

HONG KONG / JUDGMENT

RE LEE SIU WAH

COURT

Court of First Instance

DECIDED

25 June 2007

CASE / FILE NUMBER

HCB10291/2006

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bjbj ING AS CHEUNG & CHEUNG CERTIFIED PUBLIC ACCOUNTANTS and MERIC SECRETARY
AND NOMINEES LTD, the Judgment Creditor

Before: Hon Barma J in Court Date of Hearing: 25 June 2007 Date of Judgment: 25 June 2007

JUDGMENT

This is a creditor s bankruptcy petition presented against Lee Siu Wah (the Debtor) by Cheung Chi Chiu (trading as Cheung & Cheung Certified Public Accountants) and Meric Secretary and Nominees Ltd (the Petitioner) on the basis of a debt of HK\$390, due under an allocatur in respect of costs payable to the Petitioner by the Debtor in High Court Action 1403 of 2003. The allocatur was dated 4 April 2006. A statutory demand in respect of the sum certified in the allocatur was served by advertisement on 7 July 2006, but went unanswered. The petition is opposed by the Debtor. It is also opposed by another of his creditors, a Mr Edward Mok Wai Man (the Opposing Creditor). The basis of the Debtor s opposition appears from an affirmation made by him on 2 April 2007. He does not dispute that the debt is due to the Petitioner, and that it has not been paid. Nor does he suggest that he is presently in a position to pay it. Rather, he contends that no bankruptcy order should be made so that he can pursue proceedings which he has taken against a company called Sun Fook Kong Construction Company Limited (). Those proceedings, High Court Action No. 2531 of 2006, relate to shares owned by the Debtor in a company called Many Harvest Construction Company Limited (Many Harvest). The Debtor s case is that he pledged shares which he owned in Many Harvest to SFK as security for the performance by a company called Grand Smart Engineering Limited (Grand Smart), of which he was formerly a shareholder, of its obligations to SFK under an agreement relating to a construction contract. In effect, SFK was the main contractor and Grand Smart the sub-contractor. Mr Lee s case is that, without justification, SFK purported to enforce the pledge by causing his shareholding in Many Harvest to be transferred to itself. He also suggests that, in any event, SFK should not have

transferred the shares to itself, but should have sold them on the open market. He claims, in effect, the return of the shares and damages, or alternatively, payment of the fair value of the shares, which he says is not less than HK\$1,496,000. The claim is resisted by SFK, which alleges that it was entitled to enforce its security as Grand Smart was in default of its obligations to it. SFK also counterclaims against the Debtor for HK\$16,727,188.09 which it says is due to it under a guarantee given by him in connection with the same contract. Pleadings in the action closed on 14 March 2007, when SFK filed its Reply to the Debtor's Defence to Counterclaim. I have not, however, been provided with any further information as to its progress. The Debtor says that he is very likely to succeed in his claim against SFK, and should therefore recover at least the value of his shares, which will be more than sufficient to pay the Petitioner what is due to it. However, although the Debtor says that this view is based on legal advice which he has received, he gives no details of that advice. The Opposing Creditor also made an affirmation dated 19 May 2007 in opposition to the petition. He says that he is aware of the Debtor's action against SFK, and that he has been shown the pleadings in the action. He expresses the view that the Debtor's chances of success in that action are very high, opining that the issues are straightforward and that the Debtor's case can be proved from the correspondence between the Debtor and SFK. He also says that it appears that the Debtor still has some shares in Many Harvest. The Opposing Creditor goes on to say that SFK is indebted to Many Harvest for at least HK\$60 million, and that either on the basis of these further shares apparently still held by the Debtor, or those which the Debtor will recover from SFK in his action, the Debtor will be able to cause Many Harvest to sue SFK for the HK\$60 million, leading to ample funds being available to pay off all the Debtor's creditors. He says that he would prefer to wait for payment, rather than see the Debtor bankrupted at this point, as he doubts whether a trustee in bankruptcy would pursue the Debtor's claims. The Petitioner's debt is undisputed. On the evidence, the Debtor is not at present able to meet it. The only sources identified out of which the Debtor might be able to meet it are his claim against SFK, and through Many Harvest's possible claim against SFK. As to the Debtor's claim against SFK, although both he and the Opposing Creditor have expressed the view that it has strong prospects of success, this is not a conclusion to which I am able to come on the evidence. The evidence filed shows only that the Debtor has made his claim, and that it is resisted by SFK, which in addition asserts a very substantial counterclaim against the Debtor. No evidence has been put forward in relation to the underlying merits of the claim. Moreover, there is at present no indication of the current status of the proceedings, or when the claim is likely to go to trial. It is impossible to say when, or even whether, the Debtor might be in a position to settle the Petitioner's debt. So far as Many Harvest's potential claim against SFK is concerned, the position is a fortiori. The prospects of the Debtor being in a position to repay his debts from this source are even more remote (in point of time, let alone in terms of likelihood of success) than those in his action against SFK, given that Many Harvest has not as yet brought any claim against SFK at all. Even if I had been of the view that either of these claims had been shown to have merits, this would not have been sufficient to resist the making of a bankruptcy order against the Debtor. As Le Pichon J (as she then was) put it in *Re Chan Wai Keung* (unreported, CFI, HCB 2180/99, 15 November 1999) (at paragraph 6 of the judgment):- The position comes to this: although the Debtor stands to recover a substantial amount of money from a third party if he were successful in his counterclaim in the

other action, that of itself is not a sufficient reason for granting an adjournment or refusing to make a bankruptcy order when, on the evidence, he is clear, at the moment, unable to meet the judgment debt obtained by the Petitioner. Further, the making of a bankruptcy order will not mean that the Debtor's claim against SFK cannot be pursued. Whether or not the claim should be pursued will be a matter for his trustee, who will have to form a view as to its merits. In this context, I should say that the Opposing Creditor's concerns as to whether or not a trustee would pursue the claims (whether of the Debtor or of Many Harvest) against SFK do not appear to me to be well founded. If the claims appear to the trustee to have sufficient merit to be worth pursuing, and he has the funds with which to pursue them, no doubt he will do so. If he is not in a position to do so, it would be open to the creditors (which include the Opposing Creditor) to offer to fund such proceedings if they believe that to be worthwhile. I therefore do not think that the Debtor's action against SFK, or Many Harvest's potential claim against SFK, provide any reason for declining to make the bankruptcy order sought. So far as the wishes of the Opposing Creditor are concerned, while the court may have regard to them, it seems to me that in this case, for the reasons which I have given, the basis on which the Opposing Creditor resists the making of a bankruptcy order also fails. Finally, I should note that the Debtor has put in evidence an offer he made to pay the debt. However, given that all that was offered was an initial payment of HK\$25,000 followed by negotiations as to the balance, I do not think that it can be said that the Petitioner's failure to accept it was in any way unreasonable, as it provided for only a small payment, with no assurance as to when, or even if, the balance of the debt might be repaid. I therefore make the usual bankruptcy order with costs against the Debtor. There is to be no order as to costs so far as the Opposing Creditor is concerned. (Aarif Barma) Judge of the Court of First Instance High Court Mr Jose-Antonio Maurellet, instructed by Messrs Tang, Lai & Leung, for the Petitioner Mr H S Tso, of Messrs Tso & Associates, for the Opposing Creditor (Mok Wai Man Edward) Debtor: Lee Siu Wah (1udk 1udk S T U V i\$&`G 5<>| HCCW.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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