

HONG KONG / JUDGMENT

RE ASHIT SUD

[2022] HKCFI 1269

COURT

Court of First Instance

DECIDED

29 April 2022

CASE / FILE NUMBER

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HCB 5499/2021 and HCCW 357/2021

(Heard Together)

[2022] HKCFI 1269

HCB 5499/2021

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

BANKRUPTCY PROCEEDINGS NO 5499 OF 2021

Re: ASHIT SUD

Debtor

Ex Parte: UNION BANK OF INDIA

Petitioner

AND

HCCW 357/2021

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) PROCEEDINGS NO 357 OF 2021

IN THE MATTER of the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap 32)

and

IN THE MATTER of ADONISS LIMITED (formerly known as MAYAR (H.K.) LIMITED and ADONIS LIMITED)

Before: Deputy High Court Judge Le Pichon in Court

Date of Hearing: 20 April 2022

Date of Judgment: 20 April 2022

Date of Reasons for Judgment: 29 April 2022

REASONS FOR JUDGMENT

These are petitions presented by the Union Bank of India (“UBI”):

a winding up petition dated 28 September 2021 (“the HCCW Petition”) against Adoniss Limited (formerly known as Mayar (H.K.) Ltd and Adonis Limited) (“the Company”), supported by Canara Bank (“CB”) and Bank of India (“BOI”); and

a bankruptcy petition dated 29 September 2021 (“the HCB Petition”) against Ashit Sud (“the Debtor”), a director of the Company.

The HCCW Petition and the HCB Petition (collectively “the Petitions”) were ordered to be heard together. At the conclusion of the hearing, the Company was ordered to be wound up and the Debtor adjudged a bankrupt for the reasons set out below.

Background

The Petitions are founded on essentially the same debts arising out of loan facilities and guarantees made by UBI to the Company and its subsidiary Aubade Global Resources Ltd (previously known as Aubade NZ Ltd (“Aubade”) and the corresponding guarantees executed by the Company and the Debtor between 2016 and 2017 which were recalled on 3 September 2019.

A statutory demand in respect of each Petition in the sum of USD 38,462,426.76 as at 23 June 2021 (“the Subject Debt”) was served but has not been paid.

CB and BOI are supporting creditors.

From June 2020 onwards, there were discussions concerning the Company's repayment of outstanding debts between the Company on the one hand and its bank creditors (collectively "the Lenders") including UBI, CB and BOI. In the course of those discussions, the Company raised a one-time-settlement proposal ("the OTS Proposal") which evolved in the ensuing months:

On 16 October 2020, the Company first proposed to pay UBI USD 7.41 million in full and final settlement of all liabilities owed by the Company, explaining the sources of funds (including assets brought in by promoters) available for the proposed OTS. UBI rejected that offer as the amount then outstanding exceeded USD 36 million.

On 3 March 2021, in its letter to the [Lenders], the Company admitted that it was "not in a position to generate any significant funds... so as to meet its liabilities towards the Lenders, the Company may not be able to continue as a going concern..." and proposed a one-time-settlement by paying 25% of the net liability in full and final settlement of all liabilities owed by the Company and its guarantors/directors to the Lenders within 12 months by a sale of assets, namely, the Hailey Road property and the SEZ property.

On 19 April 2021, the Company after referring to the 3 March 2021 OTS Proposal, remarked that the properties to be sold are group company assets and that "[i]n the meanwhile, one of them is proposed to be offered as security to the Lenders".

UBI rejected the 19 April offer on 26 April 2021 as being "too low to accept", remarking that it did not offer any improvement over the previous OTS nor conveyed satisfactory replies to UBI's queries.

On 28 April 2021, the Company offered to pay 25% of the total outstanding liabilities of the Company and Aubade to UBI and 35% of the net outstanding liability to another subsidiary of UBI.

The 28 April offer was rejected by UBI on 13 May 2021, the "offered OTS amount [being] too low to accept".

