

## *The Importance of Pursuing Debt Recovery Action and Enforcing Judgments without Delay*

Two recent Hong Kong cases highlight the importance for creditors to pursue action for debt recovery swiftly, as any undue delay may impact on the period for which interest is recoverable and may prevent any enforcement action on a judgment debt.

### Bankruptcy Petition on a Judgment Debt Time Barred

#### *RE LI MAN HOO, RE FOO SHUK MAN PATTY*

In this Court of Appeal (CA) case, bankruptcy petitions were presented against the debtors on 22 September 2011 and were based on a judgment debt under a judgment dated 12 February 1999, more than 12 years before the date of the petitions. At first instance, bankruptcy orders were made against the debtors. On appeal, the debtors argued that the judgment debt was time-barred before the date of the petitions and therefore no bankruptcy petition could be presented against them based on the judgment debt.

#### *The CA's Ruling*

The CA decided that “action” under section 4(4) of the Limitation Ordinance (Cap. 347) includes any legal proceedings, and hence any legal proceedings based upon a judgment which was entered more than 12 years prior to such proceedings being commenced are time-barred. The CA rejected the more restricted meaning of “action” in England (and in Australia), where it has been held that the relevant limitation provision does not bar the presentation of a bankruptcy or winding-up petition and is only applicable to new sets of proceedings brought for the purpose of re-establishing a judgment debt.

The CA traced the legislative history of the relevant limitation provision in England and found that at the time of its enactment, the English Parliament adopted the restricted meaning of “action” from the case of *W. T. Lamb & Sons v. Rider* [1948] 2 KB 331. Though the House of Lords in *Lowsley v. Forbes* [1999] 1 AC 329 held that *W. T. Lamb* was wrongly decided, the House of Lords nonetheless held that the restricted meaning of “action” was still the correct position at law as Parliament had clearly intended to follow *W.T. Lamb* when the relevant limitation provision was enacted.

The CA held that the Limitation Ordinance was not burdened with the same legislative history as its English counterpart. When the Limitation Ordinance was enacted, the legislature of Hong Kong would have intended no more than to enact the legislation in the same terms as in England, to be interpreted in whatever way was the correct interpretation of such legislation. As such, the CA held that the correct interpretation of section 4(4) of the Limitation Ordinance should be adopted in Hong Kong and “action” is to have a very wide meaning which encompasses bankruptcy and winding up proceedings. This was also the conclusion reached in two recent CFI decisions (*Re Man Po International Holdings Ltd* [2012] 4 HKLRD 911 and in *Re Lau Wan*, HCB 4136/2012 (25 July 2013) (unreported)). The CA therefore held that the judgment debt on which the petitions were based in this case was statute-barred and bankruptcy petitions could not be brought against the appellants based on that judgment debt.

## Delay Bars Right to Interest

### *BANK OF CHINA (HONG KONG) LIMITED V. CHINA INTERNATIONAL BUSINESS INVESTIGATION COMPANY LIMITED AND ORS*

In this Court of First Instance case, the plaintiff Bank had obtained summary judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> named Defendants on 10 July 2000. Directions for the assessment of damages were given on 19 January 2001. However, it was not until 20 October 2011 that the Bank served on the defendants notice of intention to proceed to re-activate the proceedings.

#### *Objections of the Defendants*

The defendants submitted two grounds of objections to the proceedings. First, the defendants challenged the accuracy of the outstanding indebtedness claimed by the Bank. Second, the defendants argued that the Bank's delay in bringing the matter to assessment should bar the Bank from claiming any interest during the period of delay.

#### *The Court's Ruling*

On the issue of the accuracy of the outstanding indebtedness, the court upheld the validity of a "conclusive evidence clause" (relying on the English case of *Bache & Co (London) Ltd v. Banque Vernes Et Commerciale De Paris S.A* [1973] 2 Lloyd's Law Reports 437) found in the Bank's facility letter, which provided that any certificate of indebtedness duly signed by an officer of the Bank would be conclusive and binding evidence that the defendants owed the Bank the sum as stated on the certificate of indebtedness. As a certificate of indebtedness had been issued by the Bank, there was no uncertainty regarding the amount of the outstanding indebtedness.

On the issue of delay, there was no dispute between the parties that the delay was inordinate (there being no explanation for the delay). The only issue was whether the court has the discretion to deprive a successful plaintiff of pre-judgment contractual interest (under section 48 of the High Court Ordinance (Cap 4), the court has the discretion to determine the rate and the period for which pre-judgment statutory interest is awarded).

The court found that there was nothing which tied its hands in depriving a creditor of contractual interest where it was just and equitable to do so in light of the creditor's conduct. The court held that it would be unjust to allow the Bank to be able to benefit from the delay. As such, the court decided on a notional date on which final judgment could have been obtained by the Bank had there been no delay in proceeding with the action (in this case, a period not exceeding two years from the date of the directions order). The court awarded contractual and statutory interest to the plaintiff up to the notional date of judgment, and further statutory interest from the date of the "real" judgment until full payment.

## Take-away Points

These two cases act as reminders for creditors that they must take timely action to recover debts. First, even when the recovery action was commenced within the limitation period, the court appears to have the discretion to refuse awarding contractual interest (on top of its discretion to refuse awarding statutory interest) to a creditor where there has been undue delay on the part of the creditor to proceed with the action. Second, the CA has now clarified that the 12 years limitation period under section 4(4) of the Limitation Ordinance applies to enforcement actions and bankruptcy and winding up proceedings. Therefore, any enforcement action on a judgment debt must be taken within 12 years from the date on which the judgment debt arose, and failing to do so within the 12 years period will result in any enforcement action on the judgment debt being time-barred.

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