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Bankruptcy – Discharge or Extension?

A tougher approach by the Courts

Introduction

When an individual is adjudged bankrupt, the property of the bankrupt vests in the trustees. A bankrupt's duties include cooperating with the trustees and to assist them to recover and realise his assets. Since the legislation was amended in 1998, in Hong Kong a bankruptcy is automatically discharged after four years¹ (if the bankrupt has not previously been adjudicated bankrupt). But what happens when the Bankrupt has been uncooperative, or dishonest, or has taken actions which prejudice his creditors?

Suspension of Automatic Discharge

Trustees and creditors may object to the automatic discharge of a bankruptcy in an application under section 30A(3) of the Bankruptcy Ordinance (Cap 6) (the “**Ordinance**”). If successful, the application can result in an extension of the relevant period by up to four years. To be successful, the applicant must satisfy the Court that the objection was raised on one or more of the following grounds:

- i) that the discharge of the bankrupt would prejudice the administration of the estate;
- ii) that the bankrupt has failed to co-operate in the administration of his estate;
- iii) 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.

A bankrupt has a positive duty to cooperate with his trustees and should pro-actively reveal the complete picture of his financial affairs to the trustees. It is for him to explain any inconsistencies, and to convince the trustee of the true state of affairs. The more complex the bankrupt's transactions, the more comprehensive the bankrupt's disclosure should be.

Recent Cases

There have been a number of cases in which the Court which has agreed that more than one of the grounds are satisfied but, despite this, the Court has not been minded to exercise its discretion under the Ordinance to extend the bankruptcy period for the maximum period.

For example, in Lee Raymond Cho Min [2014] HKCU 1806, Mr Raymond Lee (the former MD of Oasis Airlines, a case in which we acted for the Liquidators) and his wife were adjudged bankrupt and would have been automatically discharged from bankruptcy on 30 August 2013. However, on 26 July 2013 the trustees sought an order suspending their discharge.

Although the Court agreed with the trustees' grounds for their application, in the exercise of its discretion it only suspended the discharge of their bankruptcy orders for 18 months and 15 months respectively.

On appeal, the bankrupts argued that the trustees had failed to establish any of the grounds of the complaint, and even if the trustees had established one or more of the grounds, the Court should not have exercised its discretion in suspending the automatic discharge. The bankrupts further argued that if the Court was minded to exercise its discretion, then the periods of suspension should be reduced.

The trustees demonstrated continued uncooperative conduct by the bankrupts both pre- and post-bankruptcy order, on the basis of which The Honourable Justice Yuen JA upheld the Master's exercise of discretion and dismissed the appeal.

Multiple Applications Under s30A(3)?

The scope of the Court's discretion to not only extend bankruptcy, but also make multiple orders under s30A(3) of the Ordinance has been examined in recent cases.

Both of these discretionary powers were tested in China Merchants Bank Co Ltd v Cheng Chao Ming [2009] HKCU 766.

The Bankruptcy Order against the bankrupt was made on 4th December 2002. On 11th November 2006, the trustees took out an application to object to the automatic discharge of the bankrupt. Master Yu granted the application on 25th July 2007 and ordered that the automatic discharge be suspended for 2 years, until 4 December 2008.

Following this, China Merchants Bank Company Limited issued a summons on 11 November 2008 seeking an

¹ This period extends to five years in the case of an individual who has previously been adjudged bankrupt.

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additional order to suspend the running of the relevant period for the bankrupt's discharge for a further period of two years.

At First Instance, the Court rejected the bankrupt's submission that since the trustees had already objected to the discharge once, the applicant was not permitted to make a subsequent application. The Court held that there is nothing in the legislation stating that the provision can only be relied on once throughout the bankruptcy period, and held that a further suspension of 18 months was appropriate.

The bankrