HONG KONG / JUDGMENT

FRED LEE v. LEE YUK MAN

COURT
Court of First Instance

DECIDED
9 January 2007

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bjbj HCB 8779/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 8779 OF 2002

BETWEEN FRED LEE, trustee of the property of LEUNG CHIN YEUNG, a bankrupt Applicant and LEUNG CHIN YEUNG Respondent

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HCB 8989/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 8989 OF 2002

BETWEEN FRED LEE, trustee of the property of LEUNG SUI SUM, a bankrupt Applicant and LEUNG SUI SUM Respondent

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HCB 9461/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 9461 OF 2002

BETWEEN FRED LEE, trustee of the property of LEE YUK MAN, a bankrupt Applicant and LEE YUK MAN Respondent

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Before: Hon Kwan J in Chambers Date of Hearing: 20 December 2006 Date of Handing Down of Judgment: 9 January 2007

J U D G M E N T

The applications I have before me three applications by consent in three bankruptcy proceedings. They were chosen as test cases and adjourned to me by Master Hui because an issue of jurisdiction is involved and how the issue is resolved may affect a number of similar cases which have been held in abeyance pending the outcome of this hearing. According to the statistics provided by the Official Receiver, 25,328 bankruptcy orders were made in 2002 and 24,922 orders were made in 2003. Thus, in 2006 and 2007, by virtue of sections 30A(1) and (2) of the Bankruptcy Ordinance, Cap. 6, many of these bankrupts would be discharged from bankruptcy by the expiration of four years (or five years where a person has been previously adjudged bankrupt) from the date of the bankruptcy order. I shall refer to this mode of discharge as automatic discharge . Where the trustee objects to automatic discharge on one or more of the grounds set out in section 30A(4), the court may make an order under section 30A(3) that the relevant period in section 30A(2) shall cease to run up to four years (or three years where a person has previously been adjudged bankrupt), thereby prolonging the overall duration of the bankruptcy to a maximum of eight years. The issue involved in these applications is whether the court has jurisdiction under section 30A(9) of Cap. 6 to order that a bankrupt be discharged from bankruptcy subject to condition, where the trustee in bankruptcy has objected to automatic discharge of the bankrupt and later sought to withdraw his objection by a consent application upon agreeing terms with the bankrupt to continue to make contributions to his estate and pay the trustee s costs in the application. The trustee in bankruptcy in each case is Mr. Fred Lee, a partner of a firm of solicitors, Messrs. Lee & Chow. It has come to the knowledge of the Official Receiver that Mr. Lee has filed a considerable number of similar consent applications. There were 35 such consent summonses issued by him between June and August 2006. In an affirmation of Mr. Lee, he disclosed that he has been appointed trustee in bankruptcy in 360 cases from June 2002 to January 2003 and has applied to object to discharge in about 150 of them. The Official Receiver is concerned if the court has power to make the orders sought on the consent applications and even if the court does have power, whether it would be an abuse of process to seek a conditional discharge of the bankrupt in such circumstances and by such mechanism. The trustee appeared by Mr. John Kerr of counsel in this hearing. Mr. Jeremy Bartlett appeared for the Official Receiver and Mr. Godfrey Lam appeared as the amicus curiae. I have been greatly assisted by the submissions of counsel. The background to the applications In each of the three cases, the trustee first issued a summons in July 2006 under section 30A(3) and rule 88 of the Bankruptcy Rules, seeking an order that the relevant period for the purposes of section 30A shall cease to run for such period as the court deems fit on one or some of the grounds as stated in section 30A(4). In each case, the trustee objected to automatic discharge on the ground set out in section 30A(4)(d), namely, that the conduct of the bankrupt in respect of the period before the commencement of bankruptcy had been unsatisfactory. In HCB No. 8779 of 2002, the trustee also relied on section 30A(4)(d) on the ground of unsatisfactory conduct after the commencement of bankruptcy. The creditors in each case were notified that the trustee intended to object to the automatic discharge of the bankrupt on the grounds specified. None of them had responded or expressed any intention to object to the discharge. At the same time when the summons to object

to automatic discharge was taken out, the trustee issued a summons for an interim order that time shall cease to run under section 30A pending the determination of the first mentioned summons. Prior to the determination of the summons to object to discharge, the trustee and the bankrupt in each case entered into a consent summons, purportedly under section 30A(9) and the inherent jurisdiction of the court. Each consent summons provided for the automatic discharge of the bankrupt on the relevant statutory date but subject to these conditions:

(1) the bankrupts are to continue to make contribution to their bankruptcy estates after their discharge of a certain sum for a specified period. In HCB No. 8779 of 2002, the amount of contribution is $4,500.00 per month for 20 months; in HCB No. 8989 of 2002, it is $24,500.00 per month for 15 months; in HCB No. 9461 of 2002, it is $5,000.00 per month for 24 months;

(2) the bankrupts are to pay the trustee $30,000.00 as contribution to the costs of the application to object to their discharge; in two of the cases payment is by 12 monthly instalments, in the third case it is by 24 monthly instalments;

(3) the trustee would have leave to withdraw the application to object to automatic discharge; and

(4) there would be no order as to costs of the consent application. On 18 August 2006, Master Hui made an interim order in each case as sought by the trustee and adjourned the application to object to discharge of the bankrupt and the consent application to a Judge for argument. Four issues were raised by the Master specifically:

(1) whether section 30A(9) is applicable in the light of the circumstances of these cases;

(2) whether the conduct of the bankrupt in each case in respect of the period before the commencement of the bankruptcy (obtaining credit when he should have known he would not be able to repay and misrepresentation of his financial position in the loan application) is unsatisfactory and warrants an order under section 30A(3);

(3) whether a single incident of non-compliance with the direction of the trustee in HCB No. 8779 of 2002 is unsatisfactory conduct after the commencement of the bankruptcy and warrants an order under section 30A(3); and

(4) whether it is appropriate for the trustee to instruct a firm of solicitors of which he is a partner to handle the applications to object to automatic discharge. I will consider these issues in the order set out above. Discharge from bankruptcy under the old regime Before the extensive amendment of the Bankruptcy Ordinance in 1996 (which came into effect on 1 April 1998), there was no provision for the automatic discharge of a bankrupt. Although a bankrupt could apply for discharge at any time, the criteria were such that it made it extremely difficult for him to comply. Under the old section 30(3) of the Ordinance, the court had various options on the hearing of a bankrupt s application for his discharge. It could grant or refuse an absolute discharge, suspend the operation of the order for a specified time, or grant a discharge but subject to any conditions with respect to any earnings or income which might afterwards become due to the bankrupt or with respect to his after-

acquired property. Where the bankrupt had committed any indictable offence under the Ordinance or any other indictable offence connected with his bankruptcy or where any of the twelve facts mentioned in the old section 30(4) was proved, there would be no absolute discharge. Instead, the bankrupt would be dealt with in one of the four ways set out in the proviso to section 30(3), one of them being a conditional discharge from bankruptcy, by which he would be required to consent to judgment being entered against him for any balance or part of any balance of the debts provable under the bankruptcy which was not satisfied at the date of the discharge, such balance to be paid out of future earnings or after-acquired property in such manner and subject to such conditions as the court might direct. The Official Receiver is not aware of any conditional discharge having been granted under the old regime. Discharge from bankruptcy under the present legislation The Law Reform Commission of Hong Kong published its report on bankruptcy in May 1995 (LRC Report) and made recommendations for substantial amendment to the law. The reforms introduced by the Bankruptcy (Amendment) Ordinance 1996 were largely based on these recommendations. Automatic discharge from bankruptcy after a period of time is now provided for in section 30A(1). This was designed to shift the emphasis from discharge being a privilege to its being a right (LRC Report, para. 17.24). At the same time, an objection system to automatic discharge was introduced, to provide the trustee and the court with the ability to prevent the discharge of a bankrupt if that is not deserved. In deciding on an appropriate objection system, the Law Reform Commission had considered various alternatives. It did not think it satisfactory to have a blanket inclusion of all the bankruptcy provisions as possible grounds for objection to discharge, as in sections 279(3) and (4) of the English Insolvency Act 1986, as bankrupts should not be left in any doubt of their obligations in the administration of their estates. It was also thought undesirable to have very specific grounds of objection, as in section 149D(1) of the Australian Bankruptcy Amendment Act 1991, as an exhaustive list would be more restrictive than necessary. In the end, section 30A(4), which contained the grounds of objection, was modelled on section 149(4) of the old Australian Bankruptcy Act 1966 as amended in 1980 (LRC Report, paras. 17.28 to 17.36). The old Australian provisions listed the criteria for objection to automatic discharge but were not too specific. To the Australian criteria, the Commission recommended adding four more grounds. They are sub-paragraphs (e) to (h) in section 30A(4). Where an objection to automatic discharge is made, the court may order that the relevant period shall cease to run for such period as provided in section 30A(3). Where the court has ordered a suspension, the bankrupt may apply at any time to lift it and the court may lift or shorten the suspension as provided in section 30A(7). The Commission recommended that if a bankrupt is making a contribution to his estate from income at the time he is automatically discharged, the court should have the power to order the bankrupt to continue making contributions but the contributions should not continue for longer than eight years from the date of the bankruptcy order (LRC report, para. 17.46 and page 177). Based on this recommendation, section 30A(9) was enacted in these terms: Where the court grants a discharge under this section, it may, as a condition of granting the discharge, order the bankrupt to continue to make contributions to his estate in such amount and for such period as it considers

appropriate but not exceeding a period of 8 years from the date the bankruptcy order was made. Apart from automatic discharge, a bankrupt may apply for early discharge notwithstanding that the relevant period for automatic discharge has not expired, provided he is not disqualified due to one of the reasons set out in the statute. The provisions for early discharge are in section 30B. The trustee or creditor may object to early discharge on one or more of the grounds in section 30A(4). The power of the court to impose a condition on granting discharge in section 30A(9) applies to early discharge, by virtue of section 30B(5). Section 32(2)(b) provides that subject to the subsections in section 32, where a bankrupt is discharged, the discharge releases him from all the bankruptcy debts, but has no effect on his liability to make continuing contributions to his estate pursuant to an order made under section 30A(9). According to my research, there were two reported instances where the Official Receiver as trustee in bankruptcy had objected to automatic discharge and the bankrupt sought to persuade the court to give him conditional discharge under section 30A(9). In both cases, the court refused to make an order under that section on the merits (Re Wong Siu Ki Oswald, HCB No 1017 of 1998, Master Ho, 16 April 2003, paras. 1, 2 and 24; and Re Ng Kwok Cheung Paul, HCB No. 104 of 2000, Master Ho, 2 November 2004, paras. 1, 3 and 60). Two rival interpretations of section 30A(9) Mr. Bartlett and Mr. Lam have advocated different interpretations for section 30A(9). Mr. Bartlett s construction is the strict or literal approach. Mr. Lam asked the court to adopt a broader interpretation. Mr. Kerr adopted Mr. s position. The case for the strict interpretation may be stated as follows:

(1) The opening words of section 30A(9) specify the circumstances in which it comes into play, namely, where the court grants a discharge under this section . The words, this section , clearly refer to section 30A as a whole. However, section 30A is not concerned with and does not involve a discharge granted by the court. Discharge under this section occurs automatically by statute pursuant to section 30A(1), upon expiry of the relevant period in section 30A(2), and not by a court order.

(2) Where an objection to automatic discharge is made, and if the objection is well founded, the resultant order under section 30A(3) is not a court order for discharge, but an order suspending the operation of the automatic discharge. The resulting ultimate discharge is still by operation of the automatic provision.

(3) The same thing happens where the court grants an application of the bankrupt to lift the suspension under section 30A(7). The court does not grant an order of discharge, but lifts or shortens the running of the suspension, with discharge at all times being automatic. See also rule 89(6) of the Bankruptcy Rules, which provides that if on the bankrupt s application the court discharges the order under section 30A(3), the relevant period should begin to run again.

