

HONG KONG / JUDGMENT

RE HAU PO MAN STANLEY

COURT

Court of First Instance

DECIDED

26 June 2007

CASE / FILE NUMBER

HCB924/2002

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bjbj HCB924/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE IN bankruptcy proceedings NO. 924 OF 2002

Re: HAU PO MAN STANLEY (IN BANKRUPTCY)

Before : Hon Poon J in Chambers Dates of Hearing : 20 September 2006 and 17 April 2007 Date of
Decision : 26 June 2007

DECISION

- a. Introduction AUTONUMOUT On 27 May 2002, Mr Stanley Man (Stanley), a dentist, was adjudicated bankrupt upon his own petition. The Joint and Several Trustees of his estate (the Trustees) were appointed at the creditors meetings on 3 September 2002. AUTONUMOUT Since their appointment, the Trustees made repeated enquiries with Stanley, his wife Mrs Lucita Hau (Lucita) and their daughter Ms Michelle Lynn Hau (Michelle) concerning Stanley s financial affairs and dealings and found their answers evasive and unsatisfactory. Pursuant to authority granted by Barma s order dated 2 November 2005, the Trustees applied by summons dated 6 March 2006 (the S29 Summons) for an order directing Stanley, Lucita and Michelle to attend court to give evidence pursuant to section 29 (section) of the Bankruptcy Ordinance, Cap.) and disclose the documents described in the Schedule attached for the purpose of giving the evidence (the S29 Application). AUTONUMOUT The automatic discharge of Stanley under section 30A of BO (section 30A) fell on 26 May 2007. By summons dated 12 May 2006, the Trustees applied for an order suspending the automatic discharge for a period of four years on the grounds set out in section 30A(4)(a), (b), (c), (d) and (g) (the S30A Application). B. Background AUTONUMOUT The background circumstances leading to these applications may be summarized as follows.

B1. Novel Gain AUTONUMOUT The main focus of the S29 Application relates to one Novel Gain Enterprises Ltd (Novel Gain). AUTONUMOUT According to the records filed with the Companies Registry, Stanley and Lucita were between 13 July 1995 and 22 June 2000 the only two shareholders of Novel Gain, each holding one of the two issued shares. By a Bought and Sold Note dated 24 June 1999 but not registered with the Companies Registry, Stanley purportedly sold his one share in Novel Gain to Michelle for HK\$1,000 (the Share Transfer). Stanley and Lucita were also directors until Stanley s resignation on 8 January 1999 when he was then replaced by their daughter Ms Ingrid Hau (Ingrid). AUTONUMOUT On 11 December 1997, Novel Gain granted a guarantee in favour of Ms Hau () as security for a loan of HK\$4,000,000 that she advanced to Stanley (the Guarantee). AUTONUMOUT Novel Gain s only asset was a residential property at 2nd Floor, 41D Shouson Hill Road (the Property), acquired in October 1995 at HK\$15,700,000. On 17 January 2000, Novel Gain sold the Property for HK\$18,500,000, fetching HK\$11,148,832.16 as net sale proceeds after discharging the outstanding mortgage. I will come to the application of the sale proceeds in a moment. AUTONUMOUT Upon Lucita s application, Novel Gain was deregistered on 19 January 2001. B2. Disclosure in the statement of affairs AUTONUMOUT In the statement of affairs dated 11 January 2002 filed in support of his petition for self-bankruptcy, Stanley stated that he had eight unsecured creditors with debts totaling HK\$21,140,305.22. The aggregate value of his assets stood at HK\$159,131.31. The regular net income derived from his dental practice was HK\$2,621 per month. And he had interest in three private companies, including Powerworth Co. Ltd (Powerworth) (50%), Sweetways Ltd (50%) and Atlanta Developments Ltd (Atlanta) (35%). B3. Disclosure in the Answers AUTONUMOUT On 9 December 2002, the Trustees requested Stanley to provide answers to a questionnaire, which he did in January 2003 (the Answers). AUTONUMOUT In the Answers, Stanley disclosed that in the five years before the presentation of the petition, he had interest in seven other private companies including Novel Gain. As to whether he had transferred the shares in those seven companies, Stanley only stated that he transferred his shares in (a) Maxi Worth Limited (Maxi Worth) to Ivy on 20 December 2000 for HK\$500,000 as partial repayment of a loan due to her and (b) Prime Search Limited to Michelle in July 2000 for HK\$1,000. He made no mention of the Share Transfer at all. Thus on the information provided by him in the Answers, Stanley remained a shareholder of Novel Gain until its deregistration on 19 January 2001. AUTONUMOUT Stanley further stated that he had share of the Property and that out of the sale proceeds of the Property, he repaid Ivy HK\$4,000,000 under the Guarantee, he lost HK\$4,000,000 in stocks investment and paid off debt in the sum of HK\$1,000,000. AUTONUMOUT As to the disposal of funds realized from life insurance policies and investments in mutual funds, Stanley stated that :

- (1) HK\$327,746.89 realized from Prudential was lost in gambling in Macau and horse racing in Hong Kong;
- (2) of HK\$662,433.68 realized from Manulife, HK\$650,000 was repaid to Ivy in July 2001; and

- (3) HK\$113,827.51 realized from SCB Prime Fund and Vietnam Investment Fund was used for personal expenditures. The Preference Application AUTONUMOUT In December 2003, the Trustees applied to set aside some transfers made by Stanley in favour of Ivy and her husband, Derek Yuen between 16 January 2001 and 15 January 2002 as unfair preference under sections 50 and 51 of BO (the Preference Application), including the said payment of HK\$4,00,000 to Ivy pursuant to the Guarantee. AUTONUMOUT By decision dated 10 July 2004 (the Decision), Lam J dismissed the Preference Application in its entirety. The Trustees then appealed against the Decision in respect of the transfers other than the said payment to Ivy. The Court of Appeal (Rogers VP, Le Pichon JA and Stone J) allowed the appeal in part : see CACV234/2004, unreported, 5 May 2005. Further enquiries with Stanley AUTONUMOUT By letter dated 23 February 2005, the Trustees asked Stanley to answer their queries about Novel Gain, the Share Transfer and the sale of the Property. Such questions included :
- (1) the reason why he resigned as a director of Novel Gain and replaced by Ingrid;
 - (2) the reason for the Share Transfer;
 - (3) the reason why the consideration for the Share Transfer was HK\$1,000;
 - (4) what was the financial position of Novel Gain and Stanley at the time of the Share Transfer;
 - (5) who and when the decision to sell the Property was made;
 - (6) the reason for the selling the Property and why was it in January 2000; and
 - (7) how the sale proceeds were applied after paying HK\$4,000,000 to Ivy. AUTONUMOUT The Trustees also asked for the contact details of Ingrid, the audited and management accounts of Novel Gain for 1999 and 2000 and a copy of the Guarantee. AUTONUMOUT After a few extensions of time, Stanley replied to the Trustees by letter dated 6 April 2005. Stanley stated that he resigned as a director of Novel Gain because he was under medial treatment for depression and sleeping disorder. He referred to the Decision and said it was decided by Lam J that the Share Transfer was not a sham. On Novel Gain s financial position at the time of the sale, he said it had a mortgage of over HK\$7,000,000 and an undertaking to repay Ivy HK\$4,000,000. On his own financial position, he referred to paragraph 30 of the Decision and said the earliest date that he was alleged to insolvent was November
1999. As to when and who decided to sell the Property, he said he did not know as he was then no longer a director or shareholder of Novel Gain. While he was a director, he had consulted one Mr Teddy Chien (Chien) on several occasions and Mr Chien strongly advised him to sell the Property and used the proceeds to invest with the hope of making a come-back . He did not provide any details of how the sale proceeds were applied other than referring to what he had earlier stated in the Answers (see paragraph 13 above). He did not provide the contact details of Ingrid. On the documents sought, he said a copy of the Guarantee had already been provided to the Trustees. He was unable to provide the rest because he was no longer a director or shareholder of Novel Gain. AUTONUMOUT The Trustees were not satisfied with Stanley s answers and pressed for further answers by letter dated 15 April

2005, to which Stanley responded by letter dated 22 April 2006. He reiterated that he resigned as a director from Novel Gain because he was under heavy stress and was suffering from severe insomnia and was advised to reduce any stress-inducing activities. He enclosed a medical certificate in support. The Share Transfer was a family decision to help relief him from any undue stress. It was transferred to Michelle who happened to be back in Hong Kong at the time. Novel Gain then had a net liability. Thus the consideration of HK\$1,000 was accepted by the Stamp Duty Office. The sale of the Property was a family decision. He wanted to sell the Property as early as 1998 but could not find a suitable buyer. Ivy was pressing for repayment of HK\$4,000,000. A genuine interested buyer came up with an attractive offer. So the Property was sold in January 2000. The sale proceeds were applied to discharge the outstanding mortgage (about HK\$7,000,000) and repay Ivy (HK\$4,000,000). The balance was used by the family. He had checked with other family members and was informed that they did not have any accounts of Novel Gain. Neither he nor any family member nor the auditor had a copy of the Guarantee. B4. Further enquiries with Lucita, Michelle and Ingrid AUTONUMOUT Separately, the Trustees made similar enquiries with Lucita, Michelle and Ingrid regarding Novel Gain, the Share Transfer and the sale of the Property. AUTONUMOUT In her reply letter dated 17 May 2005, Lucita stated that as Stanley was very depressed, he resigned as director of Novel Gain. Ingrid took up the directorship as she was the eldest daughter who was in Hong Kong at the time. As to the Share Transfer, it was a family decision. Novel Gain needed two shareholders. Michelle was then in Hong Kong for summer holiday. So Stanley's share was transferred to her who held it on trust for Lucita. The consideration was fixed at HK\$1,000 because Novel Gain then had a net liability. The sale of the Property was a family decision. She could not recall how the balance of sale proceeds in the sum of HK\$2,000,000 was spent. She said she at least owned 50% of Novel Gain. She was entitled to receive at least HK\$5,500,000 from the net proceeds but she only received HK\$2,000,000. She did not think she had a duty to disclose how she had spent it. As to accounts, Lucita said there were no audited accounts for 1999 and 2000. She did not possess any management accounts as Novel Gain had been deregistered a long time ago. The auditors also confirmed that they no longer retained any statements of Novel Gain. Lastly, she did not have a copy of the Guarantee. AUTONUMOUT In her reply letter dated 17 May 2005, Michelle basically said the Share Transfer was a family decision. Stanley's share was transferred to her because she was in Hong Kong for summer vacation. She did not know why the consideration was fixed at HK\$1,000. It was Lucita who paid that sum on her behalf. She did not know who decided to sell the Property and why. She did not know what was Novel Gain's financial position at the time of the sale. She did not know who the balance of the proceeds was applied. She did not have any accounts of Novel Gain. AUTONUMOUT In her reply letter which was undated, Ingrid said she did not know why Stanley resigned as a director of Novel Gain. She replaced him because she was then the only other family member in Hong Kong. She did not recall anything relating to the Share Transfer or the sale of the Property except that Ivy was then pressing for repayment of her loan. She did not have any accounts of Novel Gain or a copy of the Guarantee. AUTONUMOUT By letter dated 7 November 2005, the Trustees solicitors requested Lucita to

provide further information and documents in respect of Novel Gain. Lucita made no reply. C. The S29 Application AUTONUMOUT The S29 Application is supported by the Trustees report dated 3 March 2006 (the Report). Though filed together with the S29 Summons, the Report was then not served on Stanley, Lucita and Michelle. Pursuant to my order made at the call-over hearing on 30 March 2006, the Trustees served the Report on them and the parties had filed since their affidavit evidence, which I will discuss in a moment.

AUTONUMOUT At this juncture, I digress to deal with a complaint raised by Mr Chan, counsel appearing for Lucita and Michelle. Rule 25 of the Bankruptcy Rules provides that an application under section 29 should be in writing and the application should state shortly the grounds upon which the application was made. Mr Chan complained that no specific grounds had been stated in the S29 Summons. But as rightly pointed out by Ms Chan, counsel appearing for the Trustees, Rule 25 only requires the grounds in support to be stated in writing. It does not say that they must be stated in the summons, although it will be convenient to do so. Here, the grounds were set out in the Report, which had since been disclosed to Stanley, Lucita and Michelle pursuant to order made on 30 March 2006. So the requirement in Rule 25 is met. Even if contrary to the above, the grounds must be stated in the S29 Summons, Mr Chan s clients have suffered no prejudice because from reading the Report they know perfectly well the grounds the Trustees sought to rely on and have since filed affidavit evidence in answer. AUTONUMOUT now turn to the substance of the Application. C1. An overview AUTONUMOUT The Report is divided into two sections. The first section deals with Novel Gain. The Trustees set out the enquiries with Stanley, Mucita, Michelle and Ingrid as summarized above and concluded that their answers are evasive and unsatisfactory. The second section is headed The Bankrupt s Financial Position prior to Bankruptcy . The transactions that the Trustees wish to investigate into are as follows :

- (1) Between 1996 and 2000, Stanley derived a low income from his dental practice. His annual assessable profits never exceeded HK\$148,559. But with such income, Stanley was apparently able to finance the purchase of various properties set out in the statement of affairs. He also traded heavily on the stock market, through the margin accounts maintained with Thing On Securities Ltd (Thing On) and Tsun Fat Finance Co. Ltd (Tsun Fat). He was able to sustain a lavish lifestyle in 2000 because he had to pay HK\$42,300 monthly installment for his motor vehicle between February and December 2000 and a monthly rental of HK\$38,000 for his residence between March 2000 and December
2001. In view of the huge discrepancy between the level of Stanley s income, his investment, trading on stock and lavish lifestyle, the Trustees considered that a thorough investigation on his financial position prior to bankruptcy is necessary.
- (2) Stanley alleged that of the sale proceeds of the Property, HK\$4,000,000 were lost in stock market. However, between 17 January 2000 (the sale of the Property) and 31 January 2000, Stanley had in fact traded successfully for there was a credit balance of HK\$4,800,000 by 31 January 2000. Further, far from making losses, Stanley had in fact made net cash

withdrawals of HK\$3,070,000 from the Thing On Margin Account. The amount due to Thing On as at the date of his bankruptcy was HK\$770,000. The Trustees considered that Stanley had not adequately accounted for the HK\$4,000,000 that he claimed to have lost in stock market and the net cash withdrawals of HK\$3,070,000.

