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Ref : Chans advice/190

To: Transport Industry Operators

**Assignment vis-à vis cargo misdelivery**

The Hong Kong High Court issued a Judgment on 22/8/2016 dealing with a case that a forwarder wanted to strike out a cargo misdelivery claim on the ground that the claim disclosed no reasonable cause of action. [HCCL 5/2015]

On 17/2/2016, the defendant ("**the forwarder**") applied by summons to strike out the claims made against it by the plaintiff ("**Skechers**"), on the ground that the Amended Statement of Claim dated 13/8/2015 ("**Amended SOC**") disclosed no reasonable cause of action, was embarrassing, scandalous and otherwise an abuse of the process of the court.

On 10/6/2016, Skechers filed its summons dated 12/5/2016 to further amend the Amended SOC, and to join 19 other parties as plaintiffs in the action. The application was opposed by the forwarder, on the basis that the amendments were not sufficiently formulated, that no explanation had been given by Skechers as to why it sought to depart from its originally pleaded and verified case, and that without the amendments, Skechers' claim was fatally flawed such that it should be struck out.

On the striking out application, the forwarder claimed that Skechers' claim was made under the bills of lading ("**Bills**") pleaded in the Amended SOC, but that it had no title to sue as it was not a party to the Bills. It was only in the Re-amended Statement of Claim which Skechers sought leave to be filed ("**Re-amended SOC**") that Skechers pleaded that the proposed 2<sup>nd</sup> to 20<sup>th</sup> plaintiffs were the parties to the Bills, and that it sought to rely on various assignments which purportedly took place between Skechers and the additional plaintiffs. Without the alleged assignments, the forwarder claimed that Skechers had no title to sue, that the Amended SOC disclosed no cause of action, and the amendments sought to be made in the Re-amended SOC were for the purpose of saving the proceedings from being struck out. The forwarder claimed that in these circumstances, the proper course was for the court to strike out the Amended SOC, but grant leave to Skechers to amend (if there was a properly formulated amended claim), with costs to the forwarder.

*The pleaded causes of action*

On a detailed review of the Amended SOC, the Judge accepted the submissions and explanations made on behalf of Skechers, that the cause of action relied upon and as pleaded in the Amended SOC was for the forwarder's misdelivery of goods under the Agreements pleaded in paragraph 4 (a) of the Amended SOC. As defined in paragraph 4 (a), the "Agreements" were the contracts for shipment of goods, which Agreements were made orally

and were evidenced partly in writing and partly by conduct. The oral contract was Skechers' instructions to the forwarder for the goods to be shipped. The Agreements were evidenced in writing by the Bills, as pleaded in paragraph 4 (b) of the Amended SOC. The conduct relied upon as evidence of the Agreements was the previous course of dealings between Skechers and the forwarder as pleaded in paragraph 5 of the Amended SOC. This was the state of the pleadings as at the date of the Amended SOC.

As pleaded, therefore, the Amended SOC disclosed an arguable cause of action on the basis of the oral Agreements and the previous course of dealings allegedly between Skechers and the forwarder. The forwarder might claim that there were insufficient particulars of the oral agreements allegedly made, in which case it was open to the forwarder to seek further and better particulars. The Judge did not agree that the cause of action was unarguably bad, such that it was plain and obvious that Skechers' claims should be struck out. Whether the Agreements existed and could be established was a matter of evidence and proof at trial, and not for striking out (*Mak Yiu v Chinachem Realty Ltd* HCA 10335/1998, 17/11/1999).

### The proposed re-amendments

The defence raised, that Skechers was not a party to the Bills, prompted Skechers to apply to amend its pleading and to join the parties named in the Bills as the proposed 2<sup>nd</sup> to 20<sup>th</sup> plaintiffs. By the Re-amended SOC, Skechers sought to plead that the proposed 2<sup>nd</sup> to 20<sup>th</sup> plaintiffs were the shippers named in the Bills, but they had assigned to Skechers their rights under the Bills and the contracts of carriage evidenced by the Bills. The assignments were pleaded to be dated January, February and March 2015 ("**Assignments**"), before the date of the Writ.

The forwarder claimed that as Skechers' pleaded case was that its right of suit was transferred to it by reason of the Assignments, the Amended SOC disclosed no viable title to sue without the Assignments.

In the absence of a plea of any notice of the Assignments having been served on the forwarder, it would appear on the face of the proposed Re-amended SOC that Skechers was an equitable assignee. The Judge accepted the submissions made on behalf of Skechers, that an equitable assignee might sue in its own name (*Allson Classic Hotel (HK) Limited v Harvest Star International Limited* [1996] 2 HKLR 330), and that the plea of an assignment did not introduce a new cause of action (*Asia-Pac Infrastructure v Shearman & Sterling* [2012] 3 HKLRD 321, *Beijing Tong Gang v Allen & Overy* [2015] 4 HKC 391). So long as the Assignments were in existence at the date of the Writ, they could be pleaded by way of amendment (*Telecommunications & Technology v Outblaze Ltd* HCA 2541/2009, 13/5/2011). The Judge also accepted that no question of contractual time bar applied to the facts of this case, where the goods in question were delivered without production of the original Bills (*Cheong Yuk Fai v China International Freight Forwarders* [2005] 4 HKLRD 544 at 556 and *Starlight Exports v CTO* HCCL 55/2004, 19/7/2006).

The forwarder's complaint was that the Assignments were not sufficiently pleaded. Whether they were valid under the relevant governing law, whether they were supported by valid consideration, whether they were absolute assignments, whether their terms had been sufficiently pleaded and were clearly agreed, and whether the Assignments in fact took place before the Writ was issued (as was alleged), could be pursued by requests for further and better particulars, and were to be tested and established at trial. On the whole, the Judge considered that the pleadings of the Assignments were adequately formulated. As Skechers emphasized,

Skechers had a cause of action which was constituted at the time when the Writ was issued and the Amended SOC was filed, in reliance on the verbal Agreements evidenced by the course of dealings between Skechers and the forwarder. The assignors were joined as a matter of practice (*Chitty on Contracts* Vol 1 32<sup>nd</sup> Ed, para 19-039 to 19-040), particularly when there was a dispute as to the validity or effect of the assignments sought to be relied upon. In view of the arguments already raised by the forwarder, as to the consideration for the Assignments, their governing law, and whether the Assignments had actually been made, it could not be said that the joinder of the assignors as plaintiffs would not be necessary.

The Judge did not consider that the amendments proposed by the Re-amended SOC introduced allegations which were inconsistent with the verified claims originally made in the Amended SOC, on the basis of the Agreements being partly oral and partly evidenced in writing and by conduct. The forwarder's complaint, that Skechers had failed to give an explanation for its need to make the amendments, by reference to para 20/13/1 Hong Kong Civil Procedure, was not established.

*Orders on striking out, amendment and dismissal applications*

This was not a plain and obvious case that the Amended SOC should be struck out. Nor did the Judge consider that there were grounds to refuse leave to Skechers to re-amend the Amended SOC, in order to plead the Assignments and to join the 2<sup>nd</sup> to 20<sup>th</sup> plaintiffs. The forwarder's application to strike out the legal action was dismissed, and the Judge granted leave to Skechers on its application to join the 2<sup>nd</sup> to 20<sup>th</sup> plaintiffs and to re-amend the Amended SOC.

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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