

HONG KONG / JUDGMENT

FRED LEE AND ANOTHER v. LAU CHI KAM

COURT

Court of Appeal

DECIDED

2 May 2008

CASE / FILE NUMBER

CACV233/2007

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bjbj ANKRUP T Trustees and LAU CHI KAM Bankrupt Before : Hon Cheung, Yeung JJA and Lam J in Court Date of Hearing : 15 April 2008 Date of Judgment : 15 April 2008 Date of Reasons for Judgment : 2 May 2008 REASONS FOR JUDGMENT Hon Cheung JA : The application AUTONUMOUT Mr. Lau Chi Kam (the Bankrupt) was declared a bankrupt by a Court order dated 13 March 2003 based on his own petition for bankruptcy presented on 16 January 2003. AUTONUMOUT The Trustees were appointed as the trustees of the property of the Bankrupt by his creditors on 11 April 2003. AUTONUMOUT Under Section 30A of the Bankruptcy Ordinance (the Ordinance) (Cap. 6) the Bankrupt would be automatically discharged from bankruptcy upon the expiration of four years from the date of the commencement of his bankruptcy, i.e., the day on which the bankruptcy order was made against him, unless the court is satisfied on the application of the trustees or one of the Bankrupt s creditors that a valid objection based on one or more of the grounds set out in Section 30A(4) has been made out. In the absence of any objection, the Bankrupt would have been discharged on 13th March 2007. If there is a valid objection the period may be extended by the Court under Section 30A(3). AUTONUMOUT On 9 February 2007, the Trustees issued a summons objecting to the automatic discharge and on 5 March 2007 they obtained an interim order suspending the discharge. AUTONUMOUT On 26 June 2007 Master Lung heard the Trustees summons. He dismissed their application and discharged the interim order. The appeal AUTONUMOUT The Trustees appealed. At the appeal, Mr. Wong, counsel for the Trustees, informed the Court that the Trustees would not ask for an extension of the bankruptcy period. Instead, they would only ask for the Master s order to be set aside with costs. AUTONUMOUT Upon hearing the Trustees, we dismissed the appeal. I now give my reasons. Grounds for suspension AUTONUMOUT The ground relied upon by the Trustees to suspend the discharge of the bankruptcy order was under section 30A(4)(d), namely, the conduct of the Bankrupt before the commencement of the bankruptcy had been unsatisfactory. AUTONUMOUT The Trustees relied on three matters in support of their case that the pre-bankruptcy conduct of the Bankrupt was unsatisfactory. One of these was abandoned on appeal. The remaining two matters were : The gambling of the Bankrupt. The transfer of a property registered in the name of Bankrupt to his sisters seven months before the presentation of the petition for bankruptcy.

Applicable principles

AUTONUMOUT The following are principles relevant to the application : The test for considering whether or not the pre-bankruptcy conduct complained of is unsatisfactory is whether the society would be prepared to condone such conduct without any expression of disapproval. If it is not, the conduct in question will be unsatisfactory. The conduct should be examined against all relevant circumstances and the view of a reasonable man should be considered. In considering the pre-bankruptcy conduct, there may be three possible situations : One extreme situation is where there is, for example, preference over creditors, concealing assets and fraud. This is clearly recognized as unsatisfactory conduct. The other extreme situation is conduct relating to poor judgment, misfortune, supervening events and circumstances beyond the control of the bankrupt. Such conducts are clearly not unsatisfactory. In between these two situations are those associated with human weakness, indulgence, rashness, recklessness and irrational decisions. These may or not be unsatisfactory conducts. It will depend on the circumstances of the case. Even if the conduct is unsatisfactory the court still has a discretion in deciding whether to suspend the automatic discharge. The discretion is to be exercised by considering two main objectives : The rehabilitation of the bankrupt by allowing him to resume a normal life in society. The public interest of ensuring that the return of the bankrupt to the commercial world will not carry with it the unacceptable risk to persons likely to be engaged in commercial relations with him and also that commercial morality is preserved. AUTONUMOUT These applicable principles can be gathered from the following cases : Re : Tong Yuk Kin, a Bankrupt (HCB 22870/2002) (Deputy High Court Judge To, Decision 20 June 2007); Re : Law Pak Wai, a Bankrupt and others (HCB 10680/2002) (Barma J, Decision 7 March 2008); Re : Hui Hing Kwok [1999] 3 HKC 683 (Le Pichon J, as she then was); Re : Zion ex parte Bankrupt (Smithers J of Federal Court of Australia. General Division Bankruptcy Division of the State of Victoria, 26 September 1986); Fred Lee v Leung Chin Yeung Court of Appeal (CACV 32/2007); [2007] 1 HKC 164 (Kwan J); Re Tong Yuk Kin and Re Liu Man Hoo (A Bankrupt) [2007] 5 HKC 346 (Lam J). Gambling AUTONUMOUT I will now deal with each of the grounds of objection. AUTONUMOUT The Bankrupt is a teacher. He earned about \$40,000.00 per month before the bankruptcy. He admitted that he had lost \$1.7 million in gambling in Macau about two years before his bankruptcy. AUTONUMOUT The Master was of the view that the Bankrupt might have gambled either with his own money or with money borrowed from creditors, but since there was no evidence on whether he gambled with borrowed money, the gambling could not be regarded as an unsatisfactory conduct. AUTONUMOUT Mr. Wong argued that considering the income of the Bankrupt, the gambling would by itself be an unsatisfactory conduct irrespective of whether he gambled with his own money or not. To gamble with borrowed money would make the matter even worse. AUTONUMOUT In Re : Tong Yuk Kin, Judge To was of the view that the twelve factors under the former section 30(4) of the Bankruptcy Ordinance before its current amendment which would preclude the automatic discharge of the bankruptcy order, could be regarded as unsatisfactory pre-bankruptcy conducts under the new section 30A(4). One of the twelve factors was that the bankrupt had brought on or contributed to his bankruptcy by, among other things, gambling. AUTONUMOUT I will refrain from commenting whether it is necessary to regard the former twelve factors in the exercise.

