

HONG KONG / JUDGMENT

FRED LEE v. MA YUET SIN

COURT

Court of First Instance

DECIDED

21 May 2008

CASE / FILE NUMBER

HCB5334/2002

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bjbj HCB 5334/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 5334 OF 2002

RE: MA YUET SIN, a bankrupt BETWEEN FRED LEE, trustee of the property of MA YUET SIN, a
bankrupt the Applicant MA YUET SIN the Respondent/ the Bankrupt

Coram: Master Levy in Court Date of Hearing: 21 May 2008 Date of Judgment: 21 May 2008

J U D G M E N T

1. The issue I need to deal with this morning is the issue of costs. The Trustee and the Respondent have signed a consent summons by which the Trustee agreed to withdraw the application to object against the automatic discharge, with costs to the bankrupt. It is not clear in the consent summons as to whether the Trustee would personally bear the costs of the application. As a result, I have asked the parties to attend before me.
3. In the course of the submissions, Mr. Gopaoco, acting for the Trustee, told me that the Trustee is prepared not to recoup his own costs from the estate. The only issue is whether the Trustee should personally pay the Bankrupt's costs, which amount was agreed at \$40,000.
4. The application to object the automatic discharge was brought in June 2006. The Trustee only relied on one ground of objection, that is, the unsatisfactory pre bankruptcy conduct. Details of the conduct were set out in the affirmation of Fred Lee in support of the application. In paragraphs 20 to 26 of the affirmation, the allegation is basically about excessive borrowing shortly before the bankrupt petitioned for her own bankruptcy. In the same affirmation, there is also evidence that at the interview with the Trustee, the bankrupt

was asked to fill in a standard questionnaire asking her about the financial situation before the bankruptcy. In the questionnaire, it was disclosed that the bankrupt had lost quite a large amount of money in stock investment, gambling and poor financial management. Based on the information in the questionnaire, the Trustee instituted the application to object the Bankrupt from automatic discharge.

5. As a result of a string of cases brought by the same Trustee, there have been quite a number of authorities from the Court of Appeal and the Court of First Instance regarding the correct approach of this kind of application. I do not need to repeat those authorities. Practitioners should by now be familiar with those authorities. Based on the principles elucidated in these recent authorities, it is clear to me that the Trustee should not have brought this application, in particular against the background and spirit of the scheme of automatic discharge.
6. In this case, the application is no different to the similar cases previously brought by the Trustee. I should also add that in fact the facts of this case are even less serious than most of the cases brought by the same Trustee. At least in this case there is no allegation of misrepresentation, which the Trustee had also relied on in many other similar applications. The conduct of excessive borrowing alone (which ground of objection according to the settled principle) should not be used as the only ground to object automatic discharge. Regarding the gambling misconduct, in the recent Court of Appeal decision of CACV233 of 2007, the bankrupt in that case was Lau Chi Kam, the Court of Appeal in paragraph 23 held that when the Trustees discovered losses caused by the misconduct of the bankrupt, the Trustees should have taken prompt and timely steps to investigate such conduct.
7. In this case, I do not see any evidence showing similar sort of investigation having been carried out. When one applies the principles elucidated from the previous authorities, it would appear that a court would have dismissed the application. I should also apply a similar approach adopted by the Court of Appeal by requiring the Trustee to personally bear the costs of a respondent when an application is dismissed under such circumstances. I do not think this case should be different to an application withdrawn by consent.

Conclusion

8. In conclusion, apart from disallowing the Trustee from recouping the costs from the estate, I further order that the costs of the Respondent be personally paid by the Trustee.
9. Further to my earlier ruling, I am grateful to Mr. Gopaoco for drawing to my attention a mistake that in fact, in this case, the Trustee has in fact relied on a conduct of misrepresentation concerning the bankrupt's application for loans. Mr. Gopaoco however has also accepted that the additional factual allegation would not make any difference to my decision as this sort of conduct has also been similarly considered by the Court of Appeal. In the circumstances, my earlier decision, despite the said additional ground, shall remain unchanged.

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10. Order in terms of paragraphs 1, 2, 3 and 4 of the Consent Summons filed on 20th May 2008 as amended. (K. Levy) Master of the High Court Mr. E. Gopaoco, of Messrs. Lee & Chow, for the Applicant. Mr. M. Tse, of Messrs. Yip Tse & Tang, for the Respondent. PAGE - 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 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 & `#\$ JUDGE.DOT setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8
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