

HONG KONG / JUDGMENT

SIU PAK MING v. JOE WONG

COURT

District Court

DECIDED

26 June 2007

CASE / FILE NUMBER

DCCJ1640/2006

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bjbj ck-N) udge Marlene Ng in Chambers (Open to the Public) Date of Hearing: 13th June 2006
Date of Handing Down Decision: 26th June 2006

DECISION

I. Introduction The Plaintiff was/is a businessman. The Defendant was/is employed by Hhome Caf Limited () to manage a number of restaurant premises in Hong Kong. He was/is also the company secretary of HCL. The Plaintiff claimed that in about early 2005 the Defendant s brother-in-law, Mr Simon Li (Mr Li), introduced the Defendant to him. On/about 15th and 19th July 2005 respectively, the Defendant borrowed HK\$100,000.00 (1st Sum) and HK\$30,000.00 (2nd Sum) from the Plaintiff and agreed to repay the 1st and 2nd Sums (collectively Sums) on/before 25th July 2005. He failed to repay the Sums and on 31st March 2006 the Plaintiff issued the Writ of Summons herein against him for recovery of the Sums and interest thereon. According to the 1st Affirmation of Mr Wu Yuk Shing (legal executive of the Plaintiff s solicitors, Mr Wu) filed on 25th April 2006 (s 1st Affirmation), the Writ of Summons was served by registered post on 1st April 2006 under cover of the Plaintiff s solicitors letter dated 31st March 2006 in an envelop duly prepaid and addressed to the Defendant at Room 2401, 246 Des Voeux Road West, Hong Kong (Des Voeux Road Address being the usual or last known address of the Defendant . The certificate of posting was exhibited to Mr Wu s 2nd Affirmation filed on 29th November 2006 (s 2nd Affirmation) which contents were verified by Mr Wu s 3rd Affirmation filed on 13th December 2006 (s 3rd Affirmation). Wu s 2nd Affirmation stated that on 12th April 2006 Mr Wu checked the Hong Kong Post Office s Mail Tracking Service which confirmed the said envelop containing the Writ of Summons was delivered to the Des Voeux Road Address by registered post on 3rd April 2006. Mr Wu further affirmed in Wu s 1st Affirmation that the said envelop containing the Writ of Summons had not been returned to the Plaintiff s solicitors through the dead letter service, and that in the opinion of the Plaintiff the Writ of Summons so posted to the Defendant would have come to his knowledge within seven days after the date of posting. The Defendant did not file any notice of intention to defend the present proceedings. On 2nd May

2006, the Plaintiff entered default judgment against the Defendant for the sum of HK\$130,000.00 with interest thereon at 10.088% pa from 31st March to 2nd May 2006 and thereafter at judgment rate until payment and fixed costs of HK\$1,380.00 (

Judgment

). II. Amended Summons On 16th June 2006, the Defendant's solicitors filed Notice to Act in these proceedings. On 12th July 2006, the Defendant issued a summons to inter alia set aside the Judgment (Summons). Pursuant to the Order of H H Judge Yuen dated 30th November 2006, the Defendant amended the Summons to inter alia set aside the Judgment for irregularity in that the service of the Writ of Summons herein was bad or ineffective Amended Summons). On 12th July 2006, the Defendant filed his affidavit in support of the Amended Summons (Defendant's Affidavit). The Plaintiff filed the following affidavits/affirmations in opposition thereto : affidavit of Siu Wing Yee Sylvia filed on 25th July 2006 (s Affidavit); Plaintiff's 1st affirmation filed on 9th August 2006 (Plaintiff's 1st Affirmation); Wu's 2nd Affirmation; Plaintiff's 2nd affirmation filed on 13th December 2006 (Plaintiff's 2nd Affirmation); Wu's 3rd Affirmation. The Defendant did not file/serve any affidavit in reply although leave to do so was granted by Master T Chan on 26th July 2006 and by H H Judge Yuen on 30th November 2006. III. Issues The relevant issues are as follows : whether the Des Voeux Road Address was at the material time the Defendant's usual or last known address; whether service of the Writ of Summons was duly effected by bringing notice of the present proceedings to the Defendant; whether the Judgment was regular or irregular; if the Judgment was irregular, whether the court should exercise its residual discretion not to set aside the same or to impose conditions for setting aside the same; if the Judgment was regular, whether the Defendant had shown real prospect of success on the merits of the defence. IV. Undisputed facts For the purpose of the Amended Summons, the following assertions in the affidavit evidence are undisputed.

- (a) Sums On 15th July 2005, the Defendant signed a manuscript note (1st Sum Note) as follows : S/nc^AS, Wck(u\OH resses Since 1997 the Defendant and his wife resided at Flat B, 9th Floor, Hoi Ming Court, No.4 Babington Path, Hong Kong (Home Address) of which the Defendant's wife was the owner. The Writ of Summons was not served to the Home Address. The address of Room 708, K Wah Center, 191 Java Road, North Point, Hong Kong (North Point Address) mentioned in the Statement of Claim was HCL's previous registered office. Since 14th March 2006, the Des Voeux Road Address became HCL's registered office as evidenced by HCL's Notification of Situation of Registered Office dated 16th March 2006 and filed with the Companies Registry (Notification). The Notification was signed by the Defendant as Secretary . The box titled Presenter's Reference on the Notification gave inter alia the following particulars : (a) name : the Defendant, (b) address : Des Voeux Road Address, and (c) details of the Defendant's telephone number, fax number and e-mail address. HCL required the Defendant to manage a number of restaurants in Hong Kong and much of his time was spent at Shop No.5, 1st Floor (also known as Sanlitan), Causeway Centre, 28 Harbour Road, Wanchai, Hong Kong (Causeway Centre Address). No Writ of Summons against the Defendant was received at any HCL restaurant premises.