(4) The only time that the court grants a discharge, rather than this happening automatically, is when an application is made by a bankrupt for early discharge under section 30B(1). The application of section 30A(9) to this situation is expressly provided for in section 30B(5). This was in fact the scenario mirrored in the old section 30(3).

(5) The clear language of the provision is too strong to be contradicted. The effective operation of section 30A(9) is limited to the early discharge scenario in section 30B, and has no application to any of the present applications. The power to make an order under section 30A(9) will not arise in any other scenario because the court will not be called upon to grant a discharge .

(6) The old Australian Bankruptcy Act 1966 as amended in 1980, on which section 30A was modelled, did not have a provision for conditional discharge where an objection was made to the discharge of the bankrupt by operation of law under section 149. The power to make an order of discharge and suspend its operation subject to conditions was only in respect of a discharge by the court on the bankrupt s application for early discharge, pursuant to section 150(5).

(7) The LRC Report, to the extent this can legitimately be used as an aid to construction, embodies views and recommendations at an early stage. Some of the recommendations were altered or dropped in the legislative process. Further, although the Report recommended giving a power to order the bankrupt to continue making contributions despite his automatic discharge, there was little indication as to how this power was intended to operate.

(8) Last but not least, the principle against doubtful penalisation requires a strict construction of penal enactments. This principle of construction is not confined to criminal statutes but extends to enactments requiring the infliction of any form of detriment. The detriment in this context is the continuing obligation of the bankrupt to contribute to his estate under the penalty of contempt of court. When considering which of the opposing constructions of the enactment would give effect to the legislative intention, the court should presume that the legislator intended to observe the principle against penalisation under a doubtful law, and should strive to avoid adopting a construction which penalises a person where the legislator s intention to do so is doubtful, or penalises him in a way which was not made clear (Bennion on Statutory Interpretation, 4th ed., pages 705 to 709, 723 to 724). The case for a broader interpretation may be put in this way:

(1) The opening words of section 30A(9) are where the court grants a discharge under this section This section refers to section 30A. There are only two provisions in section 30A in which the court may act subsections (3) and (7). The opening words are wide enough to encompass the situation where the court declines to order the cessation of the running of the relevant period under section 30A(3) notwithstanding a valid objection on one or more of the grounds in section 30A(4), or where the court lifts the period of suspension or shortens the period during which the suspension will operate under section 30A(7). In any

of these situations, the court order allows a discharge to take place, albeit by the expiration of the relevant period.

(2) If the narrow construction were adopted, section 30A(9) would have no application to section 30A at all. That would be contrary to the opening words which expressly provide for the situation where the court grants a discharge under this section .

(3) The power under section 30A(9) is a wholesome power, and may be used in a variety of circumstances. The condition for its exercise ought to be broadly construed. Not all of the grounds for objection to automatic discharge in section 30A(4) would involve misconduct or failings of the bankrupt. Under section 30A(4)(a), an objection may be made where the bankrupt is likely to be able to make a significant contribution to his estate within five years of the commencement of his bankruptcy. The power provided for in section 30A(9) may be apt in this situation, it would allow the discharge to take place subject to the condition that the bankrupt is to bring in additional contribution.

(4) There is nothing in the LRC Report to suggest that the power under section 30A(9) should be confined to cases of early discharge under section 30B. In para. 17.46 of the Report, which has been cited earlier, it was envisaged that the power to order the bankrupt to continue making contributions was to be exercised in an automatic discharge.

(5) The Official Receiver played a major role in promoting the amendments to the Bankruptcy Ordinance in 1996. As Ribeiro PJ has remarked in Official Receiver & Trustee in Bankruptcy of Chan Wing Hing & Anr v. Chan Wing Hing & Anr. [2006] 3 HKLRD 687 at 705D to E, it was highly unusual for the Official Receiver to assert that a provision of the resultant Ordinance was unconstitutional. The provision in issue there was section 30A(10)(b)(i). Here, the Official Receiver has contended that section 30A(9) is redundant as far as section 30A is concerned. It is just as unusual for the Official Receiver to take such a position.

(6) It is a rule of statutory construction that the legislator intended the interpreter of an enactment to observe the maxim ut res magis valeat quam pereat (it is better for a thing to have effect than to be made void). The court should strive to give meaning to all the parts of a provision and avoid a result that some part is rendered otiose or nugatory (Bennion, op. cit., pages 477 to 478). It is worth noting that all the provisions in section 30A were enacted at the same time.

(7) Other provisions in the Ordinance would appear to suggest that the wording for granting or refusing a discharge from bankruptcy is used in a broad sense in the legislation, and is not limited to the situation where an order is made on early discharge with no application to the situation of automatic discharge. In section 43A, which deals with after-acquired property, it is provided in subsection (8) that the court may refuse to discharge a bankrupt who has not complied with an obligation to submit to the trustee an annual report of his earnings and acquisitions. In section 99(3)(d), it is provided that the Registrar sitting in open court shall have power to hear and determine applications for orders of discharge . Pursuant to this provision, Masters of the High Court have been hearing applications under section 30A.

(8) The provisions in the old Australian Bankruptcy Act are of little assistance as the wording is quite different from sections 30A and 30B.

