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To: Transport Industry Operators

Security for costs of appeal

The Hong Kong Court of Appeal issued a Decision on 28 January 2019 dealing with some principles for security for costs. [CACV376/2018, 2019HKCA133]

Background

The plaintiff ('the shipowner') was the owner of a bulk carrier vessel. The 1st defendant owed obligations to the shipowner under a Bareboat Charter Party ('Charterparty'). The 2nd defendant owed obligations to the shipowner under a Memorandum of Agreement. The 3rd defendant ('Mr Ma') owed obligations to the shipowner under a personal guarantee for obligations of the 1st defendant under the Charterparty. All three documents were dated 25 May 2012 ('three agreements'). As a result of the defendants' non-payment under the three agreements, various termination clauses were triggered. Mr Ma was the sole director of the 1st defendant and a director of the 2nd defendant. Under his personal guarantee with the shipowner, Mr Ma was liable for any amount due and owing to the shipowner under the Charterparty.

Notice of trial was given to all parties. The trial took place before A Chan J. The 2nd defendant and Mr Ma were absent from trial. One Mr Zhu purported to represent the 1st defendant at trial, but no leave was sought for his representation of the 1st defendant. There was no proper representation of the 1st defendant. The trial continued in the absence of any defendant representation. A Chan J held that the shipowner's case was straightforward and was based on contract. The Judge gave judgment in favour of the shipowner after some clarifications were sought in respect of the 2nd defendant's obligations under the Memorandum of Agreement.

Dissatisfied with the judgment, Mr Ma lodged a notice of appeal against the judgment in addition to making an application for a stay of execution of the judgment before the Judge. The Judge treated Mr Ma's application as an application to set aside the judgment pursuant to the *Rules of the High Court*, Order 35, rule 2. The Judge held that Mr Ma's explanation of his absence from trial due to back problem was his bare assertion with no evidence to support. The Judge held that such explanation was incredible. The Judge stated that Mr Ma admitted in Court that the shipowner's case against him was based in contract, and that the contracts were valid. The Judge further held that he could not see any merit in the Court going behind the contractual documents and somehow relieve Mr Ma from his liabilities under the guarantee in question.

The shipowner applied for security for costs of the appeal against Mr Ma in the sum of HK\$1,479,862.25. This included \$359,283 for the application in question. Of this sum, \$135,000 represented the costs of two counsel (both junior counsel). The shipowner further sought costs of the application to be summarily assessed in the sum of HK\$304,515.23.

Principles for security for costs

The Court of Appeal may in special circumstances order an appellant to lodge security for costs of his appeal. One example of the exceptional circumstances is that the respondent to the appeal may

encounter difficulties or expenses in enforcing a costs order against the appellant. The reason why security is to be ordered in such a situation is to ensure that the successful party would not be prejudiced in terms of costs despite being successful. But even if this factor is satisfied, the Court of Appeal still has a discretion not to order security where the appellant is able to show countervailing factors such as a high prospect of success in the appeal.

Difficulty in enforcement

The shipowner relied on the following to show that there was difficulty in enforcing costs against Mr Ma :

- 1) The shipowner could not identify any current shareholdings or recorded property ownership of Mr Ma in Hong Kong;
- 2) Mr Ma already had an outstanding costs order in favour of the shipowner in the amount of HK\$500,000;
- 3) Mr Ma admitted that he did not permanently reside in Hong Kong.

The Court of Appeal satisfied that the shipowner would have difficulties in enforcing costs order against Mr Ma in the event it was successful in the appeal.

Merits of the appeal

Mr Ma stated in his notice of appeal the following grounds for appeal :

- 1) The High Court did not examine the reason of why there was an existence of a total debt. The defendants did not accept bearing the difference in value in the vessel transaction;
- 2) The vessel that had been returned to the shipowner contained assets belonging to the defendants. The assets' value had not been assessed by the High Court, or their values had not been set off;
- 3) During the process of the vessel's construction, the defendants had invested a lot of money in its making. The High Court had not assessed this;
- 4) If this case was only a simple contractual matter, the defendants were only liable for rental monies under the Charterparty. The defendants should not bear difference in transactional loss;
- 5) Mr Ma did not read through the guarantee/indemnity agreement, nor was he able to negotiate or amend its terms before the signing of the same. The signing did not reflect the true intentions of Mr Ma.

The shipowner's response to the grounds of appeal was :

- 1) Ground 1, Mr Ma had not adduced any evidence on the re-sale value of the vessel;
- 2) Grounds 2 and 3, they had been struck out by Ng J on 2 December 2015 and there was no appeal against that decision;
- 3) Ground 4 was contrary to the terms of the relevant agreements; and
- 4) Ground 5 had not been pleaded, even though the defence was settled by two counsel and defendants were legally represented from 6 June 2014 to around mid-2018.

The Court of Appeal's view

The starting point was that Mr Ma had chosen not to attend trial despite being aware of the hearing. He provided no credible evidence to support his explanation for being absent from the trial. Further, in the Court of Appeal's view, Mr Ma had not shown that he had such a high prospect of success of his appeal that security for costs should not be ordered.

The sum of HK\$1,479,862.25 sought by the shipowner was highly excessive. The Court of Appeal did not see why this case should involve the engagement of one partner, one associate, one trainee and two counsel. Further, the costs incurred in engaging a costs lawyer for preparing the schedule of costs for summary assessment (HK\$7,977.48) were generally not granted, as a broad-brush approach was taken by the Court in summary assessment, see Practice Direction 14.3, paragraph 13. According to the shipowner's own assessment, the case was not difficult. The Court of Appeal was

of the view that the appropriate amount which included the costs of the application in question was \$500,000.

Accordingly, the Court of Appeal made the following orders :

- 1) Mr Ma was to pay into Court HK\$500,000 as security for the costs of his appeal within 42 days;
- 2) Pending payment into Court, the appeal was stayed;
- 3) In default of payment, the appeal would be dismissed without further order together with the costs of the appeal; and
- 4) The shipowner was to have the costs of the application for security which were summarily assessed at HK\$180,000.

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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