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DCCJ 4921 of 2007

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL JURISDICTION

ACTION NO. 4921 OF 2007

BETWEEN

HENG XIN (HK) INTERNATIONAL LIMITED Plaintiff

and

SKY ONE EXPRESS (HK) LIMITED Defendant

Coram: Deputy District Judge C. Lee

Dates of Trial: 7th, 8th and 9th June 2010(in court)

Date of further hearing: 16th July 2010(in chambers)

Date of Judgment: 19th July 2010

JUDGMENT

A. INTRODUCTION

1. The Plaintiff claims against the Defendant the sum of HK$242,112, being the loss and damages sustained by reason of the Defendant's breach of its duties as the carrier of the Goods, resulted in the Defendant's failure to deliver the Goods to the

Plaintiff's client in the PRC.

2. The main issues for determination at trial are, firstly, what are the terms of the consignment agreement between the Parties. Secondly, whether the exemption clauses or the limitation clauses in the service application form dated 29th March 2006 ("Application Form") and the Consignment Document dated 22nd August 2007 formed part of the consignment agreement between the Parties. Whether the said clauses are applicable to this case. The Parties agreed that the reasonableness of the said clauses is not in issue.

B. BACKGROUND

3. Both the Plaintiff and the Defendant are companies incorporated in Hong Kong. At the material time, the Plaintiff carried on the business of the sale of electrical accessories or appliances. The Defendant carried on the business as a carrier of goods to and from China. By a Consignment Document dated 22nd August 2007 no. 30230817, the Defendant was engaged by the Plaintiff to deliver 456 pieces of LCD (for use in mobile phone) to the Plaintiff's client in the PRC at the fee of HK$1,200. The said fee includes the duty to be levied by the PRC customs and the Defendant was responsible to prepare the manifest for clearing by the PRC's customs.

4. In the evening of 22nd August 2007 or early morning on 23rd August 2007, the Defendant said that the Goods were seized or

retained by the PRC customs for investigation. The Goods were released by the PRC customs on or about 13th September 2007.

5. Thereafter, on the same date on 13th September 2007, the Defendant delivered the Goods to the Plaintiff's client in the PRC who opened the boxes without any LCD inside. The Plaintiff's client refused to accept the empty boxes.

6. The Defendant sent a letter dated 29th September 2007 to the Plaintiff. The Plaintiff relied on the words stated therein to establish the admission of "default" on the part of the Defendant in respect of carriage of the Goods. The words are of the effect that "…. because of the operational default in the course of delivery, causing the customs to investigate, seize and forfeit [the goods], we are deeply regret for that… ." (因在運送途中出現操作上的失當，因而被海關查扣沒收，我司對此事深感抱歉…).

7. The Defendant admitted that the following terms are implied to the consignment agreement between the Parties:-

(a) the Defendant would clear customs and deliver Goods to the customer at the PRC address within reasonable time;
(b) the Defendant would take proper care of the Goods during transit;
(c) the Defendant would deliver Goods safely and securely;
(d) the Defendant would use reasonable care and skill to deliver Goods to the designated address in the PRC;

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(e) the Defendant would correctly declare the descriptions and value of the Goods to the PRC customs;

(f) the Defendant would, within reasonable time, notify the Plaintiff, with necessary particulars, of any delay in the course delivery.

8. The Defendant admitted that it was a contractual bailee and owed the duty of care to the Plaintiff.

9. The Defendant disputed liability but admitted the Plaintiff's quantum of loss and damages in the total sum of HK$242,112, that comprises of the price of Goods in the sum of $162,108; the freight cost in the sum of $3,330; the loss of profit in the sum of $32,400 and compensation paid to the client in the sum of $50,274.

