

HONG KONG / JUDGMENT

RE CHENG CHAO MING

COURT

Court of First Instance

DECIDED

25 July 2007

CASE / FILE NUMBER

HCB18932/2002

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bjbj HCB 18932/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 18932 OF 2002

RE: CHENG CHAO MING

Coram : Before Master Roy Yu in Court Date of Hearing : 26 June 2007 Date of Decision : 25 July
2007

DECISION

Background

A Bankruptcy Order was made against the Bankrupt, Cheng Chao Ming on 4 December 2002. He is a first time bankrupt and in accordance with section 30A(1) and (2) of the Bankruptcy Ordinance (the Ordinance), he would be discharged from bankruptcy 4 years after he was adjudicated bankrupt (the relevant period), that would be 4 December 2006. The Application Pursuant to section 30A(3) of the Ordinance, if the Court is satisfied that there is a valid objection under section 30A(4), the relevant period may be extended, for a first time bankrupt, to not more than 4 years. It is helpful to set out the sub-section

- (3) Where the court is satisfied on the application of the trustee or one of the bankrupt's creditors that a valid objection based on one or more of the grounds set out in subsection (4) has been made, the court may order that the relevant period under this section shall cease to run for such period, not exceeding, in the case of a person who- has not previously been adjudged bankrupt, 4 years; or has previously been adjudged bankrupt, 3 years, as may be specified in the order. It is not disputed that this is a discretionary power of the Court. The applicant has to satisfy the Court, firstly, that a ground under section 30A(4) exists; and

secondly, the Court should exercise its discretion under section 30A(3) to suspend the relevant period from running, in effect to extend the period of bankruptcy. On 11 November 2006, Alison Wong Lee Fung Ying, a joint and several trustee of the property of the Bankrupt (the Trustee) applied by Summons under section 30A(3) of the Ordinance to object the automatic discharge of the Bankrupt. The grounds relied on by the Trustee are as follows: that the Bankrupt is likely to be able to make a significant contribution to his estate; that the discharge of the Bankrupt would prejudice the administration of the estate; and that the Bankrupt has failed to prepare an annual report of his earning and acquisitions for the Trustee. In support of the application, Ms. Wong filed her affirmation on or about 11 November 2006. The application first came before Master Kwang on 1 December 2006 when the Bankrupt was legally represented. The application was adjourned for argument. An interim order was granted suspending the automatic discharge of the Bankrupt pending determination of the Summons. Master Kwang also gave directions on the filing of affirmation. Ms. Wong filed a 2nd Affirmation on or about 22 December 2006 but the Bankrupt has not filed any affirmation. Further, by order of Master Kwang, the Applicant filed the 1st Affirmation of Alan Tang (the other trustee of the property of the Bankrupt) in support of the application. I heard the substantive argument of the Summons. Shortly before the hearing, the Bankrupt acted in person. All notice of the hearing had been served on his solicitor before he acted in person. The Bankrupt did not appear before me and I proceeded with the application in his absence. The Ground in Support Mr. Cheuk instructed by Messrs. Wilkinson & Grist appeared for the Trustee. He first referred me to section 30A(4) (a) of the Bankruptcy Ordinance that the bankrupt is likely within 5 years of the commencement of the bankruptcy to be able to make a significant contribution to his estate; It is stated in the said affirmation of Ms. Wong that the Bankrupt holds 97% of the shareholding of one Chaoming Limited (Chaoming), and his wife owns the remaining 3%. Chaoming owns 30% of one Beijing City Hotel (the Hotel), and the other 70% is owned by a PRC partner, Beijing Foreign Enterprises Services Group Co. Ltd. (FESCO). Thus, the Bankrupt has indirectly a 30% interest in the Hotel. Chaoming is now in liquidation. China Merchants Bank () is the largest single creditor of the Bankrupt and Chaoming, and claimed they had a charge over Chaoming s 30% interest in the Hotel. They had difficulty in enforcing the charge as the Hotel itself is also subject to the post-judgment enforcement charges in respect of historical debt due to the PRC partner and various ongoing disputes between the PRC partner and the legal owner of the land regarding the land use rights. Despite these legal entangles, CMB and the PRC partner agreed to co-operate with the Trustees of the Bankrupt to sell the Hotel which would be in the best interest to all parties. According to the analysis by counsel, the worth of the Hotel would be at least RMB660 million. The Bankrupt s interest in the Hotel would be around RMB198 million. And if the Hotel can be re-developed into a commercial shopping/office complex, its total worth would be around RMB1.1 billion and the net payment to the Bankrupt would still be a bit higher. For the purpose of this ruling, I adopt the former valuation of the worth of the Hotel. Likely to be able to make a significant contribution to the estate Mr. Cheuk submitted that RMB198 million is a significant contribution to the estate. He had made submission on the meaning

of likely and significant contribution . I am grateful to counsel for his research as there is no direct authority on the interpretation of section 30A(4)(a). But for the following reason, I do not intend to make any ruling on the section. I believe there could be strong argument that a sum of RMB198 million is significant, either on its own value, or in comparison to the estate. But I believe the major difficulty for Mr. Cheuk is whether the realization of the Hotel could be considered as a contribution from the Bankrupt. Section 12 of the Bankruptcy Ordinance provides that on the making of a bankruptcy order, the Official Receiver shall thereby be constituted receiver of the property of the Bankrupt. By section 58, upon the appointment of a trustee, the property shall pass to and vest in the trustee appointed. The property forms the estate of a bankrupt for distribution to his creditors in accordance with the law.

