



13 August 2018
Ref : Chans advice/211

To: Transport Industry Operators

Relief against unless order

The Hong Kong High Court issued a Decision on 19 March 2018 dealing with some legal principles in relation to granting relief against unless orders in a ship collision case. [HCAJ 84/2017] [2018 HKCFI 609]

Introduction

The **Rainbow** collided with the **Calandra** on 18 July 2011. The Rainbow sank with cargo, fuel and effects on board but with no loss of life. The Calandra was damaged but later repaired.

As far as the action in question was concerned, it was a **claim in personam** by the Rainbow's owner against the owner of the Calandra, whilst the Calandra's owner had a **cross-claim in personam** against the Rainbow's owner. A master imposed an unless order on the Rainbow's owner to file and serve a defence to the cross-claim. The unless order was not complied with.

The Rainbow's owner sought extension of time. The master gave relief against sanction and gave leave to the Rainbow's owner to file and serve a defence within 28 days on condition that the Rainbow's owner paid US\$700,000 into court ("**the condition**" and the order "**the order for relief**"). Failing compliance with the condition, the unless order should stand and the Rainbow's owner should be debarred from filing and serving the defence. The figure of US\$700,000 constituted the amount of the cross-claim plus some interest.

The Rainbow's owner appealed against the order for relief insofar as it imposed the condition. The master granted the Rainbow's owner a stay of the condition pending the appeal.

Procedural background

The writ was filed by a law firm HG on behalf of the Rainbow's owner on 11 July 2013. HG in fact acted for the Rainbow's subrogated hull and machinery underwriters.

On 19 July 2017, a Settlement Agreement was signed by a law firm HFW on behalf of the Calandra's owner and HG on behalf of the Rainbow's owner. It apportioned liability at 1/3 Calandra : 2/3 Rainbow. The Settlement Agreement provided for claims for damages to be referred to the Registrar.

On 9 October 2017, the Calandra's owner filed its cross-claim.

On 10 November 2017, the Rainbow's owner and the Calandra's owner went before the master for directions on the claim and cross-claim. HG informed the master that they had limited instructions, did not represent the Rainbow's owner in respect of the Calandra's owner's cross-claim and declined to make submissions therefor. The master thereupon:

- a) Made the unless order requiring the Rainbow's owner to file a defence to the cross-claim within 14 days, ie by 24 November 2017, failing which the Rainbow's owner should be barred from filing one;
- b) By a separate order, directed that the Calandra's owner's defence to the Rainbow's owner's claim be filed within 42 days, with no debarring words. Time would have expired on 22 December 2017.

On 30 November 2017, 3 things happened:

- a) A law firm RSRB filed a notice of change of solicitors to replace HG. RSRB claiming to have been appointed to act on behalf of the NOE P&I Club (“**the P&I Club**”), ie liability underwriters for the Rainbow’s owner) to *defend* the cross-claim.
- b) RSRB issued a summons seeking extension of time for the Rainbow’s owner to file its defence to the cross-claim.
- c) HG issued a summons (“**the HG summons**”) seeking an order that they do remain on record as solicitors notwithstanding the notice of change of solicitors filed by RSRB.

On 22 December 2017, the master made the order for relief. The Rainbow’s owner only appealed against the condition. At the time the appeal was heard, both HG and RSRB informed the court that they had agreed to “co-counselling” such that HG continued to act for the hull underwriters whereas RSRB would act for the P&I Club.

On 12 February 2018, the master made a decision, pursuant to HG summons, that co-counselling was not permitted, that RSRB removed from the record and that HG be restored to the record as acting for the Rainbow’s owner.

Legal principles for appeal

An appeal against a master’s decision operates by way of rehearing and the judge exercises the discretion afresh. It is not necessary to demonstrate an error of law on the part of the master.

Legal principles for granting relief against an unless order and imposition of conditions

Order 2, rule 5(1) sets out the factors for grant of relief from sanction. Those factors are not exhaustive. The court has to do a multi-facet balancing exercise with no single factor being conclusive.

Intentional and contumelious disregard of a court’s peremptory order or failure to comply with one or a number of orders through negligence, incompetence or sheer indolence may lead to refusal of relief from sanction, although refusal is not limited to these situations.

