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5 May 2017
Ref : Chans advice/196

To: Transport Industry Operators

Uncollected cargoes - interrogatories

The Hong Kong High Court issued a ruling on 2/12/2016 dealing with a shipowner's interrogatory application in relation to an uncollected cargo case. [HCAJ 118/2015]

The Plaintiff was the registered owner of the vessel "SOPHIA Z". On about 24 July 2015, a cargo of slightly over 50,000 steel billets was shipped on board the vessel from a port in the PRC to a port in Algeria under a bill of lading.

The 1st Defendant was the named shipper under the bills of lading, the seller under a sales contract with the 7th Defendant (ie the buyer), and the named beneficiary under a letter of credit issued by the 6th Defendant, a bank in Algeria.

The shipowner duly carried the cargo to Algeria. On arrival, the buyer refused to take delivery while shipper did not give fresh instructions to the shipowner as to how to deal with the cargo.

Subsequently, the shipowner arranged for the discharge and sale of the cargo in Europe at considerable cost. The cargo's original value was about US$12 million. After the sale, about US$2.4 million was kept in the shipowner's account in Germany. Another US$1.3 million had been paid into Court in Italy.

None of the Defendants had come forward and made a claim against the shipowner for having sold the cargo. Rather, it was the shipowner who instituted the legal proceedings in October 2015.

In its prayer for relief, the shipowner sought various declarations, the essence of which was that the shipowner had already fulfilled its duty of delivery and it was under no liability for having sold the cargo and kept the proceeds. It also sought damages against all Defendants in the action, except the 5th Defendant (Deutsche Bank China), for breaches of contract and/or duty in their failure to perform their contractual obligations under the bills of lading.

The shipowner made an application to the Court seeking an order pursuant to RHC O 26 that the 1st to 4th Defendants do answer the shipowner's interrogatories dated 20 July 2016 on an unless basis.
The interrogatories were in these terms:
"1. Was the cargo lately carried on board the 'SOPHIA Z' under the bill of lading LD001002 covered by an insurance policy?
2. If the answer to the first interrogatory is yes:
(a) Was the insurance policy a cargo insurance or credit insurance policy;
(b) Has a payment been made under that policy and if so to whom and when;
(c) What is the identity of the insurer.
(d) When payment was made did the insurer became [sic] subrogated to any parties' rights or was there any assignment of rights from the party receiving the funds to the insurer?

3. Whether D1 to D4 has been compensated by an insurer or not in respect of the cargo, has any action been taken by D1 to D4 (or insurers) to recoup the invoice value of the cargo from any banks involved in the credit arrangement between D1 and D7 as indicated at the hearing dated 30 October 2015."

"4. If the answer to the third interrogatory is yes:
(a) Before which Court has the action been taken?
(b) Has the action been determined?
(c) If not, when is it anticipated to be determined?

5. Where are the original bills of lading numbered LD001002?"

The primary purpose of the shipowner's application was to ensure that the shipowner and its vessel were protected from legal actions in connection with the sale. Specifically, the shipowner was concerned about claims for misdelivery and/or conversion by someone purporting to be the true owner of the cargo and/or its insurer.

Thus, the shipowner sought, by the interrogatories, to identify all relevant parties and bring them before the Court so that the matter in the action in question could be resolved once and for all in a way that bound all concerned parties and to ensure that the shipowner and its vessel were protected from further legal action.

In support of its application, the shipowner had adduced expert evidence to the effect that, under PRC law, an insurer, upon subrogation or obtaining an assignment from the assured — in the case in question, one or more of the Defendants — might bring recovery action against the shipowner.

The evidence was contained in a letter dated 14 September 2016 from Wang Jing & Co. The relevant part reads:

"1. Generally, as a matter of Chinese law, a subrogated cargo insurer stands in the shoes of the cargo interests for recourse claims within the amount of insurance indemnity. In other words, the subrogated cargo insurer would be entitled to enforce the subsisting or revived rights of the cargo interests for the insurer's own benefit. In the meantime, the cargo insurer should also be subject to any defense against the cargo interests."

Paragraph 2(2) reads:

"Time limit. Subrogated cargo insurers under a marine cargo insurance policy should be subject to the time limit applicable to the cargo interest, which generally is one year upon cargo delivery. However, for cargo insurers who issue other insurance policies, the time limit starts from the day when the cargo insurers obtain the subrogation."

The time limit at the back of the bills of lading also stated that the time limit for bringing action was one year from the date of the delivery of the cargo or the date where the cargo should have been delivered.