(9) Section 30A(9) is not a penal provision. It does not lay down any offence. There is no deprivation of a person s right to property. It merely empowers the court to grant a discharge subject to condition. It gives the court an alternative where there is valid objection to automatic discharge, and an additional power where suspension of the relevant period is lifted or shortened. Resolving the issue of construction Faced with opposing constructions where some interpretative factors tend one way and some another way, a basic rule of statutory interpretation is to take a pluralistic approach, instead of just selecting one particular rule and applying it to reach a result. What the court should do is to take an overall view, weigh all the relevant interpretative factors, and arrive at a balanced conclusion (Bennion, op. cit., pages 468 to 469). As Lord Reid has said in Maunsell v. Olins [1974] 3 WLR 835 at 837: When doubt arises, rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction, presumptions or pointers. Not infrequently one rule points in one direction, another in a different direction. In each case we must look at all relevant circumstances, and decide as a matter of judgment what weight to attach to any particular rule Thus, a penal enactment will not be given a strict construction if other interpretative factors weigh more heavily in the scales. An example of this was given in Bennion, op. cit., pages 706 to 707 concerning the construction of the word director for the purposes of the disqualification provisions in the Companies Act 1985. In Re Lo-Line Electric Motors Ltd. [1988] Ch 477 at 489, Browne-Wilkinson V-C rejected the submission that the word director should be strictly construed, and approached the question of construction on a normal basis, as the paramount purpose of disqualification is the protection of the public, not punishment. Morritt LJ in Secretary of State for Trade and Industry v. Deverell & Anr. [2000] 2 BCLC 133 at 144i to 145a, para. 35 approached the construction of section 22(5) of the Company Directors Disqualification Act 1986 in the same way. Taking an overall view, I am inclined to think that the broader interpretation is the construction that would give effect to the legislative intent. These are the matters that weigh more heavily in the scales and tip the balance in favour of the broader interpretation:

(1) The broader interpretation is not a strained construction. The wording is capable of bearing the meaning ascribed to it by this interpretation and is consistent with other provisions in the Ordinance.

(2) The literal interpretation, although viable, would lead to a result that appears contradictory to the express wording in section 30A(9). It is clearly envisaged in this provision that the court may [grant] a discharge under this section , contrary to the literal interpretation that the court grants a discharge only in an application under section 30B. It would also bring about the unsatisfactory outcome in that the statutory provision is rendered otiose or nugatory in part, if the power to grant a discharge subject to condition should only apply to section 30B. The broader construction would not have these unsatisfactory results.

(3) Section 30A(9) is not a substantially penal provision. It is true that there may be an element of infliction of detriment, in that a condition may be imposed on the granting of discharge from bankruptcy. This provision should be looked at more in the context of an enabling or empowering provision. It gives the court the power to grant a discharge, even though a valid objection may be made out, and is a salutary alternative for the bankrupt, otherwise his period of bankruptcy may have to be prolonged. It would be appropriate to give less weight to the principle against doubtful penalisation in the circumstances. For the above reasons, I hold that it is within the jurisdiction of the court to make an order under section 30A(9) on an application to object to automatic discharge under section 30A(3) or on an application to lift or shorten the period of suspension under section 30A(7). The alternative argument an issue of discretion The Official Receiver has advanced an alternative argument in the event that it should be held it is within the jurisdiction of the court to make an order under section 30A(9) in these consent applications. Mr. Bartlett submitted that the use of this provision should be reserved for exceptional cases where there is debt on a significant scale and there is prospect of significant contribution under the condition attached to discharge. Although Mr. Lam has reservations if the power under section 30A(9) should be exercised only in exceptional cases , he agreed with the Official Receiver to the extent that the discretion to impose a condition under section 30A(9) should be sparingly exercised , for good cause, and in a judicial manner. The argument of Mr. Bartlett was on these lines:

(1) Even under the old English regime, the discretion to impose conditions on a discharge from bankruptcy was sparingly exercised. Cave J had this to say in In Re Shackleton, Ex p. Shackleton (1889) 6 Morr. 304 at 307 to 308: In deciding that question [of imposing a condition on a bankrupt before granting discharge] the Court ought to have regard to public morality and to the interests of the public generally, and unless the Court finds a man in receipt of income derived from his earnings or otherwise which is more than sufficient to keep his family in the enjoyment of the ordinary necessities of life according to their station, or unless it is satisfied that he is likely to succeed to property, it is not a wise thing to grant an order subject to a condition affecting after-acquired property. The Court ought to be careful to see it does not by a condition of that sort do away with the motive which a man has for exertion to work in his calling which is a good thing for the public interest generally. If such a burden is put on a man that he can have no hope of bettering his position he will not make the effort, and few men are more easily discouraged than that class of men who become bankrupt. Thus, whilst the bankruptcy legislation is not to be considered as a clearing-house solely for the liquidation of debts , and each case must be dealt with on its own merits, where the court does see fit to impose a condition on discharge, the condition must be such as not to discourage [the bankrupt] from carrying out the condition and from performing useful labour and looking after the duties of citizenship, including the proper provision for his wife and family. (Re Palach & Palach [1955] 4 DLR 204). It should be recalled that the overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood, and having the ordinary inducement to industry (In re Gaskell [1904] 2 KB 478 at

482; see also Butterworths Hong Kong Bankruptcy Law Handbook, 2nd ed., para. [30A.18]).

(2) Under the current regime in Hong Kong, the above observations apply with even greater force. Rehabilitation in the sense of enabling the bankrupt to resume a normal life in society is a key consideration of our legislation (Re Hui Hing Kwok [1999] 3 HKC 683 at 687). If the bankrupt has co-operated with the trustee in bankruptcy and there is no misconduct, automatic and unconditional discharge should occur in the normal way.

(3) Section 30A(9) contemplates a court order after a fully informed exercise of discretion. The level of court scrutiny inherent in this trustee s chosen method of filing a consent summons does not accord with that process. It would not be appropriate to impose a condition of continued contribution after discharge if the court has not been apprised of full financial information of the bankrupt, considered and exercised its discretion based on details similar to the type of factors involved in making an income payments order under section 43E. It was provided in section 43E(2) that the court shall not make an income payments order the effect of which would be to reduce the income of the bankrupt below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family. See Re Lau Nga Yee Christine, HCB No. 3482 of 2002, Reyes J, 30 September 2004 for an example in which the court made a determination of the reasonable domestic needs of a bankrupt for the purpose of an income payments order.

(4) Although the bankrupt in each of the three cases has consented to the application, this is not a substitute for an informed exercise of discretion by the court. Besides, the reliability of the consent may be dubious, given that it appears to be extracted in consideration for withdrawal of the trustee s objection to automatic discharge.

