

HONG KONG / JUDGMENT

RE LEE YIK KWONG

COURT

Court of First Instance

DECIDED

18 May 2007

CASE / FILE NUMBER

HCB4043/2006

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bjbj NgUY

Before: Hon Kwan J in Court Date of Hearing: 18 May 2007 Date of Judgment: 18 May 2007

J U D G M E N T

This is a bankruptcy petition presented by HRA Investments Limited (the petitioner) of Vancouver, Canada against Lee Yik Kwong (the debtor), also known as Stephen Lee, based on a statutory demand issued on 16 December 2005. The petitioner is a wholesaler of jewellery and diamonds. The debt demanded in the statutory demand was made up of two judgment debts :

- (1) In DCCJ No. 1291 of 2005, the debtor was adjudged to pay the petitioner US\$91,116.40 with interest and fixed costs of HK\$1,380.00.
 - (2) In HCA No. 1034 of 2005, the debtor was adjudged to pay the petitioner US\$456,299.86 with interest and fixed costs of HK\$1,550.00. Both are default judgements obtained for the debtor's failure to file a notice of intention to defend. The two actions were brought on 14 dishonoured cheques given by the debtor to the petitioner for diamonds sold and delivered by the petitioner to the debtor between November 2002 and January 2003. The judgment in the District Court was dated 22 April 2005.
- The judgment in the High Court was dated 28 June 2005. It is alleged in the petition that as at 8 May 2006, the debtor was indebted to the petitioner in the aggregate of US\$616,656.53 and HK\$2,930.00 for these judgment debts. The debtor has opposed the petition on the ground that the default judgments obtained against him should be set aside for irregularity, as service of the writs in both actions on him was defective. Further, he contended that he has a defence on the merits. After the petition was presented in May 2006, the debtor issued a summons in September 2006 to set aside the default judgment in each of the actions. His application in the District Court was heard on 7 March 2007 and was dismissed

by Master Lai. He lodged an appeal on 21 March 2007, this was heard by HH Judge Ng on 2 and 10 May 2007. The Judge handed down a 37-page judgment on 14 May 2007, dismissing his appeal. In the hearings before the Master in the District Court and the Judge, the debtor was represented by counsel. The summons to set aside the default judgment in the High Court came before the Registrar on 7 March 2007. He adjourned the application pending determination of the debtor's application in the District Court, and ordered the execution of the default judgment be stayed pending determination of the debtor's application to set aside the default judgment in the District Court or the petitioner's petition for bankruptcy against the debtor, whichever is earlier. The bankruptcy petition came on for trial before me on 7 February 2007. I adjourned the hearing to a date after the determination of the debtor's application to set aside the default judgment by the District Court Master. Today is the adjourned hearing of the petition. What I need to consider is whether the debts demanded in the statutory demand are valid judgment debts. It is well established that where a petition is based on a judgment debt, circumstances may be alleged which would show that the judgment should be disregarded on sufficient cause being shown. In an appropriate case, the court of bankruptcy may go behind a judgment debt and inquire into the validity of the debt. The debtor has relied on the same arguments which were exhaustively examined before the Master in the District Court and on appeal, which was a hearing *de novo*, by the District Judge. In the written submission of the petitioner's solicitor, he has drawn my attention to the points taken by the parties before the Master and the Judge. There is no reason why the debtor should have another bite of the cherry before this court, having raised these issues twice in 2 tribunals and having had both issues determined against him, namely, whether service of the writ was defective in that it was not brought to his notice, and whether he has a meritorious defence to the petitioner's claim on the dishonoured cheques. I am mindful that the debtor has issued a summons yesterday in the District Court seeking leave to appeal to the Court of Appeal against the judgment handed down on 14 May 2007 and that his application is to be heard on 11 July 2007, but that is neither here nor there. I have considered the judgment of the District Judge, I see no reason to go behind or impugn that judgment. The contention raised by the debtor on affirmation that he might not be in Hong Kong at the time the writs in the District Court and the High Court were served on him in March and June 2005 was abandoned in the hearing before the Judge, after his solicitors had obtained his travelling records from the Immigration Department. The Judge correctly found that the address at La Salle Road, Kowloon was the last known address of the debtor when service of the writ was effected, indeed this was one of the matters conceded by his counsel. In paragraphs 49 to 61 of her judgment, the Judge considered the evidence and came to the conclusion that the debtor has not satisfied the court that he did not have notice of the writ at the material time. The Judge was critical of the debtor's failure to disclose any documentary evidence to support his contention that for 10 years he had not been living at the La Salle Road address but in Discovery Bay, notwithstanding he has filed 4 affirmations over 7 months. I note further that evidence of this kind was not placed before the Judge even though the Master had commented on the absence of such evidence in his judgment. It was only after the