Paragraph 3 of the letter reads:

"By way of clarification, subrogation and assignment are two different conceptions under Chinese law. Subrogation is regulated mainly by the Chinese insurance law. By way of the subrogation, the cargo insurer does not have to inform the third liable party and any recourse claim should be commenced in the name of the cargo insurer itself. However, assignment is mainly provided under the Chinese Contract Law. Typically, a third-party is involved in a contract with the assignor and the contract is in effect transferred to the assignee. For assignment of contract, notice to the third party beforehand would be necessary."

The shipowner had not received any notice of assignment.

Lastly, towards the end of the letter, it reads:
"Depending on the terms of the insurance policy, there is a real risk that the insurer, by virtue of the rights acquired from the insurer by subrogation, would be entitled to arrest the Vessel in China in order to obtain security for their claims."

On the existing materials, it was reasonably clear that the shipowner needed only be concerned if an insurer, having paid the Defendants and subrogated to their rights, whatever those might be, made a claim against the shipowner and arrested its vessel.

It was also reasonably clear that the shipowner suspected that the Defendants had been paid by a PRC insurer, which explained why none of the Defendants had come forward to make a claim against the shipowner for the sale of the cargo and, of all jurisdictions in the world, the shipowner had chosen to put before the Hong Kong High Court a PRC legal opinion as expert evidence.

RHC O 26 r 1 reads:

"A party to any cause or matter may, in accordance with the following provisions of this Order, serve on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter which are necessary either for disposing fairly of the cause or matter; or for saving costs."

The governing principles are fully set out in Lee Nui Foon v Ocean Park Corp (No 2) [1995] 2 HKC 395 and are not in dispute.

The shipowner argued that the interrogatories were both relevant and necessary. On the issue of relevance, the shipowner submitted that the words "relating to" were of very wide scope, citing in support a House of Lords' decision and a decision of the High Court of Australia.

The Court did not doubt that the words "relating to" could be of very wide scope, but in law, context was everything and neither decision was remotely concerned with what the Court was dealing with, ie the propriety of the interrogatories in the context of RHC O 26 and the principles set out in Lee Nui Foon v Ocean Park Corp (No 2).

The Defendants accepted that the test of relevance was fairly wide and the right to interrogate was not confined to facts directly in issue, but extended to any facts the existence or non-existence of which was relevant to the existence or non-existence of facts directly in issue, but the Defendants submitted that relevance was determined by reference to the pleadings and there was nothing of remote relevance to insurance, whether or not the Defendants had been paid by an insurer, and whether any of the Defendants had pursued the banks for payment of the value of the cargo.

The Court agreed with the Defendants relevance had to be determined by reference to something and it is widely accepted that that something is the parties' pleaded case. If not, what else can it be? The opening words of paragraph 24/2/10 in the Hong Kong Civil Procedure 2017 reads as follows:

"Relating to any matter in question between them".

And that is in the context of discovery.

And the Judge further quoted:

"These words refer, not to the subject-matter of an action, but to the questions in the action. So, in an action for possession of land, where the plaintiff's title is in question, they refer to the title, not the land (per Lindley J in Philipps v Philipps (1879) 40 LT 815 at 821). Relevance will be determined by reference to the pleadings (Re Estate of Ng Chan Wah, unrep, HCAP No 5 of 2003, March 5, 2003, [2003] HKEC 317, CFI)."

The Court had read the pleadings in the case in question and was satisfied that at least paragraphs 1 to 4 of the interrogatories sought by the shipowner did not relate to the issues raised in the action in question.

The Court accepted the shipowner's application was for a proper and legitimate purpose, but that was only one hurdle that an applicant of interrogatories had to overcome.

Given the shipowner's failure to show relevance, that was sufficient to dispose of paragraphs 1, 2, 3 and 4 of the interrogatories.

Regarding paragraphs 3 and 4 of the interrogatories, the Court added that none of the Defendants were counterclaiming against the shipowner for the value of the cargo. Hence, whether any of them had taken legal action against the three banks involved in the transaction to recoup the invoice value of the cargo was not an issue that required the Court's determination at trial, if the action in question did get to trial eventually.

Lastly, in relation to paragraph 5 of the interrogatories, concerning the location of the bills of lading in question, the shipowner had already received the answer from the Defendants, not once but twice.

The Court therefore agreed with the Defendants that paragraph 5 was not necessary, either for disposing fairly of the cause or matter or for saving costs.

For these reasons, the Court would dismiss the shipowner's application Summons.

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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