

To: Transport Industry Operators

Anti-suit injunction (IV)

Following the Hong Kong Court of Appeal's Judgment dated 11/3/2015 discharging the Mareva Injunctions and the receivership orders (mentioned in our monthly newsletter of Chans advice/171 two months ago), the Hong Kong High Court issued a Judgment on 12/5/2015 to determine the question of who should pay the remuneration to the receivers. [HCMP 1449/2014]

This was about CSAV's summons for an order that:

- (1) The receivers be allowed remuneration, costs and expenses (collectively "the receivers' remuneration") from the assets of Hin-Pro and/or Soar; and
- (2) That there be a declaration that the receivers were entitled to a lien over the assets of Hin-Pro/Soar.

From 16/6/2014 to 30/7/2014, Deputy High Court Judge Saunders made a series of orders on the application of CSAV against each of Hin-Pro and Soar (referred to below as "the HK *Mareva* Orders" and "the HK Receivership Orders" respectively). Those orders were granted in support of foreign proceedings and a world-wide freezing order in England, pursuant to section 21M of the High Court Ordinance, Cap 4. Those foreign proceedings related to Hin-Pro's alleged breach of an exclusive jurisdiction clause in the bills of lading issued by CSAV which required the contractual dispute between them to be litigated in England. CSAV had obtained an interim anti-suit injunction from the English court. Notwithstanding the exclusive jurisdiction clause, Hin-Pro issued 75 actions in the PRC against CSAV. CSAV had contested the jurisdiction of the PRC courts by reference to the exclusive jurisdiction clause. The PRC courts applied PRC law in rejecting the challenge and some actions proceeded to trial. CSAV was taking steps to appeal against those judgments. On 15/10/2014, Deputy High Court Judge Wilson Chan ("DHCJ Chan") discharged the HK *Mareva* Orders and HK Receivership Orders, primarily on the ground of judicial conflict. His decision was upheld by the Court of Appeal by its judgment dated 11/3/2015.

On 8/4/2015, CSAV applied for leave to appeal to the Court of Final Appeal. The English Court of Appeal recently upheld the validity of the exclusive jurisdiction clause by its judgment dated 23/4/2015, which CSAV said would increase its prospects of success in the Court of Final Appeal.

The HK Receivership Orders did not expressly provide for the receivers' remuneration. However, CSAV had provided indemnities to the receivers for their work after their appointment.

There was no dispute that the receivers were entitled to remuneration. The only question was who should pay.

CSAV asked that the receivers' remuneration be borne out of the assets of Hin-Pro/Soar.

Hin-Pro/Soar contended that there was no jurisdiction for the court to require a party to pay the costs of receivers at an interlocutory stage. CSAV, having failed in securing the HK Receivership Orders, could not ask Hin-Pro to foot the bill of the defunct receivers. CSAV was engaging in satellite litigation, causing as much damage as possible to Hin-Pro/Soar, commencing proceedings after the receivership order was discharged.

Legal principles

A receiver appointed by the court is entitled, in respect of his remuneration, to an indemnity out of and a lien over the assets that are subject to the receivership: *Mellor v Mellor & ors* [1992] 1 WLR 517, at 526B-E; *Kerr & Hunter on Receivers and Administrators* (19th ed) at §10-8. The indemnity exists regardless of whether the order for the receivers' appointment was rightly made or the receivership proved beneficial. A receiver takes on heavy responsibilities when he accepts appointment, and he is entitled to the security of knowing that the terms of his appointment will not be changed retrospectively – even if an appellate court later decides that the receivership should have been terminated at an earlier date: *Capewell v Revenue and Customs Commissioner and anor* [2007] 1 WLR 386, at 396B-C.

Where the order appointing the receiver was silent on his remuneration, this does not amount to a decision that he is to have no remuneration, even though he be a trustee, who as a general rule receives no remuneration: *Kerr and Hunter on Receivers and Administrators* (19 ed) at §10-4.

The receiver may insist, as a condition of accepting appointment, that the person seeking his appointment or someone else be personally responsible for his remuneration and indemnify him. In default of some such agreement, the receiver can only look to the assets the subject of the receivership. *Lightman & Moss, The Law of Administrators and Receiver of Companies* (2011 ed) paragraph 29-017; *Mellor*, at 526F.

As for the receiver's lien, it covers not only assets in his actual possession but all assets bound by the receivership. His right does not terminate on discharge of the receivership, nor on the return or delivery of assets to the parties entitled to them: *Kerr & Hunter on Receivers and Administrators* (19th ed) at §10-8; *Mellor*, at 527D-G.

The court has power under Order 30, rule 3 to determine the receivers' remuneration:

"A person appointed receiver shall be allowed such proper remuneration, if any, as may be authorized by the Court and the Court may direct that such remuneration shall be fixed by reference to such scales or rates of professional charges as it thinks fit."

This rule makes it clear that the receiver appointed by the court is entitled to remuneration but the court retains control over the quantum or remuneration.

The court has no jurisdiction *by interlocutory order* to order any of the parties to the relevant litigation personally to provide the receivers' remuneration. This is because a receiver is not the agent or trustee of the parties. They cannot control him. He may incur expenses or liabilities without their having a say in the matter. It would be extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers over which they have no control. See *Mellor*, at 526C-E, following *Evans v Clayhope Properties Ltd* [1998] 1 WLR 358 at 362B-F (CA).

The Judge did not consider that the court's power to order a party to bear the costs of the receivership should be exercised at an interlocutory stage.

Application of the legal principles

The court has power after discharge of a receivership order to give directions on payment of the receivers' remuneration, eg as in *Mellor*.

However, CSAV was unable to point to any authority whereby CSAV, as opposed to the receivers, could apply for the types of order sought. In *Mellor*, it was the receiver who obtained leave to intervene and applied on his own motion for his remuneration to be determined by the court.

The HK Receivership Orders were made in an interlocutory stage on inter parte basis. The court had no jurisdiction, before the issues in the action had been determined, to make an interim order requiring Hin-Pro (a party) to pay the remuneration of the receivers.

The receivers have indemnities from CSAV to which they can resort. Clause 2.1 of the indemnities provides, "No claim may be made under the indemnity contained in clause 1 above unless [the receivers] first seek to satisfy any claim hereunder out of the assets of the company." If the receivers need to, they can apply to the court for directions. It is not for CSAV to apply on their behalf, especially since the HK Receivership Orders have been discharged.

If the court did have jurisdiction to make the orders sought, the court would decline making them. CSAV was the party applying for the HK Receivership Orders in the first place but those Orders have been discharged. The scope of those Orders was criticized as much wider than CSAV could have sought under section 21M of the High Court Ordinance (paragraph 70 of Court of Appeal's judgment in CACV 243/2014). There was no reason why Hin-Pro/Soar should pay for the receivers' remuneration.

In summary, the court had no jurisdiction at the interlocutory stage to order a party to personally provide the receivers' remuneration. It was not for CSAV to apply on behalf of the receivers.

On a *nisi* basis, costs should follow the event and be paid by CSAV to Hin-Pro/Soar, summarily assessed at \$120,000.

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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