

HONG KONG / JUDGMENT

RE CHEUNG SIU KIN

COURT

Court of First Instance

DECIDED

7 May 2013

CASE / FILE NUMBER

HCB7320/2008

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bjbj HCB 7320/2008 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 7320 OF 2008

Re: Cheung Siu Kin

Coram: Before Master J. Wong in Court Date of Hearing: 24 April 2013 Date of Decision: 7 May
2013

D E C I S I O N

Application

1. This is an application for suspension of automatic discharge of bankruptcy.

Background

2. On 4 September 2008, Quam Securities Company limited (Quam) filed a petition against Mr. Cheung Siu Kin for his failure to settle the balance of his stock trading loss in the total sums of about 16 million.
3. This Court made Mr. Cheung (hereinafter called the Bankrupt) a bankrupt in his absence on 26 November 2008.
4. Under sections 30A (1) and (2) (a) of the Bankruptcy Ordinance (Cap. 6), the Bankrupt should be discharged (commonly known as automatic discharge) after 4 years from 26 November 2008. However, the Joint and Several Trustees (the Trustee) applied on 2 November 2012 under section 30A (3) of the Ordinance and rule 88 of the Bankruptcy Rules to suspend the automatic discharge.

5. On 23 November 2012, Master H. Au-Yeung adjourned the matter and directed the Trustee to serve the application upon the Bankrupt by post to his last known address and by e-mail. The learned Master also suspended the automatic discharge until the resumed date on 27 December 2012.
6. The Bankrupt did attend the Court at the resumed hearing and Master H. Au-Yeung further adjourned the hearing and directed the parties to file and serve their usual affidavit evidence. The suspension of the automatic discharge was ordered to be continued pending disposal of the Trustee's application.
7. Parties appeared before me on 24 April 2013 for the substantive argument. Both Mr. Arab of the Trustee and the Bankrupt appeared in person. Having heard from the parties, I reserved my decision to be handed down. I now do so. Preliminary matter
8. At the outset of the hearing, Mr. Arab asked me to consider 4 additional documents/matters. An acknowledgment of receipt signed by the Bankrupt on 10 December 2008; 3 bank (Standard Chartered Bank) statements of the Bankrupt for the months of December 2007, February and March 2008; 3 Annual Statements of Earnings and Property Acquired (the Annual Statements) faxed by the Bankrupt to the Trustee at 4:40 p.m. on 23 April 2013, i.e. one day before the hearing before me; and The Bankrupt would be attending an interview in the afternoon on 24 April 2013, i.e. immediately after the hearing before me. Upon consideration, the Bankrupt indicated that he would not oppose (a), (c) and (d). I acceded to the same accordingly. As to (b), he did not agree with it. To save time and costs, I agree to consider (b) on a *de bene esse* basis at the hearing. I hereby confirm such decision formally. There is no argument on the authenticity of the bank statements. They will put this Court into a better position to understand the flow of money in the account of the Bankrupt at the material times. Last but not least, I see no prejudice suffered by the Bankrupt for so doing as such dispute has been existed between the parties for a long time, and indeed, a summary of the same was contained in the correspondence between the parties (OMA-15). Discussion
9. The Trustee made quite some complaints over the conduct of the Bankrupt. He disagreed with all of them. I will in turn examine them one after one to see if they are established on balance. Failure to submit Annual Statements?
10. The Trustee complained that the Bankrupt only submitted one Annual Statement during the bankruptcy period. Such document not only did not cover the period asked for, but also contained bare assertion of figures without supporting documents. No doubt, expenditure exceeded income, leaving no surplus to contribute to the estate.
11. In his opposing affirmation, the Bankrupt replied that the Trustee did not remind him to submit the Annual Statements. No forms were sent to him. He was completely not aware of the fact that he should take the initiative to file the documents.

12. Such defence can hardly be maintained in light of the contemporaneous conduct of the parties and documents, including the various reminders by letter and e-mail sent by the Trustee. The acknowledgment of receipt signed by the Bankrupt in 2008 further shows that he was supplied with the Simple Guide on Bankruptcy and the blank forms of all 4 Annual Statements. In fact, he did submit the 1st one, albeit consisting of the problem as pointed out by the Trustee. Last but not least, the fact that he has tried to mitigate his failure in this respect by submitting the remaining Annual Statements shortly before the hearing confirms the complaint of the Trustee.
13. Of course, I do not forget the remarks made by Mr. Arab. The mitigating Annual Statements still reiterate bare assertions of expenditure exceeding income. The Bankrupt has never submitted any supporting documents. One of course remembers that the Bankrupt was a quantity surveyor by profession earning about 300,000 to 400,000 annually before his bankruptcy.
14. To conclude, the Bankrupt did fail to submit in time 3 of his Annual Statements. Further, his belated attempt to remedy such breach is not successful as the same are not duly completed. The truthfulness of the statements is in serious doubt. Failure to attend interview with the Trustee?
15. The Trustee took the view that the administration of the estate of the Bankrupt was complex and a face-to-face interview with the Bankrupt was needed. However, despite effort and accommodation having been made, no successful interview was held.
16. The Trustee classified and divided the obstruction of the Bankrupt into 4 occasions during the years of 2011 and 2012. Particulars were provided to explain why the Bankrupt failed the Trustee on each occasion. Although the Bankrupt did finally attend the office of the Trustee on 6 October 2012, i.e. less than 2 months before his automatic discharge on 26 November 2012, the same could not be performed because of the interruption and presence of his brother and the refusal of the Bankrupt to have the interview being video-taped.
17. The Bankrupt submitted that he should not be blamed. He had different difficulties at different times. He worked in China. He had to stay there and his travelling schedule was dictated by his employer. He had to protect his own interest. He was not a criminal and did not understand why video-taped interview was required.
18. I do not propose to go into details of arguments of the parties as to the various occasions wherein interview could not be held. As questioned by me at the hearing, the crux lies on why an interview could not be held within a period of 4 years. With respect to the Bankrupt, the answer is simple. One could make up of all sorts of excuses if he or she did not want to meet another.

19. Further, I see nothing wrong with the arrangement of video-taped the interview. The Trustee has not produced before me any authority allowing him to do so. However, at the same time, the Bankrupt also adduces no valid rule or regulation prohibiting the same to be done. Common sense dictates that the tape serves nothing more than maintaining an accurate record of what has happened at the interview and should be the same as a contemporaneous note, save that the former must even be more accurate.
20. Hence, such complaint of the Trustee is proved on balance. Failure to co-operate in the administration?
21. One of the main complaints of the Trustee over the Bankrupt lies on the latter's persistent failure to provide details of his accounts maintained with banks and securities companies. Such information was important because the Bankrupt had engaged in heavy speculation activities and he became bankrupt because he was unable to repay trading loss about 16 million.
22. The Bankrupt disagreed. He said that he had given the most important and straight forward answer to them in his replies. He did not understand how detail the Trustee was expecting his answers.
23. In relation to this dispute, upon considering the correspondence adduced before me, I have no hesitation to agree with the observations of the Trustee. Although the Bankrupt did reply to the Trustee, there is no substance in the same. He was paying lip service only. The particulars provided by the Trustee in 3rd Affirmation of Mr. Arab provides a good summary of what actually happened at the material times. Date From Summary of Content 31 Mar 2010 The Trustees The Bankrupt The Trustees initial request for the provision of the bank statements the Bankrupt for the period from 25 August 2006 to 25 August 2008 (the Period 30 April, 4 May, 28 May, 10 Jun, 11 Jun 2010 The Trustees The Bankrupt The Trustees reminders to the Bankrupt regarding the provision of the statements 14 Jun 2010 The Bankrupt The Trustees The Bankrupt alleged that he did not keep any financial records for the Period 18 Mar, 23 Jun, 27 Jun 2011 The Trustees The Bankrupt The Trustees then requested the Bankrupt to provide the details, including name of bank or securities company, nature and number, of all accounts maintained by the Bankrupt with all local or overseas banks, securities companies and/ or any type of financial institutions since 25 August 2006 7 April 2011 The Bankrupt The Trustees The Bankrupt replied that he did not have any details of the accounts maintained by him with banks and securities companies and he believed the Trustees should have those records instead 11 May, 16 May, 20 May, 30 May, 7 Jun, 8 Jun, 10 Jun, 22 Jun [2011] The Trustees The Bankrupt The Trustees requests to the Bankrupt for details of the accounts maintained by him during period from 27 November 2003 to 26 November 2008 and subsequent reminders to the Bankrupt 28 Jun 2011 The Bankrupt The Trustees The Bankrupt again said that he did not have details of accounts maintained by him and that it would be easier for the Trustees to obtain information from banks and securities companies instead of asking him 28 Jun 2011 The Trustees The Bankrupt The Trustees told the Bankrupt that it would be reasonable to expect him to be able to prepare a list of banks,

