

HONG KONG / JUDGMENT

FRED LEE AND ANOTHER v. TONG MAN KIT

COURT

Court of First Instance

DECIDED

4 December 2007

CASE / FILE NUMBER

HCB17349/2002

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bjbj HCB 17349/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 17349 OF 2002

Re: TONG MAN KIT, a bankrupt BETWEEN FRED LEE and CHOW WAI LAN, CHRISTINE, trustees
of the property of TONG MAN KIT, a bankrupt Applicant TONG MAN KIT Respondent/ Bankrupt

Coram: Before Master Levy in Court Date of Hearing: 23 November 2007 Date of Decision: 23
November 2007 Date of Handing Down Reasons for Decision: 4 December 2007

REASONS FOR DECISION

Introduction

1. In August 2002, Mr. Tong petitioned for his bankruptcy when he was unable to repay the outstanding debts in the total sum of \$1.7 million. On 28 November 2002, he was adjudged bankrupt.
2. By the regime of automatic discharge under section 30A of the Bankruptcy Ordinance, Laws of Hong Kong, Mr. Tong would have been automatically discharged from bankruptcy on 26 November 2006.
3. The joint and several trustees (the Trustees) however issued an application on 31 October 2006 to object to Mr. Tong s discharge from bankruptcy. Before I disposed of the application on 23 November 2007, Mr. Tong had been prevented from discharge by the interim orders granted by Masters suspending his discharge from bankruptcy.

4. At the end of the hearing, I dismissed the application and lifted the suspension imposed by the interim orders with retrospective effect. These are the reasons for my decision. Grounds of objections
5. The Trustees rely on one statutory ground of objection, which is the unsatisfactory pre-bankruptcy conduct under section 30A(4)(d). They complain of two types of unsatisfactory pre-bankruptcy conduct: First, they allege that Mr. Tong had contracted debts when insolvent. Second, they say that Mr. Tong had misrepresented his true financial state in three loan applications.
6. Mr. Tong has not seriously disputed the facts of the application. He however opposed the application on the ground that he had good reasons for borrowing and that he has not misrepresented his financial circumstances when applying for loans.

Issues

7. It is now settled that a court will approach an objection application in two stages. In the first stage, I need to consider if Mr. Tong's conduct, when viewed objectively, is unsatisfactory. If the Trustees succeed in the first stage, I will move to the second stage to decide whether I should exercise my discretion to order suspension, and if so, how long the suspension should be. Grounds of Objections Unsatisfactory conduct 1: contracting debts when insolvent
 - (1) Complaint
8. In respect of the first unsatisfactory conduct, the Trustees allege that Mr. Tong obtained a loan of \$35,000 from United Asia Finance Limited () just two months before filing the petition for bankruptcy. The Trustees aver that this conduct is unsatisfactory as Mr. Tong's financial state at that time clearly shows that he would not have been able to repay the loan. At that time, he already had an accrued indebtedness of about \$1.7 million. However, he had monthly expenses (including loan and credit card repayments) of \$77,000. By obtaining a fresh UA loan, Mr. Tong was required to pay an additional monthly instalment of \$2,220. The Trustees therefore state that Mr. Tong knew or must have known that his salary of \$28,745 at the time was hardly enough to repay any additional loan instalment, albeit how small the amount would be.
 - (2) Explanation
9. Mr. Tong said that before he applied for the UA loan, the Hong Kong and Shanghai Banking Corporation Limited (HSBC) had made repeated demands for repayment of the arrears of the loan instalments, and further threatened to instruct a debt collector should he fail to make any payments. Mr. Tong said that he felt very scared as he believed that once a debt collector was engaged, he and his family would be subject to all sorts of threats. About the same time, UA, from whom he had previously borrowed, approached and offered him a new loan without requiring him to provide any documents. Mr. Tong said that as he was urgently

in need of money to repay some of the outstanding payments to HSBC, he accepted the loan offer. Mr. Tong said that he had used the UA loan to pay off some of the outstanding payments to HSBC so as to stop it from making further threatening demands. Unsatisfactory conduct 2 : Misrepresentation

