SUN MOBILITY
Insurance and Claims Services Limited
新移動保賠顧問有限公司

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To: Transport Industry Operators

Nominal damages

The Hong Kong High Court issued a Judgment on 13 August 2021 holding a forwarder liable to pay nominal damages of HKD1,000 to a shipper in a cargo misdelivery claim case of USD1,299,189.87. [HCA 937/2016] [2021 HKCFI 2310]

Background

The action in question arose out of a claim of misdelivery of computer accessories in 7 containers ("the Cargos") without presentation of the original bills of lading ("Bs/L"). The shipper was a Samoa-incorporated company, based in Taiwan and was the manufacturer and seller of the Cargos. The forwarder was a Hong Kong company, which provided logistics services and who arranged for the Cargos to be shipped.

One distinct feature of the action in question was that, unlike many misdelivery cases, the Cargos were ultimately delivered to the shipper's end buyer, Koodoo Technologies ("Koodoo"). It was not disputed that the shipper was paid by Koodoo for at least part of the Cargos, although the final amount of payment was in dispute.

The shipper claimed against the forwarder for US$1,299,189.87, together with interest, representing the invoice value of the Cargos and deducting part payment from Koodoo.

Undisputed facts

In September and October 2014, the shipper sold the Cargos to Esdida Limited ("Esdida"), a Cypriot company related to Koodoo, for US$1,412,584.47. Sales invoices were issued by the shipper to Esdida, whilst Koodoo remained the ultimate buyer of the Cargos.

The shipper, through its agent, Western Shipping, placed shipping orders with the forwarder to arrange for the transportation of the Cargos from Hong Kong to Kotka, Finland. Between October to November 2014, 7 Combined Bills of Lading ("the CBs/L") were issued by the forwarder as carrier to the shipper. The Cargos, loaded into 7 containers in total, were shipped from Hong Kong via Hamburg to Kotka, Finland, in 2 shipments:

(a) 4 of the containers were carried in October 2014 on the vessel *YM Uniform* ("the YMU Containers").
(b) The remaining 3 containers were carried in November 2014 on the vessel *Helsinki Bridge* ("the HB Containers").

The forwarder did not own any vessels. To arrange for the carriage of the Cargos, it contacted Yang Ming, the actual ocean carrier represented by its agent YM HK. Two ocean Bs/L ("OBs/L") were issued by Yang Ming as carrier and the forwarder as shipper, one OB/L for the YMU Containers shipment and one OB/L for the HB Containers shipment.

Under all the CBs/L and the OBs/L, Net Logistic (the forwarder's Finland agent) was named as the

consignee.

The YMU Containers and the HB Containers arrived at Kotka on 8 November 2014 and 11 December 2014 respectively. At some time between November 2014 and March 2015, the Cargos were released by the forwarder and Yang Ming without presentation of any of the original CBs/L ("the Release"). The Cargos were eventually delivered to Koodoo.

On 16 March 2016, Western Shipping emailed the forwarder to confirm the status of the Cargos. Thereafter, email correspondence and negotiations were exchanged between the shipper, the forwarder, Western Shipping, Yang Ming, YM HK, and Koodoo concerning the status of the Cargos. On 29 March 2016, the forwarder wrote an email to A4 Tech, an associate company of the shipper, informing it of the Release. It was the shipper's case that this was the first time that it learned of the Release.

On 12 April 2016, the writ in the action in question was issued.

The shipper's case - summary

The shipper claimed that the Release was made by the forwarder without the knowledge of the shipper, without obtaining the original CBs/L, and/or written authorisation from the shipper. The shipper had held the original CBs/L and had never given any authorisation for the release of the Cargos to any party. The shipper pleaded that the forwarder had deliberately concealed or failed to disclose the Release to the shipper.