B.1 PLAINTIFF'S CASE

10. The Plaintiff's position is that before or at the time of signing the Application Form, Mr. Sze Yuen Liu ("Sze") of the Plaintiff got copies of the Application Form and the Consignment Document. He concerned the exemption clauses and the limitation clauses contained therein. One Mr. Billy Chiu of the Defendant ("Billy") told Sze that the exemption clauses or the limitation clauses in the Application Form and the Consignment Document would not apply to the Plaintiff, hence they did not form part of the consignment agreement between the Parties. Secondly, even if clauses 3, 6 and 8 in the Consignment Document formed part of

the consignment agreement, they are not applicable because the standard terms in the front page states that those clauses only apply to carriage of goods by air. In the present case, it is common ground that the Goods were delivered by lorry on land. Further, the plain reading and meaning of clause 6 shows that it was irrelevant. Thirdly, clause 8 in the Consignment Document was inconsistent with paragraph 4 of the Application Form and they were subject to the contra proferendum rule. Fourthly, the two previous cases of the Defendant's compensation to the Plaintiff amount to non-enforcement of a particular right and hence the doctrine of estoppel applies. Finally, the Defendant admitted default and thus it shall be liable for the loss and damages.

B.2 DEFENCE CASE

11. The Defendant took issues of the above. Its main contentions were that both the exemption clauses and the limitation clauses in the Application Form and the Consignment Document formed part of the consignment agreement. Billy never made the alleged statement. The previous two occasions of compensation did not amount to estoppel.

C. ISSUES

12. The main issues for determination at trial are: (i) what are the terms of the consignment agreement between the parties; (ii) whether the exemption clauses and the limitation clauses in the Application Form and the Consignment Document formed part

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of the consignment agreement between the Parties; (iii) whether they are applicable.

13. The subsidiary issues are:-

(1) whether the Defendant was in breach of the implied terms, in particular in respect of "reasonable care and skill", "customs clearing and declaration" and "delay notification";

(2) whether clauses 3, 6 and 8 in the Consignment Document apply: (i) whether the said clauses were excluded from application by reason of Billy's alleged statement; (ii) whether the back page only applies to carriage of goods by air; (iii) whether clause 6 is relevant on its plain reading and meaning; (iv) whether clause 8 is inconsistent with para. 4 of the Application Form, hence, subject to the rule of contra proferendum;

(3) whether the 2 previous cases of the Defendant's compensation to the Plaintiff amounted to estoppel in this case;

(4) whether the Goods were seized by the PRC authority;

(5) whether the Defendant's letter dated 27th September 2007 contains admissions and their effect on the breach of the consignment agreement.

D. EVIDENCE

14. The relevant clauses in the Application Form and the Consignment Document are set out as follows with the agreed English translations:-

(1) the 4th bullet point on the Application Form reads:

「客戶委托本公司寄發的所有貨件之內容必須符合本公司在寄件單背面及價目表上所聲明的條件，本公司對由客戶違反或不遵守上述條件而導致的後果恕不負上任何責任，交寄之貨物如遇嚴重損壞、丟失、海關沒收等，本公司最高賠償為該貨件運費之三倍，或最多以不超過壹佰美元為限。」;

"The content of all goods consigned to our company for delivery must be in compliance with the conditions declared by our company on the back side of the consignment note and the pricelist. Our company shall not be liable for any consequences caused by the customer's breach or non-compliance with such conditions. In the event that the goods concerned are seriously damaged, lost or forfeited by the customs and excise authority, etc., the maximum compensation from our company is three times the freight of the goods concerned, or no more than US$100."

