

HONG KONG / JUDGMENT

THE OFFICIAL RECEIVER v. CHAN HING TO

COURT

Court of First Instance

DECIDED

12 June 2007

CASE / FILE NUMBER

HCMP925/2005

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bjbj HCMP 925/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 925 OF 2005

IN THE MATTER of CITREND SERVICES LIMITED (IN LIQUIDATION) and IN THE MATTER of
Section 168H of the Companies Ordinance (Chapter 32)

BETWEEN THE OFFICIAL RECEIVER Applicant and CHAN HING TO Respondent

Before: Hon Chung J in Chambers Date of Hearing: 30 May 2007 Date of Handing Down Decision:
12 June 2007

DECISION

Introduction

This is an application for extension of time to appeal (and to appeal if time is extended) against the master's order made on 25 January 2006 against the appellant of this appeal (the respondent herein). It was only made in May 2007, more than 15 months after the order was made. But the delay was caused by the appellant's earlier mistake in lodging an appeal to the court of appeal (CACV 84/2006 (19 January 2007)). The respondent of this appeal (the Official Receiver) fairly and correctly indicates that there is no objection to time being extended in the appellant's favour. I therefore grant the time extension sought by him. The master's order under appeal was made pursuant to s. 168H(1), Companies Ordinance (Cap. 32) which reads: The court shall make a

disqualification order against a person in any case where, on an application under this section, it is satisfied

- (a) that he is or has been a director of a company which has at any time become insolvent whether while he was a director or subsequently; and
- (b) that his conduct as a director of that company, either taken alone or taken together with his conduct as a director of any other company or companies, makes him unfit to be concerned in the management of a company (emphasis supplied). The master gave full and detailed reasons for his decision. In short, I agree entirely with both the decision and the reasons given for it. The appellant was the director of 18 companies which have been wound up. Most of the winding-up orders were made in August 2000; of the others, the earliest winding-up order was made in November 1999 and the latest in June 2001. A total of 8 grounds have been put forth by the Official Receiver () in support of the application for a disqualification order. They are (and were at the time when the master decided the application):
 - (a) breach of s. 190 (failing to submit statement of affairs) in respect of 10 companies;
 - (b) breach of s. 121 (failing to keep books of account) in respect of 15 companies;
 - (c) breach of s. 274 (failing to keep proper books of account 2 years before winding-up) in respect of 15 companies;
 - (d) breach of s. 122 (failing to lay out profit and loss account and balance sheets in annual general meetings) in respect of 18 companies;
 - (e) non-cooperation and breach of duties in respect of 14 companies;
 - (f) non-compliance with statutory filing obligation in respect of 3 companies;
 - (g) transactions liable to be set aside under s. 183 in respect of Farm House Restaurant Ltd. (Farm House);
 - (h) misuse of bank accounts in respect of Farm House. While noting that the burden was on the OR to establish the ingredients of s. 168H, the master observed that the appellant did not dispute the grounds referred to in sub-para. (a), (b), (c) or (f). Further, the master was satisfied that the OR had established those grounds. In relation to the other grounds to which the appellant has raised objections, the master rejected those objections and found that those grounds were also established by the OR. Further to what appeared in the master s judgment dated 25 January 2006, at the appeal hearing the appellant raised several matters which he said were his main reasons in support of the appeal. First, the appellant contends that the master s judgment is self-contradictory. At para. 15 thereof, the master describes that the appellant s conduct as serious misconducts . However, at para. 16 thereof, the master says the appellant s misconduct falls within the lowest bracket. I agree with the OR that the contention is misconceived. The relevant parts of the master s judgment are as follows: I consider that [the 8 allegations which have been proved] are serious misconducts that this court should make a disqualification order As to the quantum of disqualification I