The CBs/L evidenced the terms of the carriage agreement between the shipper and the forwarder ("the Carriage Agreement"). As a result of the Release, the forwarder breached the terms of the Carriage Agreement, was negligent and/or breached its duty of care. This also amounted to a breach of the "Presentation Rule": *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* (2009) 12 HKCFAR 185, §§21-23 per Ribeiro PJ.

In May 2016, Koodoo paid US$113,394.60 to the shipper. And the shipper thereafter adjusted the quantum of its claim to US$1,299,189.87.

The forwarder's case - summary

The forwarder did not dispute that the Cargos were released in Kotka and that no CBs/L were presented. Despite this, the forwarder raised a number of defences.

The forwarder as Agent Only

The forwarder's case was that the CBs/L were contracted or issued by the forwarder as agent for and on behalf of Yang Ming. And as such, the forwarder was not liable.

The forwarder principally relied on the following:

(a) the CBs/L state that the forwarder signed "AS AGENT";
(b) the terms of the CBs/L.

The forwarder further submitted that the shipper must have known at the time of the Carriage Agreement that Yang Ming was acting as the principal under the Carriage Agreement.

Telex releases

The shipper and the forwarder had a long-standing telex arrangement which could be utilised to release cargos without presentation of the Bs/L. The forwarder said that in the case in question it had consent of the shipper to release the Cargos in the form of telex release instructions. Following the Release, a telex release fee of HK$500 per container for the Cargos was invoiced by the forwarder and paid for by the shipper.

In respect of the YMU Containers, the forwarder further relied on an email dated 30 September 2014 from Western Shipping ("30 September 2014 Email") in submitting that telex releases of the Cargos were explicitly authorised by the shipper. The said email read:

> *"Dear Tiffany,*
> *We confirm the above mention B/L is OK. (Telex release)*
> *Please kindly send the invoice to us asap."*

For the HB Containers, the forwarder submitted that because the telex release fees were prepaid, there must, similarly, be instructions from Western Shipping for the release of the HB Containers. It was the forwarder's case that it was not uncommon for Western Shipping to give oral release instructions by telephone.

The shipper had not provided any explanation as to why there was an approximate 18-month time gap between the Release and the time when the shipper started raising issues.

Time Bar

In relation to time-bar issues, the forwarder raised 2 lines of defence: -

(a) Clause 8.2.1 of the CBs/L

Clause 8.2.1 of the CBs/L:

"The CTO shall be discharged of all liability under this Bill of Lading unless suit is brought and written notice thereof given to the CTO within nine months after delivery of the goods. In the case of total loss of the goods the period shall begin to run two months after the goods have been received for transport."

The forwarder relied on the "total loss" limb and submitted that it covered situations such as goods were not delivered or misdelivered. As such, the 11-month limitation period had expired by the time the writ was issued.

(b) Hague Visby Rules (HVR) Article III, rule 6:

"…the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered…"

No Loss

The forwarder further submitted that even if liability was established, the shipper had failed to prove its losses. The forwarder referred to (i) a spreadsheet prepared by the shipper dated 22 January 2016 headed "KOODOO Payment Record - 2014 Orders" ("the Payment Record") and (ii) email correspondence between A4 Tech and Koodoo in April 2016, to suggest that the shipper was in fact paid in full by Koodoo.

The forwarder further submitted that if there be any confusion with the shipper's accounts, that the shipper had failed to call any evidence to properly explain the same and as such the Court might draw adverse inferences as a result of such failure.

The shipper's responses

The forwarder as Agents

It was the shipper's case that the forwarder was not Yang Ming's authorised agent. Rather, the forwarder was the contractual carrier. The shipper relied on the following matters:-

(a) On the OBs/L issued by Yang Ming, the forwarder was named as the shipper.
(b) YM already had a Hong Kong agent, YM HK, as named on the OBs/L.
(c) If the CBs/L were issued by the forwarder as Yang Ming's agent, they would have named Yang Ming as principal on the front of the document.
(d) There was no written authority from Yang Ming authorising the forwarder to act as Yang Ming's agent and bind it to contracts.