(1) Complaint

10. This complaint is in relation to the loan application forms Mr. Tong had signed when he applied for loans from JCG Finance Company Limited (), Pacific Finance (Hong Kong) Limited (Pacific) and HSBC. The Trustees allege that Mr. Tong had in these loan application forms either misrepresented the extent of his indebtedness or failed to disclose his financial situation at all.
11. According to the loan application form of JCG dated 20 April 2001, the Trustees state that Mr. Tong has not fully disclosed his true financial situation as he had failed to disclose at least 5 revolving loans and 3 overdraft facilities.
12. In the case of Pacific, the allegation is that Mr. Tong has not disclosed any financial information in the loan application as the entire section for credit facilities, apart from Mr. Tong s signature on it, was blank. Mr. Gopaoco, solicitor for the Trustees, submitted that Mr. Tong s signature on the blank section would highly suggest that Mr. Tong has deliberately chosen to conceal his financial situation.
13. In the HSBC loan application, it shows that Mr. Tong had disclosed in it a monthly mortgage repayment of \$6,500 and loan repayment of \$5,000. The Trustees contend that this information is clearly incorrect as Mr. Tong had at that time at least 3 personal loans, 9 revolving loans and 3 overdraft facilities, and the monthly loan repayments must have been well above \$5,000.
14. The Trustees aver that as Mr. Tong had signed all the three loan applications confirming the truthfulness of the contents, which are in fact neither accurate nor complete, the misrepresentation is evidently manifest.

(2) Explanation

15. Mr. Tong contends that although the particulars in the loan applications are not complete, he has not caused the omissions. The omissions, contended by Mr. Tong, were in fact occasioned by the bank staffs who had selectively recorded the information in the forms.
16. In relation to the circumstances of how the JCG loan application form was completed, Mr. Tong said that the whole procedure was quick and simple, and it only took 30 minutes in total. After the JCG staff had filled out the form by asking him questions regarding his personal particulars and existing loans as well as inspecting his bank passbook showing the debits of the loan repayments, he was asked to sign on the form. He had not read the content in detail as he believed that JCG would have already got all the information required for the loan application by virtue of him being an existing customer.

17. Mr. Tong said that after he had signed the form, he only needed to wait for about 15 minutes before JCG gave him a cashier order for the loan amount. Mr. Tong said that the loan was approved so quickly that he had no reason to believe that he had not provided the information JCG needed.
18. As for the Pacific loan application, according to Mr. Tong, it was also completed and processed within a matter of 30 minutes. Mr. Tong explained that the blank section now appears in the form was not blank originally. He said that as the staff was writing out the form for him, he saw him initially fill out in the credit section as Mr. Tong was telling the latter about his loan information. Very soon, the staff interrupted him and said that it was running out of space. The staff then used some correction fluid to erase the words he had just written in that section and asked Mr. Tong to sign in the area that he had just erased. Mr. Tong asked him for the reason, and the staff told him that credit information was not necessary for the loan application. Mr. Tong said that he believed the staff and signed as instructed.
19. As for the HSBC loan application, Mr. Tong said that it was similar to the other two applications, and it only took a very short time to complete. Mr. Tong said that the staff had told him that as his salary was paid to the HSBC account, he needed not tell him about loans that were repaid through HSCB's auto-debit. He should only tell him those loans which instalments were auto-paid by other banks. Mr. Tong therefore told the bank staff that he needed to pay \$6,500 for his monthly mortgage and \$5,000 for loan-repayments. Discussion
20. To decide if Mr. Tong's conducts are unsatisfactory, I should consider, on the basis of the evidence, whether the hypothetical reasonable man would regard Mr. Tong's conducts unsatisfactory. This involves looking at the circumstances giving rise to the conducts complained of.
21. The evidence is by way of affirmations. Mr. Tong had filed two affirmations to oppose the application. As there is no evidence to contradict Mr. Tong's assertions in his affirmations, I can take Mr. Tong's evidence in the affirmations at its face value.
22. I will firstly deal with the unsatisfactory conduct regarding the UA loan. Around the time when Mr. Tong was offered the fresh loan by UA, Mr. Tong had a family and personal expenses in excess of his income. On top of that, he had about 20 credit cards and banking loans with monthly repayments of about \$22,000 for loan repayments and \$24,000 for credit card repayments. Mr. Tong has lived far beyond his means, and should have known that he could no longer maintain such a lifestyle anymore. The hypothetical reasonable man in normal circumstances would in my view likely disapprove such conduct.
23. Apart from his state of insolvency, Mr. Tong however also explained how UA had voluntarily offered him the loan as he was already an existing customer. Does it matter in this complaint? I think it does. It is well known in Hong Kong that most of the lending institutions adopt highly aggressive marketing strategies by promoting speed and ease in lending money to their customers. I believe that a lending institution such as UA will

undoubtedly more readily grant loans to an existing customer than a new one. Since Mr. Tong was UA s existing customer at the time when he obtained the loan in question, I believe that UA had likely approached and offered Mr. Tong the loan. Does UA s over- zealous lending make Mr. Tong s conduct less undesirable in this case?