(2) the clauses 3, 6, and 8 of the Consignment Document read:

「3　凡顧客在未購保險者，於運載上如有遺失，損毀及罰沒等情況，本公司所支付責任，最多以不超過一百美元（文件以不超二十美元）為限，如果未有付上運費者，不可要求作出任何賠償，作要求賠償之數額不能在運費上扣除。」("**Clause 3**");

'3　For cases where the customer has not taken out insurance, in the event of any loss, damage, penalty and forfeiture, etc., during carriage, our company shall be liable to pay no more than US$100 [for document, no more than US$20]. No compensation can be sought where the freight has not been paid and the compensation sought cannot be deducted from the freight.' ["Clause 3"]

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「6　運載貨品如在五百美元以上，恕不接受。」("**Clause 6**");

'6 Goods for carriage, if having value exceeding US$500, will not be accepted.' ["Clause 6"];

「8　如貨品遭當地海關或任何人士扣留，本公司均不作任何責任或賠償。」("**Clause 8**").

'8 In the event of detention of the goods by local customs and excise authority or any person, our company shall not be liable or will not make any compensation.' ["Clause 8"]

15. The Plaintiff called two witnesses. They were Mr. Sze Yuen Liu ('PW1") and Mr. Ng Kam Cheng ("PW2"). The Defendant called 4 witnesses to testify. They were Mr. Tang Chi Wai ("DW1"), Mr. Chan Chun Wan ("DW2"), Mr. Hung Shing Hei ("DW3") and Mr. Law Wai Yin ("DW4"). In addition, the witness statement of Mr. Hon Lung was admitted without the Plaintiff's objection.

16. PW1 said in gist how Billy told him that the exemption clauses or the limitation clauses did not apply to the Plaintiff. PW2 was the Plaintiff's client who said that the one who delivered the empty boxes to him was not DW1 as alleged by the Defendant. DW1 was the driver who testified how the Goods were seized by the PRC's customs. DW2 was the defendant's courier who received the Goods from the Plaintiff for delivery to the PRC.

DW3 was the senior and marketing manager of the Defendant who testified that Billy obtained the Plaintiff as the customer and Sze put his signature on the Application Form. DW4 was the one who prepared the manifest and supervised the drivers or couriers. Mr. Hon Lung was the Defendant's storekeeper who passed the manifest and the Goods to DW1.

17. PW1's relevant evidence can be summarized as follows:-

(1) He confirmed and adopted three witness statements made by him.

(2) He stated that when he first saw the copies of the Application Form and the Consignment Document in about March 2006. He expressed his concern over the exemption clauses and the limitation clauses. He was assured by Billy, the salesman of the Defendant that those clauses were mere formalities and they would not apply to the Plaintiff. With that assurance, the Plaintiff started to retain the Defendant to provide courier service.

(3) The Plaintiff was given a pile of blank consignment documents beforehand so that Sze or the Plaintiff's staff could fill in the necessary particulars so as to expedite the process. The Consignment Document in question was one of the stock kept by them and filled in by him before the Defendant's staff came to collect the Goods.

(4) During cross examination, he was asked to explain why, had Billy made the said assurance, why didn't he simply delete or ask to delete the clauses, Billy told him that it was unnecessary.

(5) There were 2 occasions of compensation paid by the Defendant to the Plaintiff before this case. The 1st occasions related to 3 consignment documents and a total of $680 was paid, a sum less than US$100. In the 2nd occasion, a sum of $1,890 was paid, which was 2 times of the courier fee.

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(6) He instructed his lawyer to write at least 4 letters dated between December 2007 and January 2008 to the PRC customs as to whether the Goods were forfeited, however, there was no reply.

18. DW1's relevant evidence can be summarized as follows:-

(1) Except a mistake in paragraph 2(c) where he corrected that "Hon Lung" should be "Hung Shing Hei", he confirmed and adopted his written statement.

(2) He was the driver and told the court what happened to him in the evening when he drove through the border. In the evening of 22nd August 2007, he was picked up by the PRC's customs for inspection. The inspection took a few hours until the early morning of 23rd August 2007. After the inspection, he was notified that some goods were to be seized. Apart from the Goods, there were some other clients' goods being seized. The customs officer passed him a seizure note for him to send back to the Defendant's office by facsimile machine. After he did that, he returned the seizure note to the customs officer. He did not keep any copy nor did he dare asking for a copy.

