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HCA 2614/2008

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**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

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COURT OF FIRST INSTANCE

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ACTION NO 2614 OF 2008

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BETWEEN

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GLOBAL METALS LIMITED

Plaintiff

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and

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ASIA COUNTRIES CO. W.L.L.

Defendant

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Before: Hon Fok J in Court

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Date of Hearing: 1-2 March 2010

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Date of Judgment: 16 March 2010

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Introduction

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1. This is a trial of an action arising out of a contract between the plaintiff as buyer and the defendant as seller of a quantity of scrap metal.

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The plaintiff claims it has made full payment in respect of the two shipments that have been made under the contract but that, in breach of contract, the defendant has failed to make delivery of the second shipment.

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The defendant maintains that full payment has not been made under the contract and counterclaims the balance of the price.

Background

2. The plaintiff is a Hong Kong company engaged in the business of metal trading. The defendant is a Kuwaiti company also engaged in metal trading.

3. Ala International Trading LLC (“Ala”) is a company incorporated in the UAE and acted as an agent for the defendant in the sourcing of buyers for it.

4. Pacien Development Company (“Pacien”) is a Taiwanese company which acted as an agent for the plaintiff and introduced the plaintiff to Ala.

5. The purpose for which the plaintiff purchased scrap metal from the defendant was either to process the scrap into its various component raw materials for sale to third parties or to on-sell the metal scrap itself to third parties.

6. In June 2008, the plaintiff and defendant entered into a contract for mixed metal scrap to be shipped by the defendant in Kuwait for transport to Huizhou Port (“the initial transaction”). That shipment was duly made by the defendant and paid for by the plaintiff.

7. In the case of the initial transaction, after the shipment of the scrap metal from its country of origin, namely Kuwait, the defendants sent

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to the plaintiff, via Ala and Pacien, the commercial documents consisting of an invoice, packing list, certificate of origin and a copy non-negotiable bill of lading.

8. On receipt of the commercial invoice, packing list, certificate of origin and a letter of confirmation of effective shipment, the plaintiff made payment of the purchase price by telegraphic transfer (“TT”) to the defendant. The defendant then provided the plaintiff with original bills of lading to enable the plaintiff to take delivery.

9. However, there was a dispute as to the quality of the scrap metal delivered. As a result of that dispute, the plaintiff contends that an agreement was reached by it acting through Pacien with the defendant acting through Ala that the plaintiff would be entitled to deduct the sum of US\$30,000 against invoices for future shipments from the defendant. This is disputed by the defendant.

10. Following the initial transaction, the parties entered into a second agreement, dated 20 August 2008, under which the plaintiff agreed to purchase and the defendant to sell 200 metric tons in 10 twenty foot containers of mixed metal scrap (“the Contract”). The delivery period was to be within 40 days from the date of the contract and the payment terms included a 10% advance of US\$75,000. This percentage and advance payment amount was not in fact calculated by reference to the precise contract price of the metal scrap, since the scrap was to consist of copper, lead and aluminium and there was a different unit price depending upon the percentage of each of those three metals in the scrap as shipped.

11. After the agreement was executed, the plaintiff remitted the advance payment of US\$75,000 to the defendant by TT on 4 September 2008. On 24 September 2008, the defendant shipped three containers of metal scrap from Kuwait (“the 1st shipment”). The defendant then sent a commercial invoice, packing list, certificate of origin and copy bill of lading and confirmation of effective shipment in respect of that shipment to the defendant via Ala and Pacien.

12. On 30 September 2008, the defendant shipped a further four containers of metal scrap from Kuwait (“the 2nd shipment”). The defendant then sent a commercial invoice, packing list, certificate of origin, and confirmation of effective shipment to the defendant via Ala and Pacien.