However, it is clear in the present case that the gambling of the Bankrupt contributed to his financial difficulty which eventually led him to petition for bankruptcy. He frankly admitted that his financial problems were caused by his habit of speculation and gambling. In my view the gambling of the Bankrupt was an unsatisfactory conduct. Transfer of property AUTONUMOUT In 1992, the Bankrupt and his late mother bought a property as joint tenants. He became the sole owner after his mother died in 1997. In June 2002, about seven months before the bankruptcy, he transferred the property to his two sisters without consideration. He did not disclose this asset or the transfer in the Official Receiver's questionnaire dated 14 March 2003 which required him to disclose whether within five years prior to the presentation of the petition, he had entered into transaction for no value. He only disclosed this asset and the transfer when he was interviewed by the Trustees on 30 May 2003. AUTONUMOUT The Bankrupt explained in his affirmation dated 17 March 2007 filed in opposition to the Trustees application that he was only a nominee owner of property. It was a Housing Authority property bought by his mother and his two sisters in 1992. The sisters were fully responsible for the payment of the property. As there was concern about the effect on the title and household registration if the sisters were to marry later on it was decided that the Bankrupt and his mother would become the registered owners. Later on as he needed to apply for some mortgage assistance for his own property, which would not be available if he had another property, he therefore assigned the property back to his sisters. AUTONUMOUT The Trustees claimed that the period the Bankrupt held the property and the timing of his transfer to his sisters did not match his claim. AUTONUMOUT The Master held that the Trustees did not specify why the timing did not match the Bankrupt's claim and he rejected the Trustees case that the transfer to the Bankrupt's sisters was an unsatisfactory conduct. AUTONUMOUT In this appeal Mr. Wong further submitted that the Bankrupt did not disclose any evidence of payment by the sisters. AUTONUMOUT Although the Bankrupt did not initially disclose the transfer, he did reveal it to the Trustees shortly thereafter. The Trustees, while accepting that they had investigative powers, had not taken any steps to require the Bankrupt to disclose the evidence of payment of the property despite their knowledge of the transfer prior to their application which was issued less than one month before the automatic discharge on 13 March 2007. At the hearing before the Master the Trustees did not apply to cross-examine the Bankrupt or seek discovery of payment against the Bankrupt. In the circumstances based on such evidence I am not prepared to say that the Master was wrong when he rejected the Trustees claim on this issue. Discretion AUTONUMOUT As the Master did not deal with the issue of discretion because of his finding, we had to exercise the discretion afresh. In my view even if the gambling by the Bankrupt was an unsatisfactory conduct, the discretion against the suspension of the automatic discharge should still be exercised in his favour. The gambling took place six years ago. During the four-year bankruptcy period, he had made regular contributions to the Trustees for the payment of his debts. The Trustees received \$388,400.00 from him. There is no evidence that the Bankrupt had been uncooperative or had any hidden asset. The bankruptcy period was already extended by about four months by the interim order until it was discharged by the Master. AUTONUMOUT In the circumstances it would be wrong to rely on the very reason which put the Bankrupt in financial difficulties in the first place to preclude him from being discharged from the bankruptcy order. In my view the Bankrupt should be allowed to return to normal life.

Conclusion

AUTONUMOUT Accordingly the appeal was dismissed. Costs AUTONUMOUT As the Bankrupt did not seek any costs order we made no order as to costs between the Trustees and the Bankrupt. The Trustees undertook that they would not charge their costs of the appeal against the Bankrupt s estate. The Master had already precluded them from making any charge in respect of the lower court proceedings. Translation AUTONUMOUT The Chinese translation of this Reasons for Judgment will be provided to the Bankrupt in due course. Hon Yeung JA AUTONUMOUT I agree with the judgment of Cheung JA and I have nothing to add. Hon Lam J AUTONUMOUT I agree with the judgment of Cheung JA. Further, I wish to reiterate what I had said in Re Liu Man Hoo (A Bankrupt) [2007] 5 HKC 346 and my subsequent ruling on costs in the same case (HCB 11719 of 2002, 13 Nov 2007) regarding a trustee s duty in considering whether it is a proper case to make an application under Section 30A. Had the Trustees in the present case exercised their duty accordingly, they should see immediately that this appeal should not have been proceeded with in view of the guidance set out in the recent cases referred to by my Lord. AUTONUMOUT By now, given the recent authorities on the topic, all trustees in bankruptcy should have a clear idea as to the nature of their duties in respect of a Section 30A application and what the court expects from them. It is hoped that these cases will put an end to all unnecessary Section 30A applications. (Peter Cheung) (Wally Yeung) (M H. Lam) Justice of Appeal Justice of Appeal Judge of the Court of First Instance Mr. Stephen W. C. Wong, instructed by Messrs Lee & Chow, for the Trustees The Bankrupt, in person, present PAGE - A B C D E F G 1udk 1udk D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V r p# r p# r p# "@AB9D / Jz @m2z]C]6 | W.K2 iNjv uxB26I]C]6 |W.K & 6" abc-Cheung-CACV.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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