(3) He referred to a seizure note no. 20073346 (扣留貨单) as if it was the copy he sent to the office on 23rd August 2007 by fax.

(4) During cross examination, he was told that date of the said seizure note was 30th August 2007. It was impossible that on 23rd August 2007, he sent a document dated 30th August 2007 by fax, he explained that there should be some more documents such as the vehicle inspection paper (查車纸). There were also seizure note (扣押單) and seizure warehouse note (扣倉單), these 2 sets are different documents, despite the fact that the Defendant only produced a purported faxed copy of the seizure note no. 20073346 (扣留貨单) dated 30th August 2007.

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(5) On about 13th September 2007, DW4 told him that the Goods would be released and he was instructed to deliver the Goods to the Plaintiff's client in Guangzhou, PRC. He did not move the Goods when they were loaded to his lorry at the time the PRC customs released them. There should be an attendant who assisted loading. He did not open the boxes for inspection. He then delivered the Goods to the designated address. He said that someone from the Plaintiff's client unloaded the Goods, again, he did not touch them. He had the impression of asking the person to sign and acknowledge the receipt of the Goods. He did not recall if he had any assistant at that time. He said that he only came to know during the trial that there was no LCD inside the boxes.

19. DW2's relevant evidence can be summarized as follows:-

(1) He confirmed and adopted his written statement.

(2) On or about 22nd August 2007, he went to pick up the Goods from the Plaintiff's office for delivery to PRC. He said that he brought the Consignment Document to Sze to fill in. He also asked Sze to read the terms on the back page.

20. DW3's relevant evidence can be summarized as follows:-

(1) He confirmed and adopted his written statement. He was the senior manager of the sales and marketing department of the Defendant. He took the initiative to correct that the seizure note no. 20073346 (扣留貨单). It should be issued on 30th August 2007, not on 23rd August 2007 as alleged in his witness statement.

(2) His company, apart from transporting the Goods, also prepared the manifest and declaration and paid the duty as levied by the PRC customs. They also

engaged a manifest declaration agency (報關行) to assist preparing the declaration. He referred to a particular manifest that includes the Goods. The Goods were stated to be 456 pieces, 10 kg in weight and value at HK$1,000.

(3) During the trial, he still did not know why the Goods were once seized. He confirmed that the said seizure note was the only document that related to the seizure of the Goods obtained from DW1.

21. DW4's relevant evidence can be summarized as follows:-

(1) He confirmed and adopted his written statement. He was the manager of the logistic department of the Defendant. He took the initiative to correct that the seizure note no. 20073346 (扣留貨单). It should be issued on 30th August 2007, not on 23rd August 2007 as alleged in his witness statement.

(2) In respect of the information about the Goods on the manifest, he provided such information as "456 pieces, 10 kg in weight and value at HK$1,000". He explained that he declared the value of the Goods as HK$1,000 in accordance with certain guidelines issued by the PRC customs, which was not produced at trial.

(3) He asked the manifest declaration agency (報關行) to follow up the matter of seizure and on or about 13th September 2007. He understood that the Goods were to be released and hence he instructed DW1 to collect the Goods and delivered them to the Plaintiff's client on the same day.

E. DISCUSSION

22. In the opening speech, the Parties prepared the case as if the Goods were seized and forfeited, thus they were not released by the PRC customs. Therefore, the Defendant sought to invoke the

exemption or the limitation clauses that relate to "confiscation" or "forfeiture". This caused the Plaintiff to contend that the relevant clause was not applicable. It turned out from the factual matrix, especially the evidence of the driver (DW1) and DW4 that the Goods were once seized on 23rd August 2007 but were released on 13th September 2007. For an unknown reason, the Goods were found to be disappearing when the Plaintiff's client opened the boxes on 13th September 2007. The focus seems to be shifting from "confiscation" to "Goods were lost for an unknown reason". On the question of shifting, the Defendant's position was that the Goods were released on 13th September 2007 and they disappeared thereafter for an unknown reason. The Plaintiff's position was that they did not accept that the Goods were seized, let alone the Goods were released. They doubted the authenticity of the said seizure note. Even if the Court accepts that the Goods were seized and released. The Defendant was guilty of gross negligence that the clauses could not exempt or limit its liability.