agree that this case should fall within the lowest bracket of disqualification . Hence, it is obvious that para. 15 and 16 of the master s judgment were dealing with different aspects of the application for disqualification. And quite rightly so. S. 168H(1), Cap. 32 expressly requires the court to exercise its jurisdiction thereunder when the court is satisfied (among other things) the affected person s conduct as a director makes him unfit to be concerned with the management of a company. Hence, what the court must be satisfied with is what can be called unbecoming conduct . Not every misconduct is an unbecoming conduct. The seriousness of the misconduct relied upon by the OR is relevant to the court s determination of whether the misconduct amounts to unbecoming conduct . Para. 15 of the master s judgment was concerned with that aspect. After having satisfied itself that its jurisdiction under s. 168H, Cap. 32 is engaged, the court next determines the length of the disqualification. This is a discretionary power which should take into account various matters. The gravity of the unbecoming conduct is obviously relevant to the length of disqualification: more serious unbecoming conduct usually results in longer periods whereas less serious ones should attract shorter periods. Para. 16 of the master s judgment was concerned with the last-mentioned aspect. Secondly, the appellant argues that the master has failed to take into account the effect of the financial crisis on him (and the wound-up companies). What he means is basically this. Of the unbecoming conduct relied on by the OR, the appellant says at least part of it resulted from the financial failure caused by the economic downturn which was prevalent in Hong Kong (and the nearby region) from about 1998 (to may be about 2003 or 2004). Particular emphasis has been placed on the huge increase in the number of personal and corporate insolvency cases during that period. There is no merit in the above argument. One, it is an obvious fact that not everyone (or every company) became insolvent because of the economic downturn. Cases of insolvency may sometimes be caused by pure misfortune, but more often they were related to the financial imprudence of the individual (or company) concerned (sometimes the cause was even culpable). Two, and more importantly, as the OR correctly points out, some of the appellant s unbecoming conduct could not be attributed to the economic downturn. For example, some of the unbecoming conduct took place before 1998. The failure to keep and preserve proper books of account concerned books of account dating back to 1994 or even 1993 for some companies: see para. 10 and 11, OR s First Report. The appellant attempts to counter that fact by saying that the books of account were lost because the OR failed to collect or preserve them timely after the winding-up. However, that attempt is unmeritorious because (as the OR correctly submits) the appellant has earlier been convicted of offences under ss. 121 and 274. Thirdly, as regards the OR s allegation that the appellant failed to submit preliminary examination questionnaires or to cooperate with the OR (which the OR says all took place after the economic depression), the appellant claims he was preoccupied with taking care of the survival of his family. Besides, the appellant says he has encountered about 30 officers of the OR s office; he was cooperative with most of them and only 4 officers complained that he was uncooperative. It is unnecessary to deal with the above in details except to observe that it is a lame argument which I reject. Fourthly, the appellant complains there has been unduly delay in making this application. He says this

application was made only just before the expiry of the prescribed period of 4 years: s. 168I(2), Cap. 32. This complaint was once made in one of the appellant's letter dated 17 January 2006. However, there was no advanced notice that the appellant would rely on this for the purpose of the appeal. In reply, the OR denies undue delay and asserts that the late application was caused by the lack of resources to deal with the workload. In the above circumstances, I do not consider it fair to the OR to permit the appellant to rely on this matter. The appellant also argues that the OR's delay in making this application provides evidence that there is no risk of his taking up the post of a director in future. The fact is, he says, he has not done so at any time before the disqualification order was granted by the master. Again, there is no need to set out the matter in detail save to say I agree with the master's approach at para. 13 of his judgment (citing in support *Secretary of State for Trade and Industry v. Gray* [1995] BCLC 276, 284 and 285; *Re Lo-Ling Electric Motors Ltd.* [1998] BCLC 698, 703). Finally, the appellant complains that the master's judgment provides no guidance on morality. The master was discharging a judicial function, and his judgment was part of the performance of that function. What he was tasked to deal with were essentially legal issues. There may be abundant moral basis in support of the statutory provision(s) which were relevant to the application before him. But, unless those provisions are challenged, usually there is no need to go beyond the law. The above are sufficient to dispose of the appeal. And for the reasons set out above, the appeal is dismissed. The OR seeks this court's guidance in relation to one matter. It arises as follows. The appellant himself has been adjudged bankrupt in March 2001 (HCB 4763/2000). In dealing with the length of disqualification, the master said: I consider that whilst this court is entitled to take into consideration the bankruptcy period, very little weight should be given to it (emphasis supplied) (para. 20). In reaching the above conclusion, the master referred to the English decision in *Re Tansoft Ltd.* [1991] BCLC 339, 358 and Master Kwang's decision in *The Official Receiver v. Lai Kwok Ying and Another*, HCMP 4813/2003 (6 June 2003). In the English decision, the court opined that no weight should be given to the delinquent director's bankruptcy (p.

