



29 October 2021  
Ref : Chans advice/246

To: Transport Industry Operators

**Nominal damages II**

In our Chans advice/244, we reported the Hong Kong High Court case [HCA937/2016] [2021 HKCFI 2310] that the forwarder was held liable to pay nominal damages of HKD1,000 to the shipper in the cargo misdelivery claim of USD1,299,189.87. On 20 October 2021, the Hong Kong High Court issued a Decision on Costs holding the shipper liable to pay the costs of the forwarder. [2021 HKCFI 3021]

The Court handed down Judgement on 13 August 2021, holding that the shipper had succeeded in establishing the forwarder's liability, and entered Judgement for the shipper, but also held that the shipper had failed to establish that it had suffered any loss or damage, and in consequence awarded the shipper nominal damages in the sum of HKD1,000.

As both the shipper and the forwarder acknowledged that costs should follow the event, and where nominal damages only had been awarded, the starting point was reflected in *Hong Kong Civil Procedure Order 62/2/6*:-[citing *Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd* [1951] 1 AER 873]

"Where Plaintiffs in an action for breach of contract recover only nominal damages and do not establish anything which is of the least value to them, they are not to be regarded as successful Plaintiffs, and the court will normally treat the Defendants as having succeeded and award the Defendants the costs of the action, whether or not the Defendants have at any stage made a payment into court of nominal damages....."

Furthermore the Judge considered that in conducting its case the forwarder was not guilty of any improper conduct, nor acted in any way unreasonably or to defeat or delay Justice, and indeed entered into correspondence with the shipper to try to settle the case in question. In fact in its WP letter to the shipper of 20 March 2017, the forwarder highlighted the very matter upon which the shipper ultimately lost, being its difficulty in proving its damages, and invited the shipper to withdraw its case. The shipper nevertheless chose to proceed.

In the Judge's view, the forwarder was clearly the successful party in the litigation in question. Costs should ordinarily follow the event, and where nominal damages only have been awarded, the court will normally award the Defendant the costs of the action.

Was there anything to displace this position? The shipper urged an "*Elgindata or issues based approach*", its principal submission being that "The factual and contractual defences were always hopeless, especially the T/R defence....". The Judge did not accept that characterization. Although after closing submissions the Court had no doubt that the forwarder's various defences had failed, this conclusion was only reached after having first

considered the evidence and the reasoned submissions of the parties. The forwarder was entitled to defend itself against the shipper's claims and there was no unreasonable conduct in its attempts to do so. To the contrary, at an early stage of the hearing, the Court expressed its concerns about the viability of the shipper's case on damages, which then resulted in a late and misguided attempt by the shipper to place further and new evidence before the Court.

The Judge saw no reason to depart from the normal course to be adopted when nominal damages had been awarded, and to award the forwarder the costs of and occasioned by the legal action in question.

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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