



20 November 2018
Ref : Chans advice/214

To: Transport Industry Operators

Wasted costs

The High Court of Hong Kong issued a Decision on 31/8/2018 concerning a feeder company's claim against a shipping company's lawyer for wasted costs. [HCA1919/2016] [2018HKCFI1879]

Background

On 23 July 2016, the feeder company Cargo Channel (in liquidation) commenced the legal proceedings against the shipping company Hanjin for freight and service charges in the sum of about \$1 million together with interest and costs. Hanjin contested the proceedings.

On 2 September 2016, Hanjin issued an application against Cargo Channel for security of costs. The court dealt with the application on 13 January 2017 and allowed it. Cargo Channel was in liquidation. Its' financial position was not known to the court. There was no evidence that Cargo Channel would be in a position to pay Hanjin's costs if Hanjin won the case at the end. In the exercise of discretion of the court, the costs position of Hanjin should be protected. Cargo Channel was ordered to pay security of \$280,000 up to the stage of setting down, with costs to Hanjin summarily assessed at \$67,200.

On 10 November 2016, Hanjin filed and served its Defence. It said that Cargo Channel had sued the wrong defendant. It was "Hanjin China" who entered into the connecting carrier agreement dated 1 January 2014 with Cargo Channel. Under the agreement, the dispute should be resolved by PRC law and in the China Maritime Court. In any event, it was Cargo Channel who had failed to pay the terminals. To mitigate for its loss, Hanjin China paid various terminals the total sums of CNY 688,101 to get cargos released.

Cargo Channel said that the Defence filed on 10 November 2016 was not supported by a verifying statement of truth. Later, upon application of Cargo Channel, on 25 November 2016, the court expunged such Defence, with leave to re-file and re-serve another one. The 'new' Defence was re-filed and re-served on 2 December 2016. It was supported by a verifying statement of truth, signed by Ms. Chark, the Principal of Hanjin's solicitors, Messrs. BCC. Cargo Channel took the view that it was still defective.

On 23 February 2017, the court dealt with parties' argument. Upon consideration, the court struck out the statement of truth for the 'new' Defence but allowed Hanjin to remedy the defect with the imposition of an unless order for 14 days.

BCC wrote to the court on 3 March 2017.

"We have just been notified that the former Authorised Representative of the Defendant that:

- (1) On 1 September 2016, a Rehabilitation Procedure was commenced by the Defendant with Mr Tae-Soo Suk of the Defendant being appointed as the Receiver;
- (2) On 17 February 2017, the Rehabilitation Procedure was withdrawn and a Bankruptcy Order was made against the Defendant. Mr Jin Han Kim has been appointed as the Trustee of the Defendant.

We would be grateful if you could place this letter to the Learned Master J. Wong for his review."

The court then replied.

"It appears that there is nothing for the court to "review". You will be in a better position to advise your client what should be done in light of the development made known."

Hanjin failed to comply with the unless order. After the deadline, Cargo Channel applied for default judgment. It was only until 23 March 2017 that BCC managed to get the trustee to sign on the statement of truth. Parties thereafter argued the matter on 7 April 2017 before the court who ruled in favour of Cargo Channel, because among others, there was no summons taken out by Hanjin to extend time imposed by the unless order.

On 5 May 2017, BCC applied for cease to act under order 67 rule 6 RHC. The application was allowed by the court on 19 May 2017 and the process was completed by the subsequent filing of certificate of service on 21 June 2017.

On 23 May 2017, the court also ordered the payment into court of \$280,000 as security for costs be refunded to Cargo Channel.

On 10 August 2017, Cargo Channel issued the wasted costs order application against BCC. Cargo Channel complained that Hanjin went into receivership on 1 September 2016. BCC should not have acted for Hanjin after the date without the knowledge and/or authority from the receiver of Hanjin. BCC tried to delay and indeed delayed the proceedings. As a result, Cargo Channel incurred more legal costs because of the conduct of BCC.

BCC argued that it conducted the proceedings with proper instructions from Hanjin. In any event, the trustee rectified the instructions to BCC. There was no improper conduct on its part. It did not hide anything from the court and caused no loss to Cargo Channel.

The applicable principles

The applicable principles relating to o.62 r.8 RHC (Cap. 4A) are not disputed. It states that:

- "8. (1) The Court may make a wasted costs order against a legal representative, only if –
- (a) the legal representative, whether personally or through his employee or agent, has caused a party to incur wasted costs as defined in section 52A (6) of the Ordinance; and
 - (b) it is just in all the circumstances to order the legal representative to compensate the party for the whole or part of those costs.
- (2) A wasted costs order may –
- (a) disallow the costs as between the legal representative and his client; and
 - (b) direct the legal representative to –
 - (i) repay to this client costs which the client has been ordered to pay to other parties to the proceedings; or
 - (ii) indemnify other parties against costs incurred by them.
- (3) The Court shall give the legal representative a reasonable opportunity to attend a hearing to give reasons why it should not make the order.
- (4) When the Court makes a wasted costs order, it shall –
- (a) specify the amount to be disallowed or paid; or
 - (b) direct a master to decide the amount of costs to be disallowed or paid.
- (5) The Court may give directions about the procedure that should be followed in each case in order to ensure that the issues are dealt with in a way that is fair and is as simple and summary as the circumstances permit.
- (6) ..."