13. As a result of the adverse economic conditions prevailing in the latter part of 2008, in October 2008, the plaintiff, through Pacien, invited Ala to enter into negotiations on behalf of the defendant and other suppliers regarding the purchase prices of metals under various ongoing contracts, including the Contract. To this end, various meetings took place in Nanhai between representatives of the plaintiff and Pacien on the one hand and a Mr Muzammil Haji Amin of Ala on 24 and 25 October 2008 on the other.

14. Pursuant to those meetings a document entitled Settlement Agreement dated 28 October 2008 was signed for and on behalf of Ala and for and on behalf of the plaintiff. Clause 1 of the Settlement Agreement provided as follows:-

“Ala International Trading LLC and Global Metals Co Ltd mutually agree that this Agreement supersedes all previous agreements or arrangements between the Parties (and their

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respective associates or affiliated parties) in relation to the acquisition of scrap metals and the other subject matters of this Agreement (including any letter of intents, orders or oral representations). All or any such previous agreements or arrangements (if any) shall cease and terminate with effect from the date hereof and the parties acknowledge that no claim shall arise and waiver of any rights to claim in respect of any agreement so superseded by this Agreement.”

15. The Contract was referred to in Clause 2(B) of the Settlement Agreement and this reference included the commercial invoice numbers for the 1st shipment and the 2nd shipment. In respect of payment, Clause 2(B) provided: “TT for the value of 70% of original contract price Global Metal will pay”.

16. The plaintiff contends that Ala entered into the Settlement Agreement as agent for and on behalf of the defendant. This is disputed by the defendant.

17. Following the execution of the Settlement Agreement, the plaintiff remitted to the defendant by TT the sum of US\$138,738 on 7 November 2008. The plaintiff maintains that this represented 70% of the value of the invoice for the 1st shipment less US\$32,143 being the pro-rata amount of the US\$75,000 advance already paid. Before payment was effected, Pacien confirmed with Ala by e-mail the apportionment of the US\$75,000 advance between the 1st shipment and the 2nd shipment.

18. Upon payment of that further sum, the defendant surrendered the original bill of lading for the 1st shipment to the plaintiff, which was then able to collect the three containers making up the 1st shipment at Huizhou Port.

19. The plaintiff then remitted a further sum of US\$129,673 on 28 November 2008 to the defendant. The plaintiff maintains that this represented 70% of the value of the invoice for the 2nd shipment less US\$42,857 being the pro-rata amount of the US\$75,000 advance and also less US\$30,000 being the discount the plaintiff maintains the defendant agreed to give the plaintiff after the initial shipment.

20. The defendant did not deliver any documents of title for the 2nd shipment to the plaintiff. After its arrival in Hong Kong, the 2nd shipment of goods was never transshipped for onward carriage to Huizhou Port. Instead, the defendant took steps to arrange for the four containers comprising the 2nd shipment to be transported back to the Middle East.

Procedural history

21. The plaintiff commenced this action by writ dated 13 December 2008. Immediately prior to commencing the action, the plaintiff obtained an *ex parte* injunction prohibiting the defendant from removing the four containers from Hong Kong and a mandatory injunction requiring the defendant to release the original bill of lading in respect of the 2nd shipment to the plaintiff's solicitors. That injunction was continued on 19 December 2008.

22. The Statement of Claim was served on 16 January 2009. On 16 February 2009, the defendant served its Defence and Counterclaim. The plaintiff then applied for summary judgment and to strike out the defendant's Defence and Counterclaim.

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23. On 9 March 2009, Reyes J gave various directions. He made an order for sale of the four containers and directed that the proceeds of sale (less relevant storage costs) be paid into Court pending resolution or further order. He also directed a speedy trial of the action and discharged the injunction.

The Issues

24. The plaintiff contends that it has paid the full amount due in respect of the 2nd shipment and that the defendant, in breach of the Contract, as varied by the Settlement Agreement, failed to deliver the 2nd shipment. Since the scrap metal comprising the 2nd shipment has been sold and the proceeds paid into Court, those proceeds represent the value of the goods not delivered to the plaintiff and, the plaintiff contends, it is entitled to payment out of those proceeds. The plaintiff also claims, by way of damages, the profit it would otherwise have made on the re-sale of the goods.

