
HONG KONG / JUDGMENT

RE FORMERLY KNOWN AS SHUM WAN MAN

[2020] HKCFI 1720

COURT

Court of First Instance

DECIDED

31 July 2020

CASE / FILE NUMBER

HCB1536/2015

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HCB 1536/2015

[2020] HKCFI 1720

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

IN BANKRUPTCY PROCEEDINGS

NO 1536 OF 2015

Re: SHUM TUNG LAM formerly known as SHUM WAN MAN, the Bankrupt

Before: Master Lai in Chambers (open to public)

Date of Hearing:

18 May 2020

Date of Decision:

31 July 2020

DECISION

Introduction

In this case, Mr Shum Tung Lam formerly known as Shum Wan Man (“Shum”) was adjudged bankrupt on 15 July 2015. Shum is a first time bankrupt. According to sections 30A(1) and 30A(2) (a) of the Bankruptcy Ordinance Cap 6 (the “BO”), Shum should have been discharged from bankruptcy on 15 July 2019 (the “Automatic Discharge”). However, section 30A(3) of the BO provides that:

“(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 shall cease to run for such period, not exceeding, in the case of a person who –

(a)

has not previously been adjudged bankrupt, 4 years; or

(b)

has previously been adjudged bankrupt, 3 years,

as may be specified in the order.”

For the purpose of this case, we are only concerned with the following three grounds referred to in section 30A(4) of the BO:

that the discharge of the bankrupt would prejudice the administration of his estate (“Ground (b)”);

that the bankrupt has failed to co-operate in the administration of his estate (“Ground (c)”; and

that the conduct of the bankrupt, either in respect of the period before or the period after the commencement of the bankruptcy, has been unsatisfactory (“Ground (d)”).

On 9 July 2019, Hong Kong Construction Financing Limited (the “Applicant”), one of the creditors of Shum, took out a summons returnable on 12 July 2019 to object to the Automatic Discharge of Shum (the “Objection Summons”). The Objection Summons was supported by an affirmation of Lee Mei Wah Mabel filed herein on 9 July 2019 (“Lee’s 1st Affirmation”)

Shum opposes the Objection Summons. At the hearing of 12 July 2019, I gave directions for Shum, the Applicant and Shum’s trustees-in-bankruptcy (the “Trustees”) to file and serve further affidavits or affirmations. I also made an interim order suspending the running of the relevant period referred to in section 30A(2) of the BO pending determination of the Objection Summons or until further order (the “Interim Order”).

The Applicant filed the 2nd affirmation of Lee Mei Wah Mabel (“Lee’s 2nd Affirmation”) and an affirmation of Tse Yuen Ming on 25 July 2019.

Shum filed his affirmation on 22 August 2019 (“Shum’s Affirmation”).

The Trustees filed the affirmation of Fred Lee, one of the Trustees, on 11 September 2019.

The Applicant filed the 3rd affirmation of Lee Mei Wah Mabel on 30 September 2019 (“Lee’s 3rd Affirmation”).

The Objection Summons was restored to before me for 11 October 2019.

On 10 October 2019, the Applicant took out the following further summonses all returnable on 11 October 2019:

a summons to amend the Objection Summons (the “Amendment Summons”);

a summons to file and serve the 3rd affidavit of Shek Ngo Cheung (“Mr Shek”) who is the Applicant’s solicitor (the “Affidavit Summons”); and

a summons requiring Shum to attend hearing of the Objection Summons for cross-examination (the “Cross-Exam Summons”).

At the hearing on 11 October 2019, Mr Oh, counsel for Shum, took issue on this court having no jurisdiction to deal with the Objection Summons on the ground that it was not issued in time as prescribed by section 30A(6) of the BO. Mr Shek for the Applicant contended that the Applicant had by para 3 of the Objection Summons sought time extension from the court for the Applicant to issue the Objection Summons out of time (the “Para 3 Application”).

I directed at the hearing of 11 October 2019 that whether the court has jurisdiction to deal with the Objection Summons be treated as a preliminary issue (the “Preliminary Issue”) of the Objection Summons and be dealt with before the hearing of the objection application of the Objection Summons. I further directed that the Para 3 Application, the Amendment Summons, the Affidavit Summons and the Cross-Exam Summons should be heard together with the Preliminary Issue. I directed the hearing to be in open court.

The Preliminary Issue was fixed to be heard on 6 February 2020 in open court.

On 14 January 2020, the Applicant took out yet a further summons seeking time extension for the Applicant to make the objection application by the Objection Summons (the “Time Summons”). The Time Summons was originally returnable on 22 January 2020 but re-fixed for 6 February 2020 by consent of the parties also to be heard together with the Preliminary Issue.

On 21 January 2020, Shum took out a summons returnable on 6 February 2020 seeking declaration that the Interim Order is null and void and/or of no effect, alternatively, order for the Interim Order to be discharged and/or set aside, for want of jurisdiction or otherwise (the “Declaration Summons”).

The hearing scheduled for 6 February 2020 was adjourned and re-fixed for 18 May 2020 due to the General Adjournment Period caused by the coronavirus. When the hearing was restored for 18 May 2020, it was restored as hearing in chambers. Order 32 rule 18 of the Rules of the High Court (the “RHC”) provides that: “The hearing of any summons or other application in chambers may be adjourned from chambers into court and subsequently from court into chambers.” As such, the hearing of 18 May 2020 was held in chambers. The following matters were before the court:

the Preliminary Issue;

the Para 3 Application;

the Amendment Summons;

the Time Summons;

the Declaration Summons;

the Affidavit Summons; and

the Cross-Exam Summons.

As the Preliminary Issue, the Para 3 Application, the Amendment Summons, the Time Summons and the Declaration Summons (the “Related Applications”) are closely related and inter-linked, I shall deal with all of them together. After that, I shall then deal with the Affidavit Summons and the Cross-Exam Summons.

The Related Applications

The Amendment Summons seeks to amend paras 1 and 3 of the Objection Summons. I set out below the original version and the amended version of paras 1 and 3 of the Objection Summons:

Para 1 of the Objection Summons

(1)

that the relevant period of 4 years for the automatic discharge of Shum under sections 30A(1) and (2)(a) of the BO shall cease to run for such period as submitted in Lee’s 1st Affirmation, the director of the Applicant dated 8 July 2019 on the grounds mention therein; (the original version)

(1)

that the relevant period of 4 years for the automatic discharge of Shum under sections 30A(1) and 2(a) of the BO shall cease to run for such period as the court deems fit on the following grounds:

(i)

that the discharge of the Bankrupt would prejudice the administration of his estate; and

(ii)

that the conduct of the Bankrupt, either in respect of the period before or the period after the commencement of the bankruptcy, has been unsatisfactory; (the amended version)

Para 3 of the Objection Summons

(3)

that the time for the service of the court documents in relation to this application be abridged; (the original version)

(3)

that the time for the service of this Summons [ie the Objection Summons] be abridged; (the amended version)

By the Time Summons, the Applicant makes the following application:

“Notwithstanding the time limit prescribed by section 30A(6) of the Bankruptcy Ordinance (Cap. 6) (“BO”) not complied with, the Creditor [ie the Applicant] do have leave to apply for and/or proceed with the application for an order to object the discharge of the Bankrupt under section 30A(3) of the BO by way of the Summons filed herein on 9 July 2019 [ie the Objection Summons].”

I shall first deal with the Preliminary Issue and the Para 3 Application based on the original Objection Summons. I shall then consider whether my rulings will be affected by the Amendment Summons and/or the Time Summons if allowed. If so, whether I shall allow the Applicant’s applications or any of its applications by these summonses. After that, I shall then deal with the Declaration Summons.

The Preliminary Issue

The Preliminary Issue before the court is whether this court has jurisdiction to deal with the Objection Summons.

Mr Pao SC for Shum submits that the Objection Summons was not taken out within the time limit prescribed by section 30A(6) of the BO. He contends that the time limit under section 30A(6) of the BO is mandatory and without provision for an extension of time. Thus, the Objection Summons was invalid and this court has no jurisdiction to deal with the Objection Summons.

Section 30A(6) of the BO provides that:

“(6)

Where the trustee or a creditor objects to the discharge of the bankrupt, he shall –

(a)

notify the court; and

(b)

in the case of a creditor, also notify the trustee,

not less than 14 days before the end of the relevant period, stating the grounds of his objection and applying for an order under subsection (3).”