On 29 June 2021 a meeting was held between the Lenders and the Company to discuss the OTS Proposal at which the Hailey Road property was offered to the Lenders as security but all the Lenders required an upfront payment to discuss the proposal further. They were informed by the Company that they "do not have funds for upfront payment". UBI had requested an upfront deposit of 10% of the proposed OTS. The Company then asked for time to come back on that issue.

On 5 July 2021, CB advised the Company that it was unable to consider the Company's OTS Proposal made at the June meeting as the Company could not assure that it could make the upfront payment.

UBI advised the Company by letter on 14 July 2021 that it could not consider the OTS Proposal in its present form because it lacked an upfront payment which is a mandatory condition as per bank policy.

UBI served a statutory demand on the Company and the Debtor on 15 July 2021 and 27 July 2021 respectively.

After the presentation of the Petitions on 28 and 29 September 2021, on 5 October 2021, the Company requested the Lenders to hold the legal action and consider its OTS Proposal, offering a 5% upfront payment to be paid on or before 30 November 2021.

UBI and CB did not consider the OTS Proposal acceptable and rejected the same on 15 October 2021, with UBI advising that it was UBI's policy to require a 10% upfront payment.

The Company and the Debtor (collectively "the Respondents") oppose the Petitions based on affirmations dated 24 November 2021 filed by the Debtor on behalf of the Company in the HCCW Petition and on his own behalf in the HCB Petition. They disclose similar grounds, namely, that because of the parties' discussions on the OTS Proposal to repay 25% to 34% of the Subject Debt as full and final settlement, UBI and other Lenders are estopped from commencing legal action.

The contention is that UBI and the other lenders had unreasonably refused to accept the OTS Proposal and/or had breached a mutual understanding between the Lenders and the Company that there would be further discussions on the OTS Proposal if the Company was willing to offer the Hailey Road property as security and deposit an upfront amount.

The Respondents' case

The Respondents' written submissions raised a number of objections that did not feature in their affirmations in opposition to the Petitions and sought to recast the estoppel issue. They did not oppose the Petitioner's application to admit into evidence the 2nd affirmation of Shanmugavelu Sakthivel dated 8 April 2022 ("the Petitioner's 2nd Affirmation") in answer to the new objections.

Mr Jeff Yau, counsel for the Respondents, submitted at the outset that he no longer takes issue with the calculation of the Subject Debt or that the amount is not known with certainty. However, the quantum objection is maintained for the Respondents' contentions in relation to section 178 (1) (a) of the Companies Winding up and Miscellaneous Proceedings Ordinance, Cap 32 ("CWUMPO") and section 9 (2) of the Bankruptcy Ordinance, Cap 6 ("BO").

The issues

The issues that arise for determination are the following: (1) estoppel; (2) whether rejection of the OTS Proposals was unreasonable; (3) whether section 178 (1) of the CWUMPO is satisfied; and (4) whether section 9 of the BO is satisfied.

(1) Estoppel

Ms Jasmine Cheung, counsel for UBI, submitted that the Company sought to shift the goalposts by re-framing the estoppel argument based on a free-standing and separate “Security Proposal”.

The Respondents’ evidence of the “understanding” on which the estoppel is grounded is to be found in the Debtor’s affirmation at §5 (4) as follows:

“During the [29 June] meeting ... the creditors made various representations to [the Company] and essentially promised further discussions on the OTS Proposal if [the Company] is willing to, inter alia, offer what was referred to as the “Hailey Road property” as security and deposit an upfront amount being a portion of the amount to be repaid under the OTS Proposal in a “no lien” account, mentioning also the “SEZ property” ... which constituted, and therefore there was, a mutual understanding between the creditors and [the Company] (the “Understanding”).”

Estoppel was said to arise because by relying on that understanding, the Respondents acted to their detriment or that it is inequitable for the Petitioner and Supporting Creditors now to resile from that mutual understanding.

According to the Minutes of the meeting of 29 June 2021 (“the Minutes”) the Company’s proposal for One Time Settlement (OTS) dates back to June 2020. As appears from §6 above, the OTS Proposal was the subject of negotiations over the ensuing months.

