

HONG KONG / JUDGMENT

RE LEUNG YAT TUNG

COURT

Court of First Instance

DECIDED

10 October 2005

CASE / FILE NUMBER

HCB2019/2000

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bjbj HCB 2019/2000 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 2019 OF 2000

Re: LEUNG YAT TUNG

Coram : Master J. Wong in Court Date of Hearing : 7 June 2005 Date of Handing Down Decision :
10 October 2005

D E C I S I O N

The Dispute

1. Pursuant to paragraph 1 of Master Ho s Order dated 23 February 2003 herein, the following issues were put before this Court, viz: whether the Petitioning Creditor can file the Affirmation of Ip Tak Kong on 21st February 2005 and what role the Petitioning Creditor plays in the Official Receiver s application

Background

2. On 14 June 2000, based on a judgment debt of HK\$3,566,479.37 and interest under HCA 1125/2000, the Petitioning Creditor Healthy Wharf Limited commenced the present proceedings against the Debtor Mr. Leung Yat Tung (the Bankrupt) who opposed the same by applying for an interim order under sections 20 and 20A of the Bankruptcy Ordinance (Cap. 6) ().

3. The 2 matters were heard by the Hon. Cheung J. on 20, 21 and 28 February 2001. The learned Judge later handed down his Judgment dismissing the application of interim order because the Bankrupt failed to discharge his primary responsibility with a full and frank disclosure of his net worth. A bankruptcy order was made.
4. The Bankrupt was aggrieved and took up the matter to appeal. It was dismissed by the Hon. Rogers VP and Le Pichon JA on 19 April 2004. The Court found that the proposal was not serious, inadequate and unsuccessful, despite further evidence had been filed attempting to counter the criticisms made below.
5. On 11 January 2002, upon the application by the Official Receiver () as trustee in bankruptcy of the Bankrupt, Master Ho ordered the Bankrupt to be publicly examined pursuant to section 19 of the BO. Such examination is yet to be carried out.
6. According to section 30A(2)(a) BO, the Bankrupt might have been discharged on 1 March 2005, i.e. 4 years from the making of bankruptcy order on 1 March 2001. It is commonly known as automatic discharge. However, on 8 November 2004, the OR, pursuant to section 30A(5) BO, notified that he: intend to object the bankrupt s discharge on the following grounds- that the discharge of the bankrupt would prejudice the administration of his estate; that the bankrupt has failed to co-operate in the administration of his estate;
7. On the next day, 9 November 2004, the OR also informed all the Creditors of the Bankrupt of the intention to object the Bankrupt s automatic discharge. On 29 January 2005, the Petitioning Creditor as well as two other Creditors Fonfair Company Limited and Leung Yuet Keung served 3 Forms 82 on the OR and filed the same with this Court, stating that they also objected the Bankrupt s discharge on the following grounds:
 - (i) in the case of a discharge to which section 30A(2)(a) of the Bankruptcy Ordinance (Chapter 6) 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; (ii) that the discharge of the bankrupt would prejudice the administration of his estate; (iii) that the bankrupt has failed to co-operate in the administration of his estate; (iv) 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;
 - (v) [deleted] (vi) [deleted] (vii) that the bankrupt has committed an offence under section 129 (fraudulent conduct on the part of the bankrupt) or any of sections 131 to 136 of the Bankruptcy Ordinance (Chapter 6) (obtaining credit, gambling offences, failure to keep proper accounts, absconding with property and concealing oneself to avoid service of bankruptcy proceedings); (viii) [deleted]
8. On 3 February 2005, the OR filed its summons for order under section 30A BO to oppose the Bankrupt s discharge on the 2 grounds stated in the notice of 8 November 2004. A report was also filed to support the summons on the same date.

9. On 16 February 2005, the Bankrupt filed his Notice of Intention to oppose the OR s application.
10. Then, on 21 February 2005, the Petitioning Creditor filed the Affirmation of Ip Tak Kong to support the OR s application, and relying also on the 3 additional grounds contained in the Form 82.
11. The parties appeared before Master Ho on 23 February 2005. The Bankrupt opposed the Petitioning Creditor to take part in the OR s application and the filing of the Affirmation of Ip Tak Kong upon the ground of failure to comply with section 30A(6) BO. The 2 preliminary issues were then adjourned for argument and was fixed before me on 7 June 2005. Mr. F. Ip of Messrs. Ho & Ip acted for the Petitioning Creditor, Mr. W.K. Tsang of Messrs. Tsang & Lee represented the Bankrupt and Ms. K. Cheung appeared for the OR.

Ruling

12. Upon considering the evidence authorities and submissions from the parties, I have come to the conclusion that the Petitioning Creditor can file and rely on the Affirmation of Ip Tak Kong dated 21 February 2005 in the OR s application and can take part in the same to oppose the Bankrupt s automatic discharge, but only to the extent of the 2 grounds pursued by the OR, and not the 3 additional grounds of its own. My reasons appear as follows.

Reasons

14. At the hearing, the parties disputed 3 questions:
 - (a) Has the Petitioning Creditor failed to comply with section 30A(6) BO and rule 88 of the Bankruptcy Rules (the BR) by not taking out an application 14 days before the automatic discharge?
 - (b) Does this Court have the jurisdiction or discretion to waive such failure, if any?
 - (c) Should this Court exercise his discretion in favour of the Petitioning Creditor, if applicable, in the circumstances?
15. My short answers to the questions are: Yes. No. Not applicable. Non-compliance of s 30A(6) BO & r 88 BR
16. Sections 30A(5) and (6) of the BO states that:
 - (5) Not less than 3 months before the end of the relevant period under this section, the trustee shall send a notice by ordinary mail to the last known address of each proving creditor; or publish a notice in English and Chinese, respectively, in an English and a Chinese newspaper circulating in Hong Kong, advising the creditors that the bankrupt will, in the absence of an objection, be discharged; the trustee does or does not intend to object to the discharge and, where does intend to do so, giving the grounds of the objection; each of them has a right to object to the discharge and giving the grounds on which an objection can be

based and the procedure for making an objection.

- (6) Where the trustee or a creditor objects to the discharge of a bankrupt, he shall notify the court; and in the case of a creditor, also notify the trustee, not less than 14 days before the end of the relevant period under this section, stating the grounds of his objection and applying [emphasis added] for an order under subsection (3). Rule 88 of the BR further supplements:
88. Application for suspension of discharge
- (1) The following applies where the trustee or one of the bankrupt's creditor applies to the court for an order under section 30A(3) of the Ordinance.
 - (2) Where the application is made by the Official Receiver, as trustee, he shall with his application file a report; or a trustee other than the Official Receiver or by a creditor, he shall with his application [emphasis added] file an affidavit, setting out the reasons why it appears to him that such an order should be made.
 - (3) The court shall fix the date, time and place for the hearing of the application, and give notice of it to the trustee and the bankrupt and, where the applicant is a creditor, to the applicant.
 - (4) Copies of the applicant's report or affidavit under this rule shall be sent by him to the bankrupt, and where the applicant is a creditor, to the trustee, so as to reach them at least 21 days before the date fixed for the hearing.
 - (5) The bankrupt may, not later than 7 days before the date of the hearing, file in court a notice specifying any statements in the applicant's report or affidavit that he intends to deny or dispute and, where he does so, he shall send copies of it, not less than 4 days before the date of the hearing, to the applicant and, where the applicant is not the trustee, to the trustee.
 - (6) If on hearing the court makes an order suspending the bankrupt's discharge, copies of the order shall be sent by the applicant to the bankrupt and, where the applicant is not the trustee, to the trustee.
17. These provisions 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 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. Upon application, the Court will fix a hearing date, usually for call-over. The parties shall then observe r.88 as to the time for filing and serving of the evidence so that sufficient time would be given to everybody to prepare their cases.
18. A literal reading of the two provisions can tell that, on top of the Report (by the OR) or the Affidavit in Form 82 (by the Creditor), separate application must be made (usually by way of summons). Probably, common sense is the best justification. If one simply files something

