

HONG KONG / JUDGMENT

Dr VINCENT KAY LO IP v. OFFICIAL RECEIVER

COURT

Court of Appeal

DECIDED

14 February 2006

CASE / FILE NUMBER

CACV53/2005

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bjbj 4>71 cacv 53/2005 in the high court of the hong kong special administrative region court of appeal civil appeal no. 53 of 2005 (on appeal from HCB NO. 1209 of 2000) BETWEEN Dr Vincent Kay Lo Ip Bankrupt Official Receiver Before: Hon Le Pichon, Tang JJA and Chu J in Court Date of Hearing: 25 January 2006 Date of Judgment: 25 January 2006 Date of Handing Down Reasons for Judgment: 14 February 2006 REASONS FOR JUDGMENT Hon Le Pichon JA: On 14 January 2005, on an application by the Official Receiver under section 30A of the Bankruptcy Ordinance and Rule 88 of the Bankruptcy Rules, Cap. 6, Master Wong made an order against the automatic discharge of the bankrupt pursuant to section 30A(3) such that the bankrupt would not be discharged from bankruptcy until 13 August 2008. The bankrupt s appeal from the master s order was dismissed at the hearing with written reasons to be given later which we now do. The opposition to the automatic discharge of the bankrupt was based on four matters which the Official Receiver considered amounted to misconduct on the part of the bankrupt. The master made findings in respect of each of those matters and expressed himself satisfied that the grounds set out in section 30A(b)(c) and (d) had been made out. In his view, the bankrupt was and is unwilling to cooperate with [the Official Receiver] in the administration of his estate. His conduct, before or after the commencement of the bankruptcy has been unsatisfactory . He considered that the bankrupt s discharge would prejudice the administration of the estate. The appeal depended on the bankrupt successfully challenging the master s findings in key aspects since it is clear that if his findings were upheld, the exercise of his discretion could not be impugned. The bankrupt challenged certain aspects of the master s findings. It would therefore be convenient at this point to outline the master s findings in respect of the four matters. The Canadian properties The bankrupt had a one third beneficial interest in a property in Vancouver (the other owners being his wife and his mother) and a half share in a property in Toronto (the co-owner being his wife), which shares were valued at CAD67,667 and CAD28,484.50 respectively. After the commencement of the bankruptcy proceedings but before the bankruptcy order, the Vancouver property was mortgaged to the bank and according to the bankrupt, he alone owed the mortgage debt of CAD77,000 which, incidentally, exceeded the value of his one third share. The master noted the bankrupt s stance, as disclosed in his affidavit dated 18 August 2004, vis-

his interest in the Canadian properties, namely: It is practically impossible to sell partial interests in property without the assistance of the other co-owners [the bankrupt's wife]. The OR's failure to realize these properties is not due to my fault but the nature of my interests in these properties. After referring the fact that his two daughters were currently making the mortgage repayments and expenses for the two properties, the bankrupt opined that the Official Receiver will therefore not be able to liquidate the two properties. The master considered that the letter amounted to telling the Official Receiver to keep his hands off the two properties. He found that the bankrupt should and could have executed appropriate documents to transfer the legal title to the Official Receiver and, by not so doing, he had failed the Official Receiver. The bankrupt referred to his evidence below which was to the following effect: Dr IP: So repeatedly during my years, the main subject I ask the Official Receiver, What do I have to do to stay out of trouble? The answer was repeatedly, I sign anything unless we give you. He said he was never presented with anything to sign and that it was therefore unfair for the master to criticise him for not executing appropriate documents to transfer the legal title to the Official Receiver. In my view, there was ample evidence before the master, in particular, the bankrupt's own affidavits, to justify the master's criticisms. The other point made by the bankrupt concerned the Toronto property. On 10 October 2004, the Official Receiver was advised by the bankrupt that the Toronto property had been redeemed. There followed correspondence between the Official Receiver, the bankrupt and the mortgagee bank. The master was not provided with information as to how the redemption was effected and who had provided the funds. He noted, however, that he had not heard from the bankrupt that he was willing to transfer his legal interest in the two properties to the Official Receiver who was considering commencing proceedings in Canada to realize the bankrupt's interests in them. At the appeal hearing, the court was referred to additional evidence which was not before the master said to concern the discharge of the mortgage over the Toronto property. There were two advices of credit dated 5 and 31 August 2004 respectively from Scotiabank addressed to Ip, Kay Lo Vincent and/or Ip, Chiang Sun Ching (the bankrupt's wife) to the effect that the bank had received remittances of USD1,000 and USD14,000 respectively from one Cheryl Ip who is one of the bankrupt's daughters. There was also an advice of debt dated 2 September 2004 from the same bank stating that the loan consisting of principal of USD29,200 and interest of USD23.52 had been fully repaid on 31 August 2004 and a cheque in Hong Kong dollars had been received from the bankrupt and/or his wife in respect of the discharge fee of CAD180. The bankrupt referred the court to a renewal notice in respect of an endowment (with profits) life policy held by his wife with Clerical Medical as well as a summary of the policy from which it would appear that it was first taken out in May 1993 with a maturity date of 19 May 2013 and a minimum guaranteed death benefit of the 17,764 at an annual premium of 1,000.02. The bankrupt submitted that it was his wife who had effected the redemption by applying the policy proceeds to pay off the mortgage on the Toronto property. However, the evidence adduced went nowhere near substantiating the bankrupt's case. There was nothing to show that the life policy had been cashed in, much less that the proceeds were sufficient to discharge the mortgage or had been applied to pay off the mortgage. There was simply no evidence to show the source of the funds to pay off the mortgage. In the circumstances, the master's findings in respect of the Canadian properties were plainly justified. Gaylaw This company operated as a service company for the bankrupt in relation to the

clinic () through which he had conducted his medical practice until his bankruptcy. The bankrupt and his wife () were the sole directors and shareholders of Gaylaw. Apart from acting as the service company, Gaylaw owned the medical equipment of ADG used by its laboratory service as well as investment properties unrelated to ADG. According to his statement of affairs, the bankrupt's interest in Gaylaw was valued at HK\$363,678. It should also be mentioned that his mother Madam Ho Fung was listed in his statement of affairs as a major creditor to whom HK\$3,343,000 was owing out of a total indebtedness (including a judgment debt of HK\$1,170,422.40) of HK\$6,028,964. Land search records revealed that Gaylaw had acquired a flat in Mount Trio Court in August 1996 which it sold on 3 July 1997 (at a profit of HK\$3 million) for HK\$7.9 million. Then on 7 August 1997, it purchased another flat in Caine Road for HK\$7.4 million which was sold by the mortgagee bank in February 2001 for HK\$5.25 million. Understandably, the Official Receiver was interested in ascertaining how much could be realized out of Gaylaw. Shortly after the bankruptcy order was made, the Official Receiver obtained the audited accounts the year ending 31 March 2000 for Gaylaw which disclosed that there was an amount due to directors in the sum of HK\$936,804. When accounting records were sought in order to ascertain the actual amount advanced by bankrupt, the Official Receiver was taken to a warehouse where books of accounts of the bankrupt and his wife were kept. Although 16 boxes of documents pertaining to Gaylaw were retrieved, there were many missing documents. In particular, no general ledgers were available for the five-year period from 1 April 1995 to 21 March 2000 rendering it impossible to trace the movements in the directors account and drawings made by then. Putting it bluntly, the financial records of Gaylaw were in a terrible mess. Be that as it may, in her letter of 18 January 2001 to the Official Receiver, Mrs Ip asserted that no director other than herself had ever made loans to Gaylaw, that she alone had made the directors loan shown in the March 2000 accounts as HK\$936,804. It was said that that had been carried from a HK\$1 million loan she had made to Gaylaw in August 1996 to enable Gaylaw to purchase the Mount Trio property and that that had been carried through to the Caine Road property. At the same time, Mrs Ip alleged that the HK\$1 million had in fact come from Madam Ho, the bankrupt's mother. Mrs Ip produced a bank receipt dated 8 August 1996 showing the payment of a sum of HK\$1 million into her savings account. But there was nothing on the receipt to indicate the source of the HK\$1 million. A promissory note dated 3 February 2000 was also produced. This was said to record the loan from Madam Ho to Mrs Ip retrospectively. The promissory note was in the following terms:

PROMISSORY NOTE For value received on demand I promise to pay Madame Ho Fung or order the sum of Hong Kong Dollars ONE MILLION (HK\$1,000,000.00) only. Dated this 03 February 2000.

Signature Name Vincent K.L. Ip I.D. Card No D351519 Address Block A5 Albron Court 99 Caine Road Hong Kong WITNESS SIGNATURE

Pausing here, it is to be observed that there is nothing on the face of the note to indicate any loan made to Mrs Ip. The master found that the promissory note together with others that had been produced were not true and contemporaneous documents but had been made up by the bankrupt to support his application made on 13 February 2003 under section 83 of the Bankruptcy Ordinance (the section 83 application) to reverse or set aside the Official Receiver's demand that the bank balance of Gaylaw be remitted to him to settle the directors loan owed to the bankrupt. That application was subsequently abandoned. Plainly, more than one version of facts had been presented to explain the source of

