

March 19, 2020

In a recent bankruptcy case, the Hong Kong Court has once again emphasised that it will take a strict approach on proper service of a statutory demand. Recalcitrant debtors often go to great lengths to evade service of statutory demand. Nevertheless, if a creditor decides to adopt the statutory demand mechanism in order to commence bankruptcy proceedings against a debtor, the creditor will need to show that it had done all that was reasonable for the purpose of bringing the statutory demand to the attention of the debtor. The Court has made it clear that it will take into account all applicable facts and circumstances in a case in determining whether a statutory demand has been properly and effectively served, and that it is not sufficient for a creditor to blindly adopt the steps for attempting service outlined in the relevant practice direction without regard to the prevailing situation.

Recent Case

Facts

In *Re Li Xiaoming*¹, a statutory demand against the debtor was issued on 21 June 2018. In accordance with the steps prescribed in the Practice Direction 3.1, the Creditor attempted to serve the statutory demand at the Debtor's previously known addresses in Hong Kong and his residential address in Hebei. During visits to said addresses, the process server was informed that the Debtor no longer resided at those addresses, had not been in Hong Kong for a long time or the flat had been empty for more than a year. Letters sent to the Debtor's known addresses in Hong Kong were returned unopened and marked with the words "no such person".

Ultimately, the Creditor attempted to rely on substituted service of the statutory demand by advertisement of the same on 31 August 2018, in one English and one Chinese newspaper in Hong Kong, and one newspaper in Hebei.

The Creditor claimed that the statutory demand was properly served as it would have come to the Debtor's attention by 31 August 2018 -- the date of the advertisements made in Hong Kong and Hebei. The Debtor argued that service of the statutory demand was irregular and opposed the bankruptcy petition.

Decision

Despite the Creditor's attempts to perform various steps listed in the practice direction, the Court held that the Creditor had failed to serve the statutory demand properly and the bankruptcy petition was therefore rendered defective. The Court found that the Creditor had not done all that was reasonable to bring the statutory demand to the attention of the Debtor, as it had advertised for only one day in Hong Kong and Hebei, and had no factual basis to support its belief that the Debtor was in Hong Kong or Hebei.

The Court stressed that where a creditor asserts that it is impracticable to personally serve the statutory demand on the debtor, it must satisfy the Court that this is indeed the case, and that the steps actually taken were all that was

reasonable to bring the statutory demand to the debtor's attention in the circumstances of the case. The Court further noted that "it is not sufficient for the creditor to blindly adopt the same steps [as prescribed in the practice direction], whatever the prevailing situation and outcome of the facts."

Although the Court was reluctant to set out what could have been done by the Creditor in this case to discharge its duty, it noted that the Creditor was aware of another bankruptcy petition filed against the Debtor and that a firm of solicitors was acting for the Debtor in that case. Accordingly, it should have sent a copy of the statutory demand to those solicitors in order to satisfy the Court that the statutory demand had been effectively served.

Conclusion

A statutory demand is an important document with serious consequences. It should therefore come as no surprise that the Court takes a strict approach in ensuring proper service of the statutory demand. Now that the Court has made clear that Practice Direction 3.1 serves merely as guidance, creditors and their solicitors should avoid blindly adopting the steps listed. Instead, careful attention should be given to the particular facts of the case when determining what reasonable steps should be taken in bringing the statutory demand to the debtor's attention for proper service.

1. [2020] HKCFI 361↩

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