The shipper submitted that although the forwarder might have used Yang Ming often as carrier, this of itself obviously did not create any form of agency.

The shipper averred the forwarder was the CTO pursuant to the definition in the CBs/L under Clause 1.3:

> "Combined Transport Operator (CTO) is the person by whom or for whom this Bill of Lading is signed."

The forwarder was the person "by whom" the CBs/L was signed.

Telex Release Arrangement

It was the shipper's case that it had never given any telex release letters or instructions to the forwarder regarding the Cargos. The 30 September 2014 Email was merely an arrangement made in advance for a potential telex release and that no actual release instructions were given. The telex release fees were paid to set up the potential telex release. The shipper emphasised that for a telex release to be carried out, further procedures were required. Telex release was a 2-step process: (i) a prior telex release arrangement; and (ii) an actual telex release request or instruction from the shipper. Step 2 was not taken in respect of the Cargos.

Time Bar Defence

As regards the forwarder's defence of time-bar pursuant to clause 8.2.1 of the CBs/L:-

(a) The shipper first submitted that the clause should be construed *contra proferentem*.
(b) Moreover, the forwarder must be put to an election between the "delivered" limb and the "total loss" limb as the two limbs were inconsistent factual assertions.
(c) In respect of the "total loss" limb eventually elected by the forwarder, the shipper submitted that construing clause 8.2.1 *contra proferentem*, "total loss" should be narrowly construed to cases where the goods were physically totally lost and where the forwarder had given prompt notice of that to the shipper.

As regards HVR Article III, rule 6:-

(a) The shipper submitted that the obligations under HVR only apply during ocean carriage and discharge operations themselves. It did not apply to the case in question as the losses occurred after the discharge of the Cargos from ships at Kotka.
(b) It was also not a case where the goods were delivered or should have been delivered by an identifiable date.
(c) Moreover, rule 6 should not be applied to breaches of the telex release arrangement.

No Loss Defence

The shipper claimed that it was only paid in part by Koodoo for one of the seven containers in a sum of US$113,394.60 by two bank transfers. There was not any further repayment from Koodoo in relation to the Cargos.

The payments referred to by the forwarder, as recorded in the Payment Record, were submitted (from the bar table) to have been reallocated for the release of containers not relevant to the case in question. The shipper and Koodoo had something like a running account where the buyer would send funds when it could and ask for containers to be released. Such reallocation was noted by A4 Tech in emails as a request from Koodoo's management.

Furthermore, the shipper drew the Court's attention to an email from Koodoo to A4 Tech dated 4 May 2016, whereby Koodoo offered to repay the Plaintiff the outstanding sum, with a proposed payment plan.

Analysis

Although this was a case of "misdelivery", the cargos in question were eventually delivered to the buyer, Koodoo, and indeed Koodoo had made part payment in respect of some of the Cargos.

The shipper had called no evidence whatsoever in support of its case. The shipper had informed the Court that the shipper would not rely on any factual witness statement, nor adduce factual witness evidence at the trial.

The forwarder as Agent

The Judge had no doubt that the forwarder was not the authorised agent of Yang Ming. The Judge agreed with the shipper's submissions in this regard.

Furthermore, there was no formal agency agreement with Yang Ming, and there was no written authority authorising the forwarder to act as Yang Ming's agent.

The forwarder relied heavily on the fact that each relevant CB/L had "AS AGENT" printed on it. The Judge concluded that this did not assist the forwarder's case. The inscription did not say whose agent the forwarder was supposed to be.

As the shipper pointed out, the forwarder took the two OBs/L from Yang Ming in the forwarder's own name as shipper, and that if the forwarder was the agent of Yang Ming, it would make no sense that the forwarder was listed as shipper on the OBs/L. The shipper submitted that a carrier would never list its own agent, who acts for the carrier, as shipper, as this would mean the carrier was the shipper, which is nonsensical. The Judge agreed.