23. I shall deal with the credibility of the respective witnesses. It is more convenient to deal with subsidiary issue no. (4) first. I found that on the balance of probability, Mr. Billy Chiu of the Defendant did say to PW1 that the clauses would not apply to the Plaintiff. PW1's evidence was simple and straightforward. He was unshaken during cross examination. I prefer his evidence in so far they conflict with those of the Defendant. I note that despite the said allegation from PW1 which was disclosed as early as in his witness statement, the Defendant did not call Billy

or apply for subpoena to call him to traverse the said allegation. Counsel for the Defendant explained that Billy has left the Defendant. In my view, if the Defendant believed that Billy Chiu did not make the alleged statement, it is difficult to understand why Billy was not called or subpoenaed despite he left the Defendant. Although the failure of calling Billy would not advance the Plaintiff's case, I accept PW1's evidence on the balance of probabilities.

24. I also accepted PW2's evidence. His evidence was clear in that it was Yim Lap Sun who delivered the empty boxes, not DW1. His evidence was supported by an unchallenged document which shows the return of the boxes to Yim Lap Sun, not DW1. This was in direct conflict with DW1's evidence. DW1's evidence was that he delivered the Goods on 13th September 2007, he had the impression of asking the receiver to sign and acknowledge the receipt the Goods. He did not mention anyone who opened the boxes without LCD. He gave evidence as if the Goods were delivered without abnormality. It seems to me that DW1's evidence was contrary to the defence case that the Goods were lost on 13th September 2007 that also caused DW3 to admit "default" on 27th September 2007. Further, when DW1 was asked as to the basics of the delivery on 13th September 2007, he often said "no impression". Simply put, had he asked the receiver to sign and acknowledge the receipt of the Goods, there was no reason why the alleged receipt was not produced. I rejected DW1's evidence.

25. I was also impressed that DW2 was prone to exaggeration. He

mentioned that on 22nd August 2007, he asked Sze (PW1) to read the terms at the back page. That was the occasion after the Plaintiff has engaged the Defendant for more than 180 times for courier service. He explained that his superior might call the client direct to check if their service was good. I do not see how the politeness or courtesy had anything to do with the terms overleaf. His evidence was unreliable.

26. Regarding DW3, he confirmed that the seizure note dated 30th August 2007 was the only document that he obtained from the driver (DW1). However, DW1 said that he should have sent different seizure documents by fax twice on 23rd August and 30th August 2007 respectively. They were the seizure note (扣押單) and the seizure warehouse note (扣倉單). DW1's evidence was conflicting with DW3's evidence on material aspects. Neither DW1 nor DW3 was believable.

27. Regarding DW4, it seems that he did not care how much was the value of the Goods, though the Defendant accepted that the price of the Goods was $162,108. What DW4 said was that based on certain guidelines issued by the PRC customs, he filled in the value of the Goods was HK$1,000. As a matter of common sense and logic, what kind of guideline of the PRC customs that will guide a person to declare the Goods casually or to undervalue of the goods substantially, DW4 was not asked to clarify nor Counsel for the Defendant was able to think of any plausible explanation. His evidence was out of logic and common sense. I rejected his evidence.

