

HONG KONG / JUDGMENT

# FRED LEE AND ANOTHER v. CHENG WING CHIU NELSON

## COURT

Court of First Instance

## DECIDED

31 August 2007

## CASE / FILE NUMBER

HCB26348/2002

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bjbj HCB 26348/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE  
REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 26348 OF 2002

RE: CHENG WING CHIU NELSON, a bankrupt (Holder of Hong Kong Identity Card No.  
E55xxxx(1)) BETWEEN FRED LEE and CHOW WAI LAN, CHRISTINE, trustee of the property of  
CHENG WING CHIU NELSON, a bankrupt Applicant CHENG WING CHIU NELSON Respondent

Coram : Before Master J. Wong in Court Date of Hearing : 17 August 2007 Date of Decision : 31  
August 2007

## DECISION

### Application

1. This is an application for suspension of automatic discharge of bankruptcy.

### Background

2. On 20 December 2002, Mr. Cheng Wing Chiu Nelson ( the Bankrupt ) petitioned to this Court for his own bankruptcy. He deposed that he was unable to pay his debts, including about \$780,000 unsecured loans and a secured loan relating to a mortgaged property jointly owned with his wife at a negative value of \$3.7m approximately.
3. A bankruptcy order was made against him on 27 February 2003.

4. From March 2003, the Bankrupt got a job in China Railway Engineering (Hong Kong) Limited ( the Employer ) as a Senior Project Engineering earning about \$37,000 per month. However, he failed to agree with the Official Receiver ( ) of his monthly contribution. The Bankrupt argued that he could contribute \$489 per month only. By a letter of 19 June 2003, OR asked him to pay a monthly sum of \$3,000. Nonetheless, no payment was made.
5. Later, Mr. Fred Lee and Ms. Chow Wai Lan Christine was instructed to act as trustee-in bankruptcy (the Trustee ) for the Bankrupt. The Trustee continued to liaise with the Bankrupt on the monthly contribution. Regrettably, no agreement was reached. On 13 November 2003, the Trustee issued an application for Income Payment Order ( ) against the Bankrupt. Having heard the parties argument, on 27 April 2004, Master Ho ordered, inter alia, that the Employer should set aside \$6,300 per month from the Bankrupt s income and pay the same directly to the Trustee on the 3rd day of each month commencing from 3 May 2004.
6. There was no appeal against the order of Master Ho and contribution thereafter was duly made. However, the Trustee complained that the Bankrupt had failed to pay anything before the IPO, from March 2003 to April 2004 for a period of 13 months.
7. The Trustee further complained that the Bankrupt had failed to submit his 1st, 2nd and 3rd Annual Statements. It rendered the Trustee s job difficult, if not impossible, because without information about the Bankrupt s income and expenses, one would not be in a position to assess the proper monthly contribution. Worse still, the Bankrupt once indicated that he was entitled to double pay or bonus. The Trustee has so far been kept in dark on these matters. Finally, although the Bankrupt did submit the Annual Statements after the matter had brought before the Court, not all the supporting documents was supplied with, rendering it impossible for the Trustee to verify the correctness of the financial position of the Bankrupt.
8. On 29 January 2007, the Trustee took out the present application to oppose the automatic discharge of bankruptcy upon sections 30A(4)(c), (d) and (h) of the Bankruptcy Ordinance (Cap. 6). Master Hui dealt with the call-over hearing on 26 February 2007. He granted an interim stay to suspend the discharge and directed the parties to file and serve affidavit evidence.
9. The Bankrupt opposed the application and disagreed with the complaints made by the Trustee. He argued that he had fulfilled the obligations of a bankrupt. He worked hard. He paid what Master Ho asked him to do. Before the Court s order, he did not pay because there was no agreement reached between him and the OR/the Trustee. However, he had no objection if this Court would order him to pay the said sum of \$489 per month during such period. On the other hand, he accepted that he did not submit the annual statements as alleged. Nonetheless, it was caused by his poor health condition and great working pressure. After all, by now, all outstanding annual statements have been submitted. He confirmed that they did represent his true financial position at the material times. In conclusion, his

bankruptcy should not be extended at all.

10. I heard the matter on 17 August 2007. Mr. Gopaoco of Messrs. Lee & Chow acted for the Trustee. The Bankrupt appeared in person. I reserved my decision to be handed down and now do so.

