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To: Transport Industry Operators

### Cargo loss summary judgment

The Hong Kong High Court issued a judgment on 21/4/2016 and disallowed a cargo owner's application for summary judgment against a forwarder in connection with a cargo (a diamond) missing claim of US\$900,000. [HCCL 10/2015]

The cargo owner claimed to be the joint owner of a 32.4 carat polished diamond of a cushion brilliant shape and cut ("**Diamond**"). The cargo owner was an exhibitor at the Hong Kong Jewellery & Gem Fair which was held in September 2014 ("**Fair**"). On the last day of the exhibition, on 19/9/2014, the cargo owner claimed that it entrusted and delivered the Diamond to the forwarder at the forwarder's collection point in the Fair ("**Collection Point**"), initially for storage and safe keeping, and later gave instructions to the forwarder to deliver the Diamond to the cargo owner's specified address in Belgium. The cargo owner claimed that the forwarder failed to deliver the Diamond to it, because it was discovered, when the shipment arrived in Belgium, that the Diamond was not in the parcel which was sent from Hong Kong. The cargo owner claimed that the forwarder was in breach of its agreement with the cargo owner for the storage and shipment of the Diamond ("**Agreement**"), had failed to exercise reasonable care and skill in providing the storage and shipment services, and had converted the Diamond. The cargo owner claimed the delivery up of the Diamond or its value of US\$900,000, or damages.

The forwarder denied that the cargo owner had transferred physical possession of the Diamond to the forwarder, and denied that it had received the Diamond. The forwarder claimed that the cargo owner's representative had only passed a brown box to the forwarder's representative at its Collection Point, which had not been opened by the cargo owner and the forwarder, that the brown box had been placed into the forwarder's usual yellow sack for dispatch ("**Yellow Sack**"), that the Yellow Sack had been sealed and identified with a seal number in the presence of the cargo owner's representative, and that the Yellow Sack had not been tampered with nor was its seal broken until its arrival in Belgium. It was the forwarder's evidence that when the shipment arrived in Belgium, the Yellow Sack was unsealed under CCTV surveillance, and when the brown box was opened, it was discovered that the box was empty.

The cargo owner claimed that the forwarder had no defence to its claims, since the forwarder had acknowledged in writing on its standard form of Shipping Instructions (entitled Domestic Secured Service Shipping Instructions, and dated 19/9/2014 "**Instructions**") that it had received the Diamond, that the forwarder's assertion that the cargo owner had handed over an empty box to the forwarder at the Collection Point was unsupported by evidence and was unbelievable, and that any exclusion clause relied upon by the forwarder to avoid or limit its liability did not and could not apply. The forwarder pleaded in its defence that Clause 12 of the conditions of the Instructions provided that the forwarder should not be liable for loss of, damage to the shipment or liability caused by or resulting from "mysterious disappearance or unexplained loss from or damage to the contents of any Parcel described".

#### Legal principles

The principles applicable to applications for summary judgment are clear and not in dispute. To resist an Order 14 application, the defendant must show that there are triable issues. A concise statement of the standard approach in an application for summary judgment is to be found in the dicta of Ma J in *Schindler Lifts (Hong Kong) Ltd v Ocean Joy Investments Ltd* [2003] 1 HKC 438. The court has to determine two questions: firstly, whether what the defendant says is believable as opposed to whether its version of events is to be

believed; and secondly, if it is, whether what the defendant says amounts to an arguable defence in law. In determining the first question, the court should not embark on a mini trial of the action on affidavit evidence. The burden of proof is not a heavy one. It is not the function of the court at this stage to assess if a defence will succeed at trial. Insofar as the second question is concerned, summary judgment will not be granted if there are arguable defences or serious disputes of law.

Nor should there be any dispute as to the principles applicable to the interpretation of contracts. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

### Triable issues?

Factually, there was dispute on the evidence as to whether the Diamond had been placed by the cargo owner's Mr Nissan ("**Nissan**") in a small black box, which was then placed in a small white box secured with 2 elastic bands, with the weight of the Diamond written on the white box, as Nissan alleged, before it was handed over to the forwarder's Mr Matalon ("**Matalon**"). Matalon himself had no recollection of whether the box which Nissan handed to him was brown or white, but his colleague who had allegedly seen Nissan and had directed Nissan to Matalon claimed that Nissan was carrying a brown box. The parties agreed that whatever box which was handed over to Matalon was not opened before it was put into the Yellow Sack, and that the Yellow Sack was sealed with a plastic zip tie marked and identified with a seal number 60512160 ("**1<sup>st</sup> Seal**"), all in the presence of Nissan. The standard form Instructions was completed by Nissan, and then signed by Nissan on behalf of the cargo owner, and by Matalon on behalf of the forwarder, in each other's presence.