- (3) As early as March 2003, the Trustees had requested Stanley to explain the substantial cash withdrawn from his Premier bank account with HSBC within two years of his bankruptcy. In particular, he withdrew HK\$3,000,000 on 28 February 2000. But Stanley had not provided any satisfactory answer. Nor had he explained how and where he spent the HK\$1,900,000 that he withdrew in cash from his account with Dao Heng Bank on 13 October 2000.
- (4) Between 29 February and 13 October 2000, Stanley had on eight different occasions paid a total of HK\$4,200,000 to one Wong Kwong Sing (Wong). The Trustees would like to examine Stanley on his relationship with Mr Wong, a recipient of substantial cash from him.
- (5) Stanley claimed that he transferred his share in Maxi Worth in December 2000 to Ivy and applied the proceeds from the life insurance in July 2001 to repay Ivy a HK\$1,500,000 loan made on 17 March 2000. He borrowed the loan from Ivy because he made heavy losses in the stock market in around March

2000. However, his explanation was at odds with the fact that two days before the sum of HK\$1,280,000 was paid into his Thing On account on 24 March 2000, a larger sum of HK\$1,580,000 was paid by Thing On to him. Thus there was no urgent need for Stanley to borrow the alleged loan of HK\$1,500,000 from Ivy in March

2000. Further, as the payment of HK\$1,580,000 was not recorded in the Thing On margin report for the month ended 31 March 2000, Stanley might have other undisclosed investments.

- (6) Stanley asserted that the sum of HK\$327,746.89 and HK\$980,000 realized from the life insurance policies held by Powerworth had been lost in gambling in Macau and in horse racing in Hong Kong. The Trustees would like to examine him with regard to his gambling activities prior to his bankruptcy. AUTONUMOUT The documents sought by the Trustees as per the Schedule to the S29 Summons are :

- (1) Documents relating to Novel Gain including :
 - (a) the audited and management accounts for 1999 and 2000 (items 1 to 2);
 - (b) how the purchase of the Property was financed (item 3);
 - (c) the application for deregistration of Novel Gain in January 2001 (item 4);
 - (d) the Guarantee (item 5);
 - (e) the financial position of Novel Gain (item
- 6) as at the time when :

- (i) Stanley transferred his one share in Novel Gain to Michelle on 24 June 1999 for HK\$1,000; (ii) the Property was sold on 17 January 2000; and
- (f) the disposal of the sale proceeds of the Property (item 7 to 9).
- (2) Documents showing the contact details of Ingrid (item 10). (The Trustees no longer pursued this item at the hearing before me.)
- (3) Documents evidencing Stanley's income, expenditures, investment and gambling activities including :
 - (a) how the HK\$3,000,000 and HK\$1,900,000 withdrew from Stanley's bank accounts on 28 February 2000 and 13 October 2000 respectively were disposed (item 11);
 - (b) sources of income between 1 January 2000 and 3 September 2002 (items 12 and 14);
 - (c) income and assessable profit for the years 1995/96 and 2000/02 (item 13);
 - (d) statements issued by Thing On regarding the investment accounts of companies controlled or owned by Stanley (item 15); and
 - (e) gambling activities between 1 January 2000 and 15 January 2002 (item 16). AUTONUMOUT Chan pointed out that other than the copy Guarantee, which had already been exhibited to Ivy's affirmation filed in the Preference Application, none of the documents sought by the Trustee was produced or made available to the Trustees. AUTONUMOUT The grounds of opposition relied on by Stanley, Lucita and Michelle are broadly :
 - (1) The doctrine of res judicata arising from the Decision operates to disentitle the Trustees from re-opening the issue of validity of the Share Transfer. In any event, the Decision weighs against the Application. I will call this the Res Judicata Point below.
 - (2) No useful purpose will be served by pursuing the intended investigation of the dealings pertaining to Novel Gain.
 - (3) They had in any event fully co-operated with the Trustees in making full and frank disclosure to the best of their ability. The S29 Application is an oppressive exercise.
 - (4) The Trustees are guilty of delay and ulterior motives possibly exist behind the Application. C2. The law AUTONUMOUT Before proceeding further, I will set out the relevant legal principles. They are well established and may be summarized as follows. AUTONUMOUT The relevant parts in Section read
 - (1) The court may, on the application of the Official Receiver or trustee, at any time after a bankruptcy order has been made against a bankrupt summon before it the bankrupt or his spouse, or any person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt or supposed to be indebted to the bankrupt, or any person whom the court may deem capable of giving information respecting the bankrupt, his dealings or property, and the court may require any such person to produce any documents

in his custody or power relating to the bankrupt, his dealings or property. (1A) The court may require a person referred to in subsection (1), other than the bankrupt, to submit an affidavit to the court containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt's dealings, affairs or property. AUTONUMOUT The examination under this section is called private examination as opposed to the public examination under section 19 of the Ordinance. AUTONUMOUT As can be seen in section 29(1), those who may be summoned for the examination are :

- (1) the bankrupt;
 - (2) the bankrupt's spouse;
 - (3) any person known or suspected to have possession of any of the estate or effects belonging to the bankrupt;
 - (4) any person supposed to be indebted to the bankrupt; and
 - (5) any person whom the court may deem capable of giving information respecting the bankrupt, his dealings or property. AUTONUMOUT The powers contained in section 29 are primarily directed to enabling the court to help a trustee to discover the truth and circumstances connected with and to gather information about the bankrupt's property, affairs and dealings, in order that the trustee may be able, as effectively as possible, and with as little expense as possible, to complete his function; to put the affairs of the bankrupt in order and to administer the bankruptcy in all its various aspects, including the getting in of any assets of the bankrupt available in the bankruptcy : see *Re Poulson, a bankrupt* [1976] 2 All 1020; *Williams and Muir Hunter, the Law and Practice in Bankruptcy*, 9th edn, p. ; *Muir Hunter on Personal Insolvency*, Vol. 1, January 2006, para. 3-2511 and *Butterworths Hong Kong Bankruptcy Law Handbook*, 3rd edn, para. 29-01 at p. 133. AUTONUMOUT The court has a wide discretion under section 29 but it should be exercised with considerable care. This caution is made in view of the judicial perception that private examination proceedings held under section 29 are inquisitorial in nature : see *Butterworths Hong Kong Bankruptcy Law Handbook*, para. 29-05 at p. 134. AUTONUMOUT In corporate insolvency, similar provisions for private examination can be found in section 221 of the Companies Ordinance, Cap.
32. It has been generally accepted that cases decided under section 221 or its English equivalent (sections 236 and 237 of the Insolvency Act 1986) are applicable to cases under section : see *Butterworths Hong Kong Bankruptcy Law Handbook*, para. 29-05 at pp. 134-135. Ms Chan (for the Trustees), Mr Suen (for Stanley) and Mr Chan (for Lucita and Michelle) have accordingly cited cases decided under the corporate insolvency provisions. From those cases the following main propositions may be derived :