Sections 30A(1) and (2) of the BO provides that:

“(1)

Subject to this section and section 30AC [which does not concern this case], a bankrupt is discharged from bankruptcy by the expiration of the relevant period.

(2)

The relevant period referred to in subsection (1) is as follows –

(a)

where a person has not previously been adjudged bankrupt, the period of 4 years;

(b)...

..,

beginning with the commencement of the bankruptcy.”

Section 30 of the BO provides that:

“The bankruptcy of a person against whom a bankruptcy order has been made –

(a)

commences with the day on which the order is made; and

(b)

continues until he is discharged under section 30A or 30B.”

Shum was adjudged bankrupt on 15 July 2015. He is a first time bankrupt. Thus, his bankruptcy commenced on 15 July 2015 and should have been ended on 15 July 2019. As such, under section 30A(6) of the BO, the Applicant should have notified the court and the Trustees latest on 1 July 2019 of its objection to the discharge of Shum from bankruptcy stating the grounds of its objection and applying for an order under section 30A(3) of the BO.

The Bankruptcy (Forms) Rules (Cap 6B) prescribe Form 82 as the form for “Notice of Intention to Object Bankrupt’s Discharge under Section 30A(4) of the Bankruptcy Ordinance”. The Applicant filed its Form 82 with the court on 17 June 2019 giving notice of its intention to object to Shum’s discharge on Grounds (c) and (d) (the “Applicant’s Form 82”). However, the Applicant did not take out the Objection Summons until 9 July 2019.

Para (1) of the Objection Summons states that:

“(1)

that the relevant period of 4 years for the automatic discharge of the Bankrupt [ie Shum] under ss.30A(1) and 2(a) of the Bankruptcy Ordinance shall cease to run for such period as submitted in the Affirmation of Lee Mei Wah Mabel, the director of Hong Kong Construction Financing Limited dated 8th July 2019 [ie Lee’s 1st Affirmation] on the grounds mentioned therein”.

Para 3 of Lee’s 1st Affirmation stated that:

“3.

The application to object to the automatic discharge herein is based on the ground that the discharge of the Bankrupt [ie Shum] would prejudice the administration of his estate (section 30A(4)(b) of the Ordinance) [ie Ground (b)].”

Mr Pao contends that the Objection Summons issued on 9 July 2019 was not issued within the time limit prescribed by section 30A(6) of the BO namely not less than 14 days before the end of the relevant period [ie 15 July 2019]. He contends that the objection raised in the Objection Summons was invalid and but for the Interim Order Shum would have been discharged under section 30A(1) of the BO on 15 July 2019. He further contends that this court has no jurisdiction to issue the Interim Order based on an invalid objection. Thus, Shum should have already been discharged on 15 July 2019. This court does not have jurisdiction to entertain an objection to discharge against Shum after Shum had already been discharged on 15 July 2019 by operation of law.

Mr Pao contends that there is no provision in section 30A of the BO allowing the court to extend the time limit prescribed by section 30A(6). As such, the time limit under section 30A(6) of the BO is mandatory and this court does not have jurisdiction to extend the time for the Applicant to take out the Objection Summons.

On the other hand, Ms Cheung for the Applicant contends that section 30A(6) of the BO does not prescribe a time limit for the Applicant to take out the Objection Summons. She submits that the time limit of “not less than 14 days before the end of the relevant period” only applies to the requirement of notifying the court and the Trustees and the Applicant is entitled to apply to the court for an order under section 30A(3) at any time before Shum has been discharged from bankruptcy on 15 July 2019. Thus, the Objection Summons was issued within time.

Ms Cheung further submits that as a fallback position, the Applicant has applied for time extension for it to issue the Objection Summons by the Para 3 Application and/or the Time Summons.

Time limit for the Applicant to issue the Objection Summons

The first issue this court has to decide is whether there is statutory prescribed time limit for the Applicant to issue the Objection Summons.

There is no dispute that under section 30A(6) of the BO a creditor has to take two steps in order to object to the discharge of the bankrupt, namely, (1) to notify the court and the trustee stating the grounds of objection; and (2) to apply to the court for an order that the relevant period shall cease to run for such period as may be specified in the order. The issue is whether the time limit of “not less than 14 days before the end of the relevant period” applies to both steps.

Mr Pao submits that it does and is mandatory without provision for time extension. Ms Cheung submits that the time limit only applies to step (1) in giving notice to the court and the trustee but not to step (2) in applying to the court for the relevant order.

Ms Cheung submits that section 30A(6) of the BO stipulates two distinct requirements for a creditor to object to a bankrupt’s discharge as follows:

the creditor has to notify the court and the trustee not less than 14 days before the end of the relevant period stating the grounds of his objection; and

the creditor has to apply for an order under section 30A(3) of the BO.

Ms Cheung refers to Form 83 (ie notice to creditors by trustee under section 30A(5) of the BO) which only mentions that the notification to court and trustee is subjected to the temporal limit of 14 days before discharge of the bankrupt. There is no reference in Form 83 as to any temporal limit being applicable to the applying for an order under section 30A(3) of the BO.

She further refers to para 11/93 of the Hong Kong Civil Procedure 2020 Vol 2 which states that:

“Where the trustee or a creditor objects to the discharge he shall notify the court and, in the case of a creditor, the trustee, not less than 14 days before the end of the relevant period (s.30A(6)).”

Ms Cheung concludes that an application under section 30A(3) of the BO is not subjected to any temporal limit, save and except that objection application cannot be made after the discharge of the bankrupt. With respect, I do not agree.

The draftsman of section 30A(6) of the BO used the conjunction “and” to connect the two steps required to be taken by the creditor/applicant in an objection to discharge application. Ms Cheung submits that the word “applying” in section 30A(6) shall read as “apply” to give section 30A(6) the following effects:

the creditor shall notify the court and the trustee not less than 14 days before the end of the relevant period stating the ground of his objection; and

the creditor shall apply for an order under section 30A(3) of the BO.

I do not accept Ms Cheung’s aforesaid submissions. Ms Cheung’s way of construing section 30A(6) of the BO suggests that the draftsman had made a grammatical mistake in the drafting. This is unlikely. If the legislature has in mind that the step of making application to the court shall be connected to the phrase “he [ie the creditor] shall”, the draftsman would have used the word “apply” instead of “applying” bearing in mind that he had used the word “notify” instead of “notifying” when he set out the step of notifying the court and the trustee. I have no reason to

suspect that the draftsman would have made such a grammatical mistake in such case.

Furthermore, there is a punctuation mark “comma” between the phrases “not less than 14 days before the end of the relevant period under this section” and “stating the grounds of his objection and applying for an order under subsection (3)”. This shows that the phrase “not less than 14 days before the end of the relevant period under this section” applies to the following phrases of “stating the grounds of his objection” and “applying for an order under subsection (3)”.

I am of the view that the conjunction “and” is to connect the two phrases “stating the grounds of his objection” and “applying for an order under subsection (3)” to the same place in section 30A(6), ie after the phrase “not less than 14 days before the end of the relevant period under this section”. I am of the view that section 30A(6) of the BO shall be read to the following effects:

“The creditor shall notify the court and the trustee not less than 14 days before the end of the relevant period,

(1)

stating the grounds of his objection; and

(2)

applying for an order under section 30A(3) of the BO.”

As the two steps are connected by the conjunction “and”, I am of the view that the legislation contemplates that the notification and the application will be undertaken at the same time. They are subject to the same temporal limit. Thus, Form 83 and the commentary in the Hong Kong Civil Procedure 2020 do not treat the two steps separately. I find support for my aforesaid construction of section 30A(6) of the BO in Practice Direction 3.6 and *Re Leung Yat Tung* (unrep, HCB 2019/2000, 10 October 2005).

Practice Direction 3.6 provides that “a creditor may object to the discharge of a bankrupt as late as not less than 14 days before the end of the relevant period”. Making an objection is not by merely notifying the court and the trustee, it is by making application to the court. In *Re Li Tat Kong* [2000] 3 HKC 360 at 369-370, Le Pichon J (as she then was) pointed out that:

“The court’s jurisdiction is engaged upon an application being made under s 30A(3). ... The primary purpose of sub-ss (3) and (6) of s 30A is clear: unless an application is made, the court’s jurisdiction will not be engaged. ...”

The provisions of Practice Direction 3.6 refers to “object to the discharge” which includes both steps stipulated in section 30A(6) of the BO.

The two steps were again considered together in *Re Leung Yat Tung* (supra) when the court stated that:

“17.

These provisions [ie sections 30A(5) and (6) of the BO and rule 88 of the Bankruptcy Rules (Cap 6A)] clearly govern how and what the parties should do in relation to applications to object the automatic discharge. In my view, the procedures are clear. The OR [ie the Official Receiver] shall give not less than 3 months' preliminary notice of his intention to the Bankrupt and the Creditors before the automatic discharge will take place. If the matter is to be pursued against the bankrupt by either the OR or the Creditor, formal notice as well as application are to be given not less than 14 days of the automatic discharge." (Emphasis added)

Ms Cheung refers to *Jones Lang Wootton Ltd v The Sun Plastic Supplies Ltd* (unrep, HCA 10878/1993, 28 March 1994) and *I v L & Anor* [2005] 4 HKLRD 301 to submit that when provisions of Practice Direction are in conflict with statutory provisions, the statutory provisions shall prevail. I have no disagreement with such proposition only that I do not see the provisions of Practice Direction 3.6 being in conflict with section 30A(6) of the BO. I am of the view that the provisions of Practice Direction 3.6 are consistent with the provisions of section 30A(6) of the BO which require that to object to the Automatic Discharge of Shum, the Applicant has to notify the court and the Trustees of its objection as well as to apply to the court for the relevant order not less than 14 days before 15 July 2019, ie latest on 1 July 2019. The Applicant did not take out the Objection Summons until 9 July 2019. The Applicant was late for eight days.

Whether time can be extended for issuance of the Objection Summons

If I am right in holding that the Applicant was late in issuing the Objection Summons, does the court have jurisdiction to extend the time for the Applicant to issue the Objection Summons?

Mr Pao relies on *Re Van Reesema* (1983) 50 ALR 253 and *Donnelly v Edelston* (1992) 109 ALR 651 to contend that the time limit under section 30A(6) of the BO is mandatory and without provision for an extension of time. Thus, this court does not have jurisdiction to extend the time for the Applicant to take out the Objection Summons.

Mr Pao submits that as a matter of general principle, provisions with respect to time imposed by statute are generally obligatory, unless a power of extending the time is given to the court. He refers to *Re Merck Sharp & Dohme Ltd* [2002] 1 HKLRD 820 when Kwan J (as she then was) stated that:

"13.

If the time limit to file the necessary documents were ordered by the court, and imposed by statute, it is clear that the court would have jurisdiction to extend time in an appropriate case (see *R v Bloomsbury and Marylebone County, ex p. Villerwest Ltd* [1976] 1 WLR 362). Here, the period within which that obligation is to be performed is imposed by rule 39(1) of the Patents (General) Rules. There is nothing in the Patents Ordinance or the subsidiary legislation to give the court the power to extend time in this situation."

Mr Pao further refers to *Peter A. de Kantzow & Anor v The Appeal Tribunal* (unrep, CACV 53/1991, 8 October 1991) when the Court of Appeal held that an appeal under section 43 of the Building Ordinance (Cap 123) which was made out of time was void as there was no power to extend time for the appeal under the Building Ordinance and the statutory time limit was imperative and not merely directory.

Ms Cheung pointed out that in *Franscois Ngo v Commissioner of Inland Revenue* [2018] HKCU 3967 Chan J considered that order 3 rule 5 of the RHC could not be triggered to extend time under section 69(3) of the Inland Revenue Ordinance (Cap 112) on the basis that the RHC and the Inland Revenue Ordinance are two different statutes. Order 3 rule 5 of the RHC only allows the court to extend time prescribed by rules in the RHC. Section 69(3) of the Inland Revenue Ordinance not being rules in the RHC, order 3 rule 5 of the RHC does not apply.

However, Ms Cheung submits that what set the BO apart from the Inland Revenue Ordinance, the Patents Ordinance and the Building Ordinance is that the BO contains “built-in provision” that allows the court to extend or abridge time that is prescribed by the BO. She further submits that section 99(1) of the BO brings in order 3 rule 5 of the RHC to the bankruptcy regime which gives the court power to waive non-compliance of time limit. Ms Cheung refers to sections 100(4) and 124(1) of the BO and rules 203 and 204 of the Bankruptcy Rules (Cap 6A) (the “Rules”).

Section 99(1) of the BO provides that:

“(1)

The rule and practice of the High Court for the time being for regulating the ordinary civil procedure of the court shall, so far as the same may be applicable and not inconsistent with the provisions of this Ordinance, be applied to bankruptcy proceedings, and every order of the court made in connection with bankruptcy proceedings may be enforced in the same way as a judgment of the court made in respect of any civil proceedings may be enforced.”

Section 100(4) of the BO provides that:

“(4)

Where by this Ordinance or by general rules the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof upon such terms, if any, as the court may think fit to impose.”

Mr Pao contends that if the legislature had intended a discretionary power to extend time to be conferred upon the court, this would need to be expressly provided. Mr Pao refers to section 34(7A), section 43C(1) and sections 59(1) and (4) of the BO which expressly provide that the time limits stipulated in the sections concerned can be extended by the court. He submits that there is no such provision in section 30A(6) of the BO.

With respect, I do not agree. In *Re Merck Sharp & Dohme Ltd* (supra), the issue was whether the court had jurisdiction to extend time under order 3 rule 5 of the RHC when the time-limit laid down by rule 39(1) of the Patents (General) Rules (Cap 514, Sub Leg) was not complied with. Kwan J (as she then was) remarked that:

“13.

... ... Here, the period within which that obligation is to be performed is imposed by r.39(1) of the Patents (General) Rules (Cap 514, Sub Leg). There is nothing in the Patents Ordinance (Cap 514) or the subsidiary legislation to give the court the power to extend time in this situation”

Her Ladyship was of the view that provisions to extend time limit imposed by rule 39(1) of the Patents (General) Rules might not necessarily be contained in rule 39 but could be contained in the main ordinance or its subsidiary legislation only that in *Re Merck Sharp & Dohme Ltd* no such provision was found in the main ordinance or other parts of the subsidiary legislation.

The bankruptcy regime is different. Section 100(4) of the BO expressly provides for the court to have discretionary power to extend the “time for doing any act or thing [which] is limited” by the BO.

Legislation may contain express provisions in individual section on time extension arrangements for doing things under that particular section. It may also make a “cover all” provision such as section 100(4) of the BO to cover situations not individually provided for in the relevant sections. Rule 204 of the Rules and rule 208 of the Companies (Winding-Up) Rules (Cap 32H) are similar statutory provisions. If the aforesaid contention of Mr Pao is accepted, it will render section 100(4) of the BO redundant.

In *Re Li Sau Ying* [2007] HKCU 2061 the Court of Appeal was of the view that the time extension power conferred on the court by section 100(4) of the BO could be invoked to extend the time limit prescribed by the then section 98(2) of the BO. As such, I see no reason why section 100(4) cannot be invoked to extend the time prescribed by section 30A(6) of the BO.

Mr Pao relies on *Re Van Reesema* (supra) and *Donnelly v Edelston* (supra) to submit that where the applicant has not complied with the time limits set out in section 30A(3) and/or (6) of the BO, it is not a mere irregularity but rather a failure to establish a prescribed condition precedent, and the court’s jurisdiction to deal with an application to object to the automatic discharge of a bankrupt is simply not engaged.

Re Van Reesema (supra) was a case of objection to discharge under section 149 of the Australian Bankruptcy Act 1966 (the “Bankruptcy Act”). Under section 149(1) of the Bankruptcy Act, a bankrupt will be automatically discharged from bankruptcy after the expiry of 3 years from the date of commencement of the bankruptcy. However, the bankruptcy period can be extended by virtue of section 149(3)(c) and section 149(12) of the Bankruptcy Act. Under section 149(3)(c), the bankrupt is not discharged if the Registrar, the Official Receiver or the trustee has entered, or a creditor has, with the leave of the court, entered an objection in a prescribed form and in the prescribed manner under the grounds set out in section 149(4) of the Bankruptcy Act. Under

section 149(12), the court, at any time before the discharge of a bankrupt, on the application of the Registrar, the Inspector-General, the trustee or a creditor, may direct that the bankrupt shall not be discharged from bankruptcy by virtue of section 149 of the Bankruptcy Act.

Ms Cheung rightly points out that the mechanism for the extension of bankruptcy period under section 149(3)(c) of the Bankruptcy Act is different from our objection system under section 30A of the BO. Under the Australian system, the extension of the bankruptcy period under section 149(3)(c) of the Bankruptcy Act is triggered by entering of a valid notice of objection, in which case no court order is required. Once a valid notice is entered, the bankruptcy period is extended. It is up to the bankrupt to make application to the court for the lifting of the extension under section 149(9) of the Bankruptcy Act.

As such, under the Bankruptcy Act a “valid notice of objection” is the key triggering the extension of a bankrupt’s bankruptcy period.

In *Re Van Reesema* (supra) the notice of objection to discharge entered by the Official Receiver wrongly cited a ground of objection which was not a ground recognized under section 149(3) of the Bankruptcy Act. Sweeney J stated at p 262 that:

“... ... Here the [Bankruptcy] Act provides that on the happening of a certain event, namely the entry of an objection, a person is not discharged from bankruptcy and that event has not happened. The purported entry of an objection on a ground which is, in my view, fundamentally different from that specified in s.149(4)(a) is not to be given effect which by statute arises only upon the entry of an objection so specified.” (Emphasis added)

As there was no valid objection filed under section 149(4) of the Bankruptcy Act in *Re Van Reesema*, the “statutory extension” did not occur and the bankrupt had been discharged after expiration of three years from the date of his bankruptcy.

Although section 33(1)(c) of the Bankruptcy Act (similar to section 100(4) of the BO) provides that the court may extend before its expiration or, if the Bankruptcy Act does not expressly provide to the contrary, after its expiration, any time limited by the Bankruptcy Act for doing an act or thing or abridge any such time, Sweeney J held in *Re Van Reesema* (supra) at p 261 that:

“Before his Honour, the Official Receiver, who then appeared in person, had relied upon s 33(1)(b) and s 306 of the [Bankruptcy] Act in support of his application for leave to amend the objection.

Section 33(1)(b) [of the Bankruptcy Act] provides that the court may at any time allow the amendment of any written process, proceeding or notice under the Act. What the Official Receiver needed was an order, pursuant to s 33(1)(c), under which the court may extend before its expiration, or if the Act does not expressly provide to the contrary, after its expiration, any time limited by the Act for doing an act or thing. Had such an application been made, it should, in my opinion, have been refused.

Section 149 expressly provides to the contrary, within the meaning of s 33(1)(c), in that it provides that if the three years have passed, without the entry of an objection which satisfies the requirements of sub-s (4), a bankrupt is discharged. It does not contemplate that a bankrupt so discharged may revert to the status of being undischarged by some later order. If there were a power to extend the time for entry of an objection to discharge, it would have to be wide enough to cover a case where no objection of any kind had been entered. The fact that certain conduct which is lawful for a discharged bankrupt is unlawful for one who is undischarged tells against the existence of any such power.

Similarly, s 33(1)(b) should not be used to produce the effect that a bankrupt, who has been discharged by operation of s 149(2)(b) should be revert to the status of being undischarged.” (Emphasis added)

Sweeney J took the view that the Australian statutory system of objection to discharge from bankruptcy as set out in the Bankruptcy Act constituted express provisions contradicting the existence of a power of the court to extend time after expiration for objection to discharge from bankruptcy so as to nullify the automatic discharge from bankruptcy. Without a valid objection filed under section 149(4) of the Bankruptcy Act, the bankrupt would be discharged after expiration of three years from the date of his bankruptcy by operation of law and the court did not have jurisdiction to extend the time for the Official Receiver to amend his notice of objection pursuant to section 33(1)(c) of the Bankruptcy Act to revert the legal status of a discharged bankruptcy back to an undischarged bankrupt. Under the Australian system, a valid objection is a condition precedent prescribed by the Bankruptcy Act to precluding the automatic discharge from bankruptcy.

As pointed out by Lam J (as he then was) in *Re Liu Man Hoo* [2007] 5 HKC 346 at 364B-C: “Though the grounds of objection in our legislation were modelled upon 1966 Australian Bankruptcy Act, the mechanism for objection is different.” In Hong Kong, neither the notice of objection to discharge (ie Form 82) nor the application itself (ie the Objection Summons) has the legal effect of stopping the automatic discharge of a bankrupt from bankruptcy after the relevant period. A court order is required in Hong Kong to stop the running of time for calculating the relevant period. Lam J explained in *Re Liu Man Hoo* (supra) that:

“8.

It is necessary to start by examining the relevant statutory provisions. It should be noted at the outset that under s 30A(3) [of the BO], the court is given a discretion to order the relevant period to cease to run for a specified period if valid grounds of objection are established. Hence, it does not automatically follow from the establishment of a valid ground of objection that there would be a suspension. The grounds of objection have to be established to give the court a jurisdiction to order suspension. But after a ground is established, the court still has to exercise its discretion in accordance with the facts and circumstances of the case. This is clearly spelt out in *Re Hui Hing Kwok* [1999] 3 HKC 683; see also *Fred Lee v Tong Yuk Kin* [2007] HKCU 1042 (HCB 22870/2002, Deputy Judge A To, 20 June 2007, unreported), para 18.”

Neither the Applicant's Form 82 nor the Objection Summons serves as a condition precedent for stopping Shum from the Automatic Discharge. They are just steps for pursuing a court order which may stop Shum from being discharged from bankruptcy.

Mr Pao refers to *Re Leung Yat Tung* (supra) when the learned Master found that the court had no jurisdiction to waive the non-compliance of section 30A(6) of the BO by the creditor. In that case, the creditor concerned had filed the Form 82 but failed to take out any application to object to the bankrupt's discharge. The creditor relied on the objection application of the Official Receiver which only referred to two grounds whereas the creditor wished to object on five grounds. Master J Wong held that: "The defect of failure to take out proper application goes to the very substance of the matter and is neither formal defect nor mere irregularity" (para 19(d) of the judgment). The learned Master was of the view that he had "no jurisdiction to deal with the matter because it has not even placed [the objection application] before the court" and "there is simply no room for [the court] to do anything to waive the non-compliance" (paras 19(c) and 20 of the judgment).

However, the non-compliance of section 30A(6) of the BO in the case before me is not failure to issue any objection application at all, but failure to issue the objection application in time. The nature of non-compliance is very different to *Re Leung Yat Tung*, so is the consequences.

Pursuant to section 100(4) of the BO the court has jurisdiction to extend the time for the Applicant to issue the Objection Summons under section 30A(6). As such, I am of the view that the court doth have jurisdiction to grant time extension for the Applicant to issue the Objection Summons or to amend the same. Whether the court shall exercise its discretion in favour of the Applicant is another issue which I shall discuss later in this decision.

However, despite section 99(1) of the BO, I do not see that order 3 rule 5 of the RHC is of assistance to the Applicant's case. Order 3 rule 5(1) of the RHC provides that:

"(1)

The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceeding." (Emphasis added)

The time period concerning us in this case is not a period "required or authorized by [the RHC], or by any judgment, order or direction". It is a time limit stipulated by the BO. Order 3 rule 5 of the RHC simply has no application to the case before me. (See *Franscois Ngo v Commissioner of Inland Revenue* (supra))

As to rule 203 of the Rules, it deals with non-compliance of the Rules or rule of practice for the time being in force. Non-compliance with section 30(6) of the BO is not non-compliance with the Rules or rule of practice. It is non-compliance with a statutory provision of the BO. As such, rule 203 of the Rules does not assist the Applicant.

Rule 204 of the Rules deals with abridgement or enlargement of the time appointed by the Rules or fixed by court order. The time limit concerning us in this case is not appointed by the Rules nor fixed by court order. As such, rule 204 of the Rules is inapplicable.

The Applicant has made two applications for time extension or abridgement, ie the Para 3 Application and the Time Summons. Before I consider the time extension / abridgement applications of the Applicant, I shall first consider the irregularity aspect of the Objection Summons. Section 124(1) of the BO provides for formal defect not to invalidate proceedings. However, whether the Objection Summons is irregular or defective is a matter which the court will have to take into account in considering the time extension / abridgement applications. It may not be appropriate for the court to extend or abridge time for a party to pursue an irregular or defective application.

Irregularities of the Objection Summons

The BO has prescribed a route for objecting to an automatic discharge. Any applicant wishing to avail itself of the right to object should follow the procedure laid down. I am of the view that there are two irregularities in the Objection Summons. Firstly, it was not issued within the time limit prescribed by section 30A(6) of the BO (the “Time Irregularity”). Secondly, it was issued based on ground not stated in the Applicant’s Form 82 served pursuant to section 30A(6) of the BO (the “Grounds Irregularity”).

I have discussed the Time Irregularity in paras 34 to 49 above. I found that the Applicant was late in issuing the Objection Summons.

As pointed out in paras 27 and 29 above, in the Applicant’s Form 82 the Applicant stated Grounds (c) and (d) as its grounds of objection whereas, in the Objection Summons, the Applicant cited Ground (b) as its ground of objection.

Ms Cheung submits that there is no requirement that the grounds stated in the Applicant’s Form 82 and the ground(s) stated in the Objection Summons have to be the same.

Ms Cheung contends that section 30A(6) of the BO only requires the Applicant to state the grounds of objection in the notice (ie the Form 82) and to apply for an order under section 30A(3) of the BO. There is no requirement that when the Applicant applies for an order under section 30A(3) of the BO, the Applicant has to state its grounds of objection. (See para 87 of Ms Cheung’s Skeleton Submissions)

With respect, I do not agree. If Ms Cheung’s aforesaid contention is right, it serves no purposes for the BO requiring the Applicant to state its grounds of objection in its notice served under section 30A(6) of the BO. I do not accept that statutory provisions are included to serve no purposes.

A bankrupt should not be caught by surprise in dealing with an objection against his discharge from bankruptcy. In *Re Li Tat Kong* [2000] 3 HKC 360 Le Pichon J (as she then was) held at 370B that: “Where different grounds are relied on by different parties, separate applications would

ensure that the bankrupt is not taken by surprise.” The provisions of section 30A(6) of the BO are to ensure that the bankrupt is being informed in sufficient advance of the case which he has to answer. If an applicant may state one ground in his Form 82 and issue objection summons relying on different grounds, the bankrupt will certainly be caught by surprise.

As stated in para 45 above, I am of the view that the legislation contemplates that the two steps stipulated in section 30A(6) of the BO will be undertaken at the same time. It is only logical for the legislation contemplating an applicant to state the grounds of its objection in its Form 82 and to apply for an order under section 30A(3) of the BO relying on the same grounds. If the Applicant wishes to rely on grounds other than those stated in the Applicant’s Form 82, it has to amend the Applicant’s Form 82 or to serve a fresh Form 82.

The Applicant took out the Amendment Summons seeking leave to amend the Objection Summons to add Ground (d) as a further ground of objection on top of Ground (b). The Applicant does not seek to amend the Applicant’s Form 82 served which made no reference to Ground (b). Thus, even after the proposed amendments, the Applicant’s objection application will still be relying on grounds different from the Applicant’s Form 82.

As such, there are two irregularities in the Objection Summons and three salvage applications before me.

To salvage the Time Irregularity, the Applicant applied by the Para 3 Application and the Time Summons for extension / abridgement of time. In fact, there are two versions of the Para 3 Application, ie the original version currently set out in the Objection Summons and the amended version set out in the Amendment Summons (see para 18 above). To salvage the Grounds Irregularity, the Applicant took out the Amendment Summons to amend para 1 of the Objection Summons. I shall now deal with these salvage applications.

The salvage applications

Ms Cheung refers to section 124(1) of the BO and rule 203 of the Rules to submit that the Objection Summons shall not be invalidated by any formal defect or irregularity.

Section 124(1) of the BO provides that:

“(1)

No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity unless the court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.”

Rule 203 of the Rules deals with non-compliance with the Rules or rule of practice.

The Grounds Irregularity

Ms Cheung submits that the Objection Summons referred to the grounds mentioned in Lee's 1st Affirmation as the Applicant's grounds of objection and the Applicant's Form 82 had been exhibited to Lee's 1st Affirmation. As such, the grounds stated in the Applicant's Form 82 also formed the Applicant's grounds of objection for the purpose of the Objection Summons.

Para 9 of Lee's 1st Affirmation stated that:

"9.

On 12 April 2019, the Trustees informed the Creditor [ie the Applicant] by letter that the Trustees intend to object to the discharge of the Bankrupt from bankruptcy ("Trustees' 12 April 2019 Letter"). In support of the Trustees' objection to the discharge, the Creditor filed and served Form 82 (i.e. Notice of Intention to Object to Bankrupt's Discharge under Section 30A(4) of the Bankruptcy Ordinance (Chapter 6)) on 17 June 2019 ("Creditor's Notice of Intention to Object"). It is now produced and shown to me marked Exhibit "LMWM-8" and Exhibit "LMWM-9", copies of Trustees' 12 April 2019 Letter and Creditor's Notice of Intention to Object filed and served on 17 June 2019 respectively."

Para 3 of Lee's 1st Affirmation stated that:

"3.

The application to object to the automatic discharge herein is based on the ground that the discharge of the bankrupt would prejudice the administration of his estate (section 30A(4)(b) of the Ordinance)."

It can be clearly seen that the Applicant's Form 82 exhibited to Lee's 1st Affirmation was not to state the grounds of objection of the Applicant put forward in the Objection Summons but to recap that the Applicant had previously supported the Trustees' proposed objection application which had since been abandoned by the Trustees. Lee's 1st Affirmation clearly stated that the Applicant only relied on Ground (b) as its only ground of objection, such ground not being referred to in the Applicant's Form 82. As such, when the Applicant took out the Objection Summons, it had also abandoned Grounds (c) and (d) as its grounds of objection to Shum's discharge.

By the Amendment Summons, the Applicant sought to add back one of its grounds of objection stated in the Applicant's Form 82, namely Ground (d), to the Objection Summons. Ms Cheung submits that the amendment sought is merely technical and should be allowed.

Ms Cheung in her reply submissions (the "Reply Submissions") submits that:

"18.

Although the Creditor [the Applicant] in the affirmation in support of the Objection to Discharge Summons [the Objection Summons] (i.e. Affirmation of Lee Mei Wah Mabel [Lee's 1st Affirmation]) said the Bankrupt's discharge should be suspended on ground (b) (i.e. discharge of bankrupt would prejudice the administration of his estate), in the same affirmation, the factual basis she relied on was the fraudulent misrepresentation of the Bankrupt, which was also sufficient to support the objection on ground (d). Further, in that affirmation, Lee Mei Wah Mebel [sic] also exhibited the Form 82 filed on 17 June 2019 as LMWM-9 which indicates the Creditor's intention to object by ground (d). It was reasonably clear in that affirmation that that [sic] the Creditor had in mind to object the discharge of the Bankrupt by ground (d). The Creditor by the Amendment Summons adding ground (d) was an attempt to clarify her stance." (reference to hearing bundle skipped)

Mr Pao submits that when taking out the Objection Summons, the Applicant abandoned the grounds stated in the Applicant's Form 82 and sought to rely on a different ground to object to Shum's automatic discharge but changed its mind again after the time when Shum would have already been discharged but for the Interim Order granted on 12 July 2019.

Mr Pao relies on *Re Van Reesema* (supra), *Donnelly v Edelston* (supra) and *Leung Yat Tung* (supra) to submit that a failure to engage the court's jurisdiction under section 30A(3) of the BO due to a failure to comply with section 30A(5) or (6) of the BO cannot be saved by amendment, extension of time or non-invalidity clauses.

As stated in para 99 above, I am of the view that when the Applicant issued the Objection Summons, the Applicant had abandoned objection relying on Ground (c) and (d). The content of affirmation filed in support of an objection relying on Ground (b) may or may not support objection relying on other grounds is neither here nor there. The fact is that the Applicant had chosen to rely on Ground (b) when it issued the Objection Summons and abandoned Grounds (c) and (d) stated in the Applicant's Form 82.

Section 124(1) of the BO provides that formal defect and irregularity may not invalidate proceedings. However, I am of the view that relying on a different ground of objection in the Objection Summons not referred to in the Applicant's Form 82 was not a formal defect but a defect in substance. As stated in para 89 above, I am of the view that section 30A(6) of the BO requires the Applicant to state its grounds of objection in its Form 82 and to take out an application for an order under section 30A(3) of the BO relying on those grounds stated in its Form 82. As pointed out by Le Pichon J (as she then was) in *Re Li Tat Kong* (supra) at 370B, the primary purpose of sections 30A(3) and (6) of the BO "serve to inform the bankrupt of the specific grounds of objection." (emphasis added)

In *Re Liu Man Hoo* (supra) Lam J (as he then was) noted that it would be devastating for a bankrupt (Shum in this case) to learn for the first time during the last few months of the 4 years' period that the trustees wished to prevent him from discharge from bankruptcy on a ground that he had never been previously informed of. (See para 76 of the judgment) It would be even more devastating for Shum to learn for the first time during the last few days of the 4 years' period that

the Applicant wished to prevent him from discharge from bankruptcy on a ground which he had never been previously informed of and which was different from the grounds stated on the Applicant's Form 82.