On the forwarder's evidence, all the closed and sealed Yellow Sacks delivered to or collected by the forwarder were placed on a metal trolley, and then taken to the forwarder's sorting area or hub in another part of the exhibition hall. The metal trolley was continuously guarded by a security guard, and when all scanning and formalities had been cleared, the Yellow Sacks would be taken to the forwarder's secured storage facility in Hong Kong, where the Yellow Sack containing the cargo owner's shipment ("**cargo owner's Yellow Sack**") was kept. On about 6/10/2014, the forwarder received Nissan's instructions to ship the consignment to Belgium. A set of the forwarder's standard form Global Shipping Instructions was signed by the cargo owner and faxed to the forwarder. On receipt of such instructions, the forwarder's evidence was that the cargo owner's Yellow Sack was then placed inside a second Yellow Sack ("**2<sup>nd</sup> Yellow Sack**"), and sealed with a separate seal of the forwarder marked with a seal number 60541664 ("**2<sup>nd</sup> Seal**"). On the forwarder's evidence, when the shipment arrived in Antwerp, the 2<sup>nd</sup> Yellow Sack with the 2<sup>nd</sup> Seal intact, and the cargo owner's Yellow Sack also with the 1<sup>st</sup> Seal intact, were both opened at customs under CCTV surveillance, when the seals were cut with a bolt cutter. An unopened brown cardboard box bearing the forwarder's name and logo, sealed with the forwarder's tape, was then emptied from the cargo owner's Yellow Sack, and the box was cut open with a knife. This box was shown to be empty, and the forwarder's case was that this box taken out from the untampered, sealed Yellow Sacks was the very same box that Nissan had handed over to Matalon on 19/9/2014. The alleged white box, and the alleged black box in which the Diamond was claimed to have been put by Nissan, were nowhere to be found.

The cargo owner's case was that the denials and assertions made by the forwarder did not support any defence, since the forwarder was estopped from disputing that it had received the Diamond from the cargo owner. The cargo owner relied on the fact that by the Instructions, the forwarder had acknowledged in writing that it had received the Diamond, described to be 32.4 carats in weight and US\$900,000 in value, in good condition, for delivery to the cargo owner. The cargo owner argued that the acknowledgment served as prima facie evidence of the matters represented, that the shipment contained the Diamond of a specific weight and value, and that the parties were contractually estopped from denying such a state of affairs, regardless of any detrimental reliance, and whether or not such state of affairs was in fact true (*DBS Bank (Hong Kong) Ltd v San Hot HK Industrial Co Ltd* [2013] 4 HKC 1).

The relevant acknowledgment contained in the Instructions is in the following terms:

"On behalf of (the forwarder), the undersigned subject to the terms and conditions on the reverse side of this document, hereby acknowledges receipt of the described shipment in good condition and with no

indication of having been broken or tampered with, for delivery to the above named party at the address shown above.” (Emphasis added)

Above such acknowledgment appears the customer’s (i.e. the cargo owner’s) statement, in the following form:

“On behalf of the customer, the undersigned hereby states that the description of the shipment and its contents is accurate and complete:

Pieces 1

Weight 32.40

Declared value (USD) 900,000

Description of Property polished diamond”

(emphasis added)

The cargo owner argued that construed as a whole, the forwarder contracted under the Agreement to assume liability for the “physical loss of, or damage to the shipment resulting from any cause whatsoever”, on the basis of the cargo owner’s warranty that the contents of the shipment had been accurately described, and the cargo owner’s agreement to indemnify the forwarder for any loss resulting from the breach of any such warranty. The cargo owner stressed that the burden was on the forwarder to show that the loss fell within the contractual exclusion of “mysterious disappearance or unexplained loss from the contents of any parcel described in the shipment”, and that the forwarder had slim prospects of success in establishing this.

It was not disputed that the description of the shipment (as comprising a polished diamond of the declared weight and value) was made by the customer, i.e. the cargo owner. It was not disputed that the box which was handed over by Nissan to Matalon had never been opened for the contents to be verified or checked. The forwarder claimed that the trade practice of couriers and shippers was **not** to open and inspect the packages and cargo delivered by customers for dispatch. This was conceivable, as no expert could be available on each occasion to inspect and verify the description of the precious stone or gem delivered for storage or courier.

It was also pertinent that the terms and conditions on the reverse of the Instructions (“**Terms and Conditions**”), to which express reference was made on the face of the Instructions itself, defined the term “shipment” as used in the forwarder’s acknowledgment of receipt and the cargo owner’s statement. The Terms and Conditions state:

“The particulars on the front page of the Shipping Instructions and the terms defined therein, together with these Terms and Conditions and any other documents provided by (the forwarder) ... shall be deemed to form an integral part of the Shipping Instructions, all of which are part of the agreement between the Customer and (the forwarder) and hereinafter collectively referred to as the “MA-Contract”. By signing this MA-Contract, Customer agrees to all the terms of this MA-Contract and any rider hereto...”