- (1) The applicant must satisfy the essential condition that the provision of information or documents is reasonably required in order to permit him to carry out his functions : Re New China Hong Kong Group Ltd [2003] 3 HKC 252, per Kwan J at para. 21 at p. 260D-E.
- (2) The applicant must also raise a prima facie case that the respondent is able to provide such information or documents : Re Mid East Trading Ltd [1997] 3 All 481, per Evans-Lombe J at p. 494a-c.
- (3) These two criteria having been met, the court in exercise of its discretion must then carefully strike a balance between the applicant s reasonable requirements and the need to avoid making an order which is wholly unreasonable, unnecessary or oppressive to the person concerned : The burden is on the applicant to satisfy the court, after balancing all the relevant factors, there is a proper case for such an order to be made : British & Commonwealth Holdings Plc (Joint Administrators) v. Spicer and Oppenheim [1993] AC 426 at p. 439D and G-H; followed in Re New China Hong Kong Group Ltd, per Kwan J at para. 22, at p. 260E-G. I will apply these principles to the S29 Application. C3. Essential conditions AUTONUMOUT will begin with the question whether the Trustees have satisfied the essential conditions that the provision of information or documents is reasonably required in order to permit him to carry out his functions and that Stanley, Lucita and Michelle are able to provide the information and documents sought. The discussion necessarily involves a closer examination of the answers provided by them to the Trustees so far. Thus it is convenient to consider the sufficiency of their answers at the same time.
- (1) Novel Gain AUTONUMOUT will first consider the Application concerning Novel Gain. AUTONUMOUT It is convenient to dispose of the Res Judicata Point, which if successful, would debar the Trustees from pursuing the investigation any further. AUTONUMOUT In the decision, Lam J dealt with Novel Gain s payment of HK\$4,000,000 to Ivy thus The \$4 million payment by N GEL
26. On the face of it, the payment was not made by the bankrupt. Although the guarantee of December 1997 was signed by the bankrupt as one of the director of NGEL in respect of an indebtedness of the bankrupt, there is insufficient evidence before this court to justify an inference that the bankrupt played any part in the payment in January 2000.
27. To start with, the Trustees had not adduced any evidence to make out a case that the bankrupt was an alter ego of NGEL and the property of NGEL belonged to the bankrupt beneficially. Whilst it is correct that the bankrupt had been a director and shareholder of NGEL and the property of NGEL was used by him and his family members as residence, these facts alone could not justify the piercing of corporate veil. There is no evidence to suggest that the company was used as a device to conceal the true ownership of the assets to evade liability. As acknowledged by Mr Harris, it was quite common for people in this jurisdiction to set up company to hold real property.

28. Mr Harris however relied on the provisions in Section 50(3)(b) to argue that preference includes anything suffered by the bankrupt to be done. He contended that the bankrupt had connived in the payment of the \$4 million by NGEL. That submission could only be valid if at the time of the payment, the bankrupt had control over the affairs of the company. The evidence is that the bankrupt was no longer a director of NGEL when the payment was made.
29. Although the 2000 annual return still recorded that the bankrupt was a shareholder, I cannot ignore the effect of the share transfer documents of June 1999. The Trustees referred to a number of matters to attack the transfer,
- (a) reference by the bankrupt in the letter of 30 March 2003 to the property as my residential property ;
 - (b) consideration of the transfer was \$1,000, much lower than the value of the property held by NGEL;
 - (c) the incorrect information contained in the annual return as to the shareholders of NGEL;
 - (d) the transferee was a daughter of the bankrupt and she had subsequently paid for some holiday expenses of the bankrupt.
30. I do not think these matters, whether taken individually or collectively, were sufficient to establish that the transfer was a sham and the bankrupt retained control over NGEL on the date of payment. I do not read the letter of 30 March 2003 as a confession by the bankrupt that he was the beneficial owner of the property. He was only explaining how the guarantee came into existence. There is no evidence before this court to show that the \$1,000 consideration was an undervalue having regard to the then financial position of NGEL. It has to be remembered that by June 1999, NGEL had already undertaken liability under the guarantee to the extent of \$4 million. There is no information as to the net asset position of NGEL in June 1999 after such liability is taken into account. Even if this court were to draw the inference that the transfer had not been registered in the books of NGEL, Mr Harris accepted that the transfer could operate to transfer the beneficial interest in the share. The transfer documents were duly stamped and there is no suggestion that they were not authentic. I am not prepared to draw any inference from the payment of a trip to Taiwan in the sum of \$2,706 by the daughter who happened to be the transferee that the transfer was not a bona fide one. I note that in the evidence filed by the Trustees, the earliest date the bankrupt was alleged to be insolvent was November 1999.
31. In my judgment, the Trustees failed to prove that the bankrupt had taken part in the decision by NGEL to repay the \$4 million in January 2000. In fact, the Trustees did not produce any evidence in respect of the sale of the property by NGEL. Had the Trustees so minded, they could have sought an inquiry pursuant to Section 29 of the Bankruptcy Ordinance concerning the details of the sale and the payment of \$4 million in order to ascertain the precise role played by the bankrupt, if any. But they have not done so.

Alternatively, the Trustees could issue subpoena calling persons involved in the transactions to give evidence in these proceedings. Again they have not done so. Instead they chose to rely on matters which, on analysis, only provide slender support to their case.

32. It should be noted that the statutory presumption in Section 50(5) cannot assist the Trustees in this respect. Until and unless they establish that the payment was a preference given by the bankrupt, the question of desire is not engaged and the presumption does not begin to operate.
33. There is another reason why the payment by NGEL could not be a preference. The payment would only constitute a preference if it has the effect of putting the Sister into a position which, in the event of the bankruptcy of the debtor, will be better than the position she would have been in if that payment had not been made. As submitted by Mr Chan, the Trustees did not attack the guarantee of December 1997. Hence, what NGEL did in January 2000 in making the \$4 million payment was only a performance of its obligation under the guarantee. That obligation it was legally bound to perform even if the debtor was made bankrupt. The payment itself did not improve the position of the Sister. She enjoyed the benefit of the guarantee irrespective of the bankruptcy of her brother.
34. Mr Harris submitted that but for the payment, the bankrupt and his estate would have the benefit of the \$4 million. He suggested that the Trustees might seek a winding up of NGEL to have the asset of that company distributed to the bankrupt's estate. There are three answers to that submission. First, as mentioned above, I find that the bankrupt ceased to be a beneficial shareholder of NGEL since June 2000. Second, NGEL was deregistered on 19 January 2001. The Trustees did not challenge the bona fide of that deregistration in these proceedings. Although there are procedures for reinstatement of the company, it seems to me to be far-fetched to suggest it should be reinstated in the present circumstances. Third, even assuming for a moment that the bankrupt remains a shareholder of NGEL and the company has not been dissolved, his right to the \$4 million must rank subsequent to the company's liability to its creditors. By reason of the December 1997 guarantee, the Sister became a creditor of NGEL and she must have a better right than the bankrupt (or his estate) to the \$4 million. For these reasons, I hold that the payment of \$4 million by NGEL was not a preference within Section 50 and the Trustees' claim against the Sister in that respect fails. AUTONUMOUT The argument on the Res Judicata Point is principally run by Mr Chan, whose submissions Mr Suen adopted. In essence, Mr Chan's argument is that Lam J having found that the Share Transfer was valid, the Trustees are not entitled to re-open the same issue in these proceedings. He relied on the judgment of the Privy Council in *Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd* [1973-1976] HKC 194, where Lord Kilbrandon said at pp. 200I-201E. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram VC in *Henderson v. Henderson* (1843) 3 Hare 100, 115, where the judge says: ... where a given matter becomes the subject of

litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special circumstances, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. The shutting out of a subject of litigation a power which no court should exercise but after a scrupulous examination of all the circumstances is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless special circumstances are reserved in case justice should be found to require the non application of the rule. AUTONUMOUT Chan argued that Lam J had not decided the validity of the Share Transfer. I disagree. Having read the Decision carefully, in particular paragraph 34 where Lam J found that Stanley ceased to be a beneficial shareholder of Novel Gain since June 2000 (it should be June 1999), I am of the view that the learned judge did find that the Share Transfer was valid. AUTONUMOUT Chan next argued that the doctrine of res judicata could have no application in the bankruptcy regime. She has cited no authority in support. For my part, I have considerable doubt if that is correct. But for reasons given below, I do not think I need to make a definite ruling on this point for present purposes. AUTONUMOUT Assuming that the doctrine of res judicata applies generally to bankruptcy cases, it does not necessarily follow that it applies here. Counsel accepted that the doctrine applies only if the parties are the same in both the Preference Application and the S29 Application. But Stanley, Lucita and Michelle were not parties to the Preference Application at all. Mr Chan sought to overcome this hurdle by arguing, without any authority in support, that given the wide scope of bankruptcy proceedings, they should be regarded as parties to the Preference Application. With respect, I disagree. In my view, the doctrine does not apply. The finding by Lam J on the validity of the Share Transfer does not bind the Trustees in the S29 Application. AUTONUMOUT Chan then argued that even if the doctrine of res judicata does not apply, the finding by Lam J is nevertheless an important factor that weighs against the Trustees application. For a private examination on the validity of the Share Transfer will give rise to multiplicity of proceedings and the possible risk of conflicting finding on the same issue, which had already been determined by Lam J in the Preference Application. AUTONUMOUT With respect, Mr Chan's argument is misconceived. As noted, a private examination under section 29 is to assist a trustee to discover the truth and circumstances connected with and to gather information about the bankrupt's property, affairs and dealings, in order that the trustee may be able, as effectively as possible, and with as little expense as possible, to complete his function; to put the affairs of the bankrupt in order and to administer the bankruptcy in all its various aspects, including the getting in of any assets of the bankrupt available in the bankruptcy. In practice, the person so summoned gives

evidence respecting the bankrupt, his dealings and property. The trustee will then decide what further step, if any, should be taken to complete his function and discharge his duty in light of such information. The private examination does not involve any multiplicity of proceedings or risks of conflicting findings of facts as such. AUTONUMOUT For these reasons, I will rule against the Res Judicata Point. As noted, Stanley, Lucita and Michelle all relied on the decision one way or the other as purported answers to the Trustees various enquiries about Novel Gain. In light of my ruling on the Res Judicata Point, any reliance by then on the Decision by is plainly misplaced. I will disregard such reliance when considering the sufficiency of their answers below. AUTONUMOUT When all the relevant circumstances and the answers provided by Stanley, Lucita and Michelle, including the allegations contained in affidavit evidence, are viewed in the round, the following matters arose which plainly call for further investigation. AUTONUMOUT First, Stanley stated in the answers that he had share in Novel Gain. On a proper reading, his half share referred to both legal and beneficial interest. Lucita did not take any issue that Stanley owned share in Novel Gain in her letter to the Trustees dated 17 May 2005 or her affidavit filed on 27 March 2006. In his first affidavit filed on 20 April 2006, Stanley said that because he frequently asked Lucita for money, she asked him to give up my share and interest in Novel Gain . However, less than one month later, Lucita asserted for the first time in her supplemental affidavit dated 19 April 2006 that she had solely financed the purchase of the Property (other than the bank mortgage) at the material time by way of director s loan. She therefore did not see any problem for Stanley to transfer his shareholding to Michelle, who held it on trust for her. By so alleging, Lucita is clearly implying that she wholly owned all beneficial interest in Novel Gain. In fact, Stanley expressly stated in his affidavit filed on 20 April 2006 that Lucita actually owned the whole interests of Novel Gain as she was the sole person who was responsible for financing and funding of [the Property] . This self-inconsistency is glaring indeed. AUTONUMOUT Second, Lucita s assertion that she solely financed the purchase of the Property by way of director s loan is not supported by any documentary evidence. Further, it is contradicted by Stanley s assertion in the Answers that he used the sale proceeds realized from the sale of another property held by Ever Galaxy Investment Ltd (Ever Galaxy), of which he claimed he held 50% interest, for the purchase of the Property. AUTONUMOUT Third, despite her implied allegation that she wholly owned Novel Gain, Lucita only received HK\$2,000,000 from the sale proceeds. Why? She had not offered any credible explanation so far. AUTONUMOUT Fourth, despite the Share Transfer and his resignation from directorship, Stanley was in a position to apply the sale proceeds of the sale of the Property for his personal use, including opening a margin account with Thing On with HK\$4,000,000 and repaying HK\$1,000,000 personal loan. No credible explanation as to why that was the case had been offered by Stanley, Lucita or Michelle to date. AUTONUMOUT Fifth, the explanation offered by Stanley and Lucita on the application of the sale proceeds of the Property leaves room for further investigation. (The Trustees can no longer recover the payment of HK\$4,000,000 to Ivy from her as a result of the Decision. I will leave it aside for present purposes.) AUTONUMOUT have already noted the oddity that despite her allegation about Novel Gain s ownership, Lucita only received HK\$2,000,000

from the sale proceeds. AUTONUMOUT Stanley's evidence is this. He first said in the Answers that he lost HK\$4,000,000 in stock investment. He went on to say in his 1st affidavit that he used HK\$4,000,000 to open a stock account with Thing On in the name of Novel Gain and most of the said sum was lost afterwards and he spent the balance, without giving any further particulars. After analyzing the trading records, the Trustees noted that there was in fact a credit balance of about HK\$4.8 million in the account by 31 January 2000. After further withdrawals and deposits, as at 11 January 2001, the balance was about HK\$3.07 million. According to the proof of debt filed by Thing On, the balance due is now HK\$770,000. Thus the Trustees took the view that Stanley had not adequately accounted for the use of the said HK\$4,000,000 that he claimed to have lost in stock market and also the use of the net cash withdrawals from Thing On of about HK\$3.07 million. (This forms another subject matter of investigation, which I will return to in a moment.) In his 2nd affidavit filed on 6 July 2006, Stanley responded by alleging that there was in fact a total loss of about HK\$5.44 million by the end of March

2000. He complained that the Trustees had overlooked the loss suffered by Novel Gain when considering his trading activities. He seemed to have suggested that the account maintained under the name of Novel Gain was in fact operated and proceeds generated from trading in that account were utilized by him for his personal use. As rightly pointed out by Mr Edward Middleton of the Trustees in his 13th affidavit filed on 23 August 2006, Stanley's emphasis on the need to understand Novel Gain's financial position in understanding his own really underpins the Trustees hitherto unsuccessful requests for further information in respect of payments to and from Novel Gain and the continuing influence exerted by Stanley over its affairs. Further, Mr Middleton seemed to have accepted Stanley's explanation about the movement of funds between his own and Novel Gain's margin account. But he commented that it is unclear why a credit balance of HK\$1,584,265 from Novel Gain's account was paid to his personal account when at the time he should have no control over Novel Gain's assets, having already resigned as a director and having sold his share to Michelle. I agree. AUTONUMOUT Further, the position adopted by Stanley with regard to the importance to his own affairs of understanding the financial position of Novel Gain and his ability to operate the margin account opened in the name of Novel Gain and to apply the proceeds generated therefrom does not sit well with his reliance on comment expressed by Lam J in the Decision that he was not alter ego of Novel Gain. AUTONUMOUT Sixth, it was said that the Share Transfer was made and Stanley resigned from Novel Gain's directorship because of his health reason. He was advised to reduce any stress-inducing events or activities. But at the time when he resigned from Novel Gain, he was still a director and shareholder of at least seven companies. Stanley said in his letter dated 25 April 2005 that some of those companies were either shelf companies or inactive holding companies. However, as rightly pointed out by the Trustees, at least the position of three of them, namely, Powerworth, Atlanta, which held a property each, was no different from Novel Gain. Further, after the Share Transfer, Stanley continued to trade heavily on margin, which is obviously stress-inducing. A fuller

explanation of these matters is called for. AUTONUMOUT For these reasons, I rule that the Trustees have satisfied me that the provision of the information about Novel Gain is reasonably required. AUTONUMOUT am also satisfied that on the evidence before me, the Trustees have also shown a prima facie case that Stanley, Lucita and Michelle (because of their position in Novel Gain) are in a position to produce the documents sought. It is not sufficient for them to simply say that they or the auditors do not have those documents.