Lam J further observed in para 10 of the judgment in *Re Liu Man Hoo* that "In *Lee Fred v Leung Chin Yeung* [2007] 1 HKC 164, Kwan J reiterated that an application to object to discharge is a serious matter and it should not be embarked upon lightly." I am of the view that this observation applies to objection by the trustee as well as objection by the creditor. The applicant of an objection to discharge should have carefully considered his ground(s) of objection before raising the objection. He should not be allowed to switch his ground(s) of objection without good reasons.

It is unfair and not doing justice to Shum for the Applicant to take out an objection application relying on grounds not referred to in the Applicant's Form 82. No reasons, not to say good reasons, have been provided by the Applicant justifying its switching grounds of objection.

Although section 124 of the BO does not apply, the court still has jurisdiction to allow the necessary amendments under order 20 rule 8(1) of the RHC. The Applicant cited order 20 of the RHC in the Amendment Summons as the relevant statutory provision for the application. Order 20 rule 8(1) of the RHC provides that:

"(1)

For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order a pleading or any other document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

In Australia, section 33(1)(b) of the Bankruptcy Act empowers the court to allow amendment of any written process, proceeding or notice under the Bankruptcy Act. The Official Receiver in *Re Van Reesema* did apply to amend the notice of objection but it was not made until after the bankrupt had already been discharged from bankruptcy. Sweeney J held that section 33(1)(b) of the Bankruptcy Act should not be used to produce the effect that a bankrupt, who had been discharged by operation of section 149(2), should be reverted to the status of being undischarged.

But for the Interim Order, Shum would have been discharged from bankruptcy on 15 July 2019. The Amendment Summons was not taken out until 10 October 2019, ie more than two months after the date when Shum would have been discharged. An interim order is a measure to preserve the status quo pending determination of the issues between the parties. It is not meant to allow more time for a party to make up his mind as to how he may wish to formulate his case.

No justification has been shown by the Applicant for adding back a ground of objection which had previously been abandoned when the Applicant has all along been legally represented. The Applicant also provides no explanation for not taking out the Amendment Summons prior to the date when Shum should have been discharged from his bankruptcy. In any event, after the

proposed amendments, the Applicant's objection application will still rely on Ground (b) which had not been referred to in the Applicant's Form 82. In such case, I do not agree to exercise the discretion of the court to allow the Applicant to take advantage of the legal effects of the Interim Order to amend the Objection Summons. I dismiss the Amendment Summons in so far as it seeks to amend the grounds of objection.

I shall now deal with the Time Irregularity of the Objection Summons. The Applicant made two applications for abridgement / enlargement of time, namely the Para 3 Application and the Time Summons.

As pointed out in para 92 above, there are two versions of the Para 3 Application. In the original version, the Applicant seeks an order that: "the time for the service of the court documents in relation to this application be abridged" (the "Original Time Application").

By the Amendment Summons, the Applicant seeks to amend the Para 3 Application to become: "that the time for service of [the Objection Summons] be abridged" (the "Amended Time Application").

Taking out an application and serving the application are two distinct and separate aspects of legal proceedings. They may be governed by different statutory provisions. Both the Original Time Application and the Amended Time Application deal with the service aspect of the objection application.

The Original Time Application is for time to serve court documents relating to the application by the Objection Summons out of time. The Objection Summons cited section 30A of the BO, rule 88 of the Rules and inherent jurisdiction of the court.

The Amended Time Application seeks abridgment of time to serve only the Objection Summons.

I have found that Section 30A(6) of the BO requires the Applicant to take out the Objection Summons not less than 14 days before the end of the relevant period for the case of Shum. This is the time restriction for taking out the application.

Service of documents relating to the objection application is governed by rule 88 of the Rules. Rule 88(2)(b) of the Rules requires the Applicant to file an affidavit with his application setting out the reasons why it appears to it that an order under section 30(3) of the BO should be made. The Applicant filed Lee's 1st Affirmation with the Objection Summons on 9 July 2019. As such, rule 88(2)(b) of the Rules has been complied with.

The court fixed the hearing for the Objection Summons for 12 July 2019 (Friday) being the last working day before 15 July 2019 (Monday) (the date of automatic discharge of Shum). Rule 88(4) of the Rules provides that copies of the Applicant's affidavit shall be sent to Shum so as to reach him at least 21 days before the date fixed for the hearing. Although rule 88(4) does not mention the objection summons itself, it defies common sense to suggest that an applicant is only required to serve the supporting affidavit but not the objection summons. I am of the view that under rule 88 of the Rules, the Applicant has to serve Lee's 1st Affirmation together the Objection

Summons to Shum latest on 21 June 2019 (ie 21 days before 12 July 2019). The Applicant was definitely out of time to do so.

The Original Time Application covers an application to abridge the time for service of the Objection Summons and Lee's 1st Affirmation. However, the Original Time Application is not an application to seek time extension for the Applicant to take out the Objection Summons. If the Applicant seeks time extension to issue the Objection Summons by seeking time extension "for service of the court documents in relation to this application [ie the Objection Summons]", the application is misconceived.

The Amended Time Application reduces the scope of the application to cover only the Objection Summons. If the amendment to the Para 3 Application and the Amended Time Application are allowed, the Applicant will still be in breach of rule 88(4) of the Rules in respect of service of Lee's 1st Affirmation. This cannot be what the Applicant intends to achieve. If the Applicant intends to salvage the Time Irregularity (ie failure to take out the Objection Summons within time) by the Amended Time Application, the Applicant has missed the point.

The Para 3 Application in both the original version and the amended version does not assist the Applicant to salvage the Time Irregularity. If the Para 3 Application is meant for that purpose, I shall dismiss such application and disallow the amendment application in the Amendment Summons to amend para 3 of the Objection Summons.

If the Para 3 Application is seeking leave to abridge the time for service of Objection Summons and Lee's 1st Affirmation as required by rule 88(4) of the Rules, I will allow such application if I agree to allow the Objection Summons to proceed. However, as to be discussed below, I shall not allow the Objection Summons to proceed as it fails to comply with section 30A(6) of the BO and is not relying on ground(s) stated in the Applicant's Form 82. As such, I shall also not allow the Para 3 Application whether in the original version or in the amended version.

By the Time Summons, the Applicant seeks leave to apply for and/or proceed with the application for an order to object the discharge of Shum under section 30A(3) of the BO by way of the Objection Summons notwithstanding the time limit prescribed by section 30A(6) of the BO not complied with. The Applicant relies on section 124 of the BO, rule 88 of the Rules and inherent jurisdiction of the court for its application by the Time Summons.

Ms Cheung also refers to rule 204 of the Rules which provides that:

"The court may, under special circumstances and for good cause shown, extend or abridge the time appointed by these rules or fixed by any order of the court for doing any act or taking any proceeding."

As pointed out in para 80 above, the time limit for the Applicant to take out the Objection Summons is not appointed by the Rules nor by any order of the court. It is stipulated by the BO. Rule 204 of the Rules is not applicable. (See *Re Li Sau Ying* [2007] HKCU 2061)

The Time Summons was taken out on 14 January 2020, ie almost six months after the date when Shum would have been discharged from bankruptcy but for the Interim Order. As I have stated in para 111 above, the Interim Order is not meant to be a measure to allow more time for the Applicant to sort out its case against Shum.

Ms Cheung submits that the Applicant was not informed by the Trustees until 20 June 2019 that the Trustees had decided not to object to the discharge of Shum from bankruptcy. As such, the Applicant was left with less than one month (ie about 25 days) instead of the usual three months allowed by section 30A(5) of the BO to prepare its objection application. This is the only explanation provided by the Applicant to support its application by the Time Summons.

In the Reply Submissions, Ms Cheung submits that:

“15.

The Trustees by notice dated 12 April 2019 (Form 83) inform the Creditors that they would object the Bankrupt’s discharge on ground (c) and (d)

16.

