SUN MOBILITY
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To: Transport Industry Operators

Sanchi c/w CF Crystal (II)

The Hong Kong Court of Appeal issued a Judgment on 20 February 2019 dismissing Changhong Group's appeal against the High Court's Decision of 15 November 2018 (reported in Chans advice/215) because Changhong Group had not obtained leave to appeal from the Hong Kong High Court. [CACV576/2018] [2019HKCA246]

This case concerned a collision at sea between Changhong Group's cargo vessel, the CF Crystal, and a tanker owned by Bright Shipping, the Sanchi. The collision took place on 6 January 2018 at a location about 125 nautical miles from Changjiang Kou Light Ship in the East China Sea.

The Sanchi exploded immediately upon collision and both vessels caught fire. The CF Crystal managed to reverse her engine and escape the fire. Her crew abandoned the vessel but returned to successfully extinguish the fire on board. Afterwards, she safely proceeded to and berthed at Zhousan, Zhejiang, PRC.

The Sanchi kept burning and drifting after the collision. Eventually, she sunk at a location around 151 nautical miles southeast of the point of collision on 14 January 2018. Tragically, none of her officers or crew survived the accident.

The Hong Kong legal action in question was an *in personam* collision action brought by Bright Shipping against Changhong Group. However, Changhong Group made an application for stay of the Hong Kong legal proceedings on the ground of *forum non conveniens*. On 15 November 2018, the High Court dismissed Changhong Group's application seeking a stay of the proceedings.

On 12 December 2018, Changhong Group served a notice of appeal in respect of that decision of the High Court without first seeking leave to appeal under Section 14AA of the High Court Ordinance. On 18 December 2018, Bright Shipping issued a summons to strike out the appeal on the ground that Changhong Group had not obtained leave to appeal.

It is not disputed that leave is required for the bringing of an appeal against an interlocutory decision of the Court of First Instance by reason of Section 14AA of the High Court Ordinance. It is also not disputed that the applicable test in Hong Kong for determining if a decision is interlocutory is the application approach, see *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd* (2003) 6 HKCFAR 222 though Changhong Group said the application approach in Hong Kong was a modified one.

Changhong Group submitted that adopting the application approach, the decision of the High Court should be classified as a final decision because:

(a) It was decided by a Deputy District Judge in *Fang Guo Quan v Choi Ming Sang* DCPI 1468/2008, 27 August 2009 that a refusal to stay an action on the ground of *forum non conveniens* was a final decision;

(b) The decision involved an evaluative process which was reasoned with evidence-based findings. Those were the hallmarks of a final process;
(c) A decision on anti-suit injunction was regarded as final. There should be alignment in the law regarding appeals against decisions on injunction, service out of jurisdiction and decision on stay on the ground of *forum non conveniens*;
(d) A decision on stay was as profound as a decision on whether substantive relief was to be granted;
(e) *Shell Hong Kong* did not mandate a strict "outcome" approach. Instead a common sense approach should prevail and a decision on a critical issue on the way to, or forming part of, the trial of the entitlement to final relief should be regarded as final.

The Court of Appeal could not accept the submissions of Changhong Group. Changhong Group's submissions were based on a misunderstanding that the application approach had been modified in Hong Kong. The application approach was held by the Appeal Committee to be the applicable one in Hong Kong in *B + B Construction Ltd v Sun Alliance & London Insurance* (2000) 3 HKCFAR 503. The approach was discussed by Chan PJ at p.506H to I:

> " This involves an examination of the nature of the application to see whether the order made upon such application would, whether it fails or succeeds, determine the whole action. In considering the nature of the application, it is necessary to look not only at its form, e.g., under which order or rule of court it is made, but also the purpose and substance of the application and the issues to be determined by the court."

On the facts, the Appeal Committee found that the decision below reached upon an application under Order 14A was a final judgment since the application would only be entertained on the basis that the determination of the question raised would have the effect of finally disposing of the cause or matter before the court. In other words, as Chan PJ highlighted at p.508B:

> " Whatever the outcome of the application, the order made will finally determine the action. After all, it is the intention of the parties and the court that such a decision would put an end to the dispute instead of requiring the parties to go through the trouble and expense of a full trial."

In *Shell Hong Kong*, the Court of Final Appeal had to consider the application of this approach in a case where a determination under Order 14A did not finally determine the entire cause or matter, but only an issue in the cause or matter. In such context, the Court of Final Appeal held that the application approach involved the consideration of the purpose and substance of the application, the issue determined by the court and the effect of such determination on the rights of the parties, the further conduct of the proceedings and the final disposal of the whole action.
Chan PJ discussed the procedure under Order 14A at length and then considered how the application approach was to be applied in the abovementioned context at [27] to [33]. In particular, at [31], His Lordship said,

> " In my view, what one can extract from these cases is that where an order or judgment given in an application does not finally dispose of the whole action <u>but only an issue in the action</u>, it is necessary to consider the purpose and substance of the application, the issue dealt with and determined by the court and <u>the effect of a determination of this issue on the rights of the parties</u>, the further conduct of the proceeding and the final disposal of the whole action. A broad commonsense approach should be adopted. If the issue dealt with and determined by the court is 'a substantive part of the final trial' (*Holmes v Bangladesh Biman Corp* [1988] 2 Ll Rep 120 at p.124); or 'a crucial issue' in the case or a point 'that goes to the root of the case' (*First Pacific Bank Ltd v Robert HP Fung* [1990] 1 HKLR 527 at p.532), or 'a dominant feature of the case' (*Korso Finance Establishment Anstalt v Wedge* (unrep, 15 Feb 1994 at p.7), then the order or judgment, even if it does not finally dispose of the whole action, should nevertheless be regarded as a final judgment."