## Ruling

11. Upon consideration of the evidence authorities and submissions from the parties, I agree with Mr. Gopaoco that the Trustee has proved the complaints against the Bankrupt and the discharge of the Bankrupt should be extended for one year in the circumstances. My reasons appear in below. Findings of facts
12. On balance, from March 2003 to April 2004, in my assessment, the Bankrupt should have contributed a monthly sum of \$3,000 to his estate.
13. It is not disputed that the Bankrupt did not contribute anything to his estate for the period of 13 months before the IPO. The Bankrupt further agreed to re-pay his estate \$489 per month during such period. However, it is not sufficient. In my view, the best starting point is the sum of \$6,300 ordered by Master Ho for the IPO. It represented a monthly fair sum that the Bankrupt should contribute to his estate. When Master Ho made the assessment, it was premised on a monthly salary of \$40,000. For the pre-IPO period, I note that the Bankrupt only earned about \$37,000. Hence, a sum of about \$3,000 should be deducted from the said sum of \$6,300. Further, when the Trustee was negotiating with the Bankrupt during the period, he had at one stage agreed to pay \$3,000.
14. The Bankrupt admitted that he did not submit 3 annual statements on time and explained why he did so. However, with respect, I decline to accept his explanations. To start with, there is insufficient evidence to show that he was suffering from serious health and working problems at the material times. Further, if the Bankrupt could have spent the effort to argue with the OR/the Trustee about his monthly contribution, I find it difficult to accept that he could not fill in the annual statements as required.
15. Finally, as to the accuracy of the annual statements having been submitted, I share the view of the Trustee that, on balance, they do not disclose the full income received by the Bankrupt. There is non-disclosure on the part of the Bankrupt. The tax demand notes located by the Trustee must be the more reliable evidence to show the income of the Bankrupt at the material times.
  - (a) From April 2004 to March 2005, it stated that income was \$660,154.
  - (b) From April 2005 to March 2006, the Bankrupt s income was \$690,639.
16. In this respect, the Bankrupt maintained that he only earned \$40,000 per month, hence making a total sum of \$480,000 for each of these fiscal years. How then does one account for the differences of \$180,154 and \$210,639? There is no allegation that the tax demand notes

are inaccurate. There is no or no satisfactory explanation offered by the Bankrupt on affidavit. The oral explanation given by the Bankrupt at the hearing is far from believable. He explained that the differences represented the reimbursements of entertainment expenses he spent for getting business of the Employer. I decline to accept the same. Without production of any documentation, including documents prepared by both the Employer and the Bankrupt, for the purpose of calculating tax payable for 04/05 and 05/06, I believe that adverse inference has to be drawn against the Bankrupt in the circumstances.

Exercise of discretion

17. Having satisfied that the complaints of the Trustee are established, I move to the exercise of the Court's discretion to see if the discharge of bankruptcy against the Bankrupt should be suspended, and if so, for how long. In this respect, I ask myself to bear in mind the underlying principle of the current bankruptcy regime as per paragraphs 17.6 and 17.24 of the Law Reform Commission Report on Bankruptcy (1995): 17.16 The introduction of automatic discharge should, with the objection system, have two-folded effect. Firstly, bankrupts should have a greater incentive than at present to co-operate with the trustee, as failure to co-operate could result in the trustee objecting to a bankrupt's discharge. Secondly, the rehabilitation of a bankrupt from bankruptcy would be assured, subject to rehabilitation being delayed as a consequence of a bankrupt's own failings. 17.24 The introduction of automatic discharge would shift the emphasis from discharge being a privilege to its being a right. This right, however, must be set alongside a bankrupt's duty to co-operate with the trustee in the administration of the estate. If he fails to co-operate with the trustee after bankruptcy, or if a bankrupt's conduct before bankruptcy was unsatisfactory, he should not be automatically discharged.
18. Further, useful guidance can be located in comment of Mrs. Justice Le Pichon (as she then was) in two authorities, viz: *Re Hui Hing Kwok* [1999] 3 HKC 683 and *Re Li Tak Kong* [2000] 3 HKC 360 Rehabilitation is the sense of enabling the bankrupt to resume a normal life in society is a key, if not the key consideration. It should only be delayed by bankrupt's own failings. In exercising its discretion, the court would have regard to the scope and purposes of the statutory provisions conferring the discretion, the interests of commercial morality and the public interest. Before a discharge was granted or permitted to occur, there should be an adequate investigation of a bankrupt's conduct and affairs, and such investigation should generally be concluded. It was incumbent on the bankrupt to make a full and frank disclosure and to proffer all pertinent information regarding his assets and financial dealings to the Official Receiver. In seeking a discharge, the bankrupt had to show that he had taken all reasonable steps to ensure that his estate was available for distribution among his creditors and that the trustee was appraised of all relevant information; it was not good enough for him to adopt a purely passive or reactive role. Where there had been concealment or lack of co-operation on the part of the bankrupt, it would not be unfair to delay his discharge.

19. Applying the above principles to the present case, I have no doubt that the discharge of the Bankrupt should be suspended. While I agree that the Bankrupt should enjoy a respectable living as an engineer, he did not disclose all his available incomes to the Trustee. It is uncooperative and unsatisfactory. In my opinion, if the Bankrupt had disclosed all his extra incomes to the Trustee, he would have been allowed to enjoy a reasonable portion of them because, they were presumably the appreciation of hard working by the Employer upon the Bankrupt. Nonetheless, some of them should still go to the estate because of the Bankrupt was still owing monies to his creditors.
20. Having taken into the circumstances of this case, including the background of the Bankrupt, the view of Mr. Gopaoco and the amount of undisclosed income in the said 2 fiscal years, a suspension of 1 year appears to me to be appropriate.

## Conclusion

21. To conclude, I order that the automatic discharge of the Bankrupt shall be suspended for 1 year and he shall not be discharged until 27 February 2008. Costs
22. I have not heard much from the parties on the question of costs. However, I see no reason why costs should not follow the event. I therefore make a costs order nisi, which will be made absolute within 14 days from today, that the costs of the OR incidental to and of this application is to be borne by the Bankrupt, to be taxed if not agreed. (Jack Wong) Master of the High Court Mr. E. Gopaoco of Messrs. Lee & Chow for Trustee. Cheng Wing Chiu Nelson, appearing in person. - 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 H I J K L M N O P Q R S T U V (#p# & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title HeJ HeJ HeJ Microsoft Word Document MSWordDoc Word.Document.8

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