28. I also note that DW1 only came to know the seizure note was dated 30th August 2007 when he was cross examined. DW3 and DW4 were not in Court at that time as they were invited to wait outside. When both DW3 and DW4 were giving evidence in chief, they took the initiative to correct that the seizure note was issued 30th August 2007, not 23rd August 2007. DW3 explained that he discovered the mistake 2 to 3 weeks before the trial but he did not notify the lawyer, he notified one Simon only. DW4 explained that he discovered the mistake about one week before the trial. He considered it important but he was unable to explain why he first mentioned the mistake during examination in chief. My view is that it is very likely that someone alerted DW3 and DW4 of what had happened to DW1 during his cross examination. But DW3 and DW4 denied that and purported to explain that they discovered the important mistake much earlier and did nothing. Their evidence was tainted by their lack of candour.

29. In short, I accept the evidence of PW1 and PW2 and reject the evidence of DW1 to DW4 except that there is no conflict between the Parties.

F. FINDINGS

30. In respect of the main issues, I found that the terms of the consignment agreement comprises of the front page of the Consignment Document and the implied terms as admitted. The exemption or the limitation clauses in the Application Form and

the Consignment Document did not form part of the consignment agreement. They were excluded by reason of Billy's statement. The said statement either amounted to estoppel or collateral agreement between the Parties.

31. I accept the legal proposition that a promise or representation inducing the contract estoppes the promisor or representor from invoking the printed terms in the contract to the contrary effect. See: *Great Bright Ltd v. Triangle Motors Ltd*, unreported, HCA No. 7781 of 1995, 4 February 2002, per DHCJ Lam (as he then was) at paras 43 to 44, (also quoting Lord Denning MR in *Mendelssohn v. Normand* [1970] 1 QB 177, at 183G-184G):

> *"43. Although it cannot be disputed that the clause was printed at the back of the Customers' Orders, it does not follow that legal effect would be given to the same. I find the present case indistinguishable from the case of Mendelssohn v. Normand [1970] 1 QB 177. In that case, there were exemption clauses printed at the back of a garage ticket and a notice at the reception desk. The plaintiff parked his car at the garage. He was told by the attendant to left the car unlocked. The plaintiff said that there was a suitcase containing valuables in the car. The attendant insisted that the car be left unlocked but agreed to lock it up for the plaintiff after he moved it. The plaintiff then gave the keys to the attendant. The valuables were stolen and the garage was held to be liable notwithstanding the exemption clauses. The Court of Appeal was unanimous in their reasoning as to why the printed conditions at the back of ticket (which was accepted to be a contractual document, see p.182 G to 183A) could not be relied upon by the garage. Lord Denning MR said at p.183G to p.184C:*
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> > *'He relies on the conversation which Mr. Mendelssohn had with the attendant. The man promised to lock up the car. In other words, he promised to see that the contents were safe. He did not do so. Instead he left the car unlocked. It was probably he who took the suitcase himself. What is the effect of such a promise? It was not within the* actual *authority of the attendant to give it but it was within his* ostensible *authority. He was there to receive cars on behalf of the*

> *garage company. He had apparent authority to make a statement relating to its custody. Such a statement is binding on the company. It takes priority over any printed condition. There are many cases in the books when a man has made, by word of mouth, a promise or a representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate his representation by reference to a printed condition, see* Couchman v. Hill *[1947] K.B. 554;* Curtis v. Chemical Cleaning and Dyeing Co. *[1951] 1 K.B. 805; and* Harling v. Eddy *[1951] 2 K.B. 739; nor is he allowed to go back on his promise by reliance on a written clause, see* City and Westminster Properties *(1934)* Ltd. v. Mudd *[1959] Ch. 129, 145 by Harman J. The reason is because the oral promise or representation has a decisive influence on the transaction - it is the very thing which induces the other to contract - and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation. As Devlin J. said in* Firestone Tyre and Rubber Co. Ltd. v. Vokins & Co. Ltd. *[1951] 1 Lloyd's Rep. 32, 39: "It is illusory to say: 'We promise to do a thing, but we are not liable if we do not do it'." To avoid this illusion, the law gives the oral promise priority over the printed clause.'*

Phillimore LJ said the same thing at p.185H to 186 E. In particular at p.1:

> *'In my judgment the submissions which Mr. Yorke has made are correct and he is also entitled to say that if you have an express undertaking, as here, followed by printed clauses, the latter must fail in so far as they are repugnant to the express undertaking.'*

44. In the present case, I have found that the oral assurance of Lin amounted to an undertaking by the Defendant to deliver the vehicles to the border by the deadline and that was very important to the Plaintiff. Without such undertaking, Wong would not make the contract with the Defendant. To allow the Defendant to rely on the exemption clause printed at the back of the Customers' Orders would render the undertaking to be illusory. The exemption clause, at least in its English version, is repugnant to the undertaking given by Lin. I hold that the principle of Mendelssohn v. Normand applies here and the oral undertaking prevailed."

32. I also accept that a promise or representation can be categorized as a collateral or independent contract that is itself enforceable. See: *Bank of China (Hong Kong) Ltd v. Fung Chin Kan & Anr* [2003] 1 HKLRD 181 (CFA), per Litton NPJ at 199A-E:

> *"57. A collateral agreement, like any other contract, must be objectively viewed, so the test must be this : On the totality of the evidence, must the parties be taken to have intended that the representation made by one of them should form part of the basis of the legal relationship between them?*
>
> *58. Here, the position was simply this : In consideration of Mr and Mrs Fung executing the bank's standard form of legal charge to be prepared by the solicitors, charging their flat to the bank as security for facilities to be granted to SMC, the bank agreed that their exposure to financial risk should be limited to $3.3 million, unless agreed otherwise. The bank was, in law, bound by that agreement and could not rely on the solicitor's mistake in failing to put a limit of $3.3 million in the written instrument to saddle the respondents with SMC's total liability.*
>
> *59. A conclusion thus arrived at is in accordance with well-established legal principles and requires no straining of the frontiers of Equity …"*

33. See also: *Natamon Protpakorn v. Citibank NA* [2009] 1 HKLRD 455 (CA), at 462 (para 19) and 465 (para 33):

> *"**Collateral contract/independent contract***
>
> *19. The plaintiff, however, averred that her relationship with the defendant on margin FX trading was based on terms of the 2001 Agreement, as varied by 2004 Agreement. She contended that she was entitled to roll over her contracts, and that the defendant, in breach of the 2001 and 2004 Agreements, wrongly had closed out her contracts. These two agreements were in the nature of collateral contracts or independent freestanding contracts from the Standard Agreement."*

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> *"33. Collateral contract is an exception to the parol evidence rule, which precludes the admission of oral evidence to contradict the terms of a written agreement. The collateral contract is, however, treated as an independent contract and therefore not subject to the rule …"*

34. In respect of the subsidiary issues, I found that the Defendant was in breach of the implied terms. In particular, the Defendant failed to declare the value of the Goods properly that resulted in their seizure. The Defendant failed to inspect what was inside the boxes after their release on 13th September 2007. They failed to take proper care of the Goods. They failed to deliver the Goods safely and securely. They also failed to use reasonable care and skill to deliver the Goods.

35. The Parties also made submissions regarding the applicability and the construction of the said clauses in the event that the said clauses formed part of the agreement between the Parties. In light of the above findings, it may not be necessary to deal with them. However, for completeness sake, I shall deal with them briefly. My short answer is that they are not applicable in this case.

36. Counsel for the Plaintiff, Mr. Li submitted that the exemption or the limitation clauses in the Application Form, i.e. the bullet point no. 4 only applies to a situation where the descriptions of the goods did not conform with the conditions stated in the back page of the Consignment Document or the declaration in the price list, and the client failed to comply with or was in breach of those conditions. In the present case, no evidence was adduced

on a client's failure to comply or his breach of the conditions. I accept his submission and the situation stated therein did not arise and the Defendant could not invoke that clause to exempt or limit its liability.