The Court of Appeal was of the view that it was important to bear in mind the context in which Chan PJ made those observations. It was said in relation to a decision that finally determined an issue on the substantive rights between the parties. In other words, the issue in question has to be an issue on the merits as opposed to the procedural steps for bringing or preparing a case before it is presented to the court for final determination on the merits. In contrast, in the case in question, the decision on stay did not finally determined any issue on the substantive rights between the parties. It only determines if proceedings should be entertained in the courts of Hong Kong. Even assuming that a stay was granted, it would not bar Bright Shipping from suing elsewhere.

The Court of Appeal did not find any support for Changhong Group's so-called common sense approach from the judgment of *Shell Hong Kong*. It is a misconception that the application approach in Hong Kong is a modified one. The Court of Appeal agreed with Bright Shipping that the application approach explained in *B + B Construction Ltd v Sun Alliance & London Insurance*, remains good law in Hong Kong. *Shell Hong Kong* provided guidance on how that approach is to be applied in the context of a final determination of a substantive issue (as opposed to the whole cause of action) under Order 14A.

There are many cases in which a party cannot proceed further or would be placed under constraints in the future conduct of an action or a set of proceedings by virtue of interlocutory decisions, e.g. decisions on security for costs, decisions on admission of evidence, case management decisions, decisions refusing extension of time to do certain acts. Since the introduction of the Section 14AA leave requirement, the Court of Appeal has regarded these decisions as interlocutory by nature even though the decision has the practical effect of debarring further proceedings: see e.g. *Kwok Cheuk Kin v Leung Chun Ying* [2018] 4 HKC 440; *Leung So Hung Siem v Mr Carson Wen* [2019] HKCA 94. Thus, the Court of Appeal could not accept Changhong Group's submission that the stay decision was a critical one due to its profound effect on the parties.

In a claim for anti-suit injunction, the substantive relief sought in the action would be the injunction. Hence, the determination on whether such injunction is to be granted (as in a case where a permanent injunction is sought in other contexts) is the final determination of the action. It is not analogous with an application to stay an action where the substantive relief sought is something else.

As regards decisions on service outside the jurisdiction, they have been processed as interlocutory decisions, see *Dr Yeung v Google Inc (No 2)* [2015] 1 HKLRD 26. In *Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd* FAMV 71 to 73/2007, 13 March 2008, the Appeal Committee held that a decision to set aside leave to serve outside the jurisdiction was an interlocutory decision.

Actually, an application for stay had long been regarded by practitioners as interlocutory in nature and leave has been sought under Section 14AA before the bringing of an appeal, see e.g. *The Kappa Sea* [2018] HKCA 77; *Huang Li v Hady Hartanto* [2018] HKCFI 237; *Chinachem Financial Services Ltd v Century Venture Holdings Ltd* HCA 410/2013, 21 April 2015; *Lehmanbrown Ltd v Union Trade Holdings Inc* HCMP 977/2015, 17 June 2015.

The purpose of the Section 14AA leave requirement was to curtail unmeritorious interlocutory appeals which would delay the litigation process and escalate costs of the proceedings. It was introduced to promote the proper and efficient use of judicial resources and the avoidance of oppressive and unproductive appeals. It is a filtering process instead of an absolute bar. For meritorious appeals which serve useful purposes, leave would be granted. An intended appellant is given adequate opportunity to advance submissions in the application for leave. After a failure to obtain leave at the court below, an applicant can renew the application in the Court of Appeal. Thus, a similar leave requirement (in the context of District Court cases) has been held by the Court

of Final Appeal in *Incorporated Owners of Po Hang Building v Sam Woo Marine Works Ltd* (2017) 20 HKCFAR 240 to be a proportionate measure.

Given the purpose of the leave requirement, adopting the application approach for the distinction between interlocutory and final judgment is indeed a sensible one in line with the rationale for having a filtering gateway for appeals against procedural decisions.

The Court of Appeal was not impressed by Changhong Group's submission that as a decision in a stay application based on *forum non conveniens* involved an evaluative process which was reasoned with evidence-based finding, it should be regarded as a final decision. Applications for security for costs, extension of time, or even admission of evidence equally involve an evaluative process which is reasoned with evidence-based finding. This cannot be a valid criterion for distinguishing an interlocutory decision from a final one.

The Court of Appeal opined that the Deputy District Judge in *Fang Guo Quan v Choi Ming Sang* DCPI 1468/2008, 27 August 2009 was wrong in holding that a decision of this nature was a final one. The same could be said regarding the view of the Deputy High Court Judge in *Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd* HCA 2203/2004, 28 February 2006 at [16].

Applying the application approach, it was clear to the Court of Appeal that the High Court decision of 15 November 2018 was an interlocutory one. It followed that Changhong Group needed to obtain leave under Section 14AA before an appeal could be brought. Without leave, the appeal was struck out and dismissed by the Court of Appeal.

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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