(5) The structure of the trustee s applications, linking the objection to discharge with the consent application for withdrawal of the objection subject to conditions, is open to criticism as an abuse of process. Once the trustee has formed the view that objection to automatic discharge is warranted and an interim order suspending the running of the relevant period is also warranted pending the determination of the objection application, it is for the court to determine the merits of the objection application. The court has a discretion not to order the relevant period to cease to run, even if it is satisfied of a valid ground of objection (Re Hui Hing Kwok, supra.). If, upon reconsideration, the trustee has come to the view that suspension is not warranted on the conduct identified, he should withdraw his application to object unconditionally. It would be wrong for the trustee to use his objection application as leverage to obtain a discharge on conditions, still less so when one of conditions of consent the payment of the trustee s costs in the objection application is outside the scope of section 30A(9).

(6) In all these cases, the trustee has not based his objection on the ground in section 30A(4)(a). Although that provision links suspension with further contribution to the estate, it is not in the context of discharge on conditions and continued contribution is for a more limited period of five years from the commencement of the bankruptcy. Further, the contribution

the bankrupt is likely to make must be significant . In another case involving this trustee that has come to the knowledge of the Official Receiver, an order was made on a consent summons providing for automatic discharge on condition that the bankrupt was to make a contribution as low as $400.00 for 24 months with costs in the same amount also by 24 monthly instalments. In yet another case disclosed in the trustee s recent affirmation, a bankrupt was granted a discharge subject to a condition that he was to contribute $800.00 for a further 12 months, and costs were waived on that occasion.

(7) The appearance given is that bankrupts are denied a clean break and a fresh start simply because they are in a position to continue contributing. This would defeat the intention behind the legislation. The trustee has made an affirmation to explain his approach and the steps taken in making an application to object to automatic discharge from bankruptcy. It is relevant to note these matters:

(1) After the summons to object to discharge was issued, the bankrupt would be interviewed by the staff in Messrs. Lee & Chow. The staff would advise the bankrupt he could pursue one of these alternatives: to oppose the application; not to oppose the application; to apply to lift his suspension under section 30A(7) if the court should order the relevant period to cease to run; or to seek a discharge subject to such condition for contribution as may be imposed by the court under section 30A(9).

(2) Where the bankrupt indicated he wished to avail himself of section 30A(9), he would be asked to make a proposal to the trustee. If the trustee found the proposal reasonable, a consent summons embodying the terms of the proposal would be prepared and signed by both. The consent summons would be filed before the first hearing of the objection summons and the Master would be invited to make an order in terms of the consent application at the hearing.

(3) The trustee said he would take into account all relevant factors including the following in considering the bankrupt s proposal for conditional discharge:

(a) the amount and length of the continued contribution to the estate and the contribution to costs of the objection summons;

(b) whether the practical aspects of the administration of the property of the bankrupt have been completed;

(c) the factual basis supporting the grounds to object to automatic discharge;

(d) the conduct of the bankrupt during his bankruptcy, including contributions made to the estate;

(e) whether the amount of the continued contribution is reasonable and sustainable judging from his personal circumstances including his likely future financial circumstances .

(4) In considering whether a bankrupt is suitable for discharge subject to conditions from the perspective of the estate, the trustee has taken the general view that:

(a) if the practical aspects of the administration have been completed, there is no practical need for the bankrupt to remain in bankruptcy;

(b) continued contribution to the estate would most likely increase the recovery of creditors and it would be of benefit to them;

(c) continued contribution on an agreed basis of a fixed amount and period would avoid the necessity of applying for an income payments order in section 43E if the bankruptcy period were to be extended, and administration work would be reduced;

(d) it is more likely that a bankrupt would fulfil his obligations if continued contribution is based on terms he finds acceptable;

(e) if the ground of objection is based on matters such as the failure to make the agreed contribution or to file an annual statement and such default is not flagrant, it would be reasonable to allow the bankrupt to be discharged subject to a degree of accountability on his part for his default ;

(f) if the ground of objection is based on pre-bankruptcy misconduct such as giving false or misleading information in credit applications or incurring debts recklessly and the bankrupt has co-operated during his bankruptcy, it would also be reasonable to allow the bankrupt to be discharged subject to a degree of accountability on his part for his former misconduct ;

(g) it would save the resources of the court if it is not required to deal with contentious applications under sections 30A(3), 30A(7) or 30A(9) and the assets of the estate would not be wasted in such contentious applications. It is important to bear in mind that bankruptcy proceedings are not private litigation between individual parties. There is a wider public interest involved in the proper administration of the bankrupt s estate in accordance with bankruptcy law (Official Receiver & Trustee in Bankruptcy of Chan Wing Hing & Anr v. Chan Wing Hing & Anr., supra. at 700J to 701B). In deciding whether to exercise his statutory power to object to automatic discharge, the trustee has a quasi-judicial obligation to discharge and this is performance of a public duty for the public welfare. Hence, if his application to object should turn out to be unsuccessful, unless his decision in making the application is unreasonable in some respect, he should not be responsible to pay the bankrupt s costs like an ordinary unsuccessful litigant (Re Campbell, ex parte Official Trustee (1987) 72 ALR 251). In considering the objection to automatic discharge, the public interest and the demands of commercial morality underpinning the bankruptcy laws must be weighed together with the interests of the bankrupt and his creditors (Totterdell v. Nelson (1990) 97 ALR 341 at 343 to 344; Re Maher & Anr. (1985) 61 ALR 592 at 598; Fletcher s Law of Insolvency, 3rd ed., para. 11-012). An application to object to discharge is never treated lightly by the court, it involves looking beyond the interests of the bankrupt and his creditors. The exercise of the discretion was described in this manner by Smithers J of the

