Federal Court Cour fédérale

Date: 20181115

Docket: T-805-16

Citation: 2018 FC 1156

Ottawa, Ontario, November 15, 2018

PRESENT: Case Management Judge Mireille Tabib

BETWEEN:

HANJIN SHIPPING CO. LTD.

Plaintiff

and

OGO FIBERS INC.
AND
SEVEN SEAS SHIPPING NORTH AMERICA LTD.

Defendants

ORDER AND REASONS

[1] Jin Han Kim, claiming to be the Trustee in Bankruptcy of the Plaintiff, brings the present motion for an order authorizing him to be substituted as Plaintiff to continue this action.

[2] For the reasons below, the motion will be granted, although costs, fixed in the amount of $3,955.00, shall be payable by the Trustee to the Defendants, forthwith.

[3] A brief chronology of the proceedings will assist in understanding how an apparently straightforward matter became contentious, and explain the cost award.

[4] The action herein was commenced by Hanjin Shipping Co. Ltd. in May 2016, seeking to recover nearly $850,000.00 in demurrage, storage and re-routing costs in respect of cargoes shipped by the Defendants that remained unclaimed and undelivered at their intended destinations.

[5] In August 2016, Hanjin was having financial difficulties and in an effort to restructure its debts, sought protection from its creditors before the Courts of Korea under legislation that appears similar to the *Companies' Creditors Arrangement Act*, RSC 1985 c. C-36. In October 2016, Hanjin sought and obtained protection in Canada under the *CCAA*, obtaining an order from the Supreme Court of British Columbia staying proceedings against it and appointing Tai-Soo Suk as Hanjin's foreign representative. Perhaps because Hanjin is the Plaintiff rather than the Defendant in this action, the Supreme Court of British Columbia's order was not brought to the Court's attention.

[6] This action not having progressed beyond the pleadings stage, it was placed in case management in 2017. Unbeknownst to the Court, Hanjin was formally declared bankrupt by the Seoul Central District Court Bankruptcy Court (6th Division) on February 17, 2017. Counsel for Hanjin only informed the Court of Hanjin's status in the summer of 2017, but advised he was without instructions as to Hanjin or the Trustee's intentions.

[7] It took until December 2017 for Jin Han Kim, as alleged Trustee in Bankruptcy for Hanjin, to serve and file the Notice of Transmission of Interest and supporting affidavit contemplated in Rule 117 of the *Federal Courts Rules*. The affidavit was executed on behalf of the Trustee by Wook Chong, presenting himself as the Trustee's representative. The affidavit did not reference the proceedings before the British Columbia Courts, did not explain the apparent discrepancy in the identity of the authorized representative of Hanjin for the purpose of the two Canadian proceedings, and did not even attach a copy of the Korean Court's order declaring Hanjin bankrupt and appointing Jin Han Kim as trustee.

[8] The Defendants registered an objection pursuant to Rule 117, and the Court set a schedule for bringing and determining a motion for substitution pursuant to that Rule. The briefing of that motion did not go smoothly.

[9] The Trustee did not meet the deadline for serving its motion record. Instead, it sought to tender a revised affidavit by Wook Chong in support of its Notice of Transmission of Interest, in which he seeks to establish the trustee's appointment, and addresses and explains the change in official representative and his authority to act on behalf of the Trustee. In an effort to avoid a contested motion, the Court allowed the new affidavit to be filed and permitted the Defendants to conduct a cross-examination of Wook Chong in writing before deciding whether to maintain or withdraw their objection to the transmission of interest. Not only did the Trustee fail to deliver the answers to the cross-examination questions within the delays set by the Court, but it also objected to answering 12 of the 48 questions asked. The Defendants had to make a motion to rule

on the objections and to compel the production of answers on a peremptory basis, which the Court granted in an order dated June 12, 2018, with costs payable by the Trustee forthwith.

[10] Even so, the Trustee's compliance with the June 12, 2018 order was less than stellar. The answers provided failed to address question 37 and did not include an English translation of a document written in the Korean language, which Wook Chong had produced in answer to question 22 of the cross-examination, as Exhibit 2.

[11] The Defendants maintained their objection to the transmission of interest, prompting the Trustee to bring the present motion. An unofficial translation of Exhibit 2 is included in the motion record, but is not introduced by way of a new affidavit. Question 37 remains unanswered.

[12] Raising the Trustee's failure to strictly comply with the order of June 12, 2018, the Defendants sought, as a preliminary matter, the enforcement of the sanctions contemplated in the June 12 order for the Trustee's failure to comply: the striking of the Statement of Claim and the dismissal of the action. I dismissed the Defendants' request at the hearing, being satisfied that the Trustee had substantially complied with the June 12, 2018 order. Given the subject matter of the questions to which the Trustee had failed to provide a complete or timely answer, I was and remain satisfied that the Defendants' position is not prejudiced and that the Trustee's failure to provide answers can, on the subject matter covered by the questions, result in an adverse inference being drawn against it.