- 358) whereas in the Hong Kong decision, the court considered it to be a potentially relevant mitigating factor (para. 28 thereof). The OR's stance is that the bankruptcy should not be regarded as a mitigating factor. It is trite law disqualification orders are to protect the public against the management of companies by individuals whose past records show them to be a danger to creditors and others: see, for example, *Re Lo-Line Electric Motors Ltd.* [1998] BCLC 698, 703; *Re Westmid Packing Services Ltd.* (No. 3) [1998] BCC 837, 843; the *Lai Kwok Ying* decision, para. 30. S. 156(1), Cap. 32 provides: If any person being an undischarged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any company except with the leave of the court by which he was adjudged bankrupt, he shall be guilty of an offence and liable to imprisonment and a fine (emphasis supplied). Depending on whether it is a first-time bankruptcy, a bankrupt is discharged from his bankruptcy after 4 (or 5) years: s. 30(A), Bankruptcy Ordinance (Cap. 6). That period may be extended for cause by the court for up to 4 (or 3) years. Hence, if a delinquent

director's bankruptcy cannot be taken in account when determining the period of disqualification, potentially at least it may result in the disqualification period being a lot longer; for example, where a s.168H disqualification order is made only shortly before, at the time of, or even after the discharge of bankruptcy. In enacting s. 156(1), Cap. 32, the legislature must have considered it undesirable for individuals who are bankrupts to take part in, or be concerned with, the management of companies. Bankruptcy results from an individual's insolvency. As stated above, cases of insolvency may result from pure misfortune or from financial imprudence. Sometimes it may happen even for culpable reasons such as recklessness or fraud. But s. 156(1), Cap. 32 also confers a power on the court to grant leave for an undischarged bankrupt to be a director (or to take part in, or be concerned with, the management of companies). The cause of the bankruptcy must be one of the factors to be considered when the court decides whether to grant such leave. The net result is therefore this. Any potential prolongation of the disqualification of a bankrupt arising out of the provisions of ss. 156(1) and 168H(1), Cap. 32 can be ameliorated by the granting of leave under s. 156(1). There is thus little strength in any argument that somehow the potential prolongation should again be considered when the court is determining the length of disqualification under s. 168H(1) (by taking into account the bankruptcy). There is an additional disadvantage were that argument correct: the court faced with an application brought under s. 168H(1) may also need to look into factors which are relevant to the granting of leave under s. 156(1). This may unduly lengthen the s. 168H(1) applications. Accordingly, I agree with the OR that a delinquent director's bankruptcy should not be taken in account when the court is simply considering the length of disqualification under s. 168H(1). Despite the appellant's impecuniosity, there is no valid reason to justify a departure from the usual rule that costs should follow the event. Costs of the appeal are to be paid by the appellant to the OR to be taxed if not agreed. (Andrew Chung) Judge of the Court of First Instance High Court Mr Douglas Lam, instructed by Official Receiver's office, for the Applicant Respondent acts in person and present PAGE - A B C D E F G H I J K L M N O P Q R S 1udk 1udk i\$&&h vo 5t+ XrI] |D7 vo 5 XrI] HCMP.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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