Federal Court of Australia, General Division Bankruptcy District of the State of Victoria in Re Zion; Ex parte: The bankrupt, unreported, 26 September 1986, at para. In my view it is the policy of the law that bankruptcy should in most cases come to an end at three years and when there is an objection at the end of five years from the decree for sequestration of the estate, but that in a case where public interest so requires the discharge may be delayed or made conditional according to the requirements of the public interest in the circumstances of the case. Public interest will require that a discharge be delayed or made conditional if the conduct revealed or the character of the bankrupt indicates that the return of the bankrupt to the commercial world in full freedom might involve unacceptable risk to persons likely to be engaged in commercial relations with him in the future. In other words, it is for the applicant to show that balancing the policy of the law in favour of the return to commercial life of a bankrupt against the dangers that might accrue to the public from full commercial capacity of the applicant, it is appropriate that the discharge be granted. In my view, the approach and mechanism adopted by the trustee are flawed for a number of reasons:

(1) The trustee should not act too readily in deciding to object to automatic discharge. In order not to be unduly restrictive, the grounds of objection in section 30A(4) have been broadly framed and cover a wide variety of situations. It is not appropriate to object merely because there is a ground which comes within one of the provisions in section 30A(4). The discretion to object should be exercised with caution. Where the misconduct is minor or the default is not flagrant or is just an isolated instance, the trustee should consider not objecting to automatic discharge in the first place. The present approach would appear to suggest that a summons of objection would be issued when a ground could be framed under section 30A(4). Hence, the substantial number of applications to object to discharge filed by the trustee 150 out of 360 cases in which he was appointed during June 2002 to January 2003. It is only when the bankrupt s proposal of continued contribution is acceptable that the trustee would consider whether the default is not so flagrant as to justify a discharge on conditions.

(2) An order of continued contribution to the estate as a condition to discharge should be made with restraint and circumspection. As mentioned earlier, rehabilitation in the sense of enabling the bankrupt to resume a normal life in society is a key consideration of the bankruptcy legislation. Where continued contribution is likely to bring about anticipated dividends that would be negligible, the trustee should not use contribution to the estate as leverage to a discharge. For those cases where the bankrupts were required to make continued contribution for as little as $9,600.00 over two years or $800.00 a month for a year, I am very skeptical if this would be conducive to rehabilitation. Further, contribution to the costs of the trustee in the objection summons as a condition to discharge is outside the scope of section 30A(9).

(3) The joint application for discharge subject to condition is as much the trustee s application as it is the bankrupt

s. The consent of the bankrupt alone is not sufficient. Sufficient material should be placed before the court if it is asked to make an order of continued contribution. This should be similar to that required in an application for an income payments order in section 43E. There is no reason why there should be a different test for an order of continued contribution. The court would need to be satisfied that the effect of its order under section 30A(9) would not reduce the income necessary for meeting reasonable domestic needs . If the bankrupt is subsequently unable to comply with the order for continued contribution and is committed for contempt, the problem would only escalate.

(4) If there were indeed good grounds to object to automatic discharge, the court would need to be cautious in allowing the objection to be withdrawn. In each of these cases in which a consent summons was filed, the court was not apprised of the circumstances in which the trustee consented to withdraw his objection and why he was of the view it would be appropriate to do so notwithstanding his initial objection to discharge. Public interest is involved in considering an objection to automatic discharge. An undertaking by the petitioning creditor s solicitors not to attend at a debtor s public examination or to oppose his discharge in consideration of payment of their costs was held to be illegal in Kearley v. Thomson & Anr. (1890) 24 QBD 742. In In re Shaw [1917] 2 KB 734, the trustee in bankruptcy entered into an agreement with the bankrupt to bind himself beforehand to use his best endeavours to prevent the creditors from opposing the annulment or discharge of the bankruptcy and this was held to be highly improper. For some grounds of objection, it may be quite inappropriate for the trustee to withdraw his objection even if the bankrupt is prepared to make continued contributions to the satisfaction of the trustee.

(5) Whilst in these cases the creditors were notified of the trustee s intended objection to discharge pursuant to section 30A(5), they do not appear to have been informed of the trustee s proposed withdrawal of his objection and the consent applications. Mr. Lam submitted that notice of this should also be given to all proving creditors. I agree. A creditor may have refrained from filing an objection himself because he assumes that the trustee will make the objection. Similarly, a creditor, who probably has locus to appear on the trustee s objection (Re Li Tat Kong [2000] 3 HKC 360 at 369I to 370G), may have chosen not to appear for the same reason. He should have notice of the trustee s proposed withdrawal so that he may appear and object to this if he sees fit. For the above reasons, I do not think it appropriate to grant the consent applications at this stage. Mr. Kerr agreed in that situation, I should adjourn the objection summons and the joint application for discharge on conditions back to the Master, for him to consider the merits of both applications in each case with the guidance in this judgment. This is the course I will adopt. It may be necessary for the Master to give directions on the filing of further evidence. Unsatisfactory conduct before the commencement of bankruptcy I turn to the second issue raised by the Master whether the conduct of the bankrupt in each case in respect of the period before the commencement of the bankruptcy is unsatisfactory and warrants an order under section 30A(3). Mr. Kerr has confirmed that the trustee in each case is not relying on over-borrowing as a separate ground of unsatisfactory conduct. All three bankrupts had applied for a loan