The shipper also submitted that by its email dated 22 December 2014, the forwarder sought to hold Yang Ming and/or the Net Logistic liable for the misdeliveries, which itself was inconsistent with the agency defence advanced.

In all these circumstances, the Judge found that the forwarder was not acting as the agent of Yang Ming, and this defence failed.

The Telex Release Issue

The forwarder's case was that the YMU Containers were released pursuant to the shipper's explicit authority to do so, as provided in the 30 September 2014 Email. Furthermore, that while the forwarder was unable to find a similar email for the HB Containers, there must have been an instruction like the 30 September 2014 Email because the telex release fee was also included for the HB Containers.

However, the Judge noted the admission made by the forwarder in the 22 December 2014 Email, that Yang Ming's own Finland agent had released the Cargos without the forwarder's authorisation. Furthermore, the shipper retained the originals of the CBs/L which would not have occurred if the shipper had in fact authorised telex releases of the Cargos.

Having carefully considered the evidence, the Judge had no doubt that there must be in place an actual telex request for the actual release of goods. The brief wording in the 30 September 2014 Email amounted to no more than the first step together with the telex release payment which provided the foundation for a telex release. This of itself did not amount to an actual telex request for release of the Cargos.

The forwarder's telex release defence failed.

Time Bar

The time bar defence rested on CBs/L Clause 8.2.1 and the HVR Article III, rule 6.

Clause 8.2.1 of the CBs/L:

The forwarder relied on the "total loss" limb. The forwarder submitted that "if the

Plaintiff cannot get its goods, then to that plaintiff the goods are lost." The forwarder confirmed that it had no direct authority to offer in support of this proposition, although the forwarder did refer the Court to *Hong Kong and Kowloon Wharf and Godown Co Ltd v Bank Negara Indonesia* [1980] HKLR 161 where the carrier misdelivered the goods shipped to Hong Kong to a person with a forged delivery note. McMullin JA remarked at p.169 that:

"It is not denied that it was failure to check the signatures which occasioned the misdelivery and hence the total loss of the plaintiff of these drums."

However in that case, the goods disappeared as a result of fraudulent conversion. In that sense, there was a total loss to the plaintiff. In the case in question, the goods concerned ended up in the possession of the contractual buyer who made at least a part payment for them.

The Judge proceeded on the basis submitted by the shipper that if there was any doubt about Clause 8.2.1, the Court would exercise the doubt against the forwarder, and in the shipper's favour. Further, these were the forwarder's own standard terms utilising the forwarder's own wording. If the forwarder had wanted to exclude liability altogether, it could do so, but would need to use very clear wording to achieve this.

The shipper addressed the *contra proferentem* principle and relied first at *Arab Lawyers Network Co Ltd v Thomson Reuters (Professional) UK Ltd* [2021] EWHC 1728 (Comm) at §44. The shipper stressed, and the Judge agreed, that in construing the relevant contractual provision, regard must be had to its language, purpose, contextual background, and its place in the contract as a whole.

The shipper also relied upon *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* (2009) 12 HKCFAR 185 in which Ribeiro PJ held as follows:

"62. An essential purpose of the contract is, as previously discussed, that the goods should be delivered by the carrier only against surrender of an original bill of lading. If, therefore, clause 2(b) is given a construction reflecting the full width of the words used, it would mean that the carrier could with impunity consciously disregard that primary contractual purpose by releasing the goods well knowing that the recipient has not provided any bill of lading relative to the cargo. That is a construction which the court inclines against as it would deprive the shipper of an essential protective obligation and seriously undermine the purpose of bills of lading.

63. One must therefore ask whether clause 2(b) is wholly unambiguous in conferring such a purported exemption on the carrier. Is it clear and fairly susceptible of that one meaning only? Or is it also fairly susceptible of a meaning which does not result in the negation of that primary contractual purpose?