the advances made to Gaylaw. In August 2000, the bankrupt had submitted a list of advances totalling HK\$3,343,000 allegedly made by Madam Ho Fung to Gaylaw. This was supported by copies of promissory notes including the one set out in paragraph REF _Ref126141688 \r \h above. The version of facts put forward was that the bankrupt had signed the promissory notes as guarantor only and that all monies had been advanced by his mother to Mrs Ip who in turn lent the money to Gaylaw. Quite apart from anything else, if the advances did come from the bankrupt's mother, it is exceedingly odd and hardly credible that they should not have been made to the bankrupt which would have been the most natural thing to do given the mother child relationship, but to Mrs Ip but then had to be guaranteed by the bankrupt by the provision of promissory notes. When one considers that Gaylaw was owned by the bankrupt and his wife and no one else, it is even more inexplicable. As to Mrs's claim that she was the only director who ever have made any loan to Gaylaw, that is flatly contradicted by auditors of Gaylaw who confirmed that the loan represented accumulated advances and directors meant both the bankrupt and the bankrupt's wife. Given the evidence, the findings made by the master were plainly open to him. No ground has been made out that would warrant this court to interfere with those findings. Wei Wei The bankrupt's assets included 40,000 shares in Wei Wei which were ascribed a value of HK\$288,000 in his statement of affairs. When the Official Receiver received an offer of HK\$40,000 for the shares sometime from the other shareholder(s), he consulted the bankrupt in July 2002 whose view was that the offer was too low. In the result, the offer was not accepted. In May 2003, about 2 years after the filing of the statement of affairs, Madam Fung filed an affidavit in support of the section 83 application in which she claimed that she owned or once owned the Wei Wei shares registered under the name of the bankrupt and enclosed a copy of a receipt for the shares. However, she sought no relief in respect of those shares. Some five months later she filed a further affidavit and sought a declaration that the shares belonged to her. The master considered the evidence adduced, namely, a copy receipt dated 12 May 1981. It was originally made out to Ki Lo . That was crossed off and Madam Fung was written next to the deleted name and initialled by the signatories to the receipt. Two signatures appear above the dotted line of a rubber stamp of Wei Wei Properties and Investments Ltd . Underneath the dotted line was the word Directors , forming part of the rubber stamp. The master noted that there was no corroborative evidence. The bankrupt's explanation was that it happened a long time ago and he had forgotten about it when he completed his statement of affairs. The master disbelieved the bankrupt and, on a balance of probabilities, rejected the claim that those shares belonged to Madam Ho Fung. The complaint made on appeal was that the master ought to have accepted Madam Ho Fung's claim. It is not disputed that the shares were and are registered in the name of the bankrupt. As the master noted, there was nothing on the face of the receipt to indicate the purpose of the payment and no explanation as to why the receipt had been made out to the bankrupt, nor when the alteration was made. The weight to be attached to the evidence was plainly a matter for the master. There is no basis for interfering with the finding: it has not been shown that the master had overlooked crucial evidence or had misunderstood the evidence. Failure to make contribution The master noted that the nub of the Official Receiver's complaint appeared in paragraph 44 of his report dated 16 July 2004 which he quoted in the judgment below at paragraph

25. In short, the Official Receiver considered the bankrupt's proposed expenditure to be too high but the bankrupt refused to co-operate to reduce the amount so as to enable part of his income to be applied for the benefit of his creditors. The master accepted the Official Receiver's complaint. His reasons were threefold: first, the monthly income of the bankrupt as a medical practitioner varied from HK\$16,000 to HK\$41,000. Yet, since his bankruptcy on 14 August 2000, he had not contributed any part of his monthly income to the estate. Second, the monthly statements of income and expenditure completed by the bankrupt for the period from 1 January 2003 to 31 May 2003 showed that his expenditure could correspondingly increase or decrease with his income as it varied from month-to-month. Third, the master took the view that certain items of expenditure, including school fees of HK\$10,800 paid in January 2003, were unnecessary to maintain the basic needs of the bankrupt and his family. The bankrupt criticised the master for overlooking the fact that in October 2000 he had paid over HK\$60,000 to the Official Receiver. In my view, that criticism was misplaced since the point in question related to the correlation of his income and expenditure over a four-year period. It was also said that between January 2001 to June 2004, the bankrupt was a full-time student earning nothing. On this last point, the evidence is to the contrary: the monthly statements referred to earlier showed that the bankrupt had earnings averaging HK\$32,334 per month during the first five months of 2003. The evidence before the master plainly justified the inference that the bankrupt made sure that there was never any spare income available for his creditors. Hon Tang JA: I agree with the reasons for judgment given by Le Pichon JA. Hon Chu J: I agree and have nothing to add. (Doreen Le Pichon) Justice of Appeal (Robert Tang) Justice of Appeal (Carlye Chu) Judge of the Court of First Instance The Bankrupt/Appellant in person Ms Karen Cheung, Solicitors for the Official Receiver/ Respondent PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 2QX[2QX[H; < jFen & 6" ABC Final Judiciary ABC-Final (fair)1.dot setup Microsoft Word 9.0 y471 y471 Judiciary ABC Final Title Source Erica =>71 =>71 =>71 Microsoft Word Document MSWordDoc Word.Document.8

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