with the Court, it will only go quietly into the Court File. Nothing further will be done. It must be the summons triggering the whole process by informing the Court, fixing the date, and so forth. To support such interpretation, the following references can be located in the Hong Kong Civil Procedure 2004, Vol 2, page 651 J1/95: The trustee's notice to creditors under s.30A(5) is to be in Form 83. The application [emphasis added] for postponement of discharge is made by summons [emphasis added]. Notice of intention to object to the bankrupt's discharge has to be given in Form 82 (s.30A(6)). An order of suspension of discharge under s.30A(3) is in Form 81 BFR. Where the application [emphasis added] is made by a trustee other than the Official Receiver or by a creditor, he shall with his applications [emphasis added] file an affidavit, setting out the reasons why it appears to him that such an order should be made Jurisdiction or Discretion to waive non-compliance

19. I now turn to the next question to see if this Court has the necessary jurisdiction or discretion to waive the non-compliance of the Petitioning Creditor in issuing the application with 14 days before the automatic discharge. In my view, the answer is negative.
- (a) To start with, I agree that the legislation entrusts a wide power in the hands of the Court to avoid injustice by any formal defect, irregularity and non-compliance with the rules. section 124(1) BO:
124. Formal defect not to invalidate proceedings
- (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. rules 203 and 204 BR:
203. Non-compliance with rules Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court so directs, but such proceeding may not set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the court may think fit.
204. Abridgment of enlargement of time 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.
- (b) However, the power is not without limitation. The defect must be formal or mere irregularity before it can trigger the court's jurisdiction to see if the non-compliance can be waived. Useful reference can be located in the Judgment of the Hon. Mrs. Le Pichon (as she then was) from Re Li Tat Kong [2000] 3 HKC at page 369 and 370 The court's jurisdiction is engaged upon an application being made under s 30A(3). Although on its face s 30A(6) appears to require any person (whether the trustee or creditor) wishing to object to make an application, multiple applications of themselves serve little purpose save where they are based on different grounds. 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 [emphasis added]. They also serve to inform the bankrupt of the specific grounds of objection. Where different grounds [emphasis added] are relied on by different parties, separate applications [emphasis added] would ensure that the bankrupt is not taken by surprise. Further, similar provisions in the bankruptcy legislation were thoroughly considered by learned Judges in 2 Australian cases. In *Re: Van Reesema v Official Receiver in Bankruptcy* (1983) 50 ALR 253, by a majority, the Federal Court of Australia held that the objection filed by the Official Receiver did not comply with the provision in the legislation, and as such, rendered the same to be inoperative and have no effect. Sweeney J. said at page 268 that: Reliance was placed by the trustee on s 306(1), which provides that proceedings under the Act are not invalidated by a formal defect or an irregularity unless the court is of opinion that it has caused substantial injustice which cannot be remedied by an order of the court. Although I consider the objection to be a proceeding under the Act for the purposes of this provision, I do not think that the defect is formal, nor is it a mere irregularity. For reasons already given the defect goes to the very substance of the matter. It follows that at the date his Honour made the order pursuant to s 33(1)(b) allowing the amendment of the objection, the appellant had been discharged by operation of law. No valid objection pursuant to s 149(3)(c) had been entered. The objection being a proceeding under the Act, his Honour had power to allow the amendment of it. But, in my opinion, the amendment was futile and should not have been allowed. The appellant having been discharged, amending the objection achieved nothing. And, the *Van Reesema* (ibid) case was followed in *Donnelly v Edelston* (1992) 109 ALR 651 where Ryan J. held at page 658 that the failure to file it is not a mere non-compliance with the Bankruptcy Rules. It is a failure to establish a condition precedent prescribed by the Act itself to precluding an automatic discharge from bankruptcy. If I am right in concluding that the court has no power under the Act to relieve from that failure, that absence of power cannot be supplied by resort to a provision in the rules. For these reasons I am led to conclude that the court has no discretion to permit the filing of a notice of objection after a discharge has occurred upon the expiration of three years from the date of the bankruptcy.