In the Respondents’ written submissions, the Company singled out the meeting on 29 June 2021 between the Company and the Lenders as the major factual event for its case on estoppel. It was said to give rise to an understanding that the debts would not be enforced by the Lenders provided the Company procures the sale of the Hailey Road property whilst at the same time having it offered to the Lenders as security. On that basis, it submitted that this was a separate “Security Proposal”, independent of the OTS Proposal.

In his oral submissions, Mr Yau further ‘reformulated’ the estoppel as a promise by the Petitioner that the debt under the loan agreements would be replaced by a new payment arrangement which he described as “new debt for old debt”, the new payment obligation being the OTS Proposal because the Respondents had expressly committed to work out the details.

The 3 March letter contained a section headed “D. Proposed security” which offered the Hailey Road property as security to secure the Lenders pending a sale of that property as well as the SEZ property to fund the proposed OTS. That offer was repeated in the Company’s letter of 19 April that read:

“In the meanwhile, one of the above properties (which is free of any charge) is proposed to be offered as security to the Lenders.”

It was said that that must evidence a separate arrangement although the Respondents do not deny that it is connected with the OTS Proposal. It was characterized as an interim arrangement pending the crystallization of the arrangement under the OTS Proposal to ensure that some money would eventually be paid so that the obligations would be discharged.

Reference was also made to the opening paragraph of the Minutes which stated that: “[the Company] could not dispose off (sic) the property and now offering the same as mortgage in lieu of OTS.”

The Respondents submitted that at the June meeting there was a representation and request by UBI for the Company to put up the Hailey Road property as security and to sell the same as well as making an upfront payment. It was said that if the upfront payment was so critical that UBI would not continue negotiations without it, it would have been reasonable for UBI to inform the Company so that it would not continue to take steps to sell the Hailey Road property.

Instead, they asked that steps be taken to sell the property. It was submitted that in the circumstances that amounted to an implied representation that so long as the Company is in the process of selling the Hailey Road property and putting it up as security, the old debt under the loan agreements will not be enforced.

The Respondents’ affirmation evidence does not reflect the estoppel point advanced at the hearing. Instead, the Respondents relied on selected extracts from the correspondence referred to in §§21-23 above without regard to their context to support a contrived reading of the correspondence.

All the correspondence exchanged between the parties from 16 October 2020 to 15 October 2021 bore the caption “Request for One Time Settlement (OTS) of dues in [the Company]”. Even the “Proposed security” sub-section in the 3 March letter relied on formed part of “Section III OTS Proposal” which itself fell under the umbrella of “Request for OTS”.

In my view, fairly read, the correspondence reflected a continuum of changing contours of the OTS Proposal which comprised a security element to fund the OTS Proposal. The evidence does not support a freestanding “Security Proposal” that was independent of the OTS Proposal as a whole.

As I understand it, a key component of the Respondents’ case appeared to be that UBI’s invitations/requests to the Respondents to improve on their offer during the negotiations implicitly confirmed the parties’ intention that the old debt would not be enforced. I have some difficulty in reading into a request for an offer to be improved in the course of negotiations the implication contended for the Respondents in the sense that the Lenders were free to terminate discussions at any stage since there has been no acceptance of the OTS Proposal.

The characterization of the Security Proposal as an “interim arrangement” during oral submissions does not assist in establishing the “parties’ intention” that the ‘old’ debt would not be enforced. Moreover, the notion that it was an arrangement “pending crystallization” of the OTS Proposal appears to be predicated on an assumption that agreement is bound to happen. The basis for such an assumption escapes me.

Even assuming there to be an independent “Security Proposal” as the Respondents contend, the acts the Respondents rely upon comprise the appointment of Cushman & Wakefield in February 2021 and a valuation report by GCA Technical Consultants dated 15 June 2021. Both acts preceded the June meeting.

