

HONG KONG / JUDGMENT

NICS ENGINEERING LTD v. THOMAS SEELEN

COURT
Court of First Instance

DECIDED
14 June 2007

CASE / FILE NUMBER
HCB5559/2006

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bjbj HCB 5559/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 5559 OF 2006

Between NICS ENGINEERING LIMITED Petitioner and THOMAS SEELEN Debtor

Before: Hon Barma J in Chambers Date of Written Submissions: 21 and 31 May 2007 Date of
Ruling: 14 June 2007

RULING ON COSTS

On 8 May 2007, I handed down judgment in relation to this matter, by which I dismissed the Petitioner's bankruptcy petition against the Debtor, on the grounds that the Debtor had demonstrated the existence of a bona fide dispute as to the debt on which the petition was based. When dismissing the petition, I made a costs order nisi that costs should follow the event. On 21 May 2007, the Petitioner applied by letter seeking a variation of the order nisi, contending that in the circumstances of the case, the appropriate order was no order as to costs. The letter was accompanied by written submissions in support of the order sought. I directed that the matter should be dealt with by way of written submissions, and on 31 May 2007, the Debtor lodged written submissions seeking to uphold the costs order nisi. No submissions in reply were lodged by the Petitioner. The Petitioner contends that the costs order nisi should be varied because the terms of the Deed of Guarantee under which the alleged debt arose provided in fact for a strict liability to make payment on the part of the Debtor. It was contended that notwithstanding that it might have been arguable that the principal obligor, Pacific Smart Consumer Products (HK) Limited (PSCP), was not in breach of its obligations to the Petitioner, the Debtor remained liable

to the Petitioner under the Deed of Guarantee. The Petitioner contended that this fact should be reflected in the costs order to be made, so that the appropriate order would be no order as to costs, leaving each party to bear its own costs in relation to the Petition. I do not think that the Petitioner has shown any basis for varying the costs order nisi. The argument that is now raised is in fact one that goes to liability. It is also one that was not raised at the hearing of the Petition, which was the time when it should have been raised. In my view, having failed to raise the argument at that time, it is not open to the Petitioner to seek to introduce it now in order to avoid having to pay the costs of his unsuccessful petition. If the argument is one which has merits (as to which I am far from satisfied), it is one which goes to the substantive decision, and is therefore a matter for appeal. I do not think that the fact (if it be the case) that a party who has failed in a hearing might have succeeded had he advanced different arguments at that hearing provides any justification for departing from the usual order as to costs, namely, that costs should follow the event. Accordingly, the Petitioner's application to vary the costs order nisi is dismissed, with costs to the Debtor, to be taxed on the party and party basis if not agreed. (Aarif Barma) Judge of the Court of First Instance High Court Mr Francis Haddon-Cave, instructed by Leland Chu & Co., for the Petitioner Mr Edward Shum, instructed by Wat & Co., for the Debtor - PAGE - & # \$ @ \\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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