- (2) Stanley's financial position prior to bankruptcy AUTONUMOUT To recap, the Trustees consider that a thorough investigation of his financial position prior to bankruptcy is necessary in light of the huge discrepancy between the level of Stanley's income, investment, trading on stock and lavish life style. AUTONUMOUT In his 1st affidavit, Stanley complained that the Trustees never took time or effort to solicit information from him on those matters. This relates to the Trustees conduct, which will be further discussed when I come to the exercise of discretion. But insofar as his financial position prior to bankruptcy is concerned, for reasons given below, I need not consider this complaint any further. Stanley next said that between 1994 and 1997, he was able to earn roughly HK\$40 million to HK\$50 million in stock trading. He and Lucita, through Ever Galaxy, purchased a flat at Happy Valley which was sold in about June 1997, and made a profit of about HK\$17 million. I note in the Answers, Stanley stated that he used the sale proceeds from the sale of the Happy Valley for : (a) discharging the outstanding mortgage, (b) investing in stock market through Thing On and (c) buying the Property. Stanley further said in his 1st affidavit that he manage to pay the monthly installments of his car and rental although his finance was tight by making use of the rental income from a property in Beijing which was owned by Atlanta of which he was a shareholder and managing director. He has however not provided any further particulars. He also made use of overdraft facility available to Powerworth by Wing Lung Bank to pay his dues. Lastly, he said on many occasions, he asked Lucita for cash. AUTONUMOUT In his 2nd affidavit, Stanley said that he had a history of engaging in substantial stock trading activities and property investments. Profits so realized did not form part of his assessable income. He also referred to his affirmation dated 19 September 2001 in HCA2892/2001 in which one Mr Chien sued him for HK\$17,000,000. There, Stanley admitted that Mr Chien had advanced a total of HK\$82 million to him in 1997 and 1998. Stanley said that based on this fact alone, there should not be any doubt that he had at his disposal substantial financial means to sustain his high volume and amount of stock trading. AUTONUMOUT have carefully considered all the evidence in the round. I accept Stanley's explanation that his financial position prior to bankruptcy was such that he did not derive his main income from his dental practice and that he could sustain his then stock trading activities and life style. The Trustees have not made out a case that they reasonably need the information sought.
- (3) The failure to account for HK\$4,000,000 and the loss of HK\$3.07 million AUTONUMOUT To recap, the Trustees took the view that Stanley had not adequately accounted for the use of the said HK\$4,000,000 from the sale proceeds of the Property for stock investment that he claimed to have subsequently lost in stock market and also the use of the net cash

withdrawals from Thing On of about HK\$3.07 million. But as noted in paragraph 58 above, the Trustees seemed to have accepted Stanley's explanation. In the circumstances, I do not think any further investigation is justified.

- (4) Withdrawals of funds within two years prior to bankruptcy AUTONUMOUT To recap, the Trustees want to investigate into Stanley's withdrawal of HK\$3 million from HSBC account on 28 February 2000 and how he had spent the HK\$1.9 million withdrawn in cash from his Dao Heng Bank account on 13 October 2000. AUTONUMOUT Stanley explained in his 2nd affidavit that the withdrawal of HK\$3 million was paid into as deposits to Novel Gain's margin account on the same day. Shortly thereafter, Stanley appropriated HK\$4 million out of the net proceeds of sale of the Property and paid the same as deposits to Novel Gain's margin account on 13 March 2000. On 22 March 2000, Novel Gain liquidated its position resulting in a net balance of HK\$1.5 million, which was deposited into Stanley's account on the same day. In short, a sum of HK\$5.42 million was lost in stock investment during March 2000. Then out of the HK\$1.5 million, a sum of HK\$1.28 million was paid as deposits into Stanley's own margin account on 24 March 2000. Thereafter, further deposits of HK\$650,000 and HK\$720,857 were made on 1 June 2000 and 20 October 2000. Finally on 11 January 2001, Stanley liquidated his position resulting in a payment of HK\$479,362. A further loss of HK\$2.17 million was sustained during the period between March 2000 and January 2001. AUTONUMOUT Thus Mr Suen contended that the HK\$3,000,000 withdrawn from the HSBC account was plainly lost in stock trading. AUTONUMOUT However, Stanley gave a different story of how the HK\$3,000,000 was disposed of in his 1st affidavit. There he said the said sum together with other cheques made to Mr Wong were made to pay off his gambling debt incurred by him in Macau in late 1999. AUTONUMOUT This is a glaring inconsistency, which plainly calls for further investigation. AUTONUMOUT As to the withdrawal of HK\$1.9 million, Stanley said that the withdrawal together with other cheque payments were made to Mr Wong to settle the gambling debt incurred by him in Macau in late 1999. He relied on the fact that on the same day of the withdrawal (13 October 2000), a cheque of HK\$1 million was issued by Stanley to Mr Wong out of his account with Dao Heng Bank. Two points arose from his explanation. First, it seemed rather odd for Stanley to make cash withdrawal of HK\$1.9 million and then deposit HK\$1 million into his current account with the same bank when the same could have been achieved by a simple internal transfer. Secondly, in his 1st affidavit, Stanley seemed to have suggested that the said HK1 million cheque came from the proceeds of the Property. In my view, further investigation is necessary.
- (5) Payments to Mr Wong AUTONUMOUT Between 29 February and 13 October 2000, Stanley there were eight payments to Mr Wong by cheque, totalling HK\$4,240,091.97. Stanley said that the payments were made to pay off gambling debt that he incurred in Macau in late 1999. AUTONUMOUT have already pointed out the possible discrepancy in his evidence about the HK\$1 million cheque. Further, as rightly pointed out by Ms Chan, it is rather odd that for gambling debts, five of the cheques were for exact amounts in decimals. I agree that

Stanley has not adequately accounted for these payments to Mr Wong.