securities firms and/ or other types of financial institutions 29 Jun 2011 The Bankrupt The Trustees The Bankrupt claimed again that he did not have the past bank records, not even the account numbers 27 Jul 2011 The Trustees The Bankrupt The Trustees reiterated that the Bankrupt should at least provide the name of banks and securities companies which he had maintained accounts with 9 Aug 2011 The Trustees The Bankrupt The Trustees reminder to the Bankrupt regarding the information request 11 Aug 2011 The Bankrupt The Trustees The Bankrupt provided the name of one bank and four securities companies which the Bankrupt might have maintained accounts with Unsatisfactory conduct before and/or bankruptcy?

24. The Trustee made quite a number of complaints over the Bankrupt about his behaviors which generally indicated that he was refusing to co-operate and obstruct the administration of his estate during bankruptcy. Such conduct includes the above 3 heads of disputes. In so far as these conduct having been accepted by me on balance, I do not repeat them again. As to the remaining, no matter how hard the Bankrupt has attempted to evade or avoid from the questions, it remains a fact that he has failed the Trustee. I find that the Bankrupt has not given me any reasonable and/or acceptable explanation. He did: engage in heavy speculation in stocks to such an extent that it was not proportional to his income earned, notwithstanding that he was so allowed to engage the same; and fail to explain why he had withdraw a total sums of over 2.2 million cash from his bank account at the Standard Chartered Bank about one year before his bankruptcy. The bare allegations of petty cash and/or miscellaneous expenses cannot be satisfied, nor was his excuse of lapse of memory at the hearing before me. No recovery and realization in the administration?
25. The Trustee also told this Court that the Bankrupt made no contribution at all. There was about 18 million proof of debts filed. Out of the same, the Trustee recovered only 90,000 approximately from banks, IRD and so forth only. Obviously, the Trustee did not accept that the Bankrupt only earned as he asserted. In this respect, I do not consider that the Bankrupt can satisfy me with a reasonable explanation with evidence or sufficient evidence. Investigation going on?
26. Last but not least, the Trustee told me that he would pursue the matter against the Bankrupt, including but not limited to examination, private or public. Having accepted most of the submissions of the Trustee, I no doubt agree that further investigation is necessary upon the Bankrupt before he should be released . It should also be mentioned that both the younger brother and sister-in-law of the Bankrupt are now being sued by the Trustee in HCMP 1431/2012. In the proceedings, the Trustee purported to set aside a total of 46 transfers among them for over 38 millions. The younger brother and sister-in-law had applied to strike out 36 transfers but the Hon. Poon J. dismissed the same. In the decision handed down on 10 April 2013, the learned Judge agreed that there were indicators to show transfer of gifts between the parties. It was reasonably arguable that they were transactions at undervalue. Further, the allegation by the younger brother that the Trustee brought the proceedings to bring pressure on them by Quam was rejected by the learned Judge for wholly lacking in substance. Exercise of Discretion

