

HONG KONG / JUDGMENT

RE SHIU KWOK WING SAMUEL

COURT

Court of First Instance

DECIDED

20 July 2007

CASE / FILE NUMBER

HCB24713/2002

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bjbj HCB 24713/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE BANKRUPTCY PROCEEDINGS NO. 24713 OF 2002

Re: SHIU KWOK WING SAMUEL

Coram : Before Master J. Wong in Chambers Date of Hearing : 1 June 2007 Date of Decision : 20
July 2007

D E C I S I O N

Application

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

Background

2. Mr. Shiu Kwok Wing Samuel (the Bankrupt) was born on 20 October 1955. After graduated from the secondary school, he started to work but continued to further his studies at night. At the time of his bankruptcy, he was a Property Manager earning about \$33,000 per month. Now, he is working as a Senior Property Manager at a monthly salary of \$33,650.
3. The Bankrupt is a married man with 2 children, aged 21 and 10. His wife has also been made bankrupt and is now working as a Shop Assistant for about \$6,650 per month. The parents of the Bankrupt are dependant on him.

4. On 27 November 2002, he made a self-petition for bankruptcy. He claimed that he was unable to pay his debts for over \$3m. (a) 1 Secured Creditor: mortgage on Flat D, 15/F, Block 3, Neptune Terrace, Chai Wan (the Mortgage Property) owned by the Bankrupt and his wife \$1,768,000 approx. 34 Unsecured Creditors (24 Credit Cards, 2 (Extra) Cash Cards, 7 Personal Loans/Credit Accounts and 1 overdue tax due to IRD) \$1,390,000 approx. \$3,158,000 approx.
5. On 10 February 2003, this Court made a bankruptcy order against the Bankrupt. Thereafter, Mr. Fred Lee and Ms. Christine Chow of Messrs. Lee & Chow (the Trustees) were appointed joint and several trustees of the property of the Bankrupt at a Creditor s Meeting held on 14 March 2003.
6. The Secured Creditor sold the Mortgaged Property for \$1,180,000 on 30 May 2003. There was a shortfall of \$663,185 which formed part of the debt of the Bankrupt. From April 2003 to November 2006, the Bankrupt made a total contribution of \$217,194 to the Trustee, which was about \$5,200.00 per month.
7. Under the present bankruptcy regime, the Bankrupt should have been automatically discharged after 4 years from his bankruptcy, i.e. on 11 February 2007. However, the Trustee applied by summons filed herein on 11 December 2006 to oppose it.
8. Briefly, the Trustees complained that the Bankrupt had, in July 2001, i.e. 4 months before he filed his own petition for bankruptcy, misrepresented to JCG Finance Co. Ltd. to obtain a loan of \$180,000. This misrepresentation was stated on the loan application form.
 - (a) He did not state that he and his wife had to pay a monthly mortgage payment of about \$14,000. He further represented that he resided at the Mortgaged Property owned by relatives.
 - (b) He answered to the question whether he had ever applied for any credit facility/loan from any bank/finance company. In fact, by the time, he was heavily in debt.
9. The Bankrupt did not agree to the accusation. On 25 January 2007, this Court adjourned the matter for argument and gave usual directions for the parties to file and serve affidavit evidence.
10. The matter was restored before me on 1 June 2007. Mr. E. Gopaoco represented the Trustee and the Bankrupt appeared in person. Having heard from the parties, I reserved my decision to be delivered. During such adjournment, I have further benefit of a detailed judgment handed down on 20 June 2007 by Deputy High Court Judge To, setting out the principles as to how the Court should deal with pre-bankruptcy conduct.
11. First, in relation to the question as to whether the pre-bankruptcy conduct unsatisfactory, the learned Judge said that:
17. Ultimately, the question of whether the conduct is unsatisfactory is whether the conduct is one which the society is prepared to condone without expressing disapproval. This question is to be answered by the reasonable man s test. This hypothetical reasonable man has to

bear in mind the overriding purpose of rehabilitation. He has to take into account whether the debt is a business debt or consumer credit and consider the reasons for which the debt was incurred, the amount of the debt as compared with the bankrupt's means and station in life, the blameworthiness of the bankrupt and all the circumstances in which the debt arose. In addition, the reasonable man has to take into account human nature, its weakness, its readiness to indulge in extravagant spending and its readiness to engage in speculation and assumption of risk. In the end, this is a question of fact for the reasonable member of the society.

12. Second, having found the pre-bankruptcy conduct unsatisfactory, this Court should, in exercise of his discretion, see if the automatic discharge ought to be suspended in the circumstances.
21. Thus, in the exercise of its discretion under section 30A(3), the court should take a balanced view. It should balance the interest of the bankrupt, the interest of his creditors, the public interest in the bankrupt's rehabilitation and the demands of commercial morality underpinning the bankruptcy laws. It should take into consideration all the circumstances leading to the bankruptcy and not just the conduct complained of. It should consider the seriousness of the conduct, the bankrupt's conduct after the commencement of bankruptcy, the degree of co-operation he has shown with the trustee during the relevant period and the effort he has contributed to repaying his debt. In an appropriate case, the court should consider the risk to the commercial community should the bankrupt be allowed to resume full commercial activity. The discretion to suspend the running of the relevant period should not be lightly exercised. But in its balancing exercise, the court should not allow the bankruptcy regime to be abused.
13. If suspension is necessary, for how long?
22. As for the period of suspension, the court should bear in mind the overriding policy of the law is rehabilitation. Any period of suspension should be minimal to enable the bankrupt to return to his normal life as soon as possible. The purpose of suspension is also rehabilitative and solely to mark society's disapproval of the type of unsatisfactory conduct but no more. It is not to be used as a means of extracting more contribution from the bankrupt for distribution to his creditors. The court should not be unduly concerned about the amount of the debt. The period of suspension should reflect the seriousness of the conduct which the court has found to be unsatisfactory. The court should also take into account the personal circumstances of the bankrupt, such as his age and family needs.

Ruling

14. Applying the above principles to the present case, I am of the view that the automatic discharge of the bankruptcy should be suspended for 3 months from 11 February 2007. My reasons appear in below.

15. First, as a matter of fact, the Bankrupt did not dispute the complaints made by the Trustee. He however offered the following explanations:
 1. Pre-bankruptcy Period JCG Loan It is admitted that the application form of JCG, as exhibit marked FL-6 attached in the First Affirmation of FRED LEE dated 11 December 2006, was signed by me but the said application form was not filled by me. Relationship with JCG I maintained a very long-term financial relationship with the creditor, JCG, to my memory; it was about 20 years ago. Before my bankruptcy, I had made various applications for Personal Loan from JCG and I had settled all the repayment except the last one as mentioned at paragraph 24, 25 & 26 on page 8 in the First Affirmation of Fred Lee dated 11 December 2006. Outstanding of the JCG Loan The total loan amount was HK\$180,000.00 at the date of application, subsequently partial repayments had been made prior to my bankruptcy; the total outstanding principal balance was HK\$105,000.00 after the last repayment made on 29 June 2002 as shown on copy of the proof of debt of JCG. Adding the calculated interest as shown on the said proof of debt, the total outstanding was sum up to the amount of HK\$117,848.00 as 1 February 2003. According to history of repayment records of JCG loan, it was a matter of fact that I had made repayments from 5 September 2001 to 29 June 2002, the allegation in the affirmation of the Trustee saying that the Bankrupt would be unable to repay or have no intention of repaying it is not agreed. Application Procedure of JCG Loan In the course of applying for the said loan with JCG prior to my bankruptcy, it was conducted in the manner of over the phone and I could not recall whether the attended staff of JCG did inquire the financial situation of me. It was a matter of fact that the residential address was the property jointly owned by my wife and me whereas the title of ownership could be easily ascertained via land search. IVA Application Before Bankruptcy Prior to my application for bankruptcy, I had applied for IVA through the Jimmie K.S. Wong & Partners but the proposal was not accepted by the creditors, at that period of time, I worked for two jobs about 18 hours a day. Afterwards, the employment contract of the night shift job was terminated in mid 2002, then I have no other alternative but to apply for bankruptcy in November 2002. This indicates that I am not to evade the responsibility of my debts but it turned out that some of the creditors did not accept my IVA proposal, rendering me without a chance to settle the owed debts through the arrangement of IVA proposal. It is reiterated that I was not unwilling to repay all my debts and indeed I had the intention to repaying the debts. However, on balance, I refuse to accept the above. The Bankrupt is educated and has pursued his career up to the management level. Given his experience in applying for credit facilities, it is difficult for me to accept that he did not realize the importance of the provision of his credit information as well as the implication of a declaration. Even if the staff of JCG did fill the application form for him, in my judgment, on balance of probabilities, the Bankrupt simply turned a blind eye to it and is still primarily responsible for the same. Having made such a finding against the Bankrupt, by the reasonable man's test as stipulated by the learned Judge, such misrepresentation is clearly unsatisfactory.

16. Should I then exercise my discretion to suspend the automatic discharge of bankruptcy against the Bankrupt? Bearing in mind the interest of all the relevant parties, including those of the Bankrupt, the creditors and the public, as well as having taken into account of the following factors, I say to the question.
- (a) Obtaining financial benefits by misrepresentation is per se a serious matter that should be condemned.
 - (b) After settling his outstanding debt, interest and handling fee, the Bankrupt enjoyed a benefit for a sum of \$97,099 (\$180,000 - \$78,970 - \$2,131 - \$1,800).
 - (c) The Bankrupt has fully co-operated with the Trustees by attending interviews, submitting Annual Statements and made contributions as directed. Mr. Gopaoco confirmed that the Trustees made no complaint over conduct of the Bankrupt within the four years after the making of bankruptcy order.
17. Third and finally, I take the view that 3 months ought to be sufficient in the circumstances.
- (a) The overriding policy of the new bankruptcy law is rehabilitation.
 - (b) Given the 4 years satisfactory conduct of the Bankrupt, I agree to accept that he has learnt a lesson and will not repeat the mistake again.
 - (c) I also agree to accept the mitigation by the Bankrupt. He is a man over 50. After his bankruptcy (as well as that of his wife), his family has suffered a lot. They should be allowed to resume their normal life as soon as possible.
 - (d) Nonetheless, after all, this Court should show his disapproval on misrepresentation. Costs It appears that there is no reason why costs should not follow the event. I further make an order nisi that the Bankrupt shall pay the Trustee costs of the application, including costs reserved on 25 January 2007. Such costs are to taxed, if not agreed. (Jack Wong) Master of the High Court Mr. E. Gopaoco of Messrs. Lee & Chow for the Trustee. Mr. Shiu Kwok Wing Samuel, appearing in person. - 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# @@&LH7 hsvg 7nN8R 3nzpW hsvg & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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