24. The temptation of the loan offered by UA should be considered against the reason Mr. Tong gave for taking up the loan offer. According to Mr. Tong s evidence, he did not obtain the UA loan to sustain a lifestyle of excessive borrowing. He said it was required to forestall debt-collectors coming to his doorstep. At the time of the loan, Mr. Tong s income was clearly not able to service all of his loan repayments without resorting to fresh loans. According to his Statement of Affairs filed with his bankruptcy Petition, Mr. Tong s biggest creditor at that time was HSBC. I therefore do not find it surprising that HSBC needed to exert pressure on Mr. Tong for repayment. With such a huge debt, Mr. Tong s fear of the imminent threats by debt collectors, in my view, cannot be said to be illogical. He would have been desperate. Given his desperation, and coupled with the temptation of UA s easy loan, which undoubtedly would have provided him an immediate respite from the threats by HSBC, I cannot say that the hypothetical man would regard Mr. Tong s decision to accept the loan unreasonable. Hence, I do not regard Mr. Tong s conduct in obtaining the UA loan in these circumstances unsatisfactory.
25. I now deal with the unsatisfactory conduct of misrepresentation. In support of this allegation, the Trustees rely on the affidavit of Paul Constable of HSBC dated 1 September 2006 and a statutory declaration of Kam Kwong Cho of JCG dated 8 February 2007 exhibited to their supporting affirmation. The Trustees have in similar applications in the past also exhibited the same affidavit of Paul Constable, in which he deposed that, prior to 2005, credit providers in Hong Kong were restricted from accessing to credit information of borrowers or customers. Thus, the Trustees submit that the creditors in this case could only rely on Mr. Tong to provide credit information when processing his loan applications.
26. By the Statutory Declaration, the Trustees try to show that JCG has adopted a practice of requiring its staffs to follow a standard procedure when filling out loan application forms. The procedure requires the staffs to record a customer s credit information in the loan applications, and further explain to the customers both the content of the completed applications and the customer s declaration before the customer is asked to sign on the forms.
27. In my view case non-specific evidence such as a lender s standard practice is of little value when I in fact need to consider what had in fact happened in the three loan applications, rather than what the staff would have generally done. There is no evidence from any of the creditors that whether any standard procedure such as the one specified by JCG had been followed in the loan applications.

28. In respect of the JCG loan application, it is not disputed that Mr. Tong was its existing customer. Hence, JCG must already have Mr. Tong's credit information. Mr. Tong's explanation that he had relied on what the staff had told him and subsequently signed on the form with little checking, in the circumstances, is not implausible.
29. Regarding the blank section in the Pacific loan application, I have carefully looked at the blank section in the copy of the application form exhibited by the Trustees. I can see marks that may well be marks of correction fluid. As there is no challenge to Mr. Tong's account, I cannot find any reason to disbelieve his explanation. The complaint in respect of this loan application, in my opinion, is totally groundless. This is because even if Mr. Tong had indeed deliberately left the section regarding his credit information blank as alleged, it was however Pacific which had willingly undertaken any risks of non-disclosure and gone ahead to grant the loan to Mr. Tong. The Trustees however say that Mr. Tong should take the blame for Pacific's rash decision. Such accusation is not only unfair, but also plainly absurd.
30. Finally, as for the HSBC loan application, the evidence of misrepresentation is confusing. The first problem is the words appearing in the copy of the form the Trustees exhibited. They are very small and blurred. Further it is not clear whether the words in the original copy, which Mr. Tong has signed, were also of similarly poor quality. So far as the copy exhibit was concerned, both counsel and I have great trouble of making out the words. The words in the copy (as far as I can make out) appear to be asking Mr. Tong to state if he has borrowed from other banks or institutions to finance property purchase (N&G's explanation, his understanding of the question asked of him does not seem to be consistent with the words I have made out above, which seem to require him to provide information on property purchase financed by other banks. In view of the confusing state of evidence, I am unable to say if Mr. Tong had given inaccurate information to HSBC, or whether Mr. Tong had correctly understood what information he was required to give. Hence, the Trustees are not able to demonstrate Mr. Tong has misled HSBC.
31. From the above discussion, I find that these three loan applications have the following common features:
32. First, the credit providers, without much scrutiny, processed the loan applications extremely fast. Second, it was the staffs who decided what to include or what to be left out in the loan applications by selectively recording the credit information Mr. Tong gave. Finally and more importantly, Mr. Tong had relied on the staffs' representations on how much credit information he was required to give when applying for these loans.
33. In light of the matters aforesaid, I am not satisfied that Mr. Tong has brought about the inaccuracies or omissions in the application forms. Given the circumstances of how these forms were completed, the hypothetical reasonable would unlikely regard Mr. Tong's conduct as unsatisfactory.