25. In its Defence, the defendant (1) denies that there was any agreement for a deduction of US\$30,000 on future contracts, (2) denies knowledge as to the plaintiff's purpose in purchasing the goods, (3) asserts that Ala's only role as its agent was to introduce the plaintiff to the defendant and to follow up payments by the plaintiff, (4) denies Ala's authority or consent to enter into the Settlement Agreement on its behalf and (5) denies that a 30% discount was agreed under the Settlement Agreement. Accordingly, by its Counterclaim, the defendant contends that it was the plaintiff that was in breach of the Contract in failing to pay the balance of the purchase price from the originally invoiced amount of

US\$533,440.46, namely US\$190,108.67, and counterclaims that balance as damages.

26. The principal issues in this trial are therefore:-

- (1) Was Ala the defendant's duly authorised agent to agree the US\$30,000 deduction after the initial transaction and was this deduction in fact agreed?
- (2) Was Ala the defendant's duly authorised agent to enter into the Settlement Agreement and is the 30% price discount in that agreement binding on the defendant?

27. If the answers to these questions are in the affirmative, it will follow that the defendant was in breach of the Contract in failing to deliver the 2nd shipment. On the other hand, if the answers are negative, it will follow that the plaintiff was breach of the Contract in failing to pay the balance of the purchase price under the Contract.

The evidence concerning the deduction following the initial shipment

28. It was not in dispute that Ala was an agent of the defendant. In the Defence and Counterclaim, the defendant pleaded that Ala was a sourcing agent for it and asserted that its only role was to introduce the plaintiff as buyer to the defendant as seller and to follow up payments by the plaintiff for goods purchased. The defendant denies that Ala had power or authority whether expressly or impliedly granted by it to Ala "except the authorization to source potential buyers on behalf of the Defendant and to follow up with regards to payment".

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29. As regards the initial transaction, the plaintiff’s evidence is that, after delivery of the goods, the plaintiff discovered the percentage of copper content in the metal scrap was less than it should have been as reflected in the price paid. The plaintiff therefore made a request via Pacien to Ala, on behalf of the defendant, for a price reduction.

30. By an email dated 28 August 2008, Pacien contacted Ala under the subject reference “ACC/SC/TT/08/198”, being the contract number of the initial transaction, and “Claim for asia countries quality shortage cu 4%, pb 2%”. The e-mail raised the complaint that, whereas the percentages of copper (CU) and lead (PB) under the contract should have been 15% and 41% respectively, they were found on delivery to be 11% and 39% respectively.

31. After being chased by Pacien for a response, and in the face of a proposal made by the plaintiff via Pacien to appoint an independent third party inspector for the goods, Ala sent an e-mail to Pacien on 2 September 2008 saying:-

“I don’t want to go for the arguments long detail, I will convince shipper to pay 50:50, I am sure when they will do full process they will match the % what shipper has charge them.

Why to pay money extra to any 3rd party?

Please close the issue based on 50:50- & look forward for new business.”

32. Pacien replied to reject this proposal, indicating that the plaintiff would prefer to appoint a third party inspector. This was followed by an e-mail from Pacien to Ala dated 10 September 2008 stating that the

defendant “would accept \$30,000 for the total settlement (\$30,000 is a little more than 50% 50%)”.

33. Ala then sent an e-mail dated 11 September 2008 from Ala to Pacien stating:-

“I have settle the claim with Asia countries at Usd.28000-, You try to finish at this level if not then pay as you like I will bear.”

34. This offer was rejected by Pacien on behalf of the plaintiff by an e-mail of the same date. Pacien informed Ala that “\$30,000 is the final they will deduct from Asia Country’s account”.

35. Ala responded, also on the same date, to Pacien in the following terms:-

“Noted the same & confirm to pay Usd.30000- which they can dedcut [sic] from there [sic] invoice.”

The evidence concerning the Settlement Agreement and the subsequent payments made by the plaintiff

36. The Settlement Agreement is dated 28 October 2008 and signed for and on behalf of Ala and the plaintiff respectively. I have referred above to the terms of Clause 1 of the Settlement Agreement and to the fact that the Contract is specifically referred to in Clause 2(B).

37. The plaintiff’s evidence is that the meetings leading to the Settlement Agreement arose as a result of the global economic downturn in 2008. Three meetings took place in Nanhai, two on 24 October 2008 and one on 25 October 2008. The plaintiff was represented by Mr Zhou Wen

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Jie, a director and shareholder of the plaintiff, Mr Huang Zhao Dong, the plaintiff's regional purchase manager, and Ms Idy Cheung, a consultant of the plaintiff. The plaintiff's agent, Pacien, was represented by Ms Fang Yi Lai (also known as Ms Yvonne Lai). Ala was represented by Mr Muzammil Haji Amin.

38. According to the evidence of Mr Zhou, during the course of the negotiations, Mr Muzammil made and received about 4 to 5 telephone calls. He spoke in a language which none of the plaintiff's representatives understood.

39. No agreement was reached at the first meeting but after the third meeting agreement was finally reached whereby a discount of 30% was to be applied to the goods shipped pursuant to the four contracts which were the subject of the Settlement Agreement, including the Contract.

40. Following the conclusion of the Settlement Agreement, the plaintiff made payment for the 1st shipment under the Contract in the sum of US\$138,736. The amount of this payment was calculated as 70% of the amount invoiced by the defendant for the 1st shipment less a proportion of the US\$75,000 advance paid by the plaintiff under the Contract. Since three containers had been shipped under the 1st shipment, the proportionate amount of the advance was 3/7ths of US\$75,000, namely US\$32,143.

41. In an affirmation filed by the defendant in opposition to the injunction obtained by the plaintiff at the outset of these proceedings, Mr Salman Saheb Hussain, a director of the defendant, confirmed that the

payment of the sum of US\$138,736 less bank charges was received by the defendant on 10 November 2008.

42. After this payment was received, on 11 November 2008, the defendant released the original bill of lading in respect of the 1st shipment to Hanjin Shipping Co. Ltd. ("Hanjin"), the carrier of the three containers making up the 1st shipment, thereby enabling the plaintiff to take delivery of those goods.

43. There is no evidence of any complaint from the defendant that the sum paid by the plaintiff and received by it on 10 November 2008 was less than should have been paid for the 1st shipment.

44. On 28 November 2008, the plaintiff made a further payment to the defendant. The sum paid was US\$129,673 arrived at by reducing the amount under the defendant's invoice for the 2nd shipment by 30% and then subtracting the balance of the US\$75,000 advance payment, namely US\$42,857, and also the sum of US\$30,000 being the deduction negotiated by the plaintiff following the initial transaction.

45. After the plaintiff made this payment, Pacien notified Ala of the fact that this payment had been made and followed up by inquiry as to the delivery of the 2nd shipment by an e-mail dated 1 December 2008.

46. Ala replied by e-mail dated 4 December 2008 stating:-

"Since yesterday we are trying to reach Asia Countries people but we failed to get them thru.

Also his mobile is off & worst part is from today there is a big holiday since 04-12-08 till 13-12-08 for the festival of Eid.

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We are also too much confused & disappointed for same. Soon we get any news will keep you update.”

47. Further e-mails indicate that Ala continued to try to contact the defendant several times but were unable to due to the Islamic holiday. There is no evidence of Ala questioning the payment made by the plaintiff in respect of the invoice for the 2nd shipment. Nor is there any evidence of any immediate complaint by the defendant that the amount paid on 28 November 2008 was less than the amount that should have been paid for the 2nd shipment.

48. In the light of information from the carrier, Hanjin, that instructions had been received from the defendant around 5 December 2008 to ship the four containers comprising the 2nd shipment back to the Middle East on 15 December 2008, the plaintiff for the first time communicated directly with the defendant by e-mail on 11 December 2008 demanding that the defendant deliver the documents of title to enable the plaintiff to obtain delivery of the 2nd shipment.

Was Ala authorised to agree the deduction and Settlement Agreement?

49. Before considering the two principal issues in this action, it is useful to bear in mind certain basic propositions of the law of agency which are relevant to the present case. The first is that the authority of an agent may be actual or apparent.

50. Actual authority is either express or implied. Express actual authority is the authority which the principal has given to the agent wholly or in part by means of words or writing. Implied actual authority is the

authority which the principal is regarded by the law as having given the agent because of the interpretation put by the law on the relationship and dealings of the two parties: see *Bowstead on Agency* (18th Ed.) Art. 22 and §3-003. Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal: see *Bowstead* Art. 23.

51. So far as express actual authority is concerned, the scope of such authority is a matter of contractual construction. Powers of attorney, with which this case is not concerned, are strictly construed and are interpreted as giving only such authority as they confer expressly or by necessary implication: see *Bowstead* Art. 24. Where, however, the authority of an agent is given by an instrument not under seal, or is given orally, it is construed liberally, with regard to the object of the authority and to the usages of the trade or business: see *Bowstead* Art. 25.

52. As to implied actual authority, an agent has implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of his express authority in the usual way: see *Bowstead* Art. 27.

53. Apparent authority arises where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf. In such circumstances he is bound by the acts of that other person with respect to anyone dealing with him as agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority: see *Bowstead* Art. 74.

54. Mr Jeevan Hingorani, counsel for the plaintiff, accepted that Ala's authority as agent for the defendant was not unlimited. Nor did he seek to contend that the acceptance, in the defendant's pleaded case, that Ala was authorised to follow-up with regards to payment in respect of contracts negotiated by it on behalf of the defendant was sufficient to include authority on the part of Ala to negotiate the deduction after the initial transaction or the Settlement Agreement. He put the plaintiff's case on the basis of both actual authority and apparent authority.

Actual authority

55. Mr Hingorani submitted that the evidence was sufficient from which to draw an inference, which he characterised as irresistible, that Ala must have communicated with the defendant, in all matters in which Ala acted as agent for the defendant, and must have obtained its authority to agree the US\$30,000 deduction and the Settlement Agreement.

56. In respect of the US\$30,000 deduction, the e-mail correspondence with Pacien in early September 2008 concerning the quality of the goods under the initial transaction contains express reference to Ala discussing the plaintiff's request for compensation with the defendant. There is also express reference to Ala having persuaded the defendant to compensate the plaintiff to the extent of US\$28,000.

57. There are also e-mails dated 16 and 17 September 2008, from the defendant to Ala in which the defendant set out the metal percentages in the various quantities of metal scrap which it was proposing to ship to the plaintiff under the Contract. At a time when Ala and the defendant were communicating in respect of the Contract, it would seem unlikely that

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Ala would not have communicated with the defendant about the exchanges it was having with Pacien concerning the plaintiff's request for compensation arising from the initial transaction.

58. Furthermore, there is no evidence of any objection or query raised by Ala when Pacien notified it that the plaintiff had made payment for their 2nd shipment under the Contract in the sum of US\$129,673, calculated on a basis which included the US\$30,000 deduction.

