SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Delay in appeal

The Hong Kong Court of Appeal issued a Judgment on 29/1/2016 dealing with a case of one or two days' delay in appeal in relation to a barge sinking accident. [HCMP 3172/2015]

Background

The proceedings arose out of the sinking of a container feeder barge "Ying Gao 306" ("the Vessel") in Hong Kong waters near Green Island on 30/4/2009. When the Vessel sank, there were 49 containers on board fully laden with cargo.

The 1st plaintiff was the charterer of the Vessel, operating the Vessel by employing its own master and crew on board. The 2nd plaintiff was the shipping agent of the 1st plaintiff, responsible for completing departure and arrival port formalities for vessels chartered by the 1st plaintiff as well as collecting and paying shipping charges on its behalf.

The 1st defendant and its associated company in the Mainland carried on the business of carriage of container cargo between Hong Kong and ports in Guangdong. They would either use their own chartered vessels to carry the cargo or would engage other feeder service providers to do so. The 2nd defendant carried on business as ocean-going cargo carrier. By a connecting carrier agreement dated 1/7/2005, it engaged the 1st defendant to provide connecting service between Hong Kong and ports in Guangdong.

On 29/4/2009, the 1st defendant engaged the 1st plaintiff to provide feeder service to carry 28 containers of cargoes from Huangpu, Guangzhou to Hong Kong and 21 containers of cargoes from Hong Kong to Huangpu, by virtue of two contracts respectively ("the Contracts").

The Vessel's certified deadweight tonnage and hence its cargo carrying capacity was 1,380 tonnes. The owner of the Vessel had imposed, and instructed the 1st plaintiff as its bareboat charterer to comply with, a safety guideline limiting the Vessel's carrying capacity in Hong Kong coastal waters to 80% of its deadweight tonnage i.e. 1,104 tonnes. If loaded at more than 80% of its deadweight tonnage in Hong Kong waters, the Vessel could become unsafe.

On 30/4/2009, the Vessel sank in Hong Kong waters near Green Island with the 49 containers on board fully laden with cargo. At the time of sinking, the gross weight of the cargo, (i.e. the net weight of the cargo plus packaging) on board was 1,115.095 tonnes. The gross weight of the containers, i.e. gross cargo weight plus tare weight of containers ("Gross Container Weight") on board was 1,297.46 tonnes. The Gross Container Weight of the 49 containers exceeded 80% of the Vessel's deadweight tonnage.

The plaintiffs sued the defendants for loss and damage based on three causes of action, namely, misrepresentation, breach of implied terms and negligence.

On implied terms, the plaintiffs alleged that the Contracts contained various implied terms by virtue of past dealings and/or as a matter of law in order to give business efficacy. The relevant implied term was :

> "The 1st defendant must provide accurate information on the gross weight of the containers which would be relied upon by the 1st plaintiff for the calculation of charges and the planning of a safe voyage within the loading capacity of the Vessel." ("the Term")

The plaintiffs further alleged that the 1st defendant misrepresented to the 1st plaintiff the Gross Container Weight of the 28 containers under the 1st Contract and of the 21 Containers under the 2nd Contract. By reason of the misrepresentation, the Vessel was loaded with 49 containers with the Gross Container Weight exceeding her safe and proper capacity. The overloading adversely affected the Vessel's stability or made it unseaworthy. As a result, the Vessel sank.

The plaintiffs' case against the 2nd defendant was twofold. First, as principal, it was vicariously liable for the 1st defendant's negligence. Second, the 2nd defendant owed an independent duty of care to the 1st plaintiff in respect of the weight statements given in its own bills of lading. The 2nd defendant had breached such a duty of care.

The defendants counterclaimed for loss and damage arising from the sinking of the Vessel essentially on the plaintiffs' liability as bailee and contracting/sea carrier.

The High Court Judge found that the Vessel sank because of overloading. He further found that it was the error of the Vessel's master who allowed the Vessel to be overloaded. Moreover, he found that the Contracts did not contain any of the implied terms contended for by the plaintiffs including the Term; and that the 1st defendant did not make any misrepresentation as alleged.

Appeal

By a summons dated 30/11/2015, the plaintiffs sought an extension of time to file the notice of appeal against the High Court's Judgment dated 19/10/2015, dismissing the plaintiffs' claims and entering interlocutory judgment on liability against them on the defendants' counterclaims with damages to be assessed.

The plaintiffs' summons was procedurally misconceived because the proper way to commence an appeal is by service of the notice of appeal on the intended respondent and even if leave were granted to the plaintiffs to file the notice of appeal out of time, it would get them nowhere. The plaintiffs conceded that it was a mistake to seek an extension of time to file the notice of appeal. Although the plaintiffs' summons was thus procedurally misconceived, the Court of Appeal did not think either the 1st defendant or the 2nd defendant seriously pressed the point that the plaintiffs' application should be dismissed on that basis alone. So the Court of Appeal treated the plaintiffs' application, despite the mistake in the summons, as one for extension of time to serve the notice of appeal on the defendants.

The four factors

It is well settled that in dealing with an application like the one in question, the court will take into account :

(1) the length of the delay;
(2) the reasons for the delay;
(3) the chances of the appeal succeeding if time for appealing is extended; and
(4) the degree of prejudice to the potential respondent if the application is granted.

Length of delay and reasons for delay

The High Court Judge handed down his judgment on 19/10/2015. By virtue of Order 59, rule 4(1)(c), a notice of appeal should have been served within 28 days of the date of the judgment i.e. 16/11/2015.

