

HONG KONG / JUDGMENT

RE GOODWILL CREATION LTD

COURT

Court of First Instance

DECIDED

23 August 2007

CASE / FILE NUMBER

HCCW1035/2002

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bjbj HCCW 1035/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 1035 OF 2002

IN THE MATTER OF GOODWILL CREATION LIMITED and IN THE MATTER OF THE COMPANIES ORDINANCE, CHAPTER 32.

Before: Hon. Kwan J. in Chambers Date of Hearing: 23 August 2007 Date of Decision: 23 August 2007

DECISION

This is an application to strike out a creditor's winding-up petition on the basis there is a bona fide dispute of the petitioning debt on substantial grounds. The matter arose in this way. On 13 August 2002, the former solicitors for the petitioner, So Day Wing, served a demand on the company, Goodwill Creation Limited (the Company), under section 178 of the Companies Ordinance, Cap. 32, seeking payment of \$390,590.60 within 21 days. No particulars or breakdown of the debt was given in the demand. As no payment was made, the petition was presented on 10 September 2002. On 7 November 2002, the Company's former solicitors wrote to the petitioner's former solicitors in response to the demand for payment. The Company accepted that it was indebted to the petitioner of \$60,000.00 plus interest, not in the sum of \$390,590.60 as alleged. It was a five-page letter, setting out in full the Company's position which was as follows:

- (1) As far as the Company could tell, the amount demanded made up of 3 cheques drawn by the Company in the petitioner's favour:

- (i) cheque no. 814015 dated 23 November 2001 for \$270,590.60 (the 1st cheque); (ii) cheque no. 927519 dated 31 March 2002 for \$60,000.00 (the 2nd cheque); and (iii) cheque no. 927518 for \$60,000.00 which was undated when issued by the Company but had the date of 18 June 2002 filled in by the petitioner subsequently (the 3rd cheque). I should say there is no dispute that the petitioning debt is made up of these 3 cheques, which were dishonoured.
- (2) Regarding the 1st cheque, it was intended to be repayment of a loan of \$270,000.00 made by the petitioner to the Company on 10 November 2001 with interest at 5.25% per annum. The Company indicated it would repay within half a month or 1 month, so it drew 2 consecutive post-dated cheques in the petitioner s favour in the amounts of \$270,590.60 (this is the 1st cheque and the calculation was $\$270,000.00 \times 5.25\%$ divide by 12 divide by 2) and \$271,181.25 (cheque no. 814014 and the calculation was $\$270,000.00 \times 5.25\%$ divide by 12; there was a clerical error in the letter regarding this calculation) and handed them to the petitioner, on the basis that depending on the period of the loan, either one of the cheques would be presented for payment. The Company failed to repay at the end of one month. The petitioner presented cheque no. 814014, which was the cheque for the larger amount, for payment. This was honoured on 27 December 2001. The Company heard nothing from the petitioner on this loan until the demand was served on 13 August 2002.
- (3) The 2nd and 3rd cheques are also consecutive in number. They were 2 out of 3 cheques drawn by the Company in the petitioner s favour nos. 927517, 927518 and 927519. In mid February 2002, the Company asked the petitioner for a loan of \$180,000.00 and the 3 cheques were given to the petitioner as intended repayment. Cheque no. 927517 was dated 28 February 2002 and cheque no. 927519 was dated 31 March 2002 as those dates were agreed between the parties as dates for repayment. The 3rd cheque no. 927518 was undated because the petitioner indicated that whilst he could make a loan of \$120,000.00, the remaining \$60,000.00 might not be available. It was agreed that this loan was without interest. The petitioner did not make the loan until 11 March 2002, and it was only for \$120,000.00. The petitioner presented cheque no. 927517 for payment, this was eventually honoured on 17 April 2002. The Company admitted liability for the outstanding balance of \$60,000.00, and, to avoid argument, agreed to pay interest on \$120,000.00 for 38 days and on \$60,000.00 for 7 months.
- (4) The total sum for which the Company admitted liability was calculated at \$64,991.10. The Company s solicitors were instructed to send the petitioner a cashier order for this amount. The Company also accepted its liability to pay the petitioner s costs and the Official Receiver s costs up to the date of the letter, to be taxed if not agreed. Based on the above, the Company invited the petitioner to withdraw his petition. The petitioner s response to this was to amend the petition, alleging that apart from the debt of \$390,590.60, the Company was indebted to the petitioner of \$2,781,591.00. The petition was amended on 6 January 2003. The petitioner now says that he is not relying on the additional debt of \$2.7 million, he is just relying on the amount of debt in his original petition. The cashier order of \$64,991.10 tendered by the Company in November 2002 was cashed by the petitioner s former solicitors