Under Order 2, rule 3(1) of the RHC, the court may order a party to pay a sum of money into court if that party has, without good reasons, failed to comply with a rule or court order. *Schenker International (HK) Ltd v Natural Dairy (NZ) Holdings Ltd* [2014] 1 HKLRD 274, DHCJ Le Pichon set out the guidelines for imposing a condition for payment into court:

- (a) The Court must first consider the nature and effect of the order that gave rise to the application for relief. The Court is not precluded from analyzing that despite there being no appeal from the unless order.
- (b) The condition of payment-in is a type of condition associated with summary judgment applications and normally imposed where *eg* there is good ground in the evidence for believing that the defence is a sham defence. Where there is no such ground, the condition requiring full payment-in of the amount claimed would have serious consequences for the defendant, including hampering or stifling his ability to defend the claim.
- (c) In exercising discretionary powers, the primary objective is to secure a just resolution of the dispute in accordance with the substantive rights of the parties. Payment-in may not further that objective.
- (d) A payment into court might be appropriate 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.
- (e) A short breach that does not prejudice the other side or the trial would not merit an order for payment of the claim amount into court.
- (f) Proportionality of the sanction is a relevant and weighty factor; the sanction has to be commensurate with the gravity of the ‘crime’. Where a condition is draconian and out of all proportion to the breach, it can be set aside.

Application of the legal principles

In admiralty actions where there are cross claims, the procedure is governed by Order 75, rule 41 of the RHC. Under that rule, there is no automatic deadline for a defence to be filed. The Registrar may give directions for filing under rule 41(2) as he thinks fit.

The unless order was made at the very first hearing for directions without *any* prior non-compliance of the rules or court order on the part of the Rainbow's owner. There was disparity in treatment of the Rainbow's owner and the Calandra's owner for no apparent reason. Had the Rainbow's owner been given the same 42 days to file a defence, there would have been no need for the further extension sought.

Anyway, the application for further extension of time was made promptly within 6 days of expiry of the time for compliance of the unless order. Nor had it been suggested that the delay in compliance had caused any prejudice to the Calandra's owner. The Calandra's owner only filed the cross-claim 4 years since commencement of the action. It needed a total of 70 days to file a defence to the Rainbow's owner's claim. This was not a situation where the Calandra's owner wished to speed things up.

Legal representation on the part of the Rainbow's owner

The Rainbow's owner itself was not interested in the action in question, it having been paid by the underwriters. It was the underwriters (suing or defending in the name of the Rainbow's owner) that had interests.

HFW dealt with HG exclusively in respect of all matters in respect of the collision.

Though the Calandra's owner had questioned the extent of HG's authority. HG had at all times maintained that they had been authorized by the Rainbow's owner both to prosecute the claim of the Rainbow's owner and defend the claim of the Calandra's owner. That was the position in 2013.

The master's decision on 12 February 2018 meant that only HG should remain on record as solicitors for the Rainbow's owner. This was the position in 2018.

The Judge was of the view that whilst this was not a case of intentional or contumelious delay on the part of the Rainbow's owner or their underwriters, the confusion in legal representation was a matter entirely for them to resolve. It was only in 2017 that the Calandra's owner filed the cross-claim. The P&I Club had acted promptly by instructing RSRB and sought extension of time as soon as it knew of the unless order. All in all, the Judge was of the view that the master was correct in granting further extension of time to the Rainbow's owner.

Applying *Schenker*, imposition of the condition was disproportionate to the single breach by the Rainbow's owner. It had the effect of preventing a just resolution of the dispute in accordance with the substantive rights of the parties. The condition was imposed on as part of the consideration for granting relief from sanction only.

Notwithstanding the removal of the condition, the Judge made an unless order as follows:

“Unless the plaintiffs do file and serve their defence to the defendants' claim in a reference by 4 pm on 16 April 2018, the plaintiffs shall be barred from doing so and the defendants are at liberty to apply for judgment under their cross-claim.”

This new unless order would give an extra 28 days for the underwriters to sort out the representation for the Rainbow's owner.

Conclusion

The Judge allowed the appeal and set aside the order for relief to the extent it imposed the condition and made the new unless order above.

Please feel free to contact us if you have any questions or you would like to have a copy of the Decision.

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