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To: Transport Industry Operators

Air shipment without authority?

The Hong Kong District Court issued a Decision on 8 May 2020 upholding a summary judgment ordering one forwarder to pay outstanding airfreight charges of HK\$440,000 to another forwarder. [DCCJ1202/2018] [2020HKDC307]

Introduction

The defendant Tai Shing Transport was carrying on the business in the provision of logistics services whereas the plaintiff Airsupply International Logistics was providing import and export air freight services.

Airsupply International Logistics claimed that Tai Shing Transport failed to pay the airfreight charges from July to August 2017 as demanded by Airsupply International Logistics' six invoices totalling HK\$442,332.52 ("**the Invoices**") except a partial payment made on 17 November 2017 in the sum of HK\$2,332.52. The outstanding amount stood at HK\$440,000.

Master Jacqueline Lee made an Order dated 3 December 2019 ("**the Order**") acceding to Airsupply International Logistics' application for summary judgment, and final judgment in the sum of HK\$440,000 was entered against Tai Shing Transport with costs.

Tai Shing Transport sought to appeal against the Order.

The respective pleaded cases of the parties

Tai Shing Transport denied any business relationship with Airsupply International Logistics; it denied having made any request for any service to Airsupply International Logistics. It further denied having been provided with any service by Airsupply International Logistics. It lastly denied having received any invoices from Airsupply International Logistics and made any partial payment to Airsupply International Logistics. Essentially, Tai Shing Transport shifted all the blame on one Mr Chung who allegedly dealt with Airsupply International Logistics without its consent and authority.

The directors of Tai Shing Transport were Mr Ho and his wife Madam Tsao. Mr Chung had previously worked in freight forwarder business.

In or about late 2015, Mr Chung proposed to Mr Ho and Madam Tsao that Tai Shing Transport should attempt to start freight forwarder business with his consignor clientele of his former employer. He suggested that Tai Shing Transport could contract other freight forwarders to arrange the carriage and transportation of the goods to the consignees of the consignors. Mr Chung reassured to them that no payment was required to be paid by Tai Shing Transport to the freight forwarders before the consignors settled their payment to Tai Shing Transport.

Tai Shing Transport accepted the proposal of Mr Chung in reliance of his representations. Tai Shing

Transport agreed to authorize Mr Chung to carry on the freight forwarder business under the name of Tai Shing Transport. Mr Chung agreed to account to Mr Ho and Madam Tsao the full details of all the transactions. In these circumstances, Tai Shing Transport commenced its freight forwarder business managed by Mr Chung in December 2015.

However, in August 2016, due to the failure of Mr Chung to give a full account of the freight forwarder business and some cash flow problems, Tai Shing Transport expressly instructed and ordered Mr Chung to stop all such business and he ceased to be authorized to carry on such business on behalf of Tai Shing Transport any further. Mr Chung agreed.

On 27 September 2017, Tai Shing Transport received a demand letter from a freight forwarder demanding payment of a sum of HK\$11,293,398.26 being outstanding transportation service charges.

Tai Shing Transport then confronted Mr Chung with the demand and he admitted that after being expressly instructed to cease all freight forwarder business, he nevertheless continued such business and contracted with other freight forwarders including Airsupply International Logistics under the name of Tai Shing Transport without Tai Shing Transport's authority, knowledge and consent.

Tai Shing Transport's alternative plea was that Mr Chung contracted with Airsupply International Logistics to render transportation services to the consignors without the authority, knowledge and consent of Tai Shing Transport.

Tai Shing Transport's another alternative plea was that Airsupply International Logistics rendered such purported transportation service directly to the consignors and/or Mr Chung but not Tai Shing Transport.

Airsupply International Logistics pointed out that Mr Chung on behalf of Tai Shing Transport started engaging Airsupply International Logistics for its airfreight services in April 2016. From 15 April 2016 to 25 July 2017, Mr Chung placed altogether 7 shipment orders ("**the Previous Orders**"). The Previous Orders were duly completed and Airsupply International Logistics issued 7 invoices for those transactions. Tai Shing Transport duly settled all those 7 invoices.