37. Regarding clauses 3, 6 and 8 that appear in the back page of the Consignment Document, Mr. Li referred me to a statement in the front page which reads: "Non-negotiable airway bill subject to standard conditions of carriage shown on back side" (有關航空货運契约條款請參閱底聯背面). He said that the said clauses in the back page only apply to airway bill. It is undisputed that this case is not carriage of goods by air. Hence, they are not applicable. Mr. Yeung, Counsel for the Defendant submitted that the understanding or the course of dealings between the Parties had the effect of ignoring the references to airway bill, hence the terms in the back page still apply even if it was stated to be "carriage of goods by air". I do not see there is any factual or legal basis to support his submission. I agree with Mr. Li's submissions.

38. Mr. Li further submitted that there could be many possible scenarios of lost of goods. Regarding clause 3, it provides liability limitation in case of loss of goods (遺失). Firstly, there could be loss of goods due to the negligence of the Defendant. Secondly, there could be loss of goods without the Defendant's negligence if sufficient and reasonable measures were adopted and still loss the goods was inevitable. Thirdly, there could be loss of goods due to the theft of the Defendant's staff. Fourthly,

there could be loss of goods due to the theft of the Defendant as a whole. The said clause does not state which scenario the clause applies and it is absurd if it applies to the loss of goods due to the theft of the Defendant or their staff. Hence, at most, it only applies to the loss of goods due to the Defendant's negligence, which is common in the contract of carrier. In this case, Mr. Li said that the Defendant was guilty of gross negligence. In my view, with the 2 previous cases of compensation in mind, yet the Defendant did not take appropriate steps to improve the system of inspection or checking in the course of delivery. In particular, DW1 did not open the boxes upon their release by the PRC customs or at the time the Goods were delivered to the Plaintiff's client on 13th September 2007. The Defendant was guilty of gross negligence. Consequently, it seems to me that clause 3 is not applicable on another ground.

39. Clause 6 is not applicable too. The wordings of clause 6 is not akin to other similar clauses where a client is required to give a warranty that the value of the goods does not exceed US$500, hence in case of the breach of the warranty then a carrier is not liable. By accepting the goods without requiring a client to provide or declare the value of the goods, let alone a warranty does not avail the Defendant. After all, clause 6 is not a limitation clause or the exemption clause.

40. Clause 8 is not applicable because it only applies to the situation of confiscation whereas the latest position of the Defendant was one of loss of goods after release by the PRC customs.

41. Having said that, I do not see how the 2 occasions of compensation had the effect of estoppel as contended by the Plaintiff. Had I accepted his submission, once a carrier made the compensation for say in 2 individual cases, the carrier cannot invoke a limitation clause thereafter. This will create absurdity. It seems to me that there is insufficient factual or legal basis to establish estoppel.

42. Lastly, the overall impression of the Defendant's letter dated 27th September 2007 seems to be making a without prejudice offer though it is not marked "without prejudice". I do not consider it is fair to treat the letter as an admission of default or liability, though I found that, on evidence the Defendant was in breach of the implied terms and was guilty of gross negligence.

43. The Defendant did not dispute the quantum. In a nutshell, judgment be given in the amount as claimed.

G. ORDERS

44. I hereby give the following orders:-

(1) Judgment be given for the Plaintiff. The Defendant do pay to the Plaintiff the sum of HK$242,112;

(2) Interest on the said sum at half of the judgment rate from the date of writ to the date of judgment, thereafter at full judgment rate until full payment;

(3) Costs order nisi that the Defendant do pay the costs of

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the action to the Plaintiff with certificate for counsel to be taxed if not agreed. Unless any of the parties applies by summons to vary it, the costs order nisi shall be made absolute 14 days from today.

(Clement Lee)
Deputy District Judge

Mr. Laurence Li, instructed by Messrs. Alvan Liu & Partners, for the Plaintiff

Mr. Stephen Yeung, instructed by Messrs Huen & Partners, for the Defendant