- (6) Maxi Worth and proceeds from life insurance AUTONUMOUT Stanley said because of his heavy losses in stock trading in March 2000, he borrowed HK\$1.5 million from Ivy. He repaid her by transferring the share in Maxi Worth to her and by the proceeds from life insurance. AUTONUMOUT The Trustees pointed out that a sum of HK\$1.58 million was paid by Thing On into his margin account and queried if there was any urgent need to borrow from Ivy as alleged. AUTONUMOUT In my view, the overall picture has to be taken into account. From the record, as at the end of March, Stanley had suffered a loss of HK\$5.4 million through stock trading in Novel Gain s account. This supports his explanation why he had to borrow from Ivy. AUTONUMOUT am not satisfied that the Trustees have made out a case that they reasonably required the information here.
- (7) Proceeds from policies and sale of other property lost in gambling AUTONUMOUT To recap, Stanley asserted that the sum of HK\$327,746.89 and HK\$980,000 realized from the life insurance policies held by Powerworth had been lost in gambling in Macau and in horse racing in Hong Kong. The Trustees would like to examine him with regard to his gambling activities prior to his bankruptcy. AUTONUMOUT Stanley referred to the enquiries previously made by the Trustees made in 2003 about his gambling activities and the travel records that he produced and answers given and complained that they have not made any further enquiry since until the present application. Mr Suen submitted that there is nothing to doubt Stanley s account. AUTONUMOUT In my view, the Trustees investigation is entirely legitimate because it is far too convenient for Stanley to assert that those proceeds had been lost in gambling, which can never be substantiated by documentary evidence. AUTONUMOUT This disposed of the discussion on the essential conditions that the Trustees must establish. C4. Exercise of discretion AUTONUMOUT next turn to whether I should exercise my discretion to allow the S29 Application. AUTONUMOUT Chan and Mr Suen took several points. AUTONUMOUT The first point relates to the investigation about Novel Gain only. AUTONUMOUT Chan first submitted that challenging the Share Transfer does not have any substantial effect in recovering any additional money for distribution because the payment of HK\$4,000,000 to Ivy cannot be re-opened now. AUTONUMOUT Suen raised an additional argument. He said the sale proceeds of the Property were Novel Gain s assets and not its shareholders. Assuming that the Share Transfer can be set aside and Stanley remains a shareholder of Novel Gain, the Trustee may step into his shoes but could be in no better position than him. The Trustees could exercise their rights in respect of the 50% shareholding as opposed to the proceeds belonging to Novel Gain. Assuming that Novel Gain can be reinstated, the Trustees may commence an action in its name to recover the proceeds. But the payment to Ivy cannot be recovered in light of the Decision. The payments appropriated by Stanley for stock trading and personal loans (totalling HK\$5,000,000) were prima facie unauthorized and Novel Gain may have a potential action against Stanley. But it serves the estate no purpose for an action to be brought against Stanley himself. As to the appropriation by Lucita, if it was unauthorized, the Trustees may sue her but Lucita could always commence an action in the name of Novel Gain against Stanley for the HK\$5,000,000,

which could be set against any claim against her. In the end, the Trustees will still recover nothing. AUTONUMOUT In my view, it is premature at this stage to say that no substantial or meaningful benefit will be gained by further investigation into the Share Transfer and the application of the sale proceeds. Much depends on the evidence to be disclosed and the step, if any, to be taken by the Trustees after duly considering them. AUTONUMOUT The second point relates to the Trustees conduct in general. Several complaints were made.

AUTONUMOUT First, it was said that the Trustees are guilty of delay and adopting a piece meal approach in making enquiries. However, as rightly pointed out by Ms Chan, the pace of investigation is dictated by the attitude of Stanley, Lucita and Michelle (in particular, Stanley) the quality and completeness of the answers they provided. Having carefully considered the matter in the round, I do not think it is fair to say that the Trustees are so guilty.

AUTONUMOUT Second, Stanley complained that the Application was motivated by the Trustees ulterior motive to enable Mr Chien, a major creditor, to air past grudges against him. I need not dwell on details. Suffice it to say that this is bare allegation without substance. As rightly pointed out by the Trustees, they are just discharging their responsibilities and obligations. AUTONUMOUT Third, Stanley queried the costs incurred in the application. I do not think it is a relevant matter at all. AUTONUMOUT Lastly, Stanley, Lucita and Michelle all complained that it is an oppressive exercise. This assertion is persistent on the assumption that they had already made full and frank disclosure of the information sought. In light of the discussion above, this assertion is plainly not supportable. AUTONUMOUT Having considered all the circumstances, I have no doubt that I should exercise my discretion to allow the S29 Application on all the matters sought by the Trustees with the exception of those relating to Stanley's financial position prior to bankruptcy (paragraphs 63 to 66 above), the alleged failure to account for HK\$4 million and the loss of HK\$3.07 million in stock trading (paragraph 67 above) and Maxi Worth and proceeds from life insurance (paragraph 76 to 79 above). C5. Conclusion AUTONUMOUT For the above reasons, I will make the following orders on the S29 Application :

- (1) Stanley, Lucita and Michelle do each make discovery of items 1 4, 6 to 9 in the Schedule to the S29 Summons by way of an affirmation within 21 days from today;
- (2) Stanley do make discovery of items 11 and 16 in the Schedule to the S29 Summons by way of an affirmation within 21 days from today;
- (3) Stanley, Lucita and Michelle shall each attend before the master at such time and place as the master may direct for the purpose of giving evidence in the examination under section 29; and
- (4) the Trustees be at liberty to apply from the master for directions of the conduct of the aforesaid examination. AUTONUMOUT On costs, since the Trustees have substantially succeeded in the S29 Application, I will make an order nisi that Stanley, Lucita and Michelle do pay the costs of the Trustees, including any related costs reserved, to be taxed if not agreed. D. The S30A Application AUTONUMOUT now come to the S30A Application. A preliminary point needs to be disposed of first. AUTONUMOUT It is the Trustees case that a

majority of the creditors (constituting over 99% of the total value of Stanley's debts) have no objection to the S30A Application. However, Stanley said in his 2nd affidavit that Thing On and Tsun Fat had not been informed by the Trustees of the Application. The Trustees denied. I do not think I need to resolve this factual dispute for present purposes. For even if Thing On and Tsun Fat do not support the Application, they only constitute 18% of the total value of his debt. It does not change the fact that the overwhelming majority of the creditors do not oppose the S30A Application. D1. The law AUTONUMOUT The relevant parts of section 30A provide

- (1) Subject to this section, a bankrupt is discharged from bankruptcy by the expiration of the relevant period under this section.
- (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) where a person has been previously adjudged bankrupt, the period of 5 years, beginning with the commencement of the bankruptcy.
- (3) Where the court is satisfied on the application of the trustee or one of the bankrupt's creditors that a valid objection based on one or more of the grounds set out in subsection (4) has been made, the court may order that the relevant period under this section shall cease to run for such period, not exceeding, in the case of a person who-
 - (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.
- (4) The grounds on which an objection can be made to the discharge of a bankrupt under this section are as follows-
 - (a) in the case of a discharge to which subsection (2)(a) applies, that the bankrupt is likely within 5 years of the commencement of the bankruptcy to be able to make a significant contribution to his estate;
 - (b) that the discharge of the bankrupt would prejudice the administration of his estate;
 - (c) that the bankrupt has failed to co-operate in the administration of his estate;
 - (d) 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;
 - (g) that the bankrupt has committed an offence under section 129 or any of sections 131 to 136; AUTONUMOUT The rationale of the automatic discharge provisions with the objection system is this. Firstly, Bankrupts would have a greater incentive 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 : Re

Hui Hing Kwok [1993] 3 HKC 683, at pp. 686I-689A. Rehabilitation in the sense of enabling the bankrupt to resume a normal life in society is a key, it not the key, consideration. It should only be delayed by a bankrupt's own failings : *Re Hui Hing Kwok*, per Le Pichon J (as she then was) at p. 689D. AUTONUMOUT It should be borne in mind that no bankrupt has an unconditional right to an automatic discharge. To obtain such a release, the bankrupt is required to abide by the requirements of the Ordinance during the qualifying period : *Re Chan Wing Hing*, FACV7/2006 and 8/2006, per Ribeiro PJ at para. 73. AUTONUMOUT In *Re Li Tat Kong* [2003] 3 HKC 360, Le Pichon J (as she then was), after referring to the rationale of the provision for automatic discharge coupled with the objection system, explained the applicable principles at pp. 377B 378C in these terms Thus, failure to co-operate with the trustee is a reason for delaying the bankrupt's rehabilitation. What does co-operation mean? In *Totterdell v. Nelson* [1990] 97 ALR 341, the Full Court of Australia observed (at 346) Nor is it really right to say, because no evidence was led of specified requests ignored by the bankrupt, that there was lacking any evidence of non-cooperation. Co-operation is a positive concept. I would respectfully agree. In my judgment, it is 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 Trustee. As French J observed in *Re Barrie Andrew Knight*, No. WB 307 of 1988 (unreported) August 14, 1991, a decision of the Federal Court of Australia, ... It is not sufficient, I think, for a bankrupt to say in relation to the deficiencies which the trustee complains are unexplained, that it is all there in the transcript of evidence and auditor's report put before the District Court in criminal proceedings. Nor is it sufficient to say that the trustee has not made inquiry of him. It is the bankrupt's duty, if he seeks the indulgence of discharge where discharge would not otherwise be automatically available, to show that he has taken all reasonable steps to ensure that his estate is available for distribution among his creditors and that the trustee is apprised of all relevant information. Thus, it is not good enough for a bankrupt to adopt a purely passive or reactive role, responding when asked in the expectation that with any luck, pertinent matters might be overlooked. Further, in exercising its discretion, the court will have regard to the scope and purposes of the statutory provisions conferring the discretion. In *Re Weiss* (unreported), 27 June 1986, a decision of the Federal Court of Australia cited in *Totterdell v. Nelson* (at 344), Burchett J observed An essential part of the reciprocal provisions made by the bankruptcy law for the benefit of each of creditors, debtors, and the community itself, is that there should be an adequate investigation of the conduct and affairs of the bankrupt. In a case presenting features which call for an exercise of discretion upon the question when and on what terms the bankrupt should be discharged, the investigation should generally be carried to a conclusion before a discharge is granted or permitted to occur. There may be cases where it would be unfair to a bankrupt to delay his discharge by reason of an incomplete investigation, lethargically pursued, to the torpor of which he has not contributed. But no such unfairness may appear where there has been concealment or lack of cooperation on his own part. The court will also have regard to the interests of commercial morality and the public interest. We are bound in the exercise of our discretion in such a matter, and I think I might almost say in all matters under this Act, to take a wider view. We are not only bound to

regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country. See per Fry LJ in *Re Hester* (1889) 22 QBD 632 at 641. AUTONUMOUT Further, under section 30A(4)(c), where there are matters in the administration of the estate the investigation of which have not been concluded at the expiration of the relevant period, the court will generally exercise its discretion and order the relevant period be suspended : *Totterdell v. Nelson* [1990] 97 ALR 341, at p. 344 lines 10. AUTONUMOUT With these principles in mind, I now turn to the substance of the S30A Application and will discuss it with reference to the various sub-paragraphs in section 30A that the Transfer relied on. D2. Discussion

- (1) Section 30A(4)(a) significant contribution to the estate AUTONUMOUT Stanley has earned HK\$1.8 million within three years from the commencement of his bankruptcy (1 June 2002 to 31 May 2005), of which HK\$365,000 was his net contribution. In the period between 1 June 2005 and 31 March 2006, Stanley contributed HK\$350,000, which is almost equal to the total contributions in the preceding three years. Ms Chan submitted that this pattern of earning shows that Stanley will be able to make considerable contribution in the 5th and following year of his bankruptcy. AUTONUMOUT Suen submitted that Stanley's contributions are negligible when compared to his total indebtedness. He further submitted that the contributions will not go to the creditors in any event because the Trustees have already incurred costs of HK\$480,000 within the first six months of their appointment, which will be paid out from Stanley's estate first. AUTONUMOUT In my view, although the contributions that Stanley will be able to make are relatively small when compared with the size of his debts, it does not necessarily follow that he cannot make significant contribution to his estate. Further, it is mere speculation that his contributions will all be swallowed up by the Trustees costs. I reject Mr Suen's submissions.
- (2) Section 30A(4)(b)(c) and (d) prejudice administration of estate, failure to cooperate and unsatisfactory conduct AUTONUMOUT These matters can be conveniently dealt with together. AUTONUMOUT refer to the discussion and rulings that I made in the S29 Application. I agree with Ms Chan's submission that Stanley has failed to provide full and frank disclosure of all his property and dealings before the S29 Application was taken out. Even since the Application, on certain important aspects, what he said in his 1st and 2nd affidavits are self-contradictory and unsatisfactory. Stanley sought to blame the Trustees for conducting their investigation in a piecemeal fashion. But he has completely ignored his duty to ensure that the Trustees are apprised of all relevant information about his estate. It is not enough for him to adopt a purely passive or reactive role, responding when asked in the expectation that the pertinent matters might be overlooked : *Re Li Tat Kong*, *ibid*. AUTONUMOUT have no doubt whatsoever that a discharge at this stage would prejudice the administration of Stanley's estate. AUTONUMOUT Further, I also accept Ms Chan's submission that Stanley's conduct in engaging in heavy speculation and gambling before his bankruptcy, notwithstanding his insolvency which he now seems to admit, must be regarded as unsatisfactory conduct within the meaning of section 30A(4)(d).

- (3) Section 30A(g) commitment of bankruptcy offence AUTONUMOUT To invoke S30A(4)(g), the Trustees have to show that Stanley has committed the requisite offence. AUTONUMOUT The Trustees relied on the repeated assertions by Stanley as to how he engaged in heavy speculation in the stock market, horse racing and gambling. Ms Chan submitted that the Bankrupt had committed the gambling offence within the meaning of section 133 of BO. AUTONUMOUT have reservation in accepting this submission. In my view, it is certainly arguable that on a proper construction of section 30A(4)(g), for the Trustees to show that Stanley had committed the offence, there must be a conviction of him for that offence in the first place. But I do not think it is necessary to decide this point here. For the Trustees complaint about Stanley s gambling activities will not add much to the S30A Application or the length of the suspension. It has already been covered by the complaint under section 30A(4)(d) that he engaged in gambling before his bankruptcy notwithstanding his insolvency : see paragraph 112 above. D3. Conclusion AUTONUMOUT For the above reasons, I will suspend the automatic discharge. AUTONUMOUT As to the length of the suspension, I take into account all the circumstances, including Stanley s failure to cooperate with the Trustees and to provide full and frank disclosure of his affairs. I also take into account the time that the Trustees may need to complete the necessary investigation of his affairs. I think a period of three years is warranted. I therefore order that the period of his discharge shall cease to run for a period of three years. AUTONUMOUT On costs, I will make an order nisi that Stanley do pay the Trustees the costs of the S30A Application including any related costs reserved, to be taxed if not agreed. (J. Poon) Judge of the Court of First Instance High Court Mr Jenkin Suen, instructed by Messrs Hau, Lau, Li & Yeung, for the Bankrupt Linda Chan, instructed by Messrs Johnson, Stokes & Master, for the Joint and Several Trustees Mr Kenneth C.L. Chan, instructed by Messrs Fong Chan & Lee, for Mrs Lucita O Hau & Ms Michelle Lynn O Hau Section 29 was derived from section 25 of the now repealed English Bankruptcy Act 1925. The current English equivalent is section 366 of the Insolvency Act 1986. Commenting on section 25 of the English Bankruptcy Act 1925. Commenting on sections 366 and 367 of the English Insolvency Act 1986. There are cases where the doctrine was stretched to apply beyond the parties involved in the previous litigation : see Phipson on Evidence, 16th Edn, para.44-56 at pp.1368-1369. But as I understand Mr Chan and Mr Suen, they are not relying on those cases. PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V (#p# (#p# & `#\$ & `#\$ XoFQ XoFQ XoFQ XoFQ XoFQ "n\@ `&+> :x,By Sb\_N e I~&y, `&+> Sb_N & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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