59. Given the admitted authority of Ala to act on behalf of the defendant in following up on payments under contracts it had sourced for and on behalf of the defendant, it would be strange for Ala not to have immediately raised some comment if the deduction of US\$30,000 had not actually been agreed by the defendant. On the contrary, Ala's correspondence with Pacien in early December 2008 expressed confusion and disappointment and indicated it had tried to reach the defendant several times. If it was not the case that Ala had negotiated the US\$30,000 deduction with the defendant, this reaction would be highly misleading. On a balance of probabilities, the evidence points more naturally, in my view, to Ala having in fact communicated the defendant's acceptance of the plaintiff's demand for the US\$30,000.

60. Taking all these matters into account, I am therefore prepared to draw the inference that Ala did communicate with the defendant over the plaintiff's demand for compensation in respect of the goods shipped under the initial transaction and did obtain the defendant's agreement to a deduction of US\$30,000 against the defendant's invoice under the Contract. It is pertinent to note that the agreement in respect of the deduction was

reached on 11 September 2008, approximately 3 weeks after the Contract had been entered into and shortly before shipment was to be made under that Contract. Since the price under the Contract had already been agreed, the suggested deduction arrangement makes commercial commonsense as a means to effect the compensation in question.

61. Turning from the question of the US\$30,000 deduction to the Settlement Agreement, the most telling evidence, in my view, flows from the fact the defendant released the bill of lading for the 1st shipment under the Contract following its receipt of payment under the invoice for the 1st shipment calculated on the basis of the 70% discount contained in the Settlement Agreement.

62. Although not in evidence, because the defendant did not appear at or take part in the trial, the statement of its director, Mr Hussain, provides a very unconvincing explanation for the defendant's decision to release the bill of lading for the 1st shipment if Ala was not duly authorised to enter into the Settlement Agreement on its behalf. He says that he did so because the defendant had been repeatedly assured by a Mr Sahim Haji Amin of Ala that the balance of the payment due would be forthcoming. He also says that he called Mr Amin several times before the Eid holiday, which began on 5 December 2008, to press for the outstanding amount from the plaintiff.

63. But there is no witness statement from Mr Amin supporting the assertion that he assured Mr Hussain that the balance of the payment due would be forthcoming or that Mr Hussain pressed him for payment. Nor was any such evidence filed on behalf of the defendant when it was

seeking to resist the injunction obtained by the plaintiff at the outset of these proceedings. Finally, although one might have expected the defendant to have pursued its alleged requests for payment of the balance in writing in the period following the release of the first shipment on 11 November 2008, there is no documentary evidence to support the defendant's explanation.

64. In the circumstances, I am prepared to draw the inference that Mr Muzammil of Ala did communicate with the defendant when he was negotiating the Settlement Agreement, which included an agreement to discount the price of the goods sold under the Contract by 30%, and obtained the defendant's agreement to this discount so that the Settlement Agreement was entered into by Ala with the defendant's authority, so far as it related to the price discount for the Contract.

Apparent authority

65. My conclusions above in respect of actual authority are sufficient to dispose of the issues in this action in favour of the plaintiff. In the circumstances, it is not necessary to address Mr Hingorani's alternative submission that Ala was vested with apparent authority to enter into the agreement in respect of the US\$30,000 deduction.

Conclusion on liability

66. In the light of my conclusions on the two principal issues, it follows that it was the defendant who was in breach of the Contract in failing to deliver the bill of lading in respect of the 2nd shipment to the plaintiff.

67. I therefore dismiss the defendant's counterclaim for non-payment and find in favour of the plaintiff's claim for damages for non-delivery, to the assessment of which I shall now turn.

Damages

68. The plaintiff paid US\$202,530 for the 2nd shipment, being calculated by adding the payment of US\$129,673 and the \$42,857 portion of the advance paid and the US\$30,000 agreed deduction due to the quality of the goods shipped under the initial transaction.

69. The plaintiff did not put its claim on the basis that it was seeking the return of the price paid by it. In its Statement of Claim, the plaintiff instead claimed delivery up of the 4 containers comprising the 2nd shipment under the Contract and also for damages for breach of the Contract for non-delivery.