[13] I now turn to consider the substance of the Trustee's motion.

[14] Rule 117 of the *Federal Courts Rules*, SOR/98-106 reads as follows:

(1) Subject to subsection (2), where an interest of a party in, or the liability of a party under, a proceeding is assigned or transmitted to, or devolves upon, another person, the other person may, after serving and filing a notice and affidavit setting out the basis for the assignment, transmission or devolution, carry on the proceeding.	(1) Sous réserve du paragraphe (2), en cas de cession, de transmission ou de dévolution de droits ou d'obligations d'une partie à une instance à une autre personne, cette dernière peut poursuivre l'instance après avoir signifié et déposé un avis et un affidavit énonçant les motifs de la cession, de la transmission ou de la dévolution.
(2) If a party to a proceeding objects to its continuance by a person referred to in subsection (1), the person seeking to continue the proceeding shall bring a motion for an order to be substituted for the original party.	(2) Si une partie à l'instance s'oppose à ce que la personne visée au paragraphe (1) poursuive l'instance, cette dernière est tenue de présenter une requête demandant à la Cour d'ordonner qu'elle soit substituée à la partie qui a cédé, transmis ou dévolu ses droits ou obligations.
(3) In an order given under subsection (2), the Court may give directions as to the further conduct of the proceeding.	(3) Dans l'ordonnance visée au paragraphe (2), la Cour peut donner des directives sur le déroulement futur de l'instance.

[15] The basis alleged for the transmission of interest in the present case is the bankruptcy of the Plaintiff and the appointment of Jin Han Kim as Trustee in bankruptcy. The issue before the Court is whether Jin Han Kim has proven, on a balance of probability, that the interest of Hanjin as Plaintiff in this action has been transferred to him as Trustee in bankruptcy.

[16] The affidavit of Wook Chong asserts that: “On February 17, 2017, the Courts of Korean (sic) declared Hanjin bankrupt and named a bankruptcy administrator, namely the law firm of Daeryook & Aju, and more particularly Mr. Jin Han Kim as trustee, as appears from the decision of the Korean Bankruptcy Court along with an unofficial English translation thereof, attached hereto en liasse as Exhibit A”. The difficulty with this evidence is twofold.

[17] First, Exhibit A is written in Korean and the unofficial translation is just that, an unofficial translation. Rule 68(1) provides that documents filed in a proceeding that are not in English or French must be accompanied by a translation in English or French and “an affidavit attesting to the accuracy of the translation”. The affidavit of Wook Chong does not attest to the accuracy of the translation. On cross-examination, the witness was asked and did confirm that he understands and is able to read and write Korean written script. He was asked whether the unofficial translation was “a fair translation into English of the Korean language text of Exhibit A”, and he confirmed that. A fair translation, however, is not the same as an accurate translation.

[18] Even assuming that the distinction is not material and that Exhibit A and its unofficial translation are admissible, Exhibit A is not, according to the unofficial translation itself, a decision or order of a court but a “Notice of Bankruptcy Order”, in other words, a notice of the order rather than the order itself.

[19] Had this been the extent of the evidence available on the record before me, I might have hesitated to find in favour of the Trustee. Fortunately for him, the Defendants, as part of their cross-examination, did request production of the bankruptcy order referred to in the Notice of

Bankruptcy Order produced as Exhibit A. This allowed the Trustee to produce, as Exhibit 1 to Wook Chong's responding affidavit, a copy of a registered notarial certificate comprising of both the original Korean language decision of the Seoul Central District Court Bankruptcy Court (6th Division) of February 17, 2017 declaring Hanjin bankrupt and appointing Jin Han Kim as trustee in bankruptcy and a translation accompanied by a sworn statement attesting it to be a true translation of the original.

[20] The production of this document removes any doubt about the bankruptcy of Hanjin and the status of Jin Han Kim as its duly appointed Trustee. To the extent there had been confusion from the earlier designation of Tai-Soo Suk as official representative of Hanjin under the *CCAA* proceedings, Wook Chong's affidavit explains that the designation lapsed when the restructuring of Hanjin's debts failed and it was officially declared bankrupt. I am, accordingly, satisfied that Hanjin has been declared bankrupt and that Jin Han Kim has been appointed trustee in bankruptcy by the Korean Bankruptcy Court.