The Creditor’s notice of objection filed on 17 June 2019 (Form 82) also relied on ground (c) and (d)

17.

Had the Trustees launched application to object the Bankrupt’s discharge under s.30A(3), the Creditor could jump on the bandwagon of the Trustees’ application and just file affirmation in support, without taking the trouble of launching an application separately.” (reference to hearing bundle skipped)

When the Trustees informed the Applicant on 12 April 2019 of the Trustees’ intention to object to Shum’s automatic discharge, the Trustees cited Grounds (c) and (d) as their proposed grounds of objection. In the Objection Summons, the Applicant relied on Ground (b) as its ground of objection. If the Applicant is objecting to Shum’s discharge on grounds different from that of the Trustees, the Applicant has to issue separate application in any event. (See *Re Li Tat Kong* (supra) and *Re Leung Yat Tung* (supra)) In such case, the Applicant knew that it had to prepare for the Objection Summons relying on Ground (b) as early as 12 April 2019. The Applicant had full three months to prepare the Objection Summons being an objection relying on Ground (b). In fact, a creditor does not have to wait to see whether the trustees will object to the bankrupt’s discharge to prepare for the creditor’s objection. The creditor’s right to object to the automatic discharge of the bankrupt is separate and independent from the trustees’ right to object.

In para 20 of the Reply Submissions, Ms Cheung contends that “had the Trustees launched the application to object the bankrupt’s discharge on grounds (c) and (d) as they claimed in Form 83 filed on 12 April 2019, there was no need for the Creditor to launch the application separately.” This is not right. (See paras 88 and 132 above) She further submits that: “The Creditor could have abandoned ground (b) had the Trustees launched their application.” Ms Cheung’s aforesaid submissions were not supported by the Applicant’s acts. What had actually happened was that

the Applicant abandoned Grounds (c) and (d) and chose to object on Ground (b). I do not accept that the subsequent change of stance of the Trustees rendered the Applicant unable to issue the Objection Summons within the time limit prescribed by section 30A(6) of the BO.

Ms Cheung's contention that the Applicant "was misled by the Trustees by their notice of 12th April 2019 and was under the impression that it could jump on the bandwagon of the Trustees' objection, only to find that the Trustees changed their stance on 20th June 2019" (see para 69 of Ms Cheung's Skeleton Submissions) is not supported by the Applicant issuing the Objection Summons relying on ground different from the Trustees' proposed grounds of objection.

The Applicant had on 15 June 2019 issued the Applicant's Form 82 in support of the Trustees' proposed objection also relying only on Grounds (c) and (d). If the Applicant did not have sufficient time to prepare for the Objection Summons (relying on Ground (b)) when it learned about the change of stance of the Trustees on 20 June 2019, it was because of the Applicant's change of mind on the ground(s) of objection which the Applicant would rely on to object to Shum's discharge.

Ms Cheung submits that the Applicant was prejudiced by the Trustees not conducting a thorough investigation on the Applicant's complaint and the Trustees' late filing of notice on 20 June 2019 (indicating their intention not to object) was late in breach of section 30A(5) of the BO. (See paras 66 and 69 of Ms Cheung's Skeleton Submissions)

I do not see that Shum should be held responsible for the Trustees' handling of this case. To put the Applicant's case to the highest, the Applicant can only explain for the late issuance of the Objection Summons but not the late issuance of the Time Summons.

Bearing in mind that the Objection Summons is defective in substance in relying on ground of objection not referred to in the Applicant's Form 82 and the Time Summons was not issued until after Shum would have been discharged from bankruptcy but for the Interim Order, I refuse to exercise my discretion to extend the time for the Applicant to issue the Objection Summons.

In the premise, I dismiss the Amendment Summons, the Para 3 Application and the Time Summons.

The Declaration Summons

After dismissing the Amendment Summons, the Para 3 Application and the Time Summons, the Applicant's objection application by the Objection Summons stands as an objection issued out of time relying on Ground (b) which I am of the view is not permissible in this case. Such application has no prospect of success and shall not be allowed to proceed further. In such circumstances, the Interim Order granted on 12 July 2019 shall be discharged.

However, I do not agree that the Interim Order is null and void or of no effect for want of jurisdiction. The court certainly has jurisdiction to grant the Interim Order to preserve the status quo pending determination of the Objection Summons. Section 30A(3) of the BO enables the court to make interim order suspending the automatic discharge where there are reasonable

grounds for concluding that such an order under section 30A(3) will be made after the substantive hearing on the materials then before the court and the court will lean on the side of the applicant because of the consequences of refusing an interim order where the bankrupt is about to be discharged. (See *Bagnall v Official Receiver* [2004] 1 WLR 2832 and *Official Receiver v Chan Kwok Keung* [2008] 5 HKLRD 752) The fact that the court may not grant the Applicant's application under the Objection Summons will not render the court having no jurisdiction to make the Interim Order. As Arden LJ stated in the *Bagnall* case (*supra*) at para 26 the judgment:

"The word "satisfied" means, as I see it, "proved sufficient" and there must, in the particular circumstances, be an iterative process between the proposed order and the degree of satisfaction required. Accordingly where only an interim order is proposed the degree of satisfaction required is that sufficient to justify the court in granting that interim order."

When the Interim Order was granted in this case, only Lee's 1st Affirmation was placed before this court. The court was justified to hold the ring until the Objection Summons could be heard. If the evidence of the Applicant were unchallenged, there were reasonable grounds for concluding that an order would be made under section 30A(3) of the BO at the substantive hearing of the Objection Summons.

As such, I also do not agree to set aside the Interim Order for want of jurisdiction. However, I agree to discharge the Interim Order for the reason that with my above rulings there cease to be reasonable grounds for concluding that an order under section 30A(3) of the BO would be made after the substantive hearing of the Objection Summons.

As the Interim Order was made in open court, it shall be discharged also in open court. The court shall set a date to discharge the Interim Order in open court and to discharge Shum from bankruptcy. With Shum being discharged from bankruptcy, the Objection Summons will also be dismissed.

Other applications

There remain the Affidavit Summons and the Cross-Exam Summons. After disposing of the other applications as aforesaid, there is no need for me to deal with the Affidavit Summons and the Cross-Exam Summons save and except for the costs incurred. However, for sake of completeness, I shall briefly deal with these two applications.

The Affidavit Summons

By the Affidavit Summons, the Applicant seeks to adduce the 3rd affidavit of Shek Ngo Cheung ("Shek's Affidavit") to produce documents received from the Trustees on 8 October 2019. The documents concerned are proof of debt submitted by Standard Chartered Bank (Hong Kong) Ltd ("SCB") and their supporting documents which include three facility letters addressed to Young and Fortune Limited and three guarantees of Shum (the "Documents").

Shek's Affidavit stated that the affidavit was filed in support of the Objection Summons. Shek's Affidavit stated that the Applicant was unable to produce the Documents earlier because the Trustees failed to co-operate with the Applicant's enquiry made on 29 March 2016.

It is noted that the Applicant did not receive the Documents until 8 October 2019. However, in the Objection Summons, the Applicant is relying on Ground (b), ie the discharge of Shum would prejudice the administration of his estate. As the Documents have all along been in the possession of the Trustees, I do not see how they would be relevant to an objection relying on Ground (b).

I note that the Applicant seeks to add Ground (d) as its ground of objection by the Amendment Summons. If the Amendment Summons is allowed, the Documents may be relevant to the conduct of Shum in respect of the period before the commencement of his bankruptcy. However, as I have dismissed the Amendment Summons, I shall also dismiss the Affidavit Summons.

The Cross-Exam Summons

By the Cross-Exam Summons, the Applicant seeks an order requiring Shum to attend court for cross-examination on Shum's Affirmation.

The Applicant relies on an affidavit of Mr Shek sworn on 10 October 2019 to support the Cross-Exam Summons. Para 6 of the said affidavit stated that:

"6.

Central to the issue of the [Applicant's] Objection to Discharge Summons [ie the Objection Summons] is that, whether [Shum] had, at the time of applying for the two loan applications from the [Applicant] to be secured by his property (at Flat B Level 8 Block 6 with Car Park space No. P5017 on Level 5 Peak One, No. 63 Mei Tin Road, New Territories) ("Property") as second mortgage, made fraudulently misrepresentation to the [Applicant] in order to entice the latter to approve the two loans (i.e. HK\$4,000,000 and HK\$700,000 respectively) to him." (Original emphasis)

Ms Cheung submits in her Skeleton Submissions that:

"90.

It is submitted that there are factual issue to be decided, i.e. whether [Shum] had, at the time of applying for the two loan applications from the [Applicant] to be secured by his property as second mortgage, made fraudulently misrepresentation to the [Applicant] to entice the later [sic] to approve the two loans.

91.

The [Applicant] and [Shum] each gave a different account of the event, it is submitted that the cross-examination of [Shum] would assist the court in determining the factual issue."

Shum's Affirmation deals with the Time Irregularity and the Applicant's alleged fraud and forged documents. The issue of Time Irregularity has been dealt with in this decision and I do not see how cross-examination of Shum will be of any use in assisting this court to deal with the issue of Time Irregularity.

The remaining parts of Shum's Affirmation, ie paras 8 to 10, are Shum's reply to para 3 to 5 of Lee's 2nd Affirmation in which the Applicant alleged that Shum had intentionally deceived the Applicant of Shum's outstanding indebtedness due to SCB and that the two repayment schedules on debts due to SCB previously provided by Shum to the Applicant were believed to be forged documents.

The Objection Summons cited Ground (b) as the ground of objection. Shum rightly stated in para 9 of Shum's Affirmation that:

"9.

... the [Applicant's] complaint does not fall under BO s.30A(b) at all as whether I had intentionally deceived the [Applicant] of the outstanding indebtedness due to Standard Chartered Bank (which is denied) has no bearing whatsoever on the administration of the estate (i.e. there is no detriment or prejudice to ascertaining and administering the assets and liabilities of my bankruptcy estate)."

I do not see that cross-examination of Shum on Shum's Affirmation will assist the court in determining an objection application relying on Ground (b).

I note that the Applicant seeks to add Ground (d) as its ground of objection by the Amendment Summons. If the Amendment Summons is allowed, the conduct of Shum in respect of the period before the commencement of his bankruptcy will be relevant. Whether Shum had committed fraud or produced forged documents to the Applicant in obtaining loans from the Applicant will be relevant and it may be necessary to cross-examine Shum on matters referred to in para 8 to 10 of Shum's Affirmation. However, as I have dismissed the Amendment Summons, I shall also dismiss the Cross-Exam Summons.

Miscellaneous matters

Mr Pao in his skeleton submissions asked me to expunge Lee's 3rd Affirmation or strike out part of it. No summons for such order has been taken out by Shum. I had pointed that out to Mr Oh, counsel for Shum, at the hearing of 11 October 2019. Mr Oh confirmed to the court at that hearing that Shum did not seek to strike out Lee's 3rd Affirmation but only sought leave to reply to the same. As there is no application before me to strike out Lee's 3rd Affirmation whether in part or in whole, I do not propose to deal with this part of Mr Pao's submissions.

In the course of making her reply submissions, Ms Cheung made an oral application to the court for leave for the Applicant to file Lee's 3rd Affirmation out of time. By then, the court had already heard the parties' submissions on the various applications before the court on that day. I did not consider that it was appropriate for the court to allow such application at that stage of the proceedings. As such, I refused her application.

In the Reply Submissions, Ms Cheung states that the Time Summons "was taken out at the suggestion of the learned Master at the call over hearing of 11th October 2019". I have no recollection of making such suggestion at the hearing of 11 October 2019. The court's records show that at the hearing of 11 October 2019, Mr Oh took issue on the Para 3 Application only covered service of documents but not taking out of the objection application. I pointed out at that hearing that it was up to the Applicant to consider whether to amend the Para 3 Application or take out new application or maintain the stance that the Para 3 Application had served the Applicant's purposes. In any event, how the Applicant would proceed with its application is a matter for the Applicant and its legal advisors. The court would not act as the Applicant's legal advisors.

In the Reply Submissions Ms Cheung submits that this court cannot review its own order, including the Interim Order. She submits that:

"11.

Once the interim order is granted, the court is functus officio on the matter that is covered by it, this court has no power to review it. If the bankrupt wishes to challenge the interim [order] on the basis that it is nullity, he has to appeal to a higher court."

Ms Cheung refers to *In re Tobias & Co Ex Parte H A Tobias* [1891] 1 QB 463 to support her aforesaid contention. With respect, I do not agree.

Section 98(1) of the BO provides that:

"(1)

The court or the Registrar may review, rescind or vary any order made by it or him, as the case may be, under its or his bankruptcy jurisdiction."

The BO has provided express power for this court to review the Interim Order. The Tobias case is not an authority for the proposition that the court has no power to review its own order made under its bankruptcy jurisdiction. In the Tobias case, the application to review a previous order of the court was withdrawn at the hearing. In fact, the English court in the Tobias case confirmed that the court did have jurisdiction to reconsider its previous decision under the bankruptcy jurisdiction. Cave J stated at 465 that:

“... ... It appears to me that the power of reconsidering an absolute refusal is conferred on the Court by s.104 of the [Bankruptcy] Act 1883, which provides that “every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction.” This section gives the Court a discretion of the widest and most far-reaching character; and, when properly exercised, it is so beneficial in its operation, and so calculated to advance the ends of justice, that I think it ought not to be restrained by construing it in any niggardly spirit.”

The learned judge only pointed out in the same paragraph of the judgment in the Tobias case that: “the Court should not grant a rehearing where the only object of the applicant is to obtain another opportunity for appealing from the decision of the judge when he has let the time for appealing from the original decision go by.” Although the time for appealing against the Interim Order has lapsed, I do not see that Shum’s applications relating to the Interim Order are applications aiming at obtaining another opportunity for appealing from my decision in granting the Interim Order.

Ms Cheung further submits that in *Official Receiver v Chan Kwok Keung* [2008] 5 HKLRD 752 Le Pichon JA had pointed out that the court has no power to backdate the discharge after an interim order had been made. (See para 12 of the Reply Submissions)

Section 98(1) of the BO provides express power for the court to review its own order. The fact that court has no power to backdate the discharge after an interim order had been made does not mean that the court may not review the Interim Order. It only means that one of the options will not be available to the court at the review.

Conclusion and costs

To conclude, on the Preliminary Issue I find that the court doth have jurisdiction to deal with the Objection Summons and to make the Interim Order. For reasons set out above, I dismiss the Amendment Summons, the Para 3 Application, the Time Summons, the Affidavit Summons and the Cross-Exam Summons. I agree that the Interim Order granted on 12 July 2019 shall be discharged as prayed in para 2 of the Declaration Summons. As the Interim Order was granted in open court, I shall formally discharge the Interim Order at a separate hearing in open court. I shall also dismiss the Objection Summons at that hearing.

Shum fails in the Preliminary Issue raised which is the main issue before the court at the hearing but partly succeeds in the Declaration Summons in obtaining discharge of the Interim Order. The Applicant has failed in all its applications. Shum should bear the costs for the Preliminary Issue and the challenge to the validity of the Interim Order. The Applicant should bear the costs for other applications.

Mr Oh had at the hearing on 11 October 2019 taken issue on the Applicant issuing the Amendment Summons, the Affidavit Summons and the Cross-Exam Summons on the day just before the hearing. Mr Oh contended that Shum should have the costs for the aforesaid summonses in respect of the hearing on 11 October 2019 in any event because of the Applicant’s late applications. I agree that such litigation conduct of taking out applications at the last minute

shall not be encouraged. As the hearing of 11 October 2019 would have to proceed irrespective of whether the Applicant had taken out those summonses, no costs were wasted by the Applicant's late applications on that particular occasion. I did not order the Applicant to pay costs for the hearing of 11 October 2019 but take the conduct of the Applicant into account when considering the issue of costs in this decision.

Taking into account the time and efforts spent by the parties on the Preliminary Issue and the other applications before me on this occasion, I am of the view that a fair costs order for this occasion is for each party to bear his/its own costs.

I make a costs order nisi to that effect. The costs order nisi shall become absolute after 14 days from the date of this decision unless application is received from either party to vary the same within this 14 days' period.

(Lai)

Master of the High Court

Ms K Cheung instructed by Tung, Ng, Tse & Lam for the Applicant

Mr Jin Pao SC and Mr N Oh instructed by Tonys Lawyers for the Bankrupt

Attendance of the Joint & Several Trustees being excused

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Prepared on 28 October 2026 · Esheria