- (c) Plaintiff's claim against HCL On 31st March 2006, the Plaintiff issued legal proceedings against HCL in HCA726/2006 (HC Action) for inter alia the following : return of the sum of HK\$550,000.00 received by HCL from the Plaintiff via deposit by cheque into HCL's bank account with Hang Seng Bank Limited on 27th June 2005 due to failed acquisition of 20% of the share capital of HCL; return of the sum of HK\$500,000.00 received by HCL on/about 30th September 2005 pursuant to the franchise agreement of the same date (Franchise Agreement) due to breach thereof; return of an advance of RMB47,000.00 made to HCL as evidenced by an acknowledgment of receipt dated 1st January 2006 (RMB Receipt) due to HCL's failure to hand over management of the Hhome Caf at Sogo. On 1st April 2006, the Writ of Summons in the HC Action was served on HCL at its registered office, ie the Des Voeux Road Address. On 13th April and 3rd May 2006 respectively, HCL's solicitors (who were also the Plaintiff's solicitors in these proceedings) filed (a) notice of intention to defend and (b) Defence denying the Plaintiff's claim. The Franchise Agreement referred to above dated 30th September 2005 and entered into between HCL and the Plaintiff in respect of the Hhome Caf at Sogo was on e1u: T\Ob_ 0}GR giQt^(GRdk }KNt^ N!kN & & eX[H 6e0RYN ef} 2u /nc^ O CQte T+|HQ lc^\$ }/nc^\$ & & KN p/nc^6q N/nc^ PeQH P@b g g qmi6eeQ gKN1 KN6eeQI uKN6b Demands and replies By a letter dated 10th March 2006 addressed to both the Defendant and HCL at the North Point Address (Demand Letter), the Plaintiff's former solicitors stated inter alia as follows : We are further instructed that on 15th July 2005 and 19th July 2005 our client lent you a total sum of HK\$130,000.00 which was to be repaid to our client on or before 25th July 2005. We are hereby instructed to give you notice that unless the said sums of HK\$130,000.00 are repaid to our client within 7 days from the date hereof, we have instructions to commence legal proceedings against you for recovery of the same together with interest and costs without further notice. By a reply fax dated 14th March 2006 to the Plaintiff's former solicitors (Reply Fax) signed by the Defendant, the Defendant replied stating inter alia as follows : I am acting on behalf of the management team of Hhome Caf Limited. I am writing in reply to your letter dated March 10, 2006 To my understanding, the money your letter mentioned that Mr. Siu paid (appx. HK\$80-130,000.00) are not any loan to me or to Hhome Caf Ltd. Indeed, the said amount is partial repayment to Hhome Caf who has paid upfront lots of money for Mr. Siu like staff's salary, shop decoration, equipment and fittings, kitchen accessories To our record, Mr. Siu was not in Hong Kong in payroll day and Hhome Caf need to pay the above-mentioned expense from its account. Hhome Caf has informed Mr. Siu that an interest will be charged for late repayment and Mr. Siu agreed on this as he is one of the investors also and should understand each shareholder, investor, franchisee need to bear the liability to ensure the business can be carried in proper order. By a further reply letter dated 23rd March 2006 to the Plaintiff's former solicitors (Further Reply Letter) signed by the Defendant on behalf of HCL, the Defendant stated inter alia as follows : I am acting on behalf of the management team of Hhome Caf Limited. Further to my letter to y he year end (from business starting to end of March 2006). If we cannot received any written notice from your client or you on or before 31-3-06 by registered mail to our office : [Des Voeux Road Address] or PO Box 6741 Central, Hong Kong. We will assume Mr. Siu has decided to give up his interest in Hhome

Caf Ltd.

- (e) Solicitors correspondence By a letter to the Defendant s solicitors dated 5th January 2007 (Offer Letter), the Plaintiff s solicitors wrote as follows : We refer to the hearing before The Hon. Judge Yuen on 30th November 2006 inter alias that she would have given Judgment for the sum of HK\$100,000.00. We put on record that we are prepared to waive the HK\$30,000.00 and trust that you will advice your client to pay of HK\$100,000.00 to our client so that further legal costs and the valuable Court s time can be saved. We reserve our rights to show this letter to Court should your client insists on proceedings with his unmeritorious defence. (my emphasis)
- (f) Litigation checks Wu s 2nd Affirmation stated that the Plaintiff s solicitors carried out civil litigation checks in respect of HCL and the Defendant on 17th August and 28th November 2006 respectively. It was discovered that there were about twenty sets of legal proceedings against HCL between 10th March 2005 and 10th August 2006, and apart from the present proceedings there was one further set of legal proceedings against the Defendant issued on 3rd November 2006. V. Regular or irregular judgment
 - (a) Within or outside jurisdiction The Defendant claimed he had to travel widely in his employment and had recently been to Australia and Germany on business. Mr Finley, solicitor for the Defendant, admitted this was merely background information. In my view, there is no cogent evidence that the Defendant was outside the jurisdiction at the time of service of the Writ of Summons.
 - (b) Defendant s case on usual or last known address Mr Finley in his submissions conceded that the Des Voeux Road Address was one of the Defendant s last known addresses (1st Concession), but argued it was not the Defendant s usual address. The Defendant s Affidavit claimed no Writ of Summons against the Defendant was received at the Des Voeux Road Address.
 - (c) Plaintiff s case on usual or last known address The Plaintiff s 2nd Affirmation stated the Plaintiff told his solicitors the Des Voeux Road Address was the usual address for contacting the Defendant because the Defendant personally told him to use such address. Siu s Affidavit confirmed that prior to issuing the Writ of Summons an updated company search of HCL revealed the Notification, which gave the Des Voeux Road Address as the address of the Defendant as presentor. Further, throughout the parties course of dealings, the Defendant was HCL s key management officer. The Plaintiff therefore claimed the Des Voeux Road Address (being also HCL s registered office) was the Defendant s usual or last known address as at the time for service of the Writ of Summons.

- (d) Defendant's usual or last known address There is no dispute that the Des Voeux Road Address was one of the Defendant's last known addresses at the material time. In my view, proper service of the Writ of Summons on such address is sufficient. Order 10 rule 1(2) of the Rules of the District Court () provides inter alia that [a] writ for service on a defendant within the jurisdiction may be served
- (a) by sending a copy of the writ by registered post to the defendant at his usual or last known address (my emphasis). As to the meaning of such legislative requirement, Deputy High Court Judge To in paras.10-13 of his judgment in *The Hong Kong Mortgage Corporation Limited v Ching Kit Yu & anor* HCMP2226/2002 (unreported, 15th April 2003) said as follows :
10. The crucial words of Order 10 rule 1(2)(a) and (b) are "usual or last known address". The first point to note is the disjunctive, "or", between "usual" and "last known". In the context of rule 1(2), this word must be given its ordinary meaning, so that it must be read disjunctively. Had it been intended otherwise, the conjunctive "and" would have been used.
 11. Secondly, according to the Oxford English Dictionary, the word "address" means "details of where a person lives, works or can be found, and where letters, etc. may be delivered." Thus the meaning of the word is not confined exclusively to a person's residence. The essence really is a location where the person may be reached or where contact or communication in written form, such as by letter, could be established. If so, a person may have at the same time a number of addresses. A student residing in hostel may have a home address and a hostel address in which he resides. Communication may be established with him through any of those addresses. Likewise, a person may be reached through his place of work, his home, or his quarters if the nature of his work so requires him to reside in quarters. None of those places ceases to be his address. Thus a person may have at the same time a number of addresses through which communication or contact with him may be established. Accordingly, at the same time, he may have a number of last known addresses. It would be absurd to say that he must be last known at his residential address and not at his place of work where he spends most part of the day or his quarters where he spends most nights of the week.
 12. I now turn to the words "last known" or "last known address". This phrase means the address last known to the plaintiff. The plaintiff is entitled to ascertain from whatever available source that address, i.e. the details of where the defendant lives, works or can be found, and where letters, etc. may be delivered. There is no reason why it should be qualified to mean the address which the defendant last intentionally made known to the plaintiff. The rule would be render nugatory if such a qualification is added. With such a qualification, a defendant may intentionally make known to the plaintiff an address at which he could not be reached and hence evade service. The rule provides for the means as to how service may be effected. It could not have been drafted to defeat its own purpose. Hence, I hold the words "last known address" mean the address last known to the plaintiff from whatever source and a defendant may have a number of addresses last known to the plaintiff, depending on the circumstances and the diligence of the plaintiff's inquiries.

13. I now turn to the word "usual" or "usual address". This must mean one of the above addresses where a person may usually be reached. While the word "usual" conveys the idea of a habitual or frequent connotation, the rule does not say "the most usual address" as to require the address to be one where a person may in most probability be reached. Thus, a person may have a number of usual addresses. He may be usually reached during office hours at his office address or during other hours at his home address. This may be one of the last known addresses or an alternative address, for example, an address which the defendant intentionally made known to the plaintiff. Anyway, the "usual address" and "last known address" are alternative addresses for service under Order 10 rule 1(2) of the Rules of the High Court. This means that a defendant may have a number of last known addresses as well as a number of usual addresses, but there is no need for the plaintiff to effect service of the originating process on all of such addresses. Proper service of the originating process on any one of the defendant's last known addresses or (not and) any one of his usual addresses will suffice. As explained by Deputy High Court Judge To, the phrase last known address means the defendant's address (ie a location where he may be reached or where written contact or communication can be established) last known to the plaintiff. On such basis, there is no doubt the Des Voeux Road Address was the Defendant's address last known to the Plaintiff at the material time. First, the Home Address was not one of the Defendant's last known addresses at the material time because there is no evidence that the Plaintiff ever knew of such address. But in light of paragraphs 31-32 above, the Plaintiff's lack of knowledge of the Home Address does not detract from the fact that the Des Voeux Road Address was one of the Defendant's last known addresses. Secondly, it was clearly deposed in the Plaintiff's 2nd Affirmation that the Defendant told the Plaintiff to use the Des Voeux Road Address to contact him. Although leave was granted to the Defendant to file/serve affidavit in reply, he did not adduce any affidavit evidence to refute the Plaintiff's evidence or to suggest that he had withdrawn such address (see *Morigood Development Ltd v Sunny Trading Co (a firm)* [1999] 2 HKC 710, 714-715). The Des Voeux Road Address therefore remained the Defendant's address last known to the Plaintiff at the material time. Thirdly, the Notification signed by the Defendant clearly gave the Des Voeux Road Address as his address. Such document was filed with the Companies Registry and publicly available upon payment of a prescribed fee. Mr Finley submitted that the Further Reply Letter could not be interpreted to mean the Defendant wanted his own personal correspondence to be sent to the Des Voeux Address. But the Notification made it plain that the Defendant held out to the public the Des Voeux Road was his address. As explained in *Law Kwok Hung v Tse Ping Man & anor* [1999] 4 HKC 397, 403-404, Order 10 rule 1(2) of the RDC does not say that the defendant should be served at the address he last intentionally made known to the plaintiff. A plaintiff is entitled to acquire knowledge of the defendant's address by any reasonable means available to him (see also *The Hong Kong Mortgage Corporation Limited* (supra at para.12)). In the circumstances, I am satisfied that the 1st Concession was properly made and that the Des Voeux Road Address was at the material time one of the Defendant's last known addresses. In light of such conclusion, there is no need to go further to ascertain whether such address was also at the material time the Defendant's usual address. However,

given the above analysis and the considerations in paragraphs 55-56 below, I am satisfied the Des Voeux Road Address was also one of the Defendant's usual addresses at the material time. Mr Finley raised a number of arguments, which unfortunately did not advance the Defendant's case. First, Mr Finley complained there was no evidence that the Plaintiff made any prior or concurrent attempt to effect personal service of the Writ of Summons. He pointed out that the Demand Letter sent to the North Point Address elicited response from the Defendant by way of the Reply Fax and Further Reply Letter. He argued that the Plaintiff's missed opportunity to effect personal service of the Writ of Summons as allowed under the RDC via the channel of communication (ie the North Point Address) was a surrounding circumstance relevant to the issue whether the Judgment was regular or irregular. However, Mr Finley was careful to accept there was no evidence that such failure to effect personal service of the Writ of Summons amounted to any deliberate attempt not to inform the Defendant about the present proceedings. In my view, such argument is without merit. The starting point is the statutory provision for service of originating process prescribed by Order 10 rule 1 of the RDC :

