

# WATSON FARLEY & WILLIAMS

## BRIEFING

### UPDATE ON RECENT CASES & DEVELOPMENTS IN DIAMOND & PRECIOUS STONE & JEWELLERS BLOCK INSURANCE CASES

OCTOBER 2018

- ROUGH TRADE: CLAIM FOR MISSING AND SCRATCHED GEMSTONES
- LEFT OR RIGHT HAND: CUSTOMS INVOICE VALUE VERSUS COMMERCIAL INVOICE VALUE?
- PAWNING CONSIGNED GEMSTONES



This update addresses some recent cases and claims involving diamonds and gemstones and highlights issues and lessons learnt from these matters. We hope you will find it of interest.

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“PROCEEDINGS WHICH ARE SUBJECT TO THE CCA ARE MORE FAVOURABLE TO CONSUMERS AND REVERSE THE BURDEN OF PROOF.”

#### **Rough trade: claim for missing and scratched gemstones**

In 2016, P filed proceedings against XYZ seeking compensation of approximately US\$430,000 for the non-delivery of and damage to gemstones to be transported by XYZ from P's premises to and loss of opportunity at the 2016 Bangkok Gems and Jewellery Fair, arising from the acts and omissions of XYZ.

The writ was filed pursuant to the Consumer Case Procedure Act (“CCA”). Proceedings which are subject to the CCA are more favourable to consumers and reverse the burden of proof. XYZ unsuccessfully applied to have the proceedings removed from the jurisdiction of the CCA. As the proceedings remained subject to the CCA, XYZ had to disprove their claims against it rather than P bearing the burden of proving the claims against XYZ.

The claim was defended on the basis that the maximum liability of XYZ for the non-delivered stones was the declared value for shipment, that P had not established that the stones were in fact damaged whilst in the care, custody and control of XYZ or that the claimed diminution in value was directly linked to any act or omission of XYZ. As the consignment was delivered in sealed packing boxes for carriage, P bore the burden of establishing the condition of the stones when they were packed and

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“THE COURT ASSESSED M’S LOSS BASED ON THE CUSTOMS’ DECLARED VALUE ON THE BASIS THAT THIS WAS THE VALUE DECLARED BY M TO ABC BEFORE SHIPMENT AND THE VALUE KNOWN TO ABC PRIOR TO AND DURING THE SHIPMENT.”

demonstrating that the allegedly damaged stones were in fact packed into these boxes prior to collection by XYZ.

The claims for loss of business opportunity at the Fair were defended on the basis that they were speculative.

In its judgment, handed down in October 2018, the Court ordered XYZ to pay P approximately US\$40,000 and this appears only to be in relation to the non-delivered stones.

**Key points:**

- Claims filed under the CCA must be carefully considered and any challenge should be filed as soon as possible;
- Despite this judgment, if the final use of the service or product is commercial, Thai courts are now increasingly accepting that these should not fall under the jurisdiction of the CCA;
- Claims for damage to stones require a high level of evidence of their prior condition and that the act or omission of the carrier caused the damage, save for the case of a total loss;
- Carriers must be vigilant in relation to the value declared for shipment; and
- Claims for consequential losses, such as exhibition costs and lost opportunity, should be thoroughly investigated and substantiated.

**Left or right hand: Customs invoice value versus commercial invoice value?**

M engaged a transport company (ABC) to carry a consignment of precious and semi-precious stones from Bangkok to the 2012 Hong Kong Jewellery and Watch Fair. A claim was presented for mis-delivery of two of four sealed packages comprising the consignment, based on a commercial invoice value of approximately US\$4m. This was in contrast to a declared value on the Customs declaration of approximately US\$400,000. Relying on the Customs declaration, the value of the missing stones was approximately US\$300,000.

M commenced proceedings against ABC in 2013, seeking damages based on the commercial invoice value of the shipment. In March 2015, the Court ordered ABC to pay M compensation of approximately US\$300,000. The Court assessed M’s loss based on the Customs’ declared value on the basis that this was the value declared by M to ABC before shipment and the value known to ABC prior to and during the shipment. As a carrier, the liability of ABC was limited to the value declared to it prior to shipment. The commercial invoice relied on by M was dated after the date of the shipment.

The Court noted the distinction between diamonds, for which value is assessed by reference to the Rappaport Report and the missing gemstones, for which no such valuation was possible.