70. As regards the claim for delivery up, the 4 containers were, according to Mr Hingorani's further written submission (handed up in support of his closing submission), sold by order of the Court for US\$141,207. After deduction of various storage charges and other expenses, the sum of US\$114,379.12 was paid into Court on 25 May 2009.

71. In my view, the plaintiff is *prima facie* entitled to payment out of the sum paid into Court as partially representing its claim to delivery up of the 2nd shipment. It is also entitled to the difference between the sum for which the 4 containers were sold, US\$141,207, and the amount actually paid into Court, US\$114,379.12, by way of consequential damages since the sum it should have received as representing the 2nd shipment should

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not be reduced by the storage and other expenses which were deducted from the sale proceeds, as the plaintiff should not have to bear those expenses, which were caused by the defendant's failure to release the bill of lading for the 2nd shipment. The difference in question is US\$26,827.88.

72. Since the normal measure of damages for non-delivery of goods is the difference between the contract price and the market price of the goods at the date when they should have been delivered, there are no further damages to which the plaintiff is entitled by way of damages for non-delivery (subject to the claim for damages for loss of profit, dealt with below). If the plaintiff had gone into the market to buy the equivalent quantities of the constituent metals it was expecting to receive under the 2nd shipment, the evidence indicates that it would have been able to purchase them at less than the contract price and so that measure of damages does not result in any additional loss suffered by the plaintiff.

73. By way of further damages, the plaintiff also claims its loss of profit on the re-sale of the 2nd shipment. The plaintiff calculated its loss by reference to the profit which it contends it would have made by processing the metal scrap into its constituent metals, namely copper, lead and aluminium, and selling those metals for a profit of between 8 to 10%.

74. I do not consider that damages should be calculated by reference to any notional profit which the plaintiff now claims it would have made on a re-sale of the processed metals from the 2nd shipment since the evidence does not support the plaintiff's claim that it would have sold the processed metals from the 2nd shipment at a profit.

75. The discounted price of the copper component of the metal scrap sold under the Contract was US\$5,180 per MT (i.e. US\$7,400 x 70%). A chart produced by the plaintiff showing the price of copper based on the price of that metal quoted on the London Metal Exchange shows that the price of copper fell sharply from about September 2008 until January 2009 and did not recover to the level of US\$5,180 per MT until about June 2009. It was the evidence of Mr Huang for the plaintiff that, upon receipt of the metal scrap, the plaintiff would have processed the metal scrap into its component metals in about 7 to 10 days and then would have kept the goods in its warehouse for a period of between 3 to 4 months before selling it. Mr Huang confirmed in respect of the 1st shipment that the metal scrap under that shipment was processed in the usual manner and then kept in the plaintiff's warehouse for 3 to 4 months until around March or April 2009. But when the 1st shipment was sold, the price of copper was about US\$4,000 per MT. In other words, the 1st shipment was sold by the plaintiff at a loss, as Mr Huang confirmed, and there is no reason to think the 2nd shipment would have been treated any differently.

76. In the circumstances, I decline to assess damages on the basis of the claimed loss of profit of between 8 to 10% on the purchase price under the Contract.

77. I therefore direct that the sum of US\$114,379.12 plus accrued interest be paid out of Court to the plaintiff in partial satisfaction of its claim for delivery up of the 2nd shipment and that the defendant pay to the plaintiff damages in the sum of US\$26,827.88 (being the difference between the sale proceeds of US\$141,207 and the sum paid into Court), on

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which interest should run at the usual commercial rate (prime plus 1%) as from the date of the writ.

Costs

78. I make an order *nisi* that the defendant pay the plaintiff the costs of this action, to be taxed if not agreed.

(J.P. Fok)
Judge of the Court of First Instance
High Court

Mr Jeevan Hingorani, instructed by Messrs Alvan Liu & Partners, for the Plaintiff

The Defendant, absent