Notwithstanding the discharge under section 30A, the property would not re-vest in a bankrupt. In fact, section 30A(8) provides that a bankrupt, notwithstanding the discharge, has to assist his trustee for completing the administration of his estate. I raised with Mr. Cheuk that as the Trustee is holding all the assets of the Bankrupt, that would include his shares of Chaoming. Any dividend payable from the estate of Chaoming (since it is in liquidation) upon sale of the Hotel would go directly to the Trustee. Such dividend, or any money received on realization of the Hotel, could not be considered as contribution to be made by the Bankrupt. I repeat the wordings of section 30A(4)(a) - that the bankrupt is likely within 5 years of the commencement of the bankruptcy to be able to make a significant contribution to his estate. The ground should be anticipating the situation that a bankrupt is likely to be able to make a significant contribution within 5 years, over and above his estate. Mr. Cheuk did not argue with me on this point. Rather, he pointed to the fact that the co-operation of the Bankrupt is a key factor for the success of the sale of the Hotel. He referred to his second ground of objection. In view of the above reasoning, I found the objection under section 30A(4)(a) not established. Discharge of the Bankrupt would Prejudice the Administration of his Estate Section 30A(4)(b) of the Bankruptcy Ordinance reads

- (b) that the discharge of the bankrupt would prejudice the administration of his estate; It is stated in the 1st Affirmation of Alan Tang and neatly summarized in the written submission of Mr. Cheuk the events and efforts to sell the Hotel, as follows Further, it is submitted that there is, to say the least, a reasonable prospect that there will be deal for the purpose of disposing the interests of the Hotel. The recent date of the negotiation shows clearly that such a deal is imminent: In the past 4 years, the Trustees have found various potential buyers. These included the He Qiao Group representing the Koo s family in Taiwan, clients of Siyuan Investment & Management Consultants Co Ltd, Mandala Assets Solutions and Fullview Asia Ltd who all expressed interest in acquiring 100% of the Hotel. The Applicant again recently received a conditional offer from a Singapore-based listed company for 100% ownership of the Hotel. The investor is prepared to pay funds into an escrow account pending completion subject only to the finalization of negotiations. It should be noted that what has hindered the realization of the Hotel in the past was only the land use rights disputes between the lessor of the land (Military Police) and FESCO. Prior to 28th December 2006, FESCO refused to let the Bankrupt represent the Hotel in the settlement

with the Military Police. However, as the former managing director of FESCO and the officers of the Military Police who set up the initial arrangement with the Hotel either deceased or retired, FESCO was not able to resolve the land use rights disputes. During the recent meeting on 28th December 2006, it was however agreed by the Bankrupt and the FESCO that in view of the Bankrupt's connections and relationship with the Military Police (the Bankrupt knows the former managing director of FESCO and the officers of the Military Police at the relevant time), the Bankrupt was authorized to represent the Hotel to settle the case with the Military Police. This decision therefore signifies a major progress in settling the disputes with Military Police. This is shown by the fact that the Bankrupt recently informed the Trustees that he had commenced discussions with the Military Police before the Chinese Lunar New Year 2007 and the Military Police had agreed in principle to settle the disputes out of court. When the land use rights disputes are resolved, the Trustees who had the past experience in receiving offers from various parties are confident that the Hotel will obtain a good price and contribute significantly to the estate. Mr. Cheuk submitted that this is a critical time when the Bankrupt's effort to close the deal is indispensable by completing the negotiation with the Military Police. His discharge would prejudice the administration of the estate. The administration of the estate would in the normal circumstances include collecting all the assets of the bankrupt and arranging the sale thereof and to distribute the proceeds among the creditors. In most of the reported cases, the bankrupts have not been cooperative with the trustee and thus hindering the collection of his estate. It would be obvious in such cases that the discharge would prejudice the administration. But the operation of the section should not be limited to situation when the bankrupt is uncooperative. The administration of the estate, including any sale, is a process to realize the assets of the bankrupt to repay his creditors. There is an obligation on the part of a bankrupt to assist the Trustee and to provide his skill or, as in this case his connection with the relevant parties to the proposed sale of the Hotel to assist in the negotiation in the hope of a successful deal. Surely, I appreciate that under section 30A(8), the Bankrupt has been required to assist the Trustee with the administration of the estate after his discharge. Hence, there must be evidence to suggest that on discharge, the Bankrupt may not cooperate. Mr. Cheuk submitted that upon discharge, the Trustee cannot ensure the cooperation from the Bankrupt. In this particular case, the Bankrupt had been staying in PRC during most, if not all his period of bankruptcy. He had never provided the Trustee with a permanent correspondence address. Communication between the Trustee with the Bankrupt had to be done through telephone, fax, and meeting in PRC. This increased the difficulty of administration of his estate. While the Bankrupt was cooperative in the sale of the Hotel, he had been defaulting in filing his annual statement. While this is a separate ground for suspending the relevant period, it is also a factor for considering if the administration would be prejudiced. Without the proper annual statement, the Trustee could not really conclude that the collection of property had been completed. And this is also a factor indicating that the Bankrupt had not been cooperative in certain aspect of his affair in the bankruptcy proceedings. In conclusion, I accept the submission by counsel and found that the discharge of the Bankrupt would prejudice the administration of his estate