Those acts do not remotely suffice to found any claim in estoppel. In fact, within a week of the June meeting, CB had already rejected the OTS Proposal. There followed UBI’s rejection 14 July 2021 and its statutory demand of 15 July 2021. The Respondents have not been able to articulate the detriment suffered during the short window of time elapsing since the June meeting.

In that connection, insofar as it is suggested that detriment resulted from further steps taken to sell the Hailey Road property notwithstanding the statutory demands dated 15 and 27 July 2021 and the presentation of the Petitions on 28 and 29 September 2021, such detriment would be entirely self-induced.

In any event, the ‘detriment’ sustained appears to be nothing more than that in August and September 2021 there was “good progress as various High Net worth Individuals (HNIs) have shown interest and have done site visits and personal meetings”. It is unthinkable that that could constitute sufficient detriment to support an estoppel defence.

(2) Whether rejection of OTS Proposals unreasonable

Alternatively, the Respondents submitted that their offers of security were unreasonably rejected by UBI, CB and BOI. They rely on section 178 (1) (a) (ii) of the CWUMPO and section 6D (3) of the BO. (Having regard to my views on the Respondents’ independent or freestanding “Security Proposal”, the security aspect is subsumed as constituting part of the OTS Proposals which the Petitioner, CB and BOI have rejected.)

In *Synergy Lighting Limited v HSBC* [2020] HKCFI 2490 at §14, G Lam J (as he then was) was inclined to the view that the test for “reasonable satisfaction” under section 178 (1) (a) of the CWUMPO is the same as that for section 6D (3) of the BO.

The Respondents submitted that based on UBI’s written submissions at §§34-35, its core contention is that there is no (i) full security or (ii) security that UBI should reasonably accept. The thrust of the Respondents’ contention is that their offer falls squarely within section 178 (1) (a) of the CWUMPO and it is the only reasonable choice open to UBI for 3 reasons.

The first reason given is that the Petitioner is wrong in requiring that full security be offered. Pausing there, I do not read §§34-35 of UBI’s written submissions as requiring full security at all. What was offered to settle the outstanding debts and liabilities of the Respondents to UBI ranged from 25% to 34% which was considered to be too low. That response cannot conceivably be construed or understood as requiring full security. Thus, the first of the 3 reasons advanced by the Respondents falls away.

The second reason advanced was that UBI as a reasonable hypothetical creditor should not have rejected the OTS Proposals because:

they were couched in clear and certain terms including both (i) the source of funding and (ii) a proposed timeline for repayment of the Subject Debt;

the Company had disclosed to UBI detailed information concerning its financial position;

the Company had made genuine attempts to sell the Hailey Road property and the SEZ property by causing a valuation report dated 15 June 2021 to be prepared and identifying potential buyers; and

the associated costs for acceptance of the OTS Proposal is or would be smaller when compared with obtaining a winding up order.

The third reason advanced was that had the OTS Proposals been accepted, the creditors would be in a better position than they would have been had a winding up order been made because the properties offered for sale are third-party properties.

From the Petitioner's perspective,

(a)

the OTS Proposal offered UBI 25% of the Subject Debts with a timeframe of 12 months from the date of sanction;

(b)

however, it was dependent on various properties being sold within that timeframe which creates an element of uncertainty;

(c)

the Hailey Road property had been offered for sale since February 2021 without securing any firm offers which raises questions as to its marketability;

(d)

relevantly, the security offered does not alter the percentage of the Subject Debt recoverable;

(e)

there was no sworn evidence from the Company as to its financial condition; and

(f)

the financial position of the Debtor was unknown.

In relation to the rejection of the 24% recovery proposal, the refusal of an offer of 58% of the debt was held not to be unreasonable in *Re Cheung Ka Lun Grand*, unrep., HCB 17553/2002, 23 December 2002.