[21] The Defendants object that the Trustee has failed to prove that, under Korean law, the effect of bankruptcy is to devolve a chose in action, such as the right of action asserted in these proceedings, to the Trustee.

[22] The content of foreign law is a matter of fact, of which the Court will not take judicial notice, and the Trustee has not filed an affidavit from a solicitor authorized to practice law in Korea to provide an opinion as to the content and effect of Korean bankruptcy law as to the transmission and devolution of a bankrupt's rights in litigation. However, it is a well-known

principle of law that, when the application of conflict of law rules requires the Court to apply the law of a foreign country and evidence as to the content of that foreign law has not been adduced, the Court will assume that it is similar to its own law. Counsel for the Defendants takes the position, based on the Federal Court of Appeal's decision in *Fernandez v The "Mercury Bell"*, [1986] 3 FC 545, that the presumption of identity does not extend to statute law, such as bankruptcy legislation. I do not agree with the Defendants' interpretation of the *ratio decidendi* in *The "Mercury Bell"*. It is generally accepted that this *ratio* can be found at paragraph 11 of the majority reasons written by Justice Marceau, as follows:

> What has appear constant to me, however, in reading the cases, is the reluctance of the judges to dispose of litigation involving foreign people and foreign law on the basis of provisions of our legislation peculiar to local situations or linked to local conditions or establishing regulatory requirements. Such reluctance recognizes a distinction between substantive provisions of a general character and others of a localized or regulatory character;
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> […]
>
> The Court does not repudiate the premise that the case is governed by and has to be decided on the basis of the foreign law, but simply says that insofar as it is formally aware, the foreign law is similar to its own law. It is, as noted by Castel, a pure rule of convenience, and one which, it seems to me, can be rationally acceptable only when limited to provisions of the law potentially having some degree of universality. In my view, there lies the solution to this case.

[23] The Federal Court of Appeal in *The "Mercury Bell"* found that the basic provisions of the *Canada Labour Code*, RSC 1970, c L-1, giving effect to collective agreements and empowering employees to sue for their wages under these agreements, were fundamental and had a degree of universality sufficient to presume the foreign law to be similar. In the same way, I am satisfied that the basic provisions of the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3,

to the effect that that all assets of a bankrupt, including all debts and choses in action, devolve to the trustee upon a declaration of bankruptcy, is fundamental and of sufficient universality that the law of Korea can be presumed to be similar. I am therefore satisfied that upon the declaration of bankruptcy of Hanjin and the appointment of Jin Han Kim as its Trustee in bankruptcy, Hanjin's interests in the present action devolved and was transferred to the Trustee.

[24] The Defendants further object to the Trustee's motion based on the Trustee's failure to establish that he has the authority to continue judicial proceedings and to appoint Wook Chong to act on his behalf for these purposes. I should note here that the Defendants are not suggesting (and certainly have not established) that counsel for the Trustee is not in fact instructed by Trustee or that Wook Chong is falsely claiming to have been given authority to act on behalf of the Trustee. Indeed, absent a demonstration – which the party raising the issue bears the onus of proving – that a solicitor is not in fact instructed by the party he purports to represent, or that there is a fraud being perpetrated on the Court as to the true identity of the instructing principal, there is a presumption that the solicitor is properly authorized by that party.

[25] What the Defendants argue is that the powers which the Trustee purports to exercise in seeking to be substituted as Plaintiff in this action require certain formalities and authorizations, without which he is not validly authorized to act. In particular, the Defendants point to English translations of Korean legislation its counsel accessed from a website said to be published by the Republic of Korea Ministry of Government Legislation, from which it appears that certain claims need to be formally evaluated, recovery actions formally authorized and the appointment of attorneys for the realization of debts formally approved by the Korean Bankruptcy Court before

litigation can validly be commenced or pursued by a trustee. The Defendants further argue that, even if the Court were to find that the content of Korean Bankruptcy laws are insufficiently established, the presumption of identity would refer the Court to s 30 of the *BIA*, which requires the trustee to have obtained the permission of inspectors in order to institute proceedings or appoint a solicitor for any purpose.

[26] I find, however, that the issue of the Trustee's authority to make decisions as to the disposition of the bankrupt's assets, including the pursuit of litigation to recover debts, and the issue of the validity and extent of Wook Chong's authority to act on behalf of the Trustee are not relevant to the determination of the specific issue to be determined here: whether the transmission of interest should be recognized and the Trustee substituted for Hanjin.