From 31 July to 7 August 2017, Airsupply International Logistics received 6 shipment orders from Mr Chung by way of emails. These six shipment orders ("**the Subject Orders**") were the subject transactions covered by the Invoices of HK\$442,332.52.

Airsupply International Logistics pleaded that Mr Ho only informed Airsupply International Logistics of the termination of the employment of Mr Chung with Tai Shing Transport by his email dated 15 March 2018 ("**the Email**"). Prior to that, Airsupply International Logistics relied on the representations of Tai Shing Transport that Mr Chung dealt with Airsupply International Logistics as General Manager of Tai Shing Transport.

Analysis

The central issue was whether Mr Chung had the authority to place the Subject Orders with Airsupply International Logistics and procure its freight forwarding services. If Mr Chung did not have the actual authority, Airsupply International Logistics relied on his apparent authority.

It was not disputed that at the outset Tai Shing Transport expressly gave Mr Chung the authority to carry on freight forwarding business in the name of Tai Shing Transport. In doing so, Mr Chung had to contact freight forwarders to arrange carriage of goods for the consignors whom Mr Chung knew. Tai Shing Transport did not challenge the validity of the Previous Orders. Nor did it allege that those transactions should be set aside and the payments made to Airsupply International Logistics should be refunded.

The key question was whether Tai Shing Transport could discharge its onus to show that there was at least a triable issue as to whether such an authority had been revoked before the Subject Orders were placed.

On this critical issue, the evidence of Tai Shing Transport was unsatisfactory. The evidence relating to the alleged revocation was tenuous. In the affirmation of Madam Tsao, the exact identity of the individual who allegedly told Mr Chung to cease the freight forwarding business in August 2016 was even not disclosed. It must be apparent to Tai Shing Transport that the transactions then handled by Mr Chung would not be terminated immediately upon the alleged revocation of his authority. Alarming, Tai Shing Transport did not find it necessary to follow up such transactions or at the very least made enquires with Mr Chung as to whether there were any outstanding matters of the freight forwarding business. The Judge found it unreasonable for Tai Shing Transport to do nothing after the alleged revocation and was content to give Mr Chung a free hand to wind down the business especially when its financial interest was at stake.

In the Email, Mr Ho merely told Airsupply International Logistics that Mr Chung was dismissed in December 2017 but said nothing about the alleged revocation in August 2016, which should be more relevant to the validity of the Subject Orders.

The Judge could accept that such a revocation could be made orally. However, apart from the bald assertion, there was a glaring lack of collaborative evidence. The Judge was unable to accept the alleged revocation on such evidence and that Tai Shing Transport had shown a triable issue as to whether Mr Chung ceased to have actual authority to contract with Airsupply International Logistics by the Subject Orders in July and August 2017.

Even if there was a triable issue as to actual authority, the Judge would accept the submission of Airsupply International Logistics that it was entitled to rely on the rule in *Turquand's case*. Mr Chung had the apparent authority to place the Subject Orders with Airsupply International Logistics rendering Tai Shing Transport liable for the Invoices.

The leading authority in the law of apparent/ostensible authority is *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Limited and Anor.* [1964] 2 QB 480. At pp. 505 - 506, Diplock LJ set out the following four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so:

- (a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
- (b) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
- (c) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
- (d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

In the case in question, Tai Shing Transport's consent to Mr Chung's due completion of the transactions in respect of the Previous Orders on its behalf gave rise to a representation to Airsupply International Logistics that Mr Chung did have the authority to enter on behalf of Tai Shing Transport into such contracts for carriage/transportation services with Airsupply International Logistics.

The effect of such a representation was continued to be relied upon by Airsupply International

Logistics when it completed the Subject Orders, which were no different from the Previous Orders in nature. There was nothing to cast doubt on the authority of Mr Chung.

There was no suggestion, let alone evidence, that Airsupply International Logistics had any knowledge of the alleged revocation of authority in August 2017.