64. In my view, it is plain that clause 2(b) is susceptible to more than one meaning and that it can be given adequate content as an exemption clause which operates without nullifying the cardinal obligation embodied in the presentation rule. Given its natural and ordinary meaning, the word "misdelivery" is capable of covering a range of situations which all involve the cargo being delivered to the wrong person. But many of those situations will not involve a conscious disregard of the presentation rule on the carrier's part."

The shipper submitted that "total loss" in the context here meant a maritime loss under a shipping contract where, for example, the vessel sunk with total loss of all cargo aboard with much publicity such that the recipient of the cargo would know about it (a notorious loss).

The shipper further submitted that the Clause did not apply to situations where (a) the goods were not lawfully delivered in return for original Bs/L, (b) the goods were not notoriously lost, (c) the goods were lost but not in the usual maritime sense of that word but rather by secret and unlawful release, (d) the forwarder did not tell the shipper so the shipper did not know, and (e) the forwarder had not exercised its rights to give the

shipper notice under Clause 16.3 which dealt with deemed delivery in case of non-collection.

In the Judge's view, the expression "total loss", on the face of it, could apply to all claims, even claims for breach of the presentation rule. Furthermore, it could be read as applying (or not) to claims the shipper did not know about. To this extent at least, the Clause was ambiguous, and as such the Judge construed it narrowly and, where appropriate, in favour of the shipper, taking into account the contract's nature and purpose.

In *Carewins*, Litton NPJ at para 89 said this:
"Fundamental to the tripartite arrangement between the shipper, the carrier and the consignee was that the carrier would only deliver the 23 containers on production of the bill of lading. The question then is: Are the general words in clause 2(b) precise enough to exempt the carrier from liability in such a case? It would seem very odd if that were so. On the face of the document the carrier acts at his peril by delivering the goods without production of the bill of lading; turn the document over, and it says the carrier acts with impunity by so doing. The parties cannot be deemed to have achieved such a bizarre result, by the general words used in clause 2(b). In my judgment the words in clause 2(b) are not precise enough to exempt the carrier from liability when, with eyes open, it delivers the 23 containers without production of the bill of lading."

In the Judge's view and considering this in the context of maritime loss under a shipping contract, the general words used in Clause 8.2.1 were not precise enough to cover a breach of the presentation rule. The shipper further submitted that taken in context, it was not a "total loss" where the goods were delivered without surrender of an original bill of lading and the shipper was not told about this for eleven months. The Judge agreed.

In the Judge's view, the forwarder's reliance on CBs/L Clause 8.2.1 failed.

<u>The HVR Time Bar:</u>

The shipper relied principally on the Court of Appeal judgement of *Cheong Yuk Fai & Another v China International Freight Forwarders (HK) Co Ltd* [2005] 4 HKLRD 544, at §§30 – 50, for the proposition that HVR obligations only apply during ocean carriage and discharge operations, and not during carriage or handling after discharge from the vessel.

Furthermore, the forwarder could not bring itself within the wording of rule 6 because this was not a case where the goods were either delivered or should have been delivered by an identifiable date.

The forwarder sought to distinguish *Cheong Yuk Fai* and *Trafigura Beheer BV v Mediterranean Shipping Co SA* [2007] 2 CLC 379; [2007] EWCA Civ 794 (also relied on by the shipper), and relied on *The Alhani* [2018] 2 CLC 63; [2018] EWHC 1495 (Comm) for the proposition that HVR obligations did apply to misdelivery.

The Alhani case was unique in that the cargo (bunker fuel) was discharged and misdelivered at the same time. The Court was bound by *Cheong Yuk Fai*, and there was no evidence that the eventual transmission of the Cargos to Net Logistic was part of the "discharge operations".

The Judge further accepted the shipper's submission that there was no evidence of any date when the Cargos "should have been delivered".