from JCG Finance Company Limited. In the application form, they were required to state if they had ever applied for any credit facility or loan from any bank or finance company and if so to specify the loans. The form contained a standard declaration of the borrower that for the purpose of inducing the lender to make the loan, the borrower acknowledged that the lender would rely on the information given which the borrower declared to be true and such information would be the basis on which the loan was made. In HCB No. 8779 of 2002, the bankrupt failed to mention an outstanding loan with a finance company. In HCB No. 8989 of 2002, the bankrupt failed to mention two outstanding loans. In HCB No. 9461 of 2002, the bankrupt did not mention he had applied for loans from any bank or finance company notwithstanding he had obtained loans and overdrafts in 14 instances. In all these instances, the trustee relied on the further misconduct that the bankrupts had obtained loans when they should have known they would not be able to repay. Further, in one instance, the trustee regarded the bankrupt s conduct as unsatisfactory in that he had lost $800,000.00 in gambling in the two years prior to his petition for bankruptcy. Under section 30A(4)(g), the commission of an offence under section 129 or any of sections 131 to 136 is a distinct ground for objection to discharge, and under section 133 a prosecution may be brought with leave of the court against a bankrupt who has within two years prior to the presentation of the petition materially contributed to or increased the extent of his insolvency by gambling. It is the common submission of all three counsel that unsatisfactory conduct of the bankrupt in section 30A(4)(d) connotes a broad and low jurisdictional threshold. Although it is recognised in the LRC Report (at para. 17.42) that the pre-bankruptcy behaviour of some bankrupts will effectively disqualify them from any chance of automatic discharge, Mr. Bartlett submitted that pre-bankruptcy conduct should be of a significant magnitude or quality to justify suspension of the running of the relevant period. As mentioned earlier, a balanced view should be taken by the trustee in objecting to automatic discharge. In a case involving excessive credit in which loans were obtained when the debtor should have known he would not be able to repay, where the bankrupt has been co-operative with the trustee and made voluntary contributions to the estate, and provided there is no other misconduct, I am inclined to think that the pre-bankruptcy conduct is not such as to warrant suspension of the running of the relevant period. Misrepresentation in an application for credit could be a serious matter. If there is intention to defraud, this would constitute a criminal offence under the Theft Ordinance, Cap.

210. In Re Palenkas; Ex parte Raymor (Brisbane) Pty. Ltd. (1982) 66 FLR 115, the Federal Court of Australia held that fraudulent misrepresentations as to the debtor s assets for the purpose of obtaining a loan could be unsatisfactory conduct so that leave should be given to the creditor to enter an objection to automatic discharge. The circumstances in which the alleged misrepresentations were made in the loan application forms in the three cases are not known or not fully known. In HCB No. 9461 of 2002, in which the bankrupt did not mention 14 instances of previous borrowing, the bankrupt wrote to the court on 8 August 2006 stating that he had been borrowing from JCG Finance Company Limited for close to ten years and the staff had known him as an old customer. On the occasion when he last borrowed from

them in 2002, he had told the staff that his previous loans were more or less the same. He claimed that the staff had allowed him to sign on the application form and offered to complete the information for him. These are matters that would require investigation. The trustee has not given a proper explanation why he is of the view that it is appropriate to withdraw his objection to discharge in each case, notwithstanding there was misrepresentation in obtaining credit, which may pose an unacceptable risk to persons likely to be engaged in commercial relations with the bankrupts in future. In the absence of information on the circumstances in which the misrepresentation was allegedly made in each case, I am unable to say whether this would amount to unsatisfactory conduct to warrant an order under section 30A(3). I reiterate even if an objection under one of the grounds is made out, the discretion whether to suspend the running of the relevant period must be exercised judicially, and may include the kind of factors considered by Master Levy in Re Ying Kam Hung Peter, HCB No. 2774 of 1999, 9 September 2004, paras. 26 to 41. Single incident of non-compliance with the trustee s direction This is the third issue referred by the Master. In HCB No. 8779 of 2002, the bankrupt entered into an agreement with the trustee to make contribution to the estate. It was provided in the agreement that the bankrupt should inform the trustee immediately of any circumstances that may affect the amount of his contribution and/or his ability to make such contribution as soon as the same became known to the bankrupt. The bankrupt submitted his third annual statement to the trustee on 20 September 2005, in which he stated that his salary was increased by $1,000.00 four months earlier. The bankrupt did not inform the trustee of his pay rise as soon as he received it. The trustee made inquiry of him on 15 May 2006. Since June 2006, the bankrupt has increased his contribution by $1,000.00. I agree with the submissions of Mr. Lam and Mr. Bartlett that this single incident of non-compliance is not sufficiently serious on its own to warrant an order under section 30A(3). Whether it is appropriate for the trustee to engage his own firm The last issue referred by the Master is whether it is appropriate for the trustee to engage Messrs. Lee & Chow to handle the applications to object to discharge. The allowance of remuneration to a trustee in bankruptcy is an exception to the general rule that a trustee must not profit from his trust. Trustees in bankruptcy are fiduciaries. The rules of equity prohibit a trustee or fiduciary from making a profit through self-dealing (In re Gates, Arnold v. Gates [1933] Ch 913; In re Hill, Claremont v. Hill [1934] 1 Ch 623). The trustee has filed evidence to explain how his firm was engaged in the bankruptcy cases in which he acted as trustee. There was a standardised procedure. At the general meeting of creditors in which the creditors resolved to appoint him as trustee, they also resolved to appoint a creditors committee (usually made up of the financial creditors) and that the trustee s remuneration was to be fixed by the creditors committee. The creditors committee then passed various resolutions to provide for the trustee s remuneration, including the following:

(1) the remuneration of the trustee for services rendered to the estate is to be paid out of the estate;

(2) a number of expenses as specified, including professional fees such as the cost of the professional legal services of the trustee as solicitor, are to be paid out of the estate and shall not be covered by the trustee s remuneration;

(3) the retaining of professional legal services and the charges arising therefrom shall be subject to the determination and sanction of the creditors committee;

(4) subject to the availability of funds in the estate, the total remuneration of the trustee shall not be less than $30,000.00. These resolutions of the creditors committee fixing the trustee s remuneration were passed pursuant to sections 85(1) and (4) of Cap. 6. Under section 61(c), a trustee in bankruptcy may, with the permission of the creditors committee, employ a solicitor to take any proceedings or do any business which may be sanctioned by the creditors committee. The trustee explained that the engagement of his firm to act as his solicitors in the objection applications was for practical reasons as there might be insufficient funds in the estate to pay the professional fees and disbursements and this could be dealt with in a flexible way when his own firm was engaged. The decision to object to discharge was made without regard to the funds available in the bankruptcy account or the probable recovery. The appointment of his firm was approved by the creditors committee with the knowledge that he is a partner. In appointing Messrs. Lee & Chow to act in each case, the creditors committee passed a number of resolutions including the following:

(1) Messrs. Lee & Chow shall be entitled to charge for their work done in relation to the objection application and all proceedings arising therefrom on a solicitor and own client basis, being the number of hours spent multiplied by the hourly rate of the solicitors doing the work, provided that it is taxed and allowed by the court pursuant to section 86(3);

(2) Messrs. Lee & Chow shall be entitled to recover reasonable disbursements provided it is taxed and allowed pursuant to section 86(3);

(3) costs and disbursements shall be paid from the funds in the account of the bankruptcy estate provided that such payment shall be limited to the amount in the said account;

(4) in the event an adverse costs order is made against the trustee or the bankruptcy estate as a result of the proceedings, payment of the costs to satisfy such order shall be made from funds in the account of the bankruptcy estate. For the remuneration, costs and expenses of a trustee in bankruptcy, these are the relevant provisions in Cap. 6 and the Bankruptcy Rules: A trustee shall not under any circumstances whatever make any arrangement for or accept from the bankrupt, or any solicitor, auctioneer or any other person who may be employed about a bankruptcy, any gift, remuneration or pecuniary or other consideration or benefit whatever beyond his said remuneration payable out of the estate, nor shall he make any arrangement for giving up, or give up, any part of his remuneration, whether as receiver, manager or trustee, to the bankrupt or any solicitor or other person who may be employed about a bankruptcy. (section 85(6))

(1) Where a trustee or manager receives remuneration for his services as such, no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by Ordinance or rules to be performed by himself.

(2) Where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services.

(3) All bills and charges of solicitors, managers, accountants, auctioneers, brokers and other persons, not being trustees, shall be taxed by the Registrar and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The Registrar shall satisfy himself before passing such bills and charges that the employment of such solicitors and other persons, in respect of the particular matters out of which such charges arise, has been duly sanctioned. The sanction must be obtained before the employment, except in cases of urgency, and in such cases it must be shown that no undue delay took place in obtaining the sanction. (section 86) Except as provided by the Ordinance or any rules thereunder, no trustee shall be entitled to receive out of the estate any remuneration for services rendered to the estate except the remuneration to which under the Ordinance and such rules he is entitled as trustee. (rule 167)

(1) This rule applies to -

(e) the trustee.

(2) Subject as follows, a person to whom this rule applies shall not enter into any transaction whereby he -

(a) receives out of the estate any payment for services given or goods supplied in connection with the estate's administration;

(b) obtains any profit from the administration; or

(c) acquires any asset forming part of the estate.

(3) Such a transaction may be entered into by a person to whom this rule applies -

(a) with the prior leave of the court; or

(c) with the prior sanction of the creditors' committee, where it is satisfied (after full disclosure of the circumstances) that the person will be giving full value in the transaction. (rule 177) Here, the trustee did not avail himself of section 86(2) to contract that his remuneration for his services as trustee shall include his legal professional charges. On the contrary, the creditors committee had resolved that the trustee s remuneration is not to include his professional fees as a solicitor. It would appear that the trustee has complied with the provision in rule 177 in that the engagement of his firm as his solicitors in the objection applications and the payment of the professional fees and disbursements were with the prior sanction of the creditors committee. I have no reason to think there was no full disclosure of the circumstances or that the creditors committee had not been satisfied as to

the giving of full value in the transaction, bearing in mind that a number of financial creditors have been appointing the trustee to act as such in a substantial number of cases and they would appear to be familiar with each other s ways. I do not think there is any conflict between section 85(6) and rule 177. The costs agreed to be paid by the bankrupt in the objection applications should be paid to the estates. Thereafter, the entitlement of the solicitors to be paid their bills must be determined as a matter between them and the estates. Mr. Kerr s submission that the charges of Messrs. Lee & Chow incurred in the objection applications are fixed by the creditors committee and hence not subject to taxation under section 86(3) is incorrect. It was expressly resolved by the creditors committee that the fees of Messrs. Lee & Chow in the proceedings, charged on a solicitor and own client basis, and reasonable disbursements, are subject to the proviso that they are taxed and allowed by the court pursuant to section 86(3). Mr. Lam submitted that the proper basis for taxation of the costs of Messrs. Lee & Chow in the proceedings against the estate should be on a common fund basis, not on a solicitor and own client basis, as this should come within the class of case where the client and others (i.e. the trustee and creditors) are interested in the common fund, it is not a case where the client is taxing his own solicitor s bill of costs where such costs are payable out of a fund belonging exclusively to the party himself (In re Lavey, Ex parte Cohen and Cohen [1921] 1 KB 344 at 353 to 354). I agree. For the above reasons, I do not think the trustee has been acting improperly in engaging his firm to act as his solicitors in the proceedings. Costs The Official Receiver does not seek costs in this hearing. I make this order nisi on the costs of the trustee in this hearing. It seems to me that the trustee was largely instrumental in bringing the consent applications for conditional discharge. The bankrupts being unrepresented, it is unlikely that the initiative to seek a discharge on conditions would have come from them. I am critical of the way in which a substantial number of objection applications were brought by the trustee. It does not appear to me he has properly discharged his quasi-judicial obligation in reaching a decision whether it is appropriate in each case to object to automatic discharge. In these circumstances, I think it would be appropriate to deprive the trustee of his costs from the estates of the bankrupts. I order that the trustee is not entitled to recover his costs of and occasioned in this hearing out of the bankrupt s estate in each case. (S Kwan) Judge of the Court of First Instance High Court Mr. John Kerr, instructed by Messrs. Lee & Chow, for the trustee in bankruptcy in all proceedings Mr. Leung Chin Yeung, the bankrupt in HCB No. 8779 of 2002, present Mr. Leung Sui Sum, the bankrupt in HCB No. 8989 of 2002, present Mr. Lee Yuk Man, the bankrupt in HCB No. 9461 of 2002, present Mr. Jeremy Bartlett, for the Official Receiver Mr. Godfrey Lam, as amicus curiae PAGE - A B C 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 1udk 1udk i$&lPn" HCB.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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