the 1st and 2nd lists accepted to be non-compliant, the 3rd list was provided to the forwarder (although not formally filed) on 9/5/2013. Even if the 3rd list were also to be disregarded because no list had been filed as required by the rules, that failure would constitute a breach of the April order and a second breach of court orders by Natural Dairy.

In deciding the appropriate order to make, those were the only facts to which regard was to be had. No question of any relief from sanction under a conventional unless order arose because the April order did not give rise to any such sanction.

The condition (of payment in) imposed is the type of condition associated with summary judgment applications and normally imposed where, for example, there is a good ground in the evidence for believing that the defence set up is a sham defence. Quite apart from the fact that the application in question was not one for summary judgment, the case in question was not about a sham defence. Whether the defence (that the contracting party was not the defendant but its supplier UBNZ) would ultimately succeed was a matter for trial but there was nothing in the papers that would warrant a conclusion that the defence advanced was a sham defence. Where there was no proper basis for regarding a defence as a sham defence, it was evident that the imposition of a condition requiring full payment in of the amount claimed (a sum in excess of $4.4 million) would have serious consequences for Natural Dairy. Apart from affecting its cash flow, the condition could seriously hamper or even stifle the ability of Natural Dairy to defend the claim.

In exercising its discretionary powers, it has to be borne in mind that the primary objective is to secure a just resolution of the dispute in accordance with the substantive rights of the parties. In the Judge's view, the condition imposed would not have furthered that objective.

Natural Dairy submitted that the condition imposed served merely to punish and, as such, was not a proper reason for the exercise of the power. Natural Dairy referred to the decision of Buckley J in *Mealey Horgan plc v Horgan*, (1999) The Times, 6/7/1999 for guidance as to the circumstances that would warrant its exercise. That case concerned a breach of an order to file the defendant's witness statement by a certain date. The claimant had submitted that the court should be tough to ensure compliance with the new rules (i.e. the CPR) and that failure to adhere to them should be penalised. But Buckley J considered that:

> "a payment into court might be appropriate if a party had behaved worse than the defendants had in this case; that is, where there was a history of repeated breaches of timetables, court orders or something in the conduct of the party that gave rise to the suspicion that it was not bona fide and the court thought the other side should have protection."

On the facts, the defendant's default (being 2 weeks late in serving its witness statement but which was served 6 weeks before trial) had not prejudiced the trial and had not significantly prejudiced the claimant. In those circumstances the court considered that there could be no reason to require payment into court other than as pure punishment and Buckley J did not read the rules as encouraging the courts to punish this type of default.

The Judge respectfully agreed with the approach of Buckley J. That is consistent with the approach of Millett J in *Logicrose Ltd v Southend Football Club Ltd*, The Times, 5/3/1988, a decision of the pre-CPR era, where it was held that deliberate disobedience of a peremptory order, while a contempt, should not deprive a litigant of his right to a fair trial unless that conduct was deserving of punishment because that failure had rendered it impossible to conduct a fair trial.

The concept of proportionality is a relevant consideration in circumstances where the court is minded to sanction a party for breach or non-compliance with the rules and court orders. The sanction has to be commensurate with the gravity of the 'crime'. In *Husband's of Marchwood v Drummond Ltd* [1975] 1 WLR 603, Russell LJ considered (at 606 G-H) that a condition requiring the defendants to pay the balance of the claim into court or be barred from defending the action because they had failed to comply with the discovery order to be "something which is quite inappropriate, in the sense that it is a punishment which does not fit the crime." Proportionality of the sanction is a weighty factor in the weighing exercise to be undertaken on a fresh exercise the discretion: see per Fok JA in *Daimler AG* at §§ 57 et seq.

The condition imposed on the defendant to pay into court the amount claimed prior to trial is draconian. On the facts of the case in question, it was wholly out of proportion to the breaches that had occurred. The order made was plainly wrong and unsustainable.

The proceedings were at an early stage and no milestone had yet been reached. Clearly, the objective must have been to progress the action. To that end proper discovery must go forward. At the time the August order was made, Natural Dairy had not yet filed its list. Clearly it would have been appropriate for a conventional unless order to have been made at that stage having regard to the prior breaches but that was now water under the bridge since Natural Dairy's list was filed the day after the August order pursuant to paragraph 5 of that order. If the forwarder were to take the view that specific documents had been omitted, there were avenues it could pursue if so advised.

In exercising the discretion afresh, the Judge had no hesitation in setting aside the condition requiring payment into court. In all other respects, the August order was to take effect. There was to be an order *nisi* of costs in favour of Natural Dairy with certificate for counsel.

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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