and I therefore conclude that the Trustee had proved the ground on section 30A(4)(b). Failure to Prepare an Annual Report of His Earnings and Acquisitions Section 30A(4)(h) of the Bankruptcy Ordinance reads

- (h) that the bankrupt has failed to prepare an annual report of his earnings and acquisitions for the trustee. There can be no dispute that the Bankrupt had been in default of filing of his annual report for the first 3 years of his bankruptcy, until these proceedings. He then filed annual report saying that he had no income. On the other hand, he did admit in the report that he had been working for a trust fund in PRC with unstable income. If there had been unstable income, there would be some income. These annual returns filed are far from satisfactory. Again I found that the objection on this ground established. Discretion Once one or more of the grounds under section 30A(4) are established, the discretionary power under section 30A(3) may be exercised. On how to exercise the discretion, it has been set out in a judgment of 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 paragraph 6:- but that in a case where public interest so requires the discharge maybe 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 person likely to be engaged in commercial relations with him in 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 world of a bankrupt against the dangers that might accrue to the public from full commercial capacity of the application, it is appropriate that the discharge be granted. This passage has been adopted by Madam Justice Kwan in *Fred Lee, trustee of the property of Leung Chin Yeung v. Leung Chin Yeung* HCB8779/2002. Deputy Judge To in a judgment given on 20 June 2007 in HCB22870/2002, while agreeing with the approach of Madam Justice Kwan, added that risk to commercial community is but one element of public interest to be considered and not the sole or determinant element. There are other elements of public interest which the court must take into account in the exercise of its discretion. One important element of public interest is that the bankruptcy regime should not be abused by being treated as a convenient debt clearing house . Another element is the need to preserve commercial morality. Deputy Judge To further stated that in the exercise of its discretion under section 30A(3), the court should take a balanced view. It should balance the interest of the bankrupt, interest of his creditors, the public interest in the bankrupt s rehabilitation and the demands of commercial morality underpinning the bankruptcy laws. It should take into consideration all the circumstances leading to the bankruptcy and not just the conduct complained of. I agree entirely with the careful analysis of Deputy Judge To on how to exercise the discretion. And with this principle, I proceed to determine the period of suspension that I should give in the present case. My Finding and Ruling It is a well-established principle of law that it is incumbent on the bankrupt to make full and frank disclosure and proffer all pertinent information regarding his assess and financial dealings

to the trustee. It is not good enough for a bankrupt to adopt a purely passive or reactive role, responding when asked in the expectation that with any luck, pertinent matters might be overlooked. (Re Li Tat Kong [2000] 3 HKC 360). It is clear in this case the Bankrupt was only concerned with his earlier discharge. He had at early stage suggested to the Trustee for sale of the Hotel (as can be seen in his letters to the Trustee AW-1 and AW-2 exhibited to the Affirmation of Alison Wong Lee Fung Ying). He can be considered to have co-operated with the Trustee in arranging the sale of the Hotel. But in other aspects, he was not co-operative. There had been letters of request for filing of the annual reports and he just ignored them. The annual reports are important information for the Trustee to determine if there are other assets available for collection. The information contained in the reports filed is inadequate and incorrect. While the Hotel is a valuable asset, it is not for the Bankrupt to dictate how the trustee was to administer his estate. This ground alone call for a period of suspension. Further, it is clear from the above that a period of suspension is required to ensure the cooperation of the Bankrupt in the sale of the Hotel. The overall period of suspension must be reasonable on balancing the interest of the creditors and the interest of the Bankrupt to return to the commercial world. In conclusion, I would allow the application and order that the relevant period be suspended for a period of 2 years from the last day when he were to be discharged under section 30A. On the question of costs, I would give an order nisi that the Bankrupt shall pay the costs of the Trustee after discharge, such costs to be taxed if not agreed. The order nisi shall become absolute within 14 days from today. (Roy Yu) Master of the High Court Mr. C. Cheuk instructed by Messrs. Wilkinson & Grist for the Trustee. Cheng Chao Ming, the Debtor, Absent. The Official Receiver, Absent. - 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 +5#^P G/^ Rj@ +5#^ & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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