The forwarder's reliance on the HVR time bar failed.

Damages

The shipper claimed that it suffered damages of US$1,299,189.87 together with interest.

The forwarder pleaded that the Cargos had all been paid for, and denied that the shipper suffered any loss or damage and put the shipper to strict proof.

Onus

The shipper submitted that its loss was incurred and the various causes of action were all complete when the forwarder or its agent parted with the Cargos without permission. The shipper further submitted that it had proven its loss by "proving loss of dominion of the Cargos by reason of the forwarder's acts or omissions." The shipper then submitted that the forwarder bore the onus of pleading and proving that Koodoo paid any of the unpaid invoices, e.g. by interrogatories. The shipper also submitted that the forwarder faced the burden of persuading the Court that the shipper was "perpetuating a pointless, risky, and costly fraud on the Court to recover unmerited double-payment".

The Judge did not accept the shipper's characterisation that the forwarder was in any way alleging a fraud upon the Court. The shipper pleaded that it had suffered damages, and the forwarder simply put the shipper to strict proof of this. There was no question of any fraud upon the Court.

In relation to the shipper's argument as to loss of dominion over the 7 containers being a loss in itself, the shipper relied on the decision of Stone J in *Trafigura Beheer BV Amsterdam v China Navigation Co Ltd* [2001] 1 HKLRD 17 at p.31A-B:

"In my view, the loss in this case was caused by and consequent upon the misdelivery, the cause of action vesting the plaintiff was not a "windfall", and the plaintiff is entitled to recover therefor."

Further, at p.24J-25A:

"The plaintiff pursues its claim for misdelivery in terms of contract, conversion and bailment, and quantifies its primary loss in the sum of US$953,037.47, representing the agreed value of the cargo … as at 29 April 1998, the date of the misdelivery."

In the Judge's view, there was no doubt that the cause of action vested in the shipper upon misdelivery of its goods. In the *Trafigura Beheer* case, the loss was calculated by reference to the invoice value of the cargo. In the case in question, however, the Cargos were in fact delivered to the rightful buyer and indeed on the shipper's case, part payment was made in respect of the same by that buyer.

The Court of Appeal considered this matter in *Kuwait Petroleum Corp v I & D Oil Carriers Ltd ("The Houda")* [1994] C.L.C. 1037. The Court held at 1050:-

"I can see no good reason to depart from the general rule that the owners do not fulfil their contractual obligations if the cargo is delivered to a person who cannot produce the bill of lading. Of course, if such a delivery is made and the person to whom the cargo is delivered proves to be the true owner no damages would be recoverable. In this context, it is helpful to draw attention to the speech of Lord Blackburn in *Glyn Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591 at p. 610:

> '[The master] would not fulfil his contract if he delivered [the goods] to anyone [other than someone producing the bill of lading], though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract.'"

Considering the particular facts of the case in question, where the Cargos were in fact delivered to the correct buyer (Koodoo), and where the buyer then made at least part payment to the shipper, it was in the Judge's view incumbent upon the shipper to prove that it had in fact suffered loss and damage as a result of the misdelivery. The onus of proving its loss plainly resided with the shipper.

The Documentary Evidence

No factual evidence had been called and there was a paucity of the documentary evidence consisting mainly of email chains (which on occasion appeared to be incomplete). There was also the Payment Record in relation to the Cargos in question. The shipper did not make discovery of this document, which was produced by the forwarder.

Payment Record

The Payment Record was sent under cover of an email from A4 Tech, the shipper's associated company, to Koodoo on 22 January 2016. It read:

"Dear Vasily
I have updated the balance sheet to you, please have a check.
Best Regard
[Amy]"

This Payment Record was a crucial document. In short it disclosed that all 7 containers, the subject matter of the proceedings in question, had been paid for, and that at least 5 of them had been released. The document was a detailed one. It contained the precise dates the final payments were made and the details of the deposits in respect of all 7 containers. It was not alleged that this Payment Record was in any way a forgery. The shipper submitted there were various "problems" with the Payment Record, but these problems, if they be such, were simply as to what certain wording had in fact meant.

The Court proceeded on the basis that as at 22 January 2016, this Payment Record, being the shipper's own document, unequivocally disclosed that full payment had been made for the 7 containers in question.

The Emails

There were a number of important emails passing between the shipper (through its associated company A4 Tech) and Koodoo in April and May 2016.

The email from Koodoo was dated 25 April 2016 to A4 Tech, in which Koodoo stated:-

"However, last week we received a notification from ADL, saying, that you are retrieving the same amount from them as well. That means that you are retrieving the payments from ADL, which you had received from Buyer. Twice.
That made us feel very confused, as we were thinking, that we are discussing everything in transparent way…
According to the record with your confirmation, all the 2014, including "7 ADL containers" were paid by us."

In reply to Koodoo's email of 25 April 2016, A4 Tech replied, again on 25 April 2016:-

"Dear Anna,
Thank you for your long email and concern.
1. According to the record, Koodoo has paid for the amount of the 7 containers (ADL issue), but this has nothing to do with the legal issue. Why? Because although Koodoo has "supposedly' paid for the 7 containers, but the management in Koodoo company has requested our sales to release other containers, not the 7 containers. That is perfectly why we still hold "the original B/L paper on our hand for the 7 containers."

Quite apart from the shipper's Payment Record, the Court had evidence of an assertion, from the buyer Koodoo, that it had paid for the 7 containers and, crucially, an admission by A4 Tech on behalf of the shipper that according to its own records, Koodoo had paid for the 7 containers.

The shipper then relied on an email from Koodoo to A4 Tech dated 4 May 2016, in which Koodoo attached a "Payment Agreement" which proposed payment dates for the 7 containers. The shipper submitted that this was evidence "from the horse's mouth" that

the 7 containers remained unpaid, and that there could be no better evidence than an offer from the debtor to pay.

The Court restricted itself to considering the evidence before it. The shipper had the onus of proving its loss. It called no evidence in order to do this. By contrast, the Court had before it the shipper's own Payment Record, which unequivocally recorded that the 7 containers had all been paid for by Koodoo. Added to this was the admission by A4 Tech on behalf of the shipper that according to the shipper's record, Koodoo had paid for the 7 containers.

The shipper declined to call any witnesses to give evidence to the Court concerning the alleged loss of the shipper. There was no credible explanation provided for the absence of witnesses, and in all the circumstances the Judge drew adverse inferences from their absence and silence. It was reasonable to infer that witnesses had not been called because if they were, their evidence would be unfavourable to the shipper. The Judge added that even absent these inferences, the Judge would have found that the shipper had failed to discharge its burden of proving that it had suffered loss and damage as a result of the forwarder's acts or omissions.

The Judge had considered carefully the shipper's submission that by its email dated 4 May 2016, Koodoo had acknowledged that it had not made payment for the 7 containers, and provided a payment agreement setting out the details for proposed future payments for the Cargos. The Judge put little weight on this email. First, the shipper had described Koodoo as being itself "deceptive", having deceived the shipper by its silence. Second, there was no evidence as to how the payments admitted by the shipper in its Payment Record and email exchange were somehow discarded in favour of the Payment Agreement proffered by Koodoo in its 4 May 2016 Email. Third, even if there was an offer by Koodoo to make future payments, the shipper had advanced no evidence to establish whether or not such payments were made.

The Court concluded that the shipper had failed to establish its claim of loss and damage.

Disposition

The shipper had succeeded in establishing the forwarder's liability in the case in question and there be judgment for the shipper in this respect.

The shipper had failed, however, to establish that it had suffered the loss and damages claimed. In consequence, its claim for damages was dismissed.

The shipper was awarded nominal damages in the sum of $1,000.

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

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