The representation came from Tai Shing Transport and not just by Mr Chung himself. It sufficed for the purpose of establishing apparent/ ostensible authority.

The Judge came to the conclusion that Tai Shing Transport had failed to show any triable issue as to the authority of Mr Chung at the material time. It was clear to the Judge that Mr Chung did have the actual or apparent authority to place the Subject Orders with Airsupply International Logistics to procure its carriage/transportation services on behalf of Tai Shing Transport. Tai Shing Transport was hence liable to pay for the outstanding amount of the Invoices.

Tai Shing Transport raised three other issues.

First, Tai Shing Transport submitted that Airsupply International Logistics' pleaded case was not a contractual claim and there was not an express plea of a contract. Tai Shing Transport further relied on the assertion of Airsupply International Logistics that the booking forms or shipping orders pertaining to the Subject Orders were not contractual documents. The court could not, thus, give judgment on the basis that there was a contractual relationship between the parties.

The Judge found no merit in these submissions. It was clearly pleaded that Airsupply International Logistics provided services in its ordinary course of business pursuant to the requests of Tai Shing Transport and the claim was for the outstanding charges for such services. There could be no question that the claim was made on the basis of the contractual relationship between the parties. The Judge could not accept Tai Shing Transport's submission that the parties acted in the absence of a contract.

On the other hand, how Airsupply International Logistics characterized the booking forms and shipping orders could not in any way alter their legal nature and was not a matter of concern to the court.

The Judge was of the view that the statement of claim did serve its function. If all the material facts pleaded therein were proven, the Judge saw no reason why Airsupply International Logistics should be deprived of the outstanding charges, particularly in the absence of any dispute about the quantum of those charges.

Next, Tai Shing Transport submitted that it merely acted as the agent of the shippers and the actual contracting parties should be Airsupply International Logistics and the shippers. Being an agent, Tai Shing Transport could not be personally liable for the contracts entered into on behalf of its principals. Tai Shing Transport relied on some booking forms which show that it was neither the shippers nor the consignees.

This submission had no substance. In the first place, it was against Tai Shing Transport's own pleaded case. The business which Tai Shing Transport expressly authorized Mr Chung was to contract with freight forwarders to arrange carriage/transportation of the goods of the consignors to their consignees.

This submission was further against the wealth of contrary evidence too. In the emails exchanged between Airsupply International Logistics and Mr Chung, there was not a shred of evidence that Tai Shing Transport procured the shipping services as an agent of its consignors only. The fact that

the services were to be rendered to a third party upon the requests of Tai Shing Transport did not alter the legal position of Tai Shing Transport as a contracting party.

Airsupply International Logistics was only a freight forwarder and it had to subcontract the shipping tasks in the Subject Orders to two other onward shipping agents, namely, A-Sonic Logistics and Scan-Shipping. Neither Airsupply International Logistics nor Tai Shing Transport was the actual carriers, consignors or consignees and there was no surprise that their names did not feature in the shipping documents. Such shipping documents *per se* were not contracts between Airsupply International Logistics and Tai Shing Transport. They came into being for the purpose of the fulfillment of the Subject Orders. The fact remained Tai Shing Transport procured Airsupply International Logistics to provide freight forwarding services to its clients and Airsupply International Logistics duly did so by its sub-contractors.

Lastly, Tai Shing Transport said that Airsupply International Logistics' pleaded case was one of quantum meruit and as such, Airsupply International Logistics had failed to establish the essential element that the enrichment was at the expense of Airsupply International Logistics.

The Judge could not understand this submission. On any view, the pleaded case of Airsupply International Logistics consisted of no plea of quantum meruit. Airsupply International Logistics did not say that the parties had no agreement on the charges or that there was no contract for the services procured by Tai Shing Transport at all. It was simply not a restitutionary claim.

Conclusion

For the reasons above, the Judge concluded that Tai Shing Transport did not have a bona fide defence to the claim of Airsupply International Logistics and was unable to show any triable issues. The Order was rightly made and Tai Shing Transport's appeal must be dismissed.

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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