The relevant principles and considerations applicable to section 6D(3)(c) which were summarized by DHCJ Lok (as he then was) in *Re Ho Sik Tung Terry* [2012] 5 HKLRD 777 (at §10) are set out in *Re Chiu Margaret (Debtor)* [2020] HKCFI 617 at §48:

“(a)

in determining whether a petitioner’s refusal of the debtor’s offer is unreasonable, the court has to be satisfied that no reasonable hypothetical creditor in the petitioner’s position, and in the light of the actual history, would have refused the offer: *Re a debtor* (No. 32 of 1993) [1995] 1 All ER 628, 639d-f and 640a-b;

(b)

the position should be considered only as between the petitioner and the debtor without regard to the position of other possible creditors or the impact on the entire body of creditors: *Re a debtor* (No. 32 of 1993), p. 640g;

(c)

in considering the debtor's offer, the petitioner is entitled to have regard to his own interests and is not required to balance his interests against those of the debtor, or to take a chance, or to show patience or generosity, even though some creditors might do so. Acting reasonably is not the same as acting justly, fairly or kindly: *IRC v. a Debtor* [1995] BCC 971, 974B-F;

(d)

if a debtor wishes his proposals to be looked at with sympathy, it is incumbent on him to be full, frank and open with the petitioner in respect of his statements of his position: *Re a debtor* (No. 32 of 1993), p. 640a-c;

(e)

in considering a debtor’s ability to repay the debt, no regard should be given to future contingencies such as profit or income from future contracts if he is permitted to carry on his business: *Re: Phillip and Lion Far East Ltd*, CWU No. 130 of 1991 (17 May 1991); *Re: Lam Ngai Fung Tony*, HCB 4641/ 2001 (3 December 2001);

(f)

future income may be relevant only as part of the total circumstances to be considered regarding whether a debtor’s offer to secure or compound for a debt has been unreasonably refused by the petitioner: *Re: Lam Ngai Fung Tony*.”

It is common ground that the test is objective and that the position is to be looked at the date of the hearing. The Respondents relied on additional principles stated in *Re Garwood* [2012] Lexis Citation 130 at §23:

“...

- (8) a rigid institutional policy of rejecting offers to secure could be a relevant consideration, since the reasonable hypothetical creditor was obliged to consider an offer on its merits [Lightman J in *HM Customs and Excise v Dougall* [2001] BPIR 269 at 273] ... “coherent in-house policies”, however, are not necessarily wrong;

...

- (10) the costs and resources implications for the creditor are a “highly material consideration” (Robert Walker J [in *Inland Revenue Commissioners v A Debtor* [1995] BCC 971 at 976; *Henderson J in Ross v Revenue and Customs Commissioners* [2010] EWCH 13 (Ch) at §§ 49 and 52].

The Respondents appeared to focus on the requirement of an upfront payment as being objectionable per se but that is not a correct reading of the principle which merely raised the possibility that it could be, at the same time recognizing that coherent in-house policies are legitimate. No evidence has been adduced to show that UBI’s in-house policy is demonstrably incoherent and/or unacceptable.

There was also a suggestion that UBI’s repeated rejections on the basis that the offer was “too low” reveals “a rigid institutional policy” and that the OTS Proposals were not considered on their own merits. No evidence was adduced to support the existence of “a rigid institutional policy”. It was pure speculation on the part of the Respondents.

In so far as the Respondents sought to compare the economic outcome of the offer with the return for creditors in liquidation/bankruptcy, that approach is wrong: see *Re a Debtor* (No 32 of 1993) at 640d.

The Petitioner highlighted the fact that the Respondents refrained from disclosing their asset position on affidavit. The Respondents relied on *Re a Debtor* (No 32 of 1993) at 638 but it is not authority for the proposition that sworn evidence is never necessary. Whether it is would depend on the facts of the particular case.

What is clear is that a debtor must be full and frank in his disclosure of his financial circumstances. Where, as here, the Debtor himself made no disclosure whatsoever of his financial circumstances and he is the director who signed the 3 March letter on behalf of the Company disclosing its financial affairs, the criticisms raised in §41(e)-(f) are entirely justified and valid.

Moreover, where the Company is insolvent and unable to pay its debts, it is the creditors who have a real interest in the Company, and they can decide whether it is in their interest to have the Company wound up. It is not for the Company to assert otherwise: see *Re Zhaoheng Hydropower (Hong Kong) Limited* [2021] HKCFI 1434 at §13.