on 10 April 2003. The Company issued its summons to strike out the petition on 7 February 2003, on, inter alia, the ground that there is no undisputed or indisputable debt. Directions were given on 10 February 2003 adjourning the summons pending the filing of evidence and the disposition of 2 other summonses issued by the parties. The petition was adjourned pending the outcome of the strike out application. Neither party had made a move on these proceedings until the Company sought to restore its strike out summons in January 2007. In the meantime there are other proceedings between the petitioner, his company and other related companies of the Company. I was told that the petitioner did not think it worthwhile to pursue the petition when there were negotiations. I gave fresh directions on 23 March 2007 for evidence to be filed in the strike out application, as my earlier order was not complied with. Notwithstanding this, the petitioner chose not to serve any evidence in reply until 20 August 2007. The only reason for the delay was that the petitioner has changed his solicitors on 13 July 2007 and he was given different advice. Be that as it may, I have admitted the latest affirmation of the petitioner, his 7th affirmation. The petitioner's case, as appeared from his affirmations, may be stated as follows:

- (1) The petitioner is a practising accountant and Raymond Chan Chun Fai (Raymond) was a client of his firm. Raymond frequently instructed the petitioner's firm to purchase shelf companies and to act as nominee shareholders and directors for them. There were over 20 companies. These companies were used mostly in property dealings of Raymond. Since 1998, the petitioner had lent money to Raymond from time to time at the latter's request via Raymond's companies, at interest rates as agreed. The petitioner recorded the loans to the various companies controlled by Raymond in a single current account, and there was intermingling of funds in the account. The overall situation was that according to the current account, the total amount outstanding from Raymond or Raymond's companies calculated up to 11 January 2002 was \$3,379,509.00.
- (2) The 1st cheque and the other consecutive cheque were given to the petitioner in this way. On 9 November 2001, Raymond requested the petitioner to lend him \$270,000.00 which he promised to repay within 14 days, at the interest rate of 5.25% per annum. The petitioner checked the current account with Raymond and discovered that the sum of \$240,000.00 lent to a company of Raymond called Gold Delight Industrial Limited (Gold Delight) on 26 October 1999 had remained unpaid. Raymond agreed he would repay the old loan of \$240,000.00 on or before 9 December 2001 and caused the Company to issue a post-dated cheque as security, so the petitioner agreed to give him a new loan of \$270,000.00. Raymond caused the Company to issue the 1st cheque (no. 814015, dated 23 November 2001) for repayment of the new loan and cheque no. 814014 (dated 9 December 2001) for repayment of the old loan. As the 1st cheque was dishonoured when presented for payment, the new loan of \$270,000.00 has remained unpaid.
- (3) As for the 3 consecutive cheques totalling \$180,000.00, they were issued by the Company in these circumstances, according to the petitioner's 4th affirmation. Raymond, via his companies, defaulted in payment of profits tax. The Inland Revenue Department issued a

demand letter to the petitioner as he was a nominee director and the petitioner paid \$480,000.00 on 9 February 2000. In February 2002, the petitioner received information there would be tax refund of \$300,000.00. So Raymond caused the Company to issue 3 cheques in the petitioner's favour totalling \$180,000.00 as repayment.