27. Having come to the above fact findings on balance, I should consider all the circumstances of the case in order to exercise my discretion to determine if the automatic discharge should be suspended or not, and if so, for how long. In so doing, I ask myself to bear in mind paragraphs 17.6 and 17.24 of the Law Reform Commissions Report on Bankruptcy (1995) 17.16 The introduction of automatic discharge should, with the objection system, have two-folded effect. Firstly, bankrupts should have a greater incentive than at present to co-operate with the trustee, as failure to co-operate could result in the trustee objecting to a bankrupt's discharge. Secondly, the rehabilitation of a bankrupt from bankruptcy would be assured, subject to rehabilitation being delayed as a consequence of a bankrupt's own failings. 17.24 The introduction of automatic discharge would shift the emphasis from discharge being a privilege to its being a right. This right, however, must be set alongside a bankrupt's duty to co-operate with the trustee in the administration of the estate. If he fails to co-operate with the trustee after bankruptcy, or if a bankrupt's conduct before bankruptcy was unsatisfactory, he should not be automatically discharged. Useful guidance can also be located in comment of Mrs. Justice Le Pichon (as she then was) in two authorities, viz: *Re Hui Hing Kwok* [1999] 3 HKC 683 and *Re Li Tak Kong* [2000] 3 HKC 360 Rehabilitation is the sense of enabling the bankrupt to resume a normal life in society is a key, if not the key consideration. It should only be delayed by bankrupt's own failings In exercising its discretion, the court would have regard to the scope and purposes of the statutory provisions conferring the discretion, the interests of commercial morality and the public interest. Before a discharge was granted or permitted to occur, there should be an adequate investigation of a bankrupt's conduct and affairs, and such investigation should generally be concluded. It was incumbent on the bankrupt to make a full and frank disclosure and to proffer all pertinent information regarding his assets and financial dealings to the Official Receiver. In seeking a discharge, the bankrupt had to show that he had taken all reasonable steps to ensure that his estate was available for distribution among his creditors and that the trustee was appraised of all relevant information; it was not good enough for him to adopt a purely passive or reactive role. Where there had been concealment or lack of co-operation on the part of the bankrupt, it would not be unfair to delay his discharge. Consideration
28. Applying the above principles to the present case, I note the followings in particular.
- (a) The Trustee is relying on a number of different grounds against the Bankrupt. The former has satisfied me on most of the complaints.
 - (b) With respect to the Bankrupt, my overall finding is that he has not been co-operating with the Trustee in any sense. He has not been telling the truth or the whole truth to the Trustee. He has been hiding himself in China and trying each and every possible means hoping to delay the matter so that he will be freed. He has not been contributing voluntarily a single cent to his creditors. I do not consider that he has been full and frank to disclose any of his financial position, past and present, to the Trustee. The belated attempt to supply with the remaining Annual Statements and agreement to attend interview contain no remorsefulness on the part of the Bankrupt over his conduct. It is not genuine mitigation or at all.

- (c) The Bankrupt gave all sorts of excuses to the Trustee upon his request for information and assistance. Such conduct further continued throughout the present proceedings.
- (d) I agree that a period of suspension for 4 years is justified in the circumstances of the present case. Since there has already been interim order made by this Court, I will direct that the suspension of automatic discharge of the Bankrupt shall cease to run until 25 November 2016. Costs
29. I have not heard from the parties in relation to the question of costs. However, there appears no reason why costs should not follow event. I therefore will make an order nisi (which will become absolute within 14 days from the date hereof) that the Bankrupt shall bear costs of the Trustee in relation to the application and hearing on 24 April 2013, including all costs reserved, to be taxed if not agreed. (Jack Wong) Master of the High Court Mr. Osman Mohammed Arab, one of the Joint and Several Trustees, appearing in person. Mr. Cheung Siu Kin, the Bankrupt, appearing in person. - PAGE - A B C D E F 1udk h26{ h26{ h-" h-" (#p# h26{ h5f> h5f> h`ao h`ao h0M+ h0M+ {q{q gdTF kdq kd: sh]h]S]S]S]H jff 1udk [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%`#q x}r :TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> x1)T<NT hsvg 3nzpW hsvg x1)T & 6" CACV Judiciary Normal.dotm Judiciary Microsoft Office Word Judiciary CACV Title `a4- Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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