Applying the relevant principles set out above, I do not agree that the only reasonable choice open to UBI is the acceptance of the OTS Proposals. I am firmly of the view that UBI, CB and BOI cannot be said to be unreasonable in rejecting the OTS Proposals.

(3) Section 178 (1) (a) and (c) of the CWUMPO

Section 178 (1) (a) provides that a company is deemed to be unable to pay its debt if a written demand has been served on the company specifying the amount then due and the company has neglected to pay the sum so due for 3 weeks after the service of the demand.

The Respondents relied heavily on *Processed Sand Pty Ltd v Thiess Contractors Pty Ltd* (1983) 78 CLR 956 where Waddell J considered the meaning of the words “to pay the sum so due and has neglected to pay the sum” and held (at page 7) that a notice of demand is not valid if the amount required to be paid exceeds that actually due.

The *Processed Sand* approach (which would make every winding up order bad where the creditor had demanded the smallest sum above what was actually due to him) had been deprecated in *Cardiff Preserved Coal and Coke Company v Norton* (1867) LR2 Ch App 405 at 410 which authority Waddell J did not follow.

Processed Sand in turn was not followed in *Re Newman Air Charter Pty Ltd* (1991) 5 WAR 365. In *Newman Air*, White AJ (at 371, line 20 to 373, line 40) after considering the differing views of the Full Court on the question (which had been the subject of differing views in other Courts in Australia) concluded that the better view is that the [section 364 of the Code] does not create a statutory fiction and that it merely provides a convenient method of proof of a ground upon which a company may be wound up. He further opined (at 374) that

“a statutory demand for a sum in excess of that which is in fact due, served upon a company in circumstances where it is apparent that a failure to pay the amount due may result in winding up proceedings being instituted, calls for a proper response from the company concerned. If there is a demand for \$100,001 by a creditor to whom only \$100,000 is owing, it seems absurd that the creditor’s entitlement can be defeated by the Company, paying nothing, but showing, in due course, that the demand is for an amount in excess of that due.”

Thus, if a company contends that the statutory demand has been overstated, the correct procedure to avoid the statutory presumption of insolvency is to comply with the demand as to the amount which is not bona fide disputed and then contest the remainder: per Hoffmann J (as he then was) in *In re a Debtor* (No 490-SD-1991) [1992] 1 WLR 507, at 509H-510A.

It follows that overstating amount due in the statutory demand does not ipso facto invalidate the statutory demand or render the company involved any less solvent so long as a debt which exceeds the statutory limit is due and admitted or not bona fide disputed: it was so held by Ng J in *Re SEC (Hong Kong) Limited*, unrep., HCCW 215/2013, 21 March 2014.

The statutory demands served in HCCW 357 and HCB 5499 were for the sum of USD 38,462,426.76 as on 23 June 2021. In the present case, when a Singapore property (a 3rd party security) was sold, UBI appropriated USD 1.9 million out of the net proceeds of approximately USD 3.4 million towards the Company's debt on 21 September 2021 about a week prior to the HCCW Petition: see §§8-10 of the Petitioner's 2nd affirmation. Taking this credit into account, a sum in excess of USD 34 million remained outstanding and undisputed.

For the HCCW Petition, applying the principle stated in the SEC case, the discrepancy between the amount stated in the statutory demand and the amount outstanding at the date of the HCCW Petition cannot affect the applicability of section 178 (1) (a).

In any event, a statutory demand is merely a means of proof of insolvency. When a debt which is not substantially disputed remains unpaid, an inference could be drawn that it was unable to pay its debt within section 178 (1) (c): see per Tang J (as he then was) in *Re AuraSound Speakers Limited* [2004] 3 HKLRD 502 at §50.