34. In the circumstances, I conclude that the Trustees have failed to establish the statutory ground of objection.
35. In the event that I am found to be wrong to have come to this conclusion and that Mr. Tong's conduct were found to be unsatisfactory, I will consider whether the circumstances justify a suspension. Second-stage consideration
36. Were Mr. Tong's conducts found to be unsatisfactory, Mr. Dawes submitted that the circumstances in this case did not warrant any suspension. First and most importantly, Mr. Dawes submitted that the Trustees are guilty of dereliction of duty. Second, the alleged pre-bankruptcy misconduct is not serious. Finally, Mr. Tong's post-bankruptcy conduct has been satisfactory.
37. Mr. Dawes was most critical of the Trustees' failure to carry out investigation into the circumstances giving rise to the unsatisfactory conduct. Regarding the unsatisfactory pre-bankruptcy conduct, Mr. Dawes said that the amount of UA loan was insignificant particularly when compared to Mr. Tong's stable income with a monthly salary of about \$28,000 at the time. Further, the misrepresentation in the loan application is unintentional. Regarding the post-bankruptcy conduct, Mr. Dawes submitted that I should take into account of Mr. Tong's cooperation with the Trustees as well as the relatively large contributions of \$400,000 he had paid to the bankruptcy estate, which amount represents a large proportion of Mr. Tong's total earnings during the period of bankruptcy.
38. Mr. Dawes submits that the above circumstances show that Mr. Tong's conducts are excusable and not of exceptional gravity justifying suspension (see *Lam J in Fred Lee and Chow Wai Lan Christina v Liu Man Hoo*, HCB 11719/2002, unrep., 28 August 2007, para. 68).
39. It is not in dispute that Mr. Tong's misconduct is not very serious. However Mr. Gopaoco submitted that suspension did not have to be for very serious misconduct, citing the remark by *Barma J in Fred Lee and Chow Wai Lan Christina v Wong Hing Wah Michael* (HCB 26018/2002, unrep., 12 October 2007, para.19). Hence, Mr. Gopaoco contended that favourable factors relating to pre-bankruptcy and post-bankruptcy conducts could only be relevant considerations militating against a longer term of suspension.
40. Mr. Gopaoco however rejected Mr. Dawes's criticism of the Trustees. He said that although the Trustees have not made any investigation into the pre-bankruptcy conducts, it would not have made any difference as the Trustees might very well have come to the same view had an investigation been carried out before the application. He further submitted that by requiring the Trustees to conduct an investigation and form a provisional view of a bankrupt's conduct before deciding whether an objection application was to be issued would be placing too onerous a burden on them. It would be wrong, Mr. Gopaoco submitted, to penalize the Trustees for making a wrong judgment.

