



Case in Brief:

Contractor unable to show court the money in retentions trust dispute.

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In a recent Hong Kong decision, *Hip Hing Construction Company Limited v Hong Kong Airlines Limited*,¹ the Hong Kong Court of First Instance (the **Court**) considered whether a trust had been created by the employer, Hong Kong Airlines Limited (**HKA**) to protect the retention monies of a contractor, Hip Hing Construction Company Limited (**Hip Hing**).

¹ *Hip Hing Construction Company Limited v Hong Kong Airlines Limited* [2024] HKCFI 370.



Retentions

→ Hong Kong Court of First Instance could not identify a trust's subject matter.

Background

In 2017, the parties signed a standard form contract containing a clause for retentions. The clause instructed for retention monies to be held on a trust by HKA for Hip Hing.

The retention monies had never been paid into any separate bank account of HKA, nor had they been segregated from the rest of HKA's receipts or funds held.

In 2022, a winding-up petition was presented against HKA. The Court later addressed the situation by ordering a scheme of arrangement and restructuring plan.

At this point, Hip Hing sought the retention monies in its entirety. Hip Hing argued that although the retention monies had not been segregated, a trust was still in existence. Hip Hing hoped it would not have to share the retention monies with other creditors by equal distribution under the scheme.

Issue

In order for there to be a trust, three points of certainty need to be established – intention, subject matter and object. The Court found no problem with identifying certainty of intention. However, HKA argued that there was no

certainty of subject matter. The Court therefore had to decide whether the retention monies could be identified.

Decision

The Court first recognised that the omission to segregate the funds did not necessarily mean there had been no intention to create a trust.² Even if funds are mingled, a court should look at the circumstances as a whole.³ Unfortunately for Hip Hing, nothing in their situation lent itself to such leniency. There was no identifiable source of the retention monies. The accounts which should have stored the retention monies were

² *Hip Hing Construction*, above n 1, at [46].

³ Citing *Re Clowes (No 2)* [1994] 2 All ER 316.

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not ascertained.

The Court was able to distinguish between the situation in this case and that in *Re Hsin Chong Construction Co Ltd*.⁴ In that decision, the Court of Appeal had found certainty of subject matter. However, the employer had adopted a “stringent” project accounting system. In respect of that system, it could be

shown:

- how payment was made by the employer;
- how the retention money had been set aside in the payable account since the commencement of the project; and
- how the retention money was maintained throughout.

The cumulative effect was that

the retention money of each nominated subcontractor could be identified clearly any time.

Conclusion

The decision ends with a stark warning: contractors must be vigilant about the status of their retentions trust before their employer becomes insolvent.

⁴ *Re Hsin Chong Construction Co Ltd* [2021] 5 HKLRD 212.