- (1) A writ must be served personally on each defendant by the plaintiff or his agent.
- (2) A writ for service on a defendant within the jurisdiction may, instead of being served personally on him, be served-
 - (a) by sending a copy of the writ by registered post to the defendant at his usual or last known address; or
 - (b) if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant. (my emphasis) In light of the above statutory provision, there can be no valid criticism of the Plaintiff's conduct. Mr Finley was constrained to accept that any attempt to effect personal service was not a pre-condition for proper service of originating process by registered post. This must be right. I need only refer to Hong Kong Civil Procedure 2007 Vol.1 para.10/1/11 at p.92 as follows : Alternatives to personal service Service of the writ by registered post (r.1(2)(a)) or by insertion through a letter box (r.1(2)(b)) are alternative modes of service to personal service. It is entirely at the option of the plaintiff which mode he chooses to adopt in any particular case. The virtue of personal service is that it brings the proceedings to the notice of the defendant. The alternatives of service by registered post and of service by insertion through a letter box are allowed because they are based on a good working, but rebuttable presumption that they will bring the proceedings to the notice of the defendant (my emphasis) Since there is no requirement in the procedural rules for the Plaintiff to attempt personal service of the Writ of Summons prior to effecting service by registered post, it is difficult to appreciate why this should be a relevant factor or consideration in determining the regularity of service of the Writ of Summons. Mr Finley did not cite any authority for his proposition save to say that in the particular factual matrix of various case authorities canvassed at the hearing before me personal service of the originating process was attempted prior to service by registered post. In particular, he referred to Cheng Chi Lun v

Ng Lai Ming Juliana HCA1611/2006, Mr Recorder Fok SC (unreported, 14th February 2007) where the plaintiff attempted unsuccessfully to effect personal service of the writ of summons on the defendant at two addresses in Wanchai and Kwun Tong respectively. Subsequently the writ of summons was served by insertion through the letter box at the Kwun Tong address. Although the unsuccessful attempts at personal service was mentioned in the judgment by way of background, I do not discern any reliance by the learned judge on such factor in his discussion on the correct approach to be adopted (see paras.22-26) or in his application of the correct approach to the factual circumstances of the case (see paras.34-39). In any event, each case turns on its own facts and no useful purpose is served by comparing the factual matrix of different cases. In my view, so long as it can be shown that the originating process was properly served by registered post on one of the defendant's last known addresses, the plaintiff is entitled to enter default judgment against the defendant irrespective of whether there has been any prior unsuccessful attempts to effect personal service on the defendant at such address or at any other address. There is no merit in the complaint that the Plaintiff imprudently ignored the North Point Address when entering the Judgment against the Defendant. Secondly, Mr Finley suggested that the Plaintiff's 1st and 2nd Affirmations showed the Plaintiff was aware of the Des Voeux Road Address as well as the North Point and Causeway Centre Addresses. There was also reference in the Plaintiff's affirmation evidence to Hhome Caf at Sogo, which was the subject matter of the Franchise Agreement. However, as explained in paragraphs 31-32 above, the fact that the Defendant might have other last known or usual address(es) is neither here nor there so long as the Des Voeux Road Address was one of the Defendant's last known addresses at the material time. But in light of Mr Finley's emphasis on the North Point Address, I will say a few words on the same. In my view, there is no sufficient evidence to show that the North Point Address was the Defendant's last known or usual address at the time of service of the Writ of Summons. Although the Demand Letter addressed to the North Point Address elicited written responses from the Defendant and HCL, it must be remembered that the Reply Fax and Further Reply Letter were dated 14th and 23rd March 2006 respectively. Shortly after issuing the Reply Fax, the Defendant on 16th March 2006 presented the Notification to the Companies Registry giving notice that HCL's registered office had changed from the North Point Address to the Des Voeux Road Address with effect from 14th March 2006. This coincided with the Further Reply Letter which urged the Plaintiff to send written notice by registered post to the Des Voeux Road Address. Despite the Defendant's admission in the Reply Fax and Further Reply Letter that he acted on behalf of the management team of HCL, the Defendant's Affidavit was conspicuously silent as to whether HCL still retained the North Point Address at all after change of its registered office with effect from 14th March 2006. In my view, there is no sufficient evidence to show that the North Point Address remained a channel of communication for effecting personal service or otherwise after 14th March 2006. The available evidence indicated the channel of communication changed to the Des Voeux Road Address after that date. Thirdly, Mr Finley cast doubt over the regularity of service of the Writ of Summons by reminding this court that Mr Wu provided 3 affirmations in these proceedings. Mr Finley did not identify what

were the doubts that arose from Mr Wu s 3 affirmations. Bearing in mind the 1st Concession, the 2nd Concession (see paragraph 50 below) and the fact that Wu s 3rd Affirmation did nothing more than to formally verify Wu s 2nd Affirmation, such argument is plainly without merit.