The Court dismissed M’s claim for the cost of participating in the Fair in Hong Kong and the claim for loss of business arising from the absence of two of the four packages on the basis that this was a decision made by M and no evidence was presented to directly link the claimed losses with the absence of two of the four packages.

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“JUDGMENT APPEARS TO IMPUTE TO CARRIERS AN UNDERSTANDING AND KNOWLEDGE OF THE VALUATION OF THE DIAMONDS AND OTHER GEMSTONES, WHERE THEY DO NOT INSPECT THE STONES AND DO NOT HAVE THE EXPERTISE TO ASSESS THE VALUE OF THE STONES.”

M appealed in 2015. The appeal focused on the value of the missing stones and M sought the balance of the original claimed amount, equivalent to approximately US\$3.7m, and challenged the Court’s finding that its claim for exhibition costs was too remote.

The Supreme Court handed down its judgment in October 2018, increasing the amount of compensation from approximately US\$300,000 to US\$1m. The Court held that the court below should not have relied solely on the declared value in the Customs invoice and that ABC, as an experienced transporter of gemstones, should have been aware of the practice of shippers declaring a lower value in Customs invoices than in commercial invoices.

The judgment appears to impute to carriers an understanding and knowledge of the valuation of the diamonds and other gemstones, which they transport, in circumstances where they do not inspect the stones and, even if they were to do so, they do not have the expertise to assess the value of the stones. Little or no weight was given to contractual terms which state that the carrier does not inspect the consignments and, in offering transport and/or security services, does not have the expertise to assess the values provided by the shipper for the consignment. The Court also appears to have ignored evidence from the carrier that it was not in the business of inspecting, valuing or dealing with diamonds and gemstones and testimony from M’s witnesses that they were unable to value the gemstones solely by reference to the photographs provided by M.

It is not clear how the Supreme Court determined the increased damages, particularly as the increased amount does not reflect the position of either party or the evidence of M’s witnesses. It is equally unclear how the court has reconciled the requirement to make a true and accurate declaration to Thai Customs and the higher stated value in the commercial invoices.

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“THE DECISION MAY ENCOURAGE FURTHER DUAL VALUATIONS AND THE USE OF CUSTOMS AND COMMERCIAL INVOICES WITH DIFFERENT VALUES.”

The decision may create more uncertainty and lead to more claims. If the outcome is an increase in the cost of insurance and/or carriage and/or more restrictive terms and conditions of carriage, this may put shippers in a less favourable position.

**Key points:**

- The decision may encourage further dual valuations and the use of customs and commercial invoices with different values;
- The decision does not give due weight to the obligation to make a true and accurate declaration to Thai Customs;
- Carriers will need to consider whether to require sight of both invoices and to amend their procedures and whether their terms and conditions to address the knowledge of the difference between the Customs and commercial invoice values imputed to the carrier by the Supreme Court; and
- Carriers may need to exercise more care in checking the values declared in the shipping instructions/waybill, particularly where there is a significant variation between the commercial invoice value and the value declared to Customs. This may then necessitate a declaration or statement from the shipper as to the primacy of the Customs’ declared value.

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“GEMSTONES HELD ON  
CONSIGNMENT HAVE  
BEEN PAWNED TO  
ADDRESS CASH FLOW  
ISSUES.”

### Pawning consigned gemstones

The use of consignment notes for the loan, exhibit and display of diamonds and other precious stones is widespread and accepted. Bangkok is no exception to this and its location in Asia provides a useful base from which consigned stones can be exhibited to buyers from across the region.

Recent market conditions have caused difficulties for some Bangkok-based traders. Gemstones held on consignment have been pawned to address cash flow issues. In many cases, the trader is able to recover the pawned gemstone before its owner requests its return. We have assisted gemstone owners and their insurers in a number of cases where the trader was unable to retrieve pawned gemstones to recover gemstones from pawn shops and consignees.

#### Key points:

- Ensure that the wording of the consignment note is up-to-date and expressly prohibits the use of the consigned gemstones as security or as pledged goods;
- Ensure that the consigned stones are clearly described on the consignment note;
- Ensure that there are photographs of the gemstones before being delivered to the consignee;
- Set reasonable and defined periods of consignment; and
- Recovery can be time consuming and uncertain and risks can be moderated by due diligence on potential consignees.

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## FOR MORE INFORMATION

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Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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