According to Mr Ho of the solicitors of the plaintiffs, who had conduct of the litigation, his firm tried to file the notice of appeal on 16/11/2015 but were not allowed to do so because they were unable to file the sealed order of the judgment, which was not yet available, together with the notice of appeal. It would appear that Mr Ho was then under the misconception that a notice of appeal had to be filed in order to trigger the appeal process. On either 17/11/2015 or 18/11/2015, the plaintiffs' solicitors served the notice of appeal on the defendants' solicitors by hand delivery. There was a delay of 1 or 2 days in service. There was a further delay of 10-odd days when the summons in question was only taken out on 30/11/2015.

In the Court of Appeal's view, the delay in serving the notice of appeal and the delay in taking out the application in question were insubstantial.

That said, Mr Ho was unable to explain the delay satisfactorily. He only said, without any reason in support, that he and the handling clerk thought that the deadline for service was 17/11/2015. He did not explain why it had taken the plaintiffs almost another fortnight from 17/11/2015 or 18/11/2015 to take out the application in question either. The plaintiffs conceded that the delay due to Mr Ho's mistake was inexcusable.

Chances of success

Because the delay was inexcusable, according to the well established principle, the plaintiffs had to satisfy the Court of Appeal that their proposed appeal had a reasonable prospect of success.

The notice of appeal raised 3 grounds of appeal :

> " 1. The learned Judge erred in law and in fact (at paragraph 107) in holding that the Contracts between the 1st Plaintiff and the 1st Defendant were perfectly effective and workable in practice even without [the Term]. The learned Judge ought to have found that it was an implied term for the 1st Defendant to inform the 1st Plaintiff of the gross weight of the containers which would be relied upon by the 1st Plaintiff for the calculation of charges and the planning of a safe voyage within the loading capacity of Yinggao 306 ("the Vessel") by reason of the following:
>
> (a) Regulation 3(4) of the Merchant Shipping (Safety) (Carriage of Cargoes) Regulation (Cap 369AV) requires the shipper to provide the gross cargo unit, being the gross contained weight.
>
> (b) The 1st Defendant, being the shipper in this case, could have access to information from its customers to the tare weight of the container.
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> (c) The 1st Plaintiff's being the actual feeder carrier, would only be able to see the tare weight stenciled on the door of the container after the Contracts have been concluded and when, on some occasions, receiving the containers from any ocean carrier.
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> 2. As a consequence of Ground 1 above, the learned Judge erred in finding (at paragraphs 152 and 156 of the Judgment) that the sinking of the Vessel was caused by overloading which was Master Pang's error by allowing the Vessel to be overloaded, and the consequent loss of containers and cargo inside was due to the fault of the 1st Plaintiff as bareboat charterer, contracting carrier and bailee. The learned Judge should have found that the 1st Defendant was in breach of the implied term by wrongfully providing the 1st Plaintiff the incorrect gross weight of the 49 containers, which caused the Vessel to be overloaded and sank, and the consequent loss of the containers and cargo inside was due to the fault of the 1st Defendant.
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> 3. It follows that the learned Judge erred in finding that the counterclaim of the 2nd Defendant has succeeded against the 1st Plaintiff and should have found that the 2nd Defendant's counterclaim has failed as the consequent loss of containers and cargo inside was due to the fault of the 1st Defendant."

As formulated, Ground 1 was pivotal. If the plaintiffs failed to show that Ground 1 had a reasonable prospect of success, then Grounds 2 and 3 would not take their case any further.

The plaintiffs made no reliance on or even reference to Regulation 3(4) the Merchant Shipping (Safety) (Carriage of Cargoes) Regulation at the High Court trial in support of their case that the Term should be implied into the Contracts. The Court of Appeal failed to see how they could in the appeal. This disposed of factor (a) in Ground 1.

As to factors (b) and (c), the Court of Appeal was of the view that they were re-runs of points already dealt with by the High Court Judge. The Court of Appeal was not satisfied that the plaintiffs had raised any reasonably arguable point based on them in support of their case that the Term should be implied into the Contracts.

In the course of his oral submissions, the plaintiffs' counsel tried to criticize various findings made by the High Court Judge. But those criticisms did not feature in the Notice of Appeal. The plaintiffs' counsel justified his submissions by saying that they were closely linked to factors (b) and (c). The Court of Appeal disagreed. If the plaintiffs wanted to challenge those findings made by the High Court Judge, they had to be expressly identified in the notice of appeal. Cogent reasons why the Judge got them wrong had to be clearly set out, too. Failing that, the Court of Appeal would not entertain the plaintiffs' criticisms.

The Court of Appeal was not satisfied that the plaintiffs had raised a reasonably arguable case that the Term should be implied into the Contracts.

Even if the Term were to be implied into the Contracts, that would not take the plaintiffs' case any further. In order to succeed on their claims against the defendants, the plaintiffs had to prove not only the Term but also the misrepresentation as contended. The plaintiffs' claims against the defendants were predicated upon the common thread of the misrepresentation alleged. But the High Court Judge had found against the plaintiffs on the misrepresentation. And there was no appeal by the plaintiffs against the High Court Judge's finding on the misrepresentation point. That being the case, the plaintiffs' claims had to fail even if the Term were to be implied into the Contracts.

For the above reasons, the Court of Appeal was not satisfied that the plaintiffs had shown that their proposed appeal had a reasonable prospect of success on Ground 1. The same was also true for Grounds 2 and 3.

Prejudice

In light of the Court of Appeal's conclusion on the third factor, it was not necessary for the Court of Appeal to consider the fourth factor of prejudice.

Conclusion

The Court of Appeal dismissed the plaintiffs' application with costs to the defendants, 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@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com