(4) Whether section 9 of the BO is satisfied

As regards the HCB Petition, it is the Respondents' case that the burden is on the Petitioner to prove "the debt" under section 9 (2) of the BO which provides as follows:

"At the hearing the court shall require proof of the debt of the petitioning creditor and of the service of the petition, and, if satisfied with the proof, may make a bankruptcy order in pursuance of the petition."

It was submitted that as the Subject Debt owing by the Debtor to UBI under the HCB Petition had been reduced by USD 1.9 million as explained in §58 above, the amount stated as the Subject Debt in the HCB Petition is demonstrably wrong.

The Debtor relied on the Court of Appeal's decision in *Lim Por Yen v Lam Kuen Leung* [1994] 2 HKLR 248 at 252, ll. 20-25 a case where the petitioner alleged the debt to be 4.6 m-odd being the balance of a 25m loan plus accrued interest. In that case, the relationship between the parties was very complex and some of the loans were not made between the parties but companies closely associated with them. The petitioner accepted that the figure of 4.6m-odd was wrong. On those facts Litton JA (as he then was) considered "a radical re-calculation" was required and what "the product of that exercise might finally be" was unclear. In those circumstances the judge's dismissal of the petition was affirmed.

In the *Lim Por Yen* case, it was not known whether and if so what amount would be owing after the "radical re-calculation" exercise. The present case is factually very different. The single event that rendered the Subject Debt inaccurate was the failure to give credit for the USD 1.9 million appropriated to the Adoniss debt on 21 September 2021. On any view, the amount the Debtor owed the Petitioner would have been at least USD 34 million.

The question which arises is whether overstating the amount of the debt in a bankruptcy petition is fatal. It is relevant to note that the HCB Petition is based on a failure to comply with a statutory demand. The amount of debt stated in the statutory demand (USD 38 million odd) that was served on the Debtor on 27 July 2021 was correct in every respect. This is not a case where the statutory demand itself was wrong.

In the interim, between the date of the statutory demand and the filing of the HCB Petition, a sum of USD 1.9 million was appropriated from the sale proceeds to reduce the amount of the Company's debt.

UBI submitted that real question is whether the overstatement causes any prejudice to the Debtor: see *Re Kwok Chok Yee* [2000] 2 HKC 543 at 548G; *Bright Islands Corporation v Joachim Chao*, appointed representative of the estate of Chao Sze Bang Frank, deceased [2002] 2 HKLRD 97 at §92; and *Re Lo Kwai Ying Louisa*, unrep., HCB 3145/2015, 5 April 2017 at §§48-49.

Where substantial indebtedness is shown notwithstanding an overstatement of the Subject Debt, I cannot see any injustice being done to the Debtor who has not made any repayment. In my view, *Lim Por Yen* is distinguishable.

It should be mentioned that the Debtor made submissions seeking to distinguish Hoffmann J's decision in *In re a Debtor* (No 490-SD-1991) on the basis that that case involved rule 6.5 (4) (b) of the Insolvency Rules 1986 and was not concerned with section 5 (2) of the Bankruptcy Act 1914 (now abolished) which was the parallel provision to section 9 of the BO.

No Hong Kong authority was cited for the proposition that section 9 (2) cannot be satisfied where the amount of the debt is overstated in the petition. While the authorities referred to in §67 above concern section 6D rather than section 9 (2) of the BO, the same approach must apply to both sections.

Conclusion

For the reasons stated above, a winding up order in respect of the Company was made and the Debtor adjudged a bankrupt.

(Doreen Le Pichon)

Deputy High Court Judge

Ms Jasmine Cheung, instructed by Nixon Peabody CWL, for the Petitioner in HCB 5499/2021 and HCCW 357/2021

Mr Jeff Yau, instructed by Vincent T. K. Cheung, Yap & Co, for the Respondents in HCB 5499/2021 and HCCW 357/2021

Mr Thomas T.L. Nip, instructed by Tung, Ng, Tse & Lam, for Bank of India in HCCW 357/2021

Mr Ludwig Ng, Solicitor advocate of ONC Lawyers, for Canara Bank in HCCW 357/2021

The Official Receiver was absent

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