



06 March 2019  
Ref : Chans advice/217

To: Transport Industry Operators

### Wasted costs (II)

The Hong Kong High Court issued a Judgment on 16 January 2019 dealing with the appeal of the wasted costs' case reported by our Chans advice/214. [HCA1919/2016] [2019HKCFI127]

#### Introduction

This was an appeal from a decision of Master J Wong dated 31 August 2018, which had dismissed the Cargo Channel's application for a wasted costs order against BCC, the former solicitors of Hanjin. Cargo Channel made the claim on the ground that BCC did not have authority to act for Hanjin from 1 September 2016 onwards.

#### The facts

The readers can refer to Chans advice/214 dated 20 November 2018 for the background of the case in question.

#### Analysis of Cargo Channel's submissions

Since Cargo Channel applied for a wasted costs order against BCC, it was for Cargo Channel to show that BCC's authority to represent Hanjin had ceased or terminated by the appointment of Mr Suk as the legal administrator or receiver on 1 September 2016 and/or by the bankruptcy order made on 17 February 2017 and that costs had been wasted by reason of BCC's conduct in defending the action for Hanjin but without Hanjin's authority.

Cargo Channel referred to paragraph 12.048 of *Company Law in Hong Kong (Insolvency) 2015, Sweet & Maxwell*:

"Irrespective of whether the foreign law provides for a vesting of assets in the foreign liquidator or similar officer (e.g. receiver, supervisor, administrator, examiner), such a person will, if the appointment was made with proper jurisdiction in the eyes of the Hong Kong court, be recognised in Hong Kong as being entitled to control of the assets in question and, if necessary, as having standing to sue in the Hong Kong court."

Cargo Channel further referred to §§ 3.004 and 11.027 of *Company Law in Hong Kong (Insolvency)* and submitted that the appointment of a receiver and manager or liquidator by the court practically removes the conduct and guidance of the undertaking from the directors of the company and places it into the hands of a receiver and manager. However, Cargo Channel did not explain why the appointment of Mr Suk as the legal administrator or receiver under the South Korean rehabilitation procedure had thereby terminated the retainer and agency of BCC which was in place prior to 1 September 2016.

There are many types of receivers appointed by the court. The court may appoint a receiver of a company's business and undertaking. In this case, the powers of the directors to conduct the company's business and dispose of its assets are in abeyance for the duration of the receivership. However, the court may also appoint a receiver and manager of the company itself (as opposed to its undertaking). In the former case, the receiver appointed cannot contract as agent for the

company. Such appointment would also effect a change in the personality of the company and hence operates to instantly dismiss the company's employees.

This is not so in the latter case. A receiver of the company (as opposed to its undertaking) is constituted as the managing agent of the company in place of its directors. There is no change in the identity of the company. The employees will not be dismissed by the appointment. The receiver of a company has a continuing duty to preserve the goodwill of the company's business for the benefit of all persons interested and should not disregard existing contracts. It is his duty to carry into effect contracts entered into before his appointment. Such contracts, unless they are contracts depending on personal relationships, remain valid and subsisting, notwithstanding the appointment of a receiver and manager. Any breach of such contracts will render the company, not the manager, liable in damages, and will destroy the goodwill of the business.

There was no expert evidence on the nature of the rehabilitation procedure and the status of Mr Suk. However, if Mr Suk's status as the legal administrator was equivalent to that of a receiver, the available evidence showed that it was more likely than not that he was appointed as a receiver of the company of Hanjin rather than just of its business and undertaking. He was not appointed to take control of any asset or to collect any money to pay Hanjin's creditor(s) but to rehabilitate Hanjin as a company. He was to manage Hanjin as a whole and to propose a plan to navigate it out of financial trouble. Hence, his appointment as the legal administrator would not have put an end to any ongoing contract that Hanjin had made with third parties prior to his appointment. That would include the retainer of BCC to defend the action on behalf of Hanjin.

Ms Chark of BCC had also told Master J Wong on 13 January 2017 that she had met the authorised representative of Hanjin, Mr Kang Ho Jun at Hanjin's principal place of business in Hong Kong on 2 December 2016 and was given instructions there. A return filed by Hanjin with the Companies Registry on 17 October 2016 showed that Mr Kang was appointed by Hanjin on 16 October 2016 to be its company secretary.

In the premises, the Judge held that Cargo Channel failed to show that BCC's authority to represent Hanjin in the action in question had lapsed by virtue of the appointment by the South Korean Court of Mr Suk as the legal administrator or receiver in the rehabilitation procedure on 1 September 2016.

The Judge also noted that the appointment of receiver or grant of a winding up (or bankruptcy) order by a South Korean court against Hanjin would not stay the action in question. Only a winding up order made by the court in Hong Kong against Hanjin could stay the action in question under s 325 of the Winding Up Ordinance. Hence, if Hanjin did not agree to Cargo Channel's claim, its receiver had to direct Hanjin's lawyer through the staff of Hanjin to defend it.

Hanjin was declared bankrupt on 17 February 2017. The making of a winding up order against a company does not put an end to its legal personality. Winding up is a process of management of the company by which its liabilities are settled and assets distributed (*Company Law in Hong Kong (Insolvency) 2019*, §§12.005). Cargo Channel did not produce any authority to support its submission that the making of a winding up order would put an end to BCC's retainer.

In any event, even if BCC's retainer had been terminated by the Seoul Bankruptcy Court's declaration of bankruptcy against Hanjin on 17 February 2017, the work done by BCC purportedly on behalf of Hanjin since 17 February 2017 was ratified by Mr Kim, the trustee for Hanjin. The evidence of ratification was the provision by Mr Kim, the trustee of a statement of truth dated 23 March 2017 verifying the truthfulness of the facts pleaded in the defence filed by BCC for Hanjin on 2 December 2016.

Cargo Channel also submitted that BCC did not produce any written authorization by Hanjin's trustee. But a retainer can be made orally and need not be in writing (*Cordery on Legal Services* §F-3153). BCC had confirmed to HLC (the solicitors of Cargo Channel) that BCC were appointed by the trustee to represent Hanjin. The provision of the statement of truth dated 23 March 2017 was also sufficient evidence of such ratification. The Judge could not see any purpose for Mr Kim to have provided that statement.

Finally, the Judge held that no costs had been wasted by BCC acting for Hanjin since 17 February 2017. The Judge had already held that the appointment of legal administrator or receiver for Hanjin on 1 September 2016 did not terminate BCC's retainer. BCC had also taken instructions from Mr Kang, Hanjin's authorized representative in Hong Kong at Hanjin's principal place of business in Hong Kong on 2 December 2016 to defend the action in question. Hence, BCC was properly authorized to act for Hanjin until 17 February 2017 when the declaration of bankruptcy was made in Seoul.

All the steps taken by HLC for Cargo Channel since 17 February 2017 were steps necessary to perpetuate the interests of Cargo Channel in the action. The hearing on 17 February 2017 was for the summons taken out by HLC on 7 February 2017 to enforce costs orders. The hearing on 23 February 2017 was for the summons taken out by HLC on 14 November 2016 to strike out the statement of truth signed by BCC for Hanjin. The hearing on 7 April 2017 was for the summons taken out by HLC on 15 March 2017 for default judgment because Hanjin had failed to file a fresh statement of truth on 9 March 2017.

Cargo Channel also relied on BCC's breach of warranty of authority to seek an order that BCC do indemnify Cargo Channel for its wasted costs. For the reasons given above, the Judge held that Cargo Channel could not rely on this legal principle.

#### Order

In the premises, the Judge dismissed Cargo Channel's appeal.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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