- (4) In the petitioner's 7th affirmation, he gave a different version. The loan of \$120,000.00, which he made to the Company on 11 March 2002, arose from a tax refund from the Inland Revenue Department of \$336,229.00 payable to Great Raise (Asia) Limited (Great Raise). The petitioner was a nominee shareholder and director of Great Raise on behalf of Raymond. The petitioner had to lend \$120,000.00 to Raymond in exchange for the refund cheque from Inland Revenue Department which was in Raymond's possession. The Company's defence to the petitioning debt is that there was a lack of consideration, which is a good defence between immediate parties. Evidence is admissible to show that no consideration was given for the remaining 2 cheques in dispute. The cases cited by Mr Alexander Wong for the petitioner that extrinsic evidence is not admissible to vary or contradict the terms of the written contract evidenced by the cheque itself have no application. I do not think the present case comes within that situation. I note that in *Man Sun Finance (International) Co Ltd v Wong Kwan Man* [1982] HKLR 146 at 148 (on appeal, the appeal was allowed on a different ground), evidence led for the purpose of denying the existence of an essential characteristic of the instrument admitted to be a cheque was held not admissible, whereas evidence to show that no consideration was given for the cheque was admissible. Here evidence adduced by the Company was to show that no value was given for the remaining 2 cheques. I reject Mr Wong's argument on admissibility of evidence. Mr Wong further submitted that the Company has not adduced evidence from Raymond or anyone directly involved in the loan transactions. I take note of that. For present purpose, it does not mean that the evidence adduced on behalf of the Company should be disregarded merely for that reason. Mr Wong contended that this is a simple case and the documents speak for themselves. I take a different view. The debt relied on to found this petition is but a small part of the dispute between the petitioner, the petitioner's companies, Raymond and Raymond's companies. I have read the pleadings filed in High Court Action No. 742 of 2006 and the current account adduced in that action. Due to the intermingling of funds in the current account kept by the petitioner, it is far from clear that in respect of a given sum who had advanced the money to whom. Mr Benjamin Chain for the Company made a number of points in his submission to demonstrate there is great doubt about the petitioner's case. I think there is substance in his submission and I agree with these points:
- (1) On the petitioner's case, cheque no. 814014 (dated 9 December 2001) was for repayment of the old loan of \$240,000.00. According to the current account, that loan was made on 26 October 1999 with interest at 13.5% per annum. The total amount of repayment with interest, 2 years from the date of the loan, should be \$304,800.00. However, the cheque was only for \$271,181.25. There is no satisfactory explanation for this on the petitioner's evidence, whereas the Company has demonstrated to the exact amount the reason for the

different amounts on the 1st cheque and cheque no. 814014.

- (2) The petitioner alleged in his 4th affirmation that the 3 cheques totalling \$180,000.00 issued in February 2002 were to repay \$480,000.00 advanced by him to another company of Raymond on the basis that he had a tax refund of \$300,000.00. In his 7th affirmation, he said he had to make a further loan of \$120,000.00 to Raymond to get back a tax refund of \$336,229.00.
- (3) Even if \$240,000.00 and \$60,000.00 were indeed owed by Gold Delight and Great Raise to the petitioner, and the Company had issued the 2 cheques in purported repayment, as a matter of law, there was no consideration as the petitioner had not agreed to and had not released the debts owed by Gold Delight and Great Raise (AEG (UK) Limited v Lewis [1993] 2 Bank L R 119). I disagree with Mr Wong that this case is distinguishable and irrelevant. The belated assertion of release in the petitioner's 7th affirmation does not clearly address this point and does not alter the position. Mr Chain surmised that this assertion was made only after the petitioner had read his submission which was served before the petitioner made his 7th affirmation. It does seem to me to be an opportunistic move on the petitioner's part. I agree with Mr Chain there is nothing incredible about the Company's case. On the contrary, there are weaknesses about the petitioner's case which the petitioner has not satisfactorily explained. I am satisfied there is a bona fide dispute on substantial grounds. The petition must be dismissed. As costs should follow the event, I award the costs of this application to the Company. For the costs of the petition, the Company has accepted liability for the petitioner's costs up to 7 November 2002, including the Official Receiver's costs. In respect of the costs incurred thereafter, I order the petitioner to pay the Company's costs, including all costs reserved. (S Kwan) Judge of the Court of First Instance High Court Mr Alexander Wong, instructed by Messrs Kwan & Chow, for the Petitioner Mr Benjamin Chain, instructed by Messrs So, Lung & Associates, for the Company The Official Receiver, attendance excused
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