41. The quasi-judicial role of a trustee requires him (among other things) to investigate any abuse by or misconduct of a bankrupt so that the trustee can properly and competently administer the affairs of a bankruptcy estate. Therefore if a trustee forms a judgment after carrying out a diligent investigation of a bankrupt's conduct, and which is later found to be wrong, in which case, I will agree with Mr. Gopaoco that the trustee should not be punished.
42. An objection based on the statutory ground of pre-bankruptcy conduct should be different to an objection based on, for example, post-bankruptcy conduct. The reason is obvious. For any pre-bankruptcy misconduct, the trustee would have been able to discover the nature of misconduct in the early stage of the administration of the estate, and should have plenty of time to investigate into a bankrupt's misconduct. The Trustees in this case were appointed as trustees on 24 January 2003, and they must have known about the facts they now allege against Mr. Tong at the early stage of bankruptcy.
43. The Trustees, however, without any explanation, have done no inquiry or investigation into Mr. Tong's conduct, which they rely on to support their objection application. In this regard, I would respectfully echo with Lam J's sentiment in *Liu Man Hoo* that it would be devastating for a bankrupt (Mr. Tong in this case) to learn for the first time during the last few months of the 4 years period that the Trustees wanted to prevent him from discharge from bankruptcy (see Para.76 *Liu Man Hoo* (ibid).) on a ground that he had never been previously informed of.
44. The devastation, in this case, must be great. Without the application, Mr. Tong would have been automatically discharged from bankruptcy on 28 November 2006. The Trustees, before issuing the application to object, had not only failed to make any timely attempt to find out from Mr. Tong his reasons or explanation for the conducts they complained about, they also saw fit in not informing Mr. Tong of the ground that they were relying. The only notice they gave before the application was the notice (as required by the rules) to the creditors of their intention to object. When they issued the application on 31 October 2006, they had not interviewed Mr. Tong in order to find out from him what led to the conduct they complained of.
45. It was only after more than 3 months since the 1st hearing of the application on 27 November 2006 that the Trustees interviewed Mr. Tong in March 2007 for the purpose of commenting on Mr. Tong's affirmation of opposition filed on 20 November 2006.
46. In those circumstances, would the Trustees, as Mr. Gopaoco contended, have come to the same view had they done an investigation? I have no evidence from the Trustees as to whether any difference could have been made. Hence, what Mr. Gopaoco said is only a surmise. Had the Trustees investigated at the very early stage of the administration of the estate, the likely scenario would have been something like this:
47. First, as soon as they identified Mr. Tong's pre-bankruptcy conduct, they could have firstly approached Mr. Tong for an explanation in respect of any alleged improprieties shown on the documents. Next, they could have gone to the creditors to verify the accounts Mr. Tong

might have told them by, for example, interviewing the responsible bank staffs. After this exercise, the Trustees should have been able to tell Mr. Tong of their preliminary view and further inform him that his post-bankruptcy conduct could also be taken into account in deciding if the Trustees would subsequently object to his discharge. In this way, Mr. Tong could have time to mitigate any misconduct during the period of bankruptcy. At about one year or 6 months (at the latest) before the end of the 4 years period, the Trustees should have evaluated Mr. Tong's post-bankruptcy conduct and assessed the circumstances of the whole case before deciding if an objection application would be suitable.

48. Had the Trustees done an investigation such as the one I have set out above, and their judgment was later found to be wrong, I would agree with Mr. Gopaoco that the Trustees should not be blamed. The Trustees here however have done none of the above. Mr. Tong would naturally have felt a great sense of injustice. Luckily in this case, Mr. Tong's post-bankruptcy conduct was satisfactory; otherwise he might have been unfairly deprived of an opportunity to mitigate any unsatisfactory conduct during the period of bankruptcy. However, the Trustees' failure to carry out timely investigation is shown to have an undesirable consequence. Mr. Tong has not been able to find witnesses or locate documents to corroborate his evidence.
49. As a result of the Trustees' failure to investigate, and the injustice that has caused to Mr. Tong by virtue of the interim suspension, I would have been, after having balanced all the circumstances of the case and the statutory spirit of the scheme of automatic discharge, more inclined to refuse suspension were Mr. Tong's conduct found to be unsatisfactory.
- Costs
50. As Mr. Tong is the successful party, I grant a cost order nisi that the Trustees do personally pay Mr. Tong's costs of the application with certificate for counsel, to be gross-sum assessed (by me) if not agreed and that the Trustees shall not recoup their costs from the estate. As Mr. Tong is legally aided, I further direct that Mr. Tong's own costs be taxed in accordance with the Legal Aid Regulations. (K. Levy) Master Mr. E. Gopaoco of Messrs. Lee & Chow for the Trustees Mr. V. Dawes instructed by Messrs. Leung Tam & Wong for the Bankrupt - 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# (#p# uRjA & 6" Judgment Format(English).dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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