[27] There is a presumption that when those who have the status of representatives, agents, trustees or administrators purport to act in that capacity, the actions they take are within the scope of their authority. The person so represented will be bound by its representative's actions, even if they exceeded the scope his or her authority. The consequence of the representative's lack of authority will be to engage the representative's personal liability for unauthorized actions. This principle has been specifically applied to unauthorized actions taken by trustees in bankruptcy, and stems from the reasoning that the rule requiring certain steps to be authorized exists to protect the assets of the bankrupt and the interests of the creditors, and not to protect third parties, including the bankrupts' debtors (*Re Plourde: Marcoux v Filion* EYB 1979 – 135960, *Landry v Banque de Montréal*, 2010 QCCS 2116 and *Canada (AG) v* Roy, 2007 FCA 410).

[28] I am accordingly satisfied that it is not necessary, in order for the Court to grant the Trustee's motion to be substituted as Plaintiff in this action, that he establishes that he has met all formal requirements of Korean Law in order to exercise the rights and powers attached to the interests that devolved to him as Trustee in bankruptcy.

[29] Had it been a requirement for granting the motion that the Court be satisfied, on the balance of probabilities, that those formalities were respected, I may not have granted the motion. The evidence before me is sufficient to establish that Jin Han Kim has executed a power of attorney in favour of Wook Chong. The evidence also indicates that Wook Chong has reasonable grounds to believe that the power of attorney was granted in accordance with specific authority given by the Korean Bankruptcy Court in an Order dated April 19, 2017, and that he believes that the authority so granted includes the authority to prosecute this action on the Trustee's behalf. However, the Order dated April 19, 2017 was only tendered by Wook Chong, as Exhibit 2 to his answers to cross-examination questions, in the Korean language. As mentioned earlier in these reasons, the unofficial English translation of that document was never properly introduced in evidence accompanied by an affidavit attesting it to be an accurate translation of the original. Accordingly, while the Court has no basis to disbelieve the sincerity of Wook Chong's belief that he is properly authorized to act on behalf of the Trustee in respect of the present litigation and that the Trustee is properly authorized to delegate to him the conduct of this litigation, the Court has no evidentiary basis upon which it can satisfy itself that Wook Chong's interpretation of the Korean Court's order of April 19, 2017 is correct.

[30] For that reason, I decline to grant that part of the relief requested in the Trustee's notice of motion, seeking an order "Recognizing the Power of Attorney granted by Jin Han Kim in favour of Wook Chong". In any event, as mentioned above, that recognition is unnecessary to give effect to the transmission of interest, to the substitution of the Plaintiff and to the presumption that counsel for the Trustee is properly instructed and that his actions in this litigation bind the Trustee. The status and powers of Wook Choong are, at this time, not relevant to the conduct of this action.

[31] Although the Trustee's motion is ultimately successful and the objection of the Defendants dismissed, costs of this motion should nevertheless be borne by the Trustee. As mentioned, the evidence initially tendered by the Trustee to establish the transmission of interest was particularly poor, especially given the earlier recognition by the Supreme Court of British Columbia of a different person as the official representative of Hanjin in respect of insolvency matters. The Trustee failed to put his best foot forward at the earliest opportunity and to tender a properly certified copy and translation of the decision forming the basis for the devolution, and indeed, seemed to wait until the last possible moment to do so. The Trustee's management of what should have been a simple and straightforward matter was marked by delay and the provision of incomplete and confusing information and documents that bred the Defendants' mistrust and suspicion.

[32] Given the bankruptcy of Hanjin and the presumption of insolvency of the estate that devolved to the Trustee, costs will be ordered payable forthwith and direction will be given to

allow the Defendants to bring a motion for security for costs before they are required to take any further step in this action.

ORDER

THIS COURT ORDERS that:

1. The transmission of interest from the Plaintiff, Hanjin Shipping Co. Ltd. to the trustee in bankruptcy, Mr. Jin Han Kim is hereby recognized and the latter is hereby substituted as Plaintiff in this action.

2. The style of cause is hereby amended so that the Plaintiff shall be designated as: Jin Han Kim, as Trustee in Bankruptcy of Hanjin Shipping Co. Ltd.

3. Costs, in the amount of $3,955.00 shall be payable by the Plaintiff to the Defendants, forthwith, and the Plaintiff shall advise the Court promptly when payment is effected.

4. The Defendants have 30 days from the date of payment of the costs to serve and file a motion record on any motion for security for costs. The motion will be accompanied by a letter advising the Court of whether the motion is contested, and, if an oral hearing is required, a proposed schedule for briefing and hearing the motion, including counsel's mutual places and dates of availability for hearing. If the motion is to proceed in writing, the delays set out in the *Federal Courts Rules* shall apply.

5. The deadlines for the further steps to be taken in this action are otherwise suspended until the delays for serving and filing a motion for security for costs have expired or a motion has been brought and determined, whichever is the latest.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-805-16
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APPEARANCES:

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