Section 52A (6) High Court Ordinance (Cap.4) further states wasted costs means:

- “... any costs incurred by a party as a result of –
- (a) an improper or unreasonable act or omission; or
 - (b) any undue delay or other misconduct or default,
- ...”

Li, CJ (as he then was) said in *Ma So So v. Chin Yuk Lun & Solicitors* (2004) 7 HKCFAR 300 at p.309 that:

“The approach

6. In considering the exercise of the jurisdiction under this rule, the court should approach the matter by dealing with the following questions:

- (1) Whether the solicitor was responsible for (i) acting improperly or without reasonable cause or (ii) for undue delay or any other misconduct or default in any proceedings.
- (2) Whether such conduct of the solicitor caused costs to be incurred or wasted. This is a question of causation. The casual link between the solicitor’s conduct and the extent of costs incurred or wasted must be established.
- (3) Whether the court should exercise its discretion to make an order.”

Application of the principles

Applying the above principles to the case in question, the court decided to dismiss Cargo Channel’s application.

First, the matter could not be resolved in a simple and summary way. Cargo Channel raised 3 questions for the court’s determination:

“50 ...

- (1) Whether BCC had the actual authority to act for the Defendant since 1 September 2016; and/or whether BCC has received proper instructions from the Defendant to act on its behalf during its receivership and after its liquidation;
- (2) Whether BCC and/or the Solicitor had made reasonable enquiries to the relevant persons of the Defendant of its trading status in South Korea, especially before the Defendant’s winding-up; and
- (3) Whether BCC and/or the Solicitor knew and/or ought to have known the Defendant’s trading status when BCC made such representations in their correspondence with HLC and when Ms. Chark made such representations in Court.”

BCC further raised a number of issues, including the lack of expert evidence on Korean law and causation.

“15. P has adduced no expert evidence on the effect of the rehabilitation proceedings from 1 September 2016 to the Bankruptcy Order made on 17 February 2017 other than relying on press reports.”

...

“61. As soon as Mr Kang confirmed to BCC on 3 March 2017 that a Bankruptcy Order was made in Korea against D, BCC immediately notified this Court and HLC. There may be a gap between the Bankruptcy Order made on 17 February 2017 and the letter to the Court on 3 March 2017, there is no undue delay on the part of BCC in notifying this Court and P of D’s latest status.

62. Despite the notice given by BCC on 3 March 2017, L chose to issue a summons on 15 March 2017 for entering judgment against D. In the circumstances, D’s trading status or BCC’s conduct of these proceedings was not a factor that would affect L’s decision as to whether to proceed with these proceedings or not.”

All the issues raised by the parties were relevant and they involved substantial factual disputes and/or argument or interpretation on foreign law.

Second, the major complaint of Cargo Channel was that BCC should not have defended the proceedings as she did so because either she knew or should have known that there was no authority to do so. Regarding this, to sum up the answers and evidence (of which, the court accepted on balance) provided by Ms. Chark:

- (a) Hanjin was incorporated in South Korea (Hanjin-Korea) and registered in Hong Kong (Hanjin-HK) as a non-Hong Kong company.
- (b) BCC was instructed by the manager (Mr Ng) of the operating Department of Hanjin-HK to defend the proceedings. She contacted different officers to take instructions and to report progress (Mr. Kong – the Authorized Representative of Hanjin-HK, Mr Chan – the Deputy General Manager of the Operation & Logistics Department of Hanjin-HK and Ms. Lam, the Deputy Manager of the Human Resources & Corporate Administration).
- (c) Having being doubted of her authority to act for Hanjin in late 2016 or early 2017, she did try to verify the situation by contacting the said officers who also agreed to check from the Korean office.
- (d) While she was waiting for the verification, parties could not agree on withholding the proceedings.
- (e) On 3 March 2017, Mr. Kong confirmed with her that Hanjin did commence a rehabilitation procedure on 1 September 2016 and a bankruptcy order was made on 17 February 2017. Mr. Jin Han Kim was then appointed trustee of Hanjin. She immediately informed the court accordingly.
- (f) She also contacted with the trustee who instructed her to continue defending the proceedings.
- (g) Unfortunately, the court refused to allow Hanjin to file its statement of truth (signed by the trustee) out of time, leading to the default judgment.
- (h) BCC ceased acting for Hanjin and a certificate was filed on 21 June 2017.

With the above, the court did not consider there had been any improper or unreasonable act or omission on the part of BCC. The court was also not satisfied that undue delay or other misconduct or Hanjin had been proved. It had taken BCC and the officers of Hanjin in HK for some 2 months' time to confirm the position with the head office of Hanjin in Korea. The court did not find it amounting to total unreasonable or undue delay. In any event, the trustee did confirm and/or rectify the act of BCC.

Conclusion

The application for wasted costs order by Cargo Channel against BCC was dismissed.

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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