hearing before the Judge that the debtor placed documentary evidence before this court for the first time to show he had been living in Discovery Bay. They are utilities bills sent to him at an address in Discovery Bay in May 2002, September 2003, April 2004, May 2006 and January 2007. However, no utilities bills regarding the relevant periods in March and June 2005 were disclosed, or for the entire year of 2005. There is still no documentary evidence of any assignment of the property in Discovery Bay or a tenancy agreement. Even if I were to accept the debtor's assertion he was residing at Discovery Bay and not at La Salle Road, other matters taken into account by the Judge in arriving at the conclusion that his denial of having received the writ is of doubtful credibility are still valid. They are set out in paragraphs 55 to 60 of the judgment. The debtor's evidence concerning his address at La Salle Road is contradictory, as stated in paragraphs 55 to 58. His evidence when he acquired actual knowledge of the writ is vague, as mentioned in paragraph 59. The parents of the debtor have been living at the address in La Salle Road. The debtor is a joint tenant of this property with his father since 1981. The address at La Salle Road was given by the debtor as his contact address since the 1990s when he set up various companies. There is still no explanation from the debtor why he did not update or notify the Companies Registry to replace the La Salle Road address with the Discovery Bay address as his address in relation to the companies he set up. Notwithstanding the debtor's allegation in a recent affirmation that his relationship with his father has deteriorated drastically, he has remained a joint tenant of the property at La Salle Road with his father, and, according to him, is holding that property on trust for his father. According to one of the debtor's affirmations, after he came to know about the two actions some time in 2006, he made enquiries with his father if the writ was received and his father said he was not aware of having received the writ. There is no reason to doubt the process server's evidence that the writ was served by insertion in the letter box at the La Salle Road address and that in the normal course of events, the writ would have come to the attention of the occupants. I note further in one of the affirmations filed by the process server in the bankruptcy proceedings in February 2006, when he attempted service of the statutory demand on the debtor at La Salle Road in December 2005, he was given the mobile phone number of the debtor by a man, probably the debtor's father. Further, all appointment letters sent to the debtor at La Salle Road by post in January and February 2006 have not been returned through the dead letter service. There is no basis to go behind the finding made by the Judge that the debtor did have notice of the writ when it was served, and that the default judgment was a regular judgment. I also agree with the Judge that the debtor has not made out a case of real prospects of success on the merits of his defence. The Judge has examined thoroughly the evidence before her in paragraphs 65 to 92 of the judgment, and I see no reason to disagree. Further, the debtor's counsel had made a concession that of the two cheques in the District Court Action, the debtor has no defence to the petitioner's claim for the first cheque in the sum of US\$55,616.00. His counsel also conceded that the debtor would no longer maintain the argument that the two cheques were issued merely as gestures of sincerity or good faith and that they were delivered to the petitioner on the understanding that they would not be presented for payment. It was only in an affirmation made in March

2007 that the debtor raised for the first time there was total failure of consideration for the second cheque, on the allegation that the diamonds covered by the invoice were not delivered. This line of defence was rightly rejected by the Judge. The petitioner has established valid judgment debts on which the petition is founded. As a judgment creditor with wholly unsatisfied judgment debts, the petitioner is entitled ex debito justitiae to a bankruptcy order against the debtor. I find there was proper service of the statutory demand by advertisement in a newspaper on 20 January 2006. An order was made for substituted service of the petition by a Master on 17 July 2006, and that order was complied with. The debtor has failed to make out any proper ground for opposing the petition. I make a bankruptcy order against him. The petitioner's costs, including the costs reserved, are to be paid out of the bankrupt's estate. (S Kwan) Judge of the Court of First Instance High Court Mr Camille Jojo, of Messrs Barlow Lyde & Gilbert, for the Petitioner The Debtor, acting in person, present The Official Receiver, attendance excused PAGE - 1udk 1udk H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V (mLP< 0=_~tZ HCMA .dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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