- (e) Knowledge of the Writ of Summons The words unless the contrary is shown in Order 10 rule 3(a) of the RDC show it is open to a defendant to demonstrate that he did not have actual notice of the writ. It is now clear that the test for service of a writ of summons is whether it was brought to the defendant s notice and not whether it had been delivered to his usual or last known address (see *Chu Kam Lun v Yap Lisa Susanto* [1999] 3 HKC 378, *Kwan Kam Wah v Chan Wai Ming* [2000] 2 HKC 378, *Cosec Nominees Ltd and anor v Lau Hon Ming Alan*

[2001] 3 HKC 290, *Bank of China (Hong Kong) Limited (formerly known as Po Sang Bank Limited) v Hung Chun Wai Christina and anor* HCA 69/2000 and HCB 5837/2003, *Sakhrani J* (unreported, September 2004) and *Sinokawa Investment (Holdings) Limited v Li Chun* [2006] 3 HKLRD 441 at para.15). In his submissions before me, Mr Finley conceded that the Writ of Summons was apparently delivered by registered post to the Des Voeux Road Address (2nd Concession). In my view, such concession was properly made in light of (a) the confirmation by the Hong Kong Post Office s Mail Tracking Service as set out in paragraph 4 above, and (b) the absence of any countervailing evidence as to non-delivery of the Writ of Summons by the Defendant. Despite the 1st and 2nd Concessions, the Defendant s Affidavit claimed the Defendant did not receive the Writ of Summons at the Des Voeux Road Address. But other than such bare assertion, the Defendant did not condescend upon the relevant factual particulars or supporting evidence. Hong Kong Civil Procedure 2007 (supra at para.13/9/5 at p.161) states inter alia as follows : When a defendant deposes that he has not received the writ through the post, the court has little option but to believe this save when there is sufficient material to cast doubt upon the defendant s credibility to enable the court to disbelieve him (which is a matter of evidence dependent on the circumstances of the case: see *Wei Bingqing v. Xie Diangrong*, unreported, HCA No. 2654 of 2003, [2006] H.K.E.C. 634). Tang JA in giving the judgment of the Court of Appeal in *Bank of China (Hong Kong) Limited v Cheung King Fung* [2007] 1 HKLRD 462, 469-470 said the court did not necessarily have to accept the defendant s assertion no matter how improbable : It is quite clear from *Forward v West Sussex County Council*, cited above, that a defendant is required to provide convincing evidence : at 1473G. The Master of the Rolls went on to say of the judge that He was in our view quite right to be sceptical of the contention that the 4th defendant had not received the writ in the absence of compelling evidence to show that it had not been forwarded on to him, as would in the ordinary course be accepted : at 1474H. Of course, how much evidence is required must depend on the circumstances of the particular case. As Chung J said in *Wei Bingqing s case* (supra), the Court of Appeal in *Bank of China (Hong Kong) Limited* (supra) went on to observe that in an application to set aside default judgment, the burden was on the applicant to prove that the judgment was irregular. Chung J added that whether the applicant discharged such burden of proof was a matter of evidence. In *Cheng Chi Lun*

(supra at para.26), Mr Recorder Fok SC also said as follows : The Court of Appeal has, however, made clear that this does not mean that the court must accept a defendant's assertion no matter how improbable: *Bank of China (Hong Kong) Ltd v Cheung King Fung, Francis and Anor*, unrep, CACV 66 of 2005, 5 July 2005 at 33 per Tang JA. A defendant is required to provide convincing evidence; how much evidence is required must depend on the circumstances of the particular case *ibid*.

34. The relevant question is whether there is sufficient evidence to cast doubt on the Defendant's credibility such that the court should not accept the bare allegation that she has not received the writ. Mr Finley urged me to consider all the surrounding circumstances in order to determine the credibility of the Defendant's assertion that he had not received the Writ of Summons. However, upon careful consideration of the affidavit evidence as well as Mr Finley's submissions, I am satisfied the Defendant failed to discharge his burden of proof. I further find that he must have had notice and knowledge of the Writ of Summons at or soon after the date of service of the same : The Defendant accepted that the Des Voeux Road Address was one of his last known addresses at the material time. The Writ of Summons was apparently delivered by registered post to the Des Voeux Road Address. The Defendant did not advance any reasonable explanation why the Writ of Summons apparently delivered to one of his last known addresses was not received by him. There was no evidence on, say, (i) which person (if any) at the Des Voeux Road Address received the Writ of Summons, (ii) his enquiries of the personnel at the Des Voeux Road Address (if any) as to the whereabouts of the Writ of Summons that was apparently delivered to such address, (iii) whether he had been notified of the delivery of the envelop (containing the Writ of Summons and the letter from the Plaintiff's solicitors addressed to the Defendant) that was addressed to him at the Des Voeux Road Address, and/or (iv) why the said envelop and contents thereof were not given to him. Although the Defendant claimed much of his time was spent at the Causeway Centre Address, he was careful in not saying he never spent time or could not be reached at the Des Voeux Road Address. Apart from being one of the Defendant's last known addresses, the Des Voeux Road Address was also HCL's registered office at the material time. The Defendant admitted he was HCL's company secretary, acted on behalf of the management team of HCL (see Reply Fax and Further Reply Letter) and managed a number of HCL's restaurant premises in Hong Kong. Plainly the Defendant was involved in and dealt with the business affairs of HCL. No explanation was given as to why the said envelop containing the Writ of Summons together with a cover letter from the Plaintiff's solicitors, ie correspondence addressed to the Defendant, was not received by him at HCL's registered office at the Des Voeux Road Address. According to the Plaintiff, the Defendant gave the Des Voeux Road Address as his contact address to the Plaintiff and by the Notification he publicly held out such address as his address. Plainly, the Defendant intimated to the Plaintiff and the public that he could be reached at the Des Voeux Road Address. No explanation was forthcoming from the Defendant as to why he did not receive the Writ of Summons apparently delivered to such address or why (if correspondence could not reach him via such address) he chose to give the Des Voeux Road Address as his address

in the Notification. Further, the Defendant must have acquired knowledge of the Writ of Summons and/or the Judgment in June/July 2006 in order to instruct his solicitors to act on his behalf in these proceedings and to apply to set aside the Judgment. It is significant that the Defendant failed to give any explanation how he acquired such knowledge. His allegation of non-receipt of the Writ of Summons despite its apparent delivery to the Des Voeux Road Address does not sit well with his apparent knowledge of Writ of Summons and/or Judgment in June/July 2006. I find the Defendant's assertion not credible or convincing. Mr Finley asked me to bear in mind his submissions set out in paragraphs 40, 45 and 48 above. He argued that the surrounding circumstances were sufficient to establish the bona fides of the Defendant's assertion that he had not received the Writ of Summons. I am not with him in his arguments and need do no more than to refer to the analysis in paragraphs 33-38, 41-44 and 46-48 above. Mr Finley referred to *Cheng Chi Lun* (supra) where the plaintiff in the particular factual matrix of that case made prior unsuccessful attempts to effect personal service of the writ of summons (see paragraph 43 above). He went on to argue, with a courage that I envy, that once the Defendant stated on affidavit he had not received the Writ of Summons, the Plaintiff's imprudence in not attempting personal service and/or in not trying to serve the Writ of Summons to the Defendant at other addresses known to the Plaintiff ought to be taken into account in order to place the Judgment in context to determine whether it was regular or irregular. Mr Finley did not cite any legal authority in support of his proposition. I need only refer to paragraphs 41-44 above to illustrate the fallacy of such argument. In any event, as the authorities show, it is for the Defendant to adduce cogent and convincing evidence to establish that he had not received the Writ of Summons. He could not do so by criticising the Plaintiff for acting in a way that was permissible under law (ie serving the Writ of Summons by the alternative mode of registered post without personal service to one of the last known addresses of the Defendant). Mr Finley further submitted that the Defendant's meritorious defence contentions were also part of the relevant circumstances to be considered in establishing the bona fides of the Defendant's assertion that he did not receive the Writ of Summons. I am not persuaded that this is the correct approach. In my view, the true approach is to first determine whether the defendant's explanation (if any) for not receiving notice of the writ of summons is credible or convincing. If the court is so satisfied, the default judgment is irregular and the court should not go on to consider the defence on the merits at all (see *Po Kwong Marble Factory Limited v Wah Yee Decoration Co Ltd* [1996] 4 HKC 157). It is only when the court forms the view that the defendant has not shown he had no notice of the writ of summons and the default judgment is found to be regular that the court will proceed to consider the defence on the merits disclosed by the affidavit evidence. I refer to the approach adopted by Tang JA in *Bank of China (Hong Kong) Limited* (supra at paras.35-41 at pp.470-471). Mr Finley tried to distinguish such case by saying there were meritorious defence arguments in the present case, but no defence on the merits in *Bank of China (Hong Kong) Limited* (supra). I disagree. The correct approach as to regularity of service of the originating process does not turn on whether there is any defence on the merits. There is no legitimate basis for distinguishing the legal principles set out in paragraphs 52-54 above.

However, even if the Defendant's defence contentions were to be considered, they still do not assist him (see paragraphs 76-88 below). Mr Finley pointed out that HCL, which faced a plethora of legal actions, proceeded to instruct his firm to defend the Plaintiff's claim in the HC Action. The Writ of Summons in the HC Action was served to the Des Voeux Road Address at about the same time as the service of the Writ of Summons in these proceedings. He submitted it defied belief that the Defendant facing personal liability in these proceedings would not defend the Plaintiff's claim had he received the Writ of Summons. Mr Wong, counsel for the Plaintiff, fairly submitted that the Plaintiff was in no position to explain the Defendant's subjective reason for not defending these proceedings. In my view, it is not for this court to speculate on such reason. The burden of proof is on the Defendant, but he has not condescended upon the relevant circumstances. In my view, there is no sufficiently convincing or compelling evidence to show that the Defendant failed to receive the Writ of Summons at the Des Voeux Road Address. Having carefully considered all the circumstances, the Defendant has not satisfied me he did not have notice of the Writ of Summons at the material time. I find the Writ of Summons was properly served on the Defendant and the Judgment was a regular judgment. VI. Discretion Mr Finley's submissions seemed to suggest that deciding whether the Judgment was regular or irregular involved an exercise of discretion. In my view, such issue turns on whether there has been proper or regular service of the Writ of Summons, which in turn depends on a consideration of the affidavit evidence before the court. If the Judgment is found to be irregular (which I disagree), the court then retains a residual discretion not to set aside the same or to impose conditions for setting aside the same (see *Po Kwong Marble Factory Limited* (supra at p.161)). Since I have found the Judgment was a regular judgment, there is no need for me to consider the issue raised in paragraph 10(d) above. I will now proceed to consider whether the Judgment ought to be set aside pursuant to the legal principles discussed in paragraphs 65-68 below. VII. Defence on the merits

- (a) Law Since the Judgment is a regular judgment, the Defendant must show a meritorious defence with a real prospect of success or which carried some degree of conviction (*Premier Fashion Wears Ltd v Lee Hing Chung* [1994] 1 HKC 213, 219). Godfrey JA said at pp.219-220 that [it] seems to me that unless potentially credible affidavit evidence from the defendant has demonstrated a real likelihood that he will succeed on fact, he cannot have shown that he has a real prospect of success. (see also *Tong Yi Sang & anor v Fung Law & Ng & ors* [1993] 2 HKC 665, 671-672). Kaplan J in *Tong Yi Sang* (supra) went on to say as follows : I believe that there is a substantial onus on an applicant who seeks to set aside a regular judgment. This is clear from the *Saudi Eagle* [1986] 2 Lloyd's Ref. 221. In a case such as this, I would expect a defendant to condescend to particulars of his Defence on the merits in his own words. What is far more preferable (and I leave over the question whether it is strictly necessary) is an affidavit in narrative form explaining precisely what the proposed defence will be so that the court can be assisted in forming a value judgment as to whether it can be satisfied that there is some degree of conviction and a real prospect of success in the proposed defence. This required the court to form some provisional view of the probable outcome of the action.

Where the outcome depended on whose evidence was likely to be accepted, the appropriate test for determining whether the defendant had a real prospect of success was to ask whether the defence could well be established at trial or whether the defence witnesses could well be believed at trial (*Guangdong International Trust and Investment Corp Hong Kong (Holdings) Ltd v Yuet Wah (Hong Kong) Wah Fat Ltd & anor* [1997] 2 HKC 696, *Morigood Development Ltd (supra)* and *L & M Specialist Construction Ltd v Wo Hing Construction Co Ltd* [2000] 3 HKLRD 262). There are other considerations which a court must consider in deciding whether or not to set aside a default judgment, such as the reason why default judgment was allowed to occur in the first place, any delay in setting aside and any consequent prejudice caused to the plaintiff. The court's approach was to conduct a balancing exercise of all relevant factors (see *Morigood Development Ltd (supra)* and *Chekiang First Bank Limited v Ng Chun Hing Benjamin* HCA3473/2000, Ma J (as he then was) (unreported, 12th December 2001) at para.13). But as Ma J (as he then was) pointed out in para.14 of the judgment in *Chekiang First Bank Limited (supra)*, the critical factor and starting point are the merits of the defence. If the defence has no real prospects of success, there is no point in setting aside the same (see also *Premier Fashion Wares Ltd (supra)*).

- (b) Defendant's case The Defendant denied the Plaintiff's allegation of a loan which defies all comprehension and claimed the Plaintiff was a franchisee of HCL who was requested to make investments and payments in respect of same. He referred to the Writ of Summons in the HC Action in support of such defence contention which Mr Finley submitted was already set out in the Reply Fax. Mr Finley submitted that the Plaintiff's claim was poppycock and a pot shot out of the blue against HCL's company secretary. He asked the court to bear in mind that the Plaintiff filed/served 6 affidavits/affirmations to oppose the Amended Summons. Mr Finley further submitted that the reference to borrow/ borrowed in the 1st Sum Note was mere casual reference by a lay person and the purpose of the alleged loan stated therein for renovating Hhome Caf suggested the 1st Sum was not a personal loan to the Defendant. Mr Finley suggested that not everything was in apple pie order at the outset of the franchise arrangement and money flew around. He argued it was extraordinary that the Defendant being HCL's company secretary would take up a loan for renovating Hhome Caf. Mr Finley argued it was evident from the Offer Letter that pursuant to the indication by H H Judge Yuen the Plaintiff recognised there was little merit to his claim for the 2nd Sum and offered to waive the same. He submitted it was extraordinary that the 2nd Sum was paid into the bank account of HCL if it were a loan to the Defendant in his personal capacity.
- (c) Plaintiff's case The Plaintiff's 1st Affirmation explained that in early 2005 Mr Li introduced the Defendant to the Plaintiff. On/about 15th July 2005, the Defendant telephoned the Plaintiff and sought to borrow a temporary loan being the 1st Sum and agreed to repay the same on/before 25th July 2005. On the same day, the parties met at Hhome Music Caf at the Causeway Centre Address. The Plaintiff lent the 1st Sum to the Defendant in cash for which the Defendant signed the 1st Sum Note. On/about 18th July 2005, the Defendant telephoned the Plaintiff to ask for a further loan in the amount of the 2nd Sum and orally agreed to repay the same on/before 25th July 2005. Upon the instructions of the Defendant, the

Plaintiff deposited the 2nd Sum into HCL's bank account on behalf of the Defendant on 19th July 2005. The Plaintiff orally requested for a receipt for the loan of the 2nd Sum on a number of occasions, but the Defendant did not issue any to him. Despite oral demands and the Demand Letter, the Defendant failed to repay the Sums to the Plaintiff.

- (d) Analysis The Defendant did not offer any reason why he allowed the Judgment to go by default. He merely denied the loans pleaded in the Statement of Claim and did not condescend upon the particulars of his defence on the merits. The Defendant said the alleged loans defied comprehension. Yet in the Demand Letter which was received by the Defendant (as evidenced by the Reply Fax and Further Reply Letter), the Plaintiff had already explained the circumstances in which he granted the loans for the Sums. Despite such particulars given in the Demand Letter and/or the Plaintiff's 1st Affirmation, the Defendant did not condescend upon particulars as to (a) whether he had meetings with the Plaintiff on 15th and 19th July 2005, (b) whether he received the 1st Sum in cash from the Plaintiff, (c) whether he made any promise of repayment to the Plaintiff, or (d) what happened to the 2nd Sum deposited into HCL's bank account. In the Defendant's Affidavit, the Defendant claimed the Plaintiff was a franchisee of HCL who was requested to make investments and payments in respect of the same without clearly stating the Sums were such investments and/or payments. In the Reply Fax (which the Defendant did not verify in the Defendant's Affidavit), the Defendant claimed the Sums were partial repayments to HCL for paying lots of money upfront for the Plaintiff (eg staff salary, shop decoration, equipment and fittings and kitchen accessories) because the Plaintiff was not in Hong Kong on payroll day. The Reply Fax added that the Plaintiff as one of the investors should understand that each shareholder, investor, franchisee should be responsible for ensuring that the business was carried on properly. But the Defendant did not provide any affidavit evidence or documents to show when and how the Defendant became an investor or franchisee of HCL. The Defendant's Affidavit was conspicuously silent as to whether the Defendant was an investor or franchisee of HCL at the time of service of the Writ of Summons. Although the Defendant was granted leave to file/serve affidavit in reply, he did not adduce any affidavit evidence to refute the Plaintiff's evidence (which was supported by the Franchise Agreement) that the Plaintiff only became a franchisee of HCL on 30th September 2005, ie quite some time after the loans of the Sums to the Defendant. There is no affidavit evidence to support Mr Finley's submissions from the Bar table that from the outset not everything was in apple pie order and money flew around. Indeed, other than the Defendant's bare assertion, there is no clear and cogent evidence that the Plaintiff was a franchisee or investor of HCL at the time of service of the Writ of Summons. I am also unable to draw assistance from the Writ of Summons in the HC Action which referred to claims in respect of other sums of money allegedly due from HCL to the Plaintiff and supported by other documents. The Defendant also did not state the payroll date when the Plaintiff was allegedly not in Hong Kong or provide any supporting evidence or particulars as to the amount, date and purpose of the various upfront payments made by HCL on behalf of the Plaintiff. There is also no evidence that the Plaintiff repaid or HCL pursued repayment of the

balance of such upfront payments after the alleged partial repayments in mid-2005. No such demand was evident in the Reply Fax, Further Reply Letter and/or Defence to the HC Action. As company secretary and manager of the restaurant business of HCL, the Defendant should either have access to the aforesaid particulars or should have been in a position to make enquires with HCL to obtain such information. None is forthcoming from the Defendant. As regards the 1st Sum, the Defendant did not deny he gave and signed the 1st Sum Note. But he failed to give any explanation why he would do so if the 1st Sum were in fact the Plaintiff's partial repayment to HCL and not a loan to the Defendant. I find his defence contentions unpersuasive and incredible. I am unable to place any weight on Mr Finley's attempt to brush aside the 1st Sum Note by saying the word borrow/borrowed was an offhand reference by a lay person. Such submission is unsupported by evidence. The Defendant did not dispute he gave and signed the 1st Sum Note, yet he never explained in the Defendant's Affidavit that use of the word borrow/borrowed was unintended and did not reflect what it apparently meant. He was an experienced businessman who managed a number of restaurant premises of HCL. He was also HCL's company secretary. He negotiated the Franchise Agreement on behalf of HCL. There is no basis to infer that the word borrow/borrowed was mistaken or unintended. Mr Finley laid strong emphasis on the purpose of the 1st Sum as stated in the 1st Sum Note (ie for renovating Hhome Caf) to support the contention that the 1st Sum could not have been a personal loan to the Defendant. Such argument is again mere submission since there is no affidavit evidence from the Defendant to explain why he gave and signed the 1st Sum Note stating such purpose for the loan. In my view, the Defendant plainly knew he assumed personal liability for the loan for the 1st Sum in contra-distinction to the alleged repayment to HCL. This is evident from the use of the words I, Wong Ching Chung, borrow/borrowed and his signature in his personal capacity in the 1st Sum Note. Had he been acting on behalf of HCL, the Defendant would have stated so as he did in the Reply Fax and Further Reply Letter (ie I am acting on behalf of the management team of [HCL]) and the relevant documents would have been signed for and on behalf of HCL as in the Further Reply Letter, Franchise Agreement and RMB Receipt. As regards the 2nd Sum, although Mr Finley tried to cast doubt by pointing out the 2nd Sum was deposited into HCL's bank account, the Defendant failed to adduce any affidavit evidence to refute the Plaintiff's affirmation evidence that there was a meeting between the parties on 19th July 2005 and the Defendant instructed the Plaintiff to so deposit the 2nd Sum. I bear in mind that the Defendant was granted leave to file affidavit in reply but did not do so. I am also not persuaded the Offer Letter supported the Defendant's argument that there was a good defence on the merits in respect of the Plaintiff's claim for the 2nd Sum. As conceded by Mr Finley, the Offer Letter must be read as a whole and in light of earlier correspondence between the parties which reflected attempts to amicably resolve the Summons with a view to save time and costs. It should be remembered that H H Judge Yuen did not hear substantive arguments on the Summons but gave directions for filing/service of the Amended Summons and further affidavit evidence. She also directed that the Amended Summons be adjourned to a date to be fixed for argument. In the circumstances, it cannot be said that the learned judge expressed any definitive view on the Defendant's defence on

the merits in respect of the claim for 1st Sum let alone the claim for the 2nd Sum. Indeed, careful reading of the Offer Letter shows that the learned judge was silent on the matter of the claim for the 2nd Sum and the matter was in fact not substantively argued before her. Further, the Plaintiff's proposal in the Offer Letter to waive the 2nd Sum in return for the Defendant's payment of the 1st Sum was plainly made so that further legal costs and the valuable Court's time can be saved. It is clearly not an admission by the Plaintiff that the claim for the 2nd Sum had little merit. This is amply reflected in the Offer Letter which went on to say that the Plaintiff considered the Defendant's defence unmeritorious and warned he would show the Offer Letter to the court upon persistence in such defence. I am unable to draw assistance from the Offer Letter in the manner suggested by Mr Finley. There is also no merit to Mr Finley's criticism of the number of affidavits/affirmations filed by the Plaintiff. The substance of the Plaintiff's case in respect of his claims for the Sums appears in the Plaintiff's 1st Affirmation. Wu's 1st to 3rd Affirmations did not touch on the merits of the Plaintiff's claim. Siu's Affidavit and the Plaintiff's 2nd Affirmation essentially dealt with the issue of regularity of the Judgment. In respect of the merits of the Plaintiff's claim, Siu's Affidavit only exhibited a draft of the Plaintiff's 1st Affirmation. In the circumstances and looking at the totality of the evidence, the Defendant failed to discharge his burden in showing a defence which had a real prospect of success.

VIII. Conclusion In the circumstances, the Judgment should not be set aside. It therefore remains for me to dismiss the Amended Summons, which I now do. There is no reason why costs should not follow event. I therefore grant a costs order nisi that the Defendant do pay the Plaintiff costs of the Amended Summons (including all costs reserved, if any) to be taxed if not agreed with certificate for counsel. Mr Finley indicated he would oppose certificate for counsel. But having considered the Amended Summons and the legal arguments that were involved, I am of the view that the present application is fit for counsel. I am grateful to Mr Wong for his helpful written and oral submissions. (Marlene Ng) District Court Judge Representation : Mr Samuel Wong instructed by Messrs Sit, Fung Kwong & Shum for the Plaintiff Mr Stephen Finley of Messrs Finley & Co for the Defendant

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