In particular, clause 4 of the Terms and Conditions provides as follows:

“A “Shipment” for the purposes of this MA-Contract shall be deemed to mean any distinctively and securely sealed parcel (or parcels) which is (are) said to contain the Property described on the front page or rider hereto and which is (are) packaged as specified in Section 14 (f) or rider hereto.”

The forwarder’s acknowledgment of receipt, set out in the Instructions and sought to be relied upon by the cargo owner, was expressly stated to be subject to the Terms and Conditions. The customer’s request for the forwarding of the shipment described in the Instructions was likewise expressly made subject to the Terms and Conditions.

The forwarder’s liability was set out in clause 11 of the Terms and Conditions, which provides:

“(The forwarder) shall be liable for the physical loss of, or damage to the Shipment resulting from any cause whatsoever, during the period of responsibility, subject however to the exclusions from liability and limitations of liability set forth hereinafter.”

Clauses 12 and 13 of the Terms and Conditions set out exclusions from and limitations of the forwarder’s liability, for specified loss of or damage “to the Shipment”, including shortage or mysterious disappearance or unexplained loss from or damage to the contents of any Parcel described (under clause 12 (c)).

It is in the Judge's view reasonably arguable that on a proper construction of the Agreement, and taking into account the definition of "Shipment" in clause 4 of the Terms and Conditions, the forwarder's acknowledgment of receipt, contained in the Instructions, was only intended by the parties, at the time when the Agreement was made, to be an acknowledgment of receipt of the sealed parcel, *said* and stated by the cargo owner *to contain* the property described by the cargo owner in the Instructions as "polished diamond", 32.40 in weight and of a declared value of US\$900,000. As clause 14(f) of the Terms and Conditions provided, the cargo owner as customer acknowledged and agreed that the forwarder should be under no obligation to ascertain or check the contents of any parcel forming part of the "Shipment" as defined. Clause 14 (f) further expressly provided that "the Shipment shall be considered delivered in good order and condition, unless the Customer's sealed parcel(s) or container(s) show evidence of tampering or penetrating damage at the time of delivery". As the evidence showed that the cargo owner's Yellow Sack and the 1<sup>st</sup> Seal were not damaged, nor was there any evidence of tampering of the cargo owner's Yellow Sack and the 1<sup>st</sup> Seal, at the time of delivery in Belgium, it was reasonably arguable that the Shipment, as defined, was delivered in good order and condition.

When the definition of "Shipment" was considered and borne in mind, as a reference to a parcel or parcels "said to contain the Property described" on the front page of the Instructions, the Judge did not agree that clause 14 of the Terms and Conditions could not be sensibly and commercially construed, simply because there were different references to "Shipment", "Property" and "parcel" in different contexts.

It would be a matter of evidence, including evidence of trade custom and usage, as to the purpose and objective of the "said to contain" provisions in the Agreement.

If there was no estoppel which operated to prevent the forwarder from disputing the contents of the shipment, the Defence and evidence filed for the purposes of the application for summary judgment showed that there were triable issues, as to whether the cargo owner and Nissan on its behalf had in fact delivered the Diamond, allegedly in the black box which was placed in the white box, to the forwarder, and whether it was a brown box with the forwarder's name which was delivered to the forwarder at the Collection Point. The cargo owner had put in evidence CCTV footages and screenshots, from the CCTV cameras installed within the cargo owner's booth at the Fair. The Judge could not find from these materials clear evidence that the Diamond inspected by Nissan on the day and in the booth was indeed put into the black box, and then into the white box, as alleged. The footages did not cover the entire time period in question as there were gaps in time which were not shown on the screenshots. Even if Nissan's claims were accepted in full as to what had happened in the cargo owner's booth, the CCTV footages did not show that the white box (allegedly containing the black box and the Diamond) taken from the cargo owner's booth by Nissan was in fact handed over to the forwarder at the Collection Point, in the state Nissan claimed, without the forwarder's cardboard brown box. There was no evidence as to what had happened between the time when Nissan left the cargo owner's booth with the white box, and when he arrived at the forwarder's Collection Point, and what Nissan had handed over to Matalon. All this would be a matter for cross-examination at trial.

### Orders

Since the Judge was satisfied that there were triable issues as to the construction of the Agreement, whether the Diamond had been delivered to the forwarder, and that the forwarder had raised an arguable defence that the cargo owner's loss did not result from a failure on the forwarder's part to exercise care, the Judge gave unconditional leave to the forwarder to defend the cargo owner's claims.

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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