- (c) In our case, the Petitioning Creditor only filed the notice (Form 82) but never took out its application at all. It relied 3 additional and different grounds than the 2 of the OR. The Bankrupt was not informed of the stand of the Petitioning Creditor until the serving of the Affirmation of Ip Tak Kong on 21 February 2005. It amounts to the surprise as described by the Hon. Mrs. Le Pichon (as she then was) in *Re Li Tak Kong* (ibid). Hence, I have no jurisdiction to deal with the matter because it has not even been placed before the Court.
- (d) To look at the present case from the views of the Australian Courts: But for the application of the OR, the Bankrupt would have been discharged on 2 March 2005, it would be too late for the Petitioning Creditor to come to this Court. 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. No discretion to be exercised in favour of the Petitioning Creditor in its own application.

20. From my above analysis over the question of jurisdiction over the Petitioning Creditor's application, it follows that there is simply no room for me to do anything to waive the non-compliance. The Answers to the Issues put before the Court
21. Having answered the 3 questions, I do not consider the parties dispute can be resolved. In my opinion, there remains the pending application by the OR relying on the 2 grounds. Hence, can the Petitioning Creditor, not having itself made an application pursuant to section 30A(3) BO, still be heard in the OR's summons objecting the automatic discharge of the Bankrupt? This is one of the very questions put before the Court in *Re Li Tat Kong* (ibid). In this respect, Madam Le Pichon J. (as she then was) held that the irregularities are technical and could be waived by the Court. Upon consideration of the facts put before her, the learned Judge further ruled that the bankrupt had not been prejudiced in any way and allowed the creditor to be heard. At page 369 and 370 of the judgment, it was stated that: In the present case, the trustee's advice was dated 20 July 1999. On 24 July 1999, the creditor notified the trustee of its intention to object. It did not notify the court as required by s 30A(6) (a). The trustee made his application pursuant to s 30A(3) on 13 October 1999. The creditor did not issue its own summons. The creditor's objection to the automatic discharge set out in its letter to the trustee dated 24 July 1999 was exhibited to the trustee's supplemental report filed pursuant to the court's directions on 26 November 1999. It was submitted that the fact that the trustee made an application pursuant to sub-s (3) did not relieve any creditor who wished to object of its own obligation to apply for an order under sub-s (3). The question is whether a creditor who has not himself made an application pursuant to s 30A(3) is entitled to be heard on an application made by another interested party objecting to the automatic discharge. I see no reason why the irregularity should not be waived. Mr. Li had full notice of the grounds of the creditor's objections as these had been exhibited to the trustee's supplemental report dated 26 November 1999 well before any affidavit in opposition was filed by Mr. Li. In fact, his affirmation was not filed until 14 January 2000, which was after a directions hearing on 6 January 2000 at which the creditor was present and was granted leave to file a reply to Mr. Li's affirmation. It is to be noted that the creditor was represented at that hearing and no objection was taken as to his standing. In those circumstances, it is clear that the irregularities are technical and that Mr. Li has not been prejudiced in any way. Accordingly, the discretion to waive any irregularity ought to be exercised in the creditor's favour.
22. Hence, when the Petitioning Creditor is relying only on the OR's summons, this Court can waive the defect unless substantial injustice has been caused and it cannot be remedied. Mr. Tsang said that the Bankrupt had suffered substantial prejudice:

7. The Petitioning Creditor's eleventh hour attempt to introduce new grounds for objection is a cause of substantial and completely unnecessary prejudice to the Bankrupt. The Fifth Affirmation of Leung Yuet Keung filed on 23 March 2005 demonstrates the breadth of information and detail which could be given by the Petitioning Creditor at very short notice, and the indisputable capability of the Petitioning Creditor to file an application or evidence well within time, had it chosen to do so.
8. The Bankrupt was able to file his affirmation in reply to the Trustee's Report on 21 February 2005, just 7 days after receiving the Trustee's application and Report and before the hearing on 23 February 2005.
- 2nd Affirmation of Leung Yat Tung p.2, para 6
9. Had the Petitioning Creditor applied within time, then there is every reason to suggest that the Bankrupt could have responded promptly by filing appropriate evidence, as he did in relation to the Trustee's Report before the first hearing. As it was, the Bankrupt only received the Petitioning Creditors affirmation on the evening of 21 February 2005 and was taken by surprise.
10. The consequent delay which the Petitioning Creditor's belated filing of evidence has caused to the Bankrupt is in itself serious and substantial prejudice to the Bankrupt as through the fault of the Petitioning Creditor, his possible discharge from bankruptcy and his inability to have the matter determined earlier as is his entitlement has been substantially delayed. It is unnecessary to respond to the allegations in the Affirmation of Ip Tak Kong at this stage as it had been admitted as evidence. (skeleton submission of Mr. Tsang)
23. However, with respect, I am not persuaded.
 - (a) After the introduction of the 3 additional grounds has been rejected, it remains only a matter of evidence or additional evidence for the court to consider to see if the 2 complaints by OR can be established. Although the Affirmation of Ip tak Kong purported to make complaints against the Bankrupt under grounds, I see no reason why they cannot be taken as a whole for the purpose of pursuing only the two grounds of the OR.
 - (b) Rule 88(4) BR requires the affidavit of the Petitioning Creditor to be served on the Bankrupt at least 21 days before the scheduled hearing. The hearing was fixed at 23 February 2005. The affidavit of the Petitioning Creditor only reached the Bankrupt in the evening on 21 February 2005. There appears to have some 19 days late. However, it should be noted that the rule aims at allowing sufficient time for the Bankrupt to prepare his case. 23 February 2005 was only the call-over hearing. The matter was adjourned for argument. Directions can certainly be given to regulate the filing of affidavit evidence so that all the parties will be able to prepare their cases.

- (c) Finally, bare assertion of prejudice is not sufficient. The Bankrupt does not condescend with any particulars at all. There is no evidence before me that the Bankrupt has been made unable to deal with the allegation/evidence in the Affirmation of Ip Tak Kong dated 21 February 2005 because it was served late for some 3 weeks time. Costs/Further Directions
24. I do not have the benefit of hearing arguments on costs from the parties. Mr. Tsang succeeded on the 3 questions put before me while Mr. Ip convinced me on the question of locus and use of the Affirmation of Ip Tak Kong in the application of the OR. As between the Petitioning Creditor and the Bankrupt, I see fit that there be no order as to costs. Regarding Ms. Cheng, she appeared only to assist this Court and the dispute really did not touch on the OR. I therefore direct that costs of the OR be costs in the cause of his summons. These costs orders nisi will become absolute after the expiry of 14 days from today.
25. Since I have allowed the Affirmation of Ip Tak Kong to be relied upon at the OR s summons, I further make the following directions.
- (a) The Bankrupt be at liberty to file and serve a further affidavit in opposition thereof within 21 days from today,
- (b) The OR and/or the Petitioning Creditor be also granted leave to file and serve further report/ affidavit in reply 21 days thereafter. (Jack Wong) Master Ms. K. Cheung for Official Receiver and Trustee. Mr. F. Ip of Messrs. Ho & 1udk 1udk N O P Q R S T U V (#p# OM_G([z(T`6J hsvg 3nzpW hsvg OM_G & 6" CACV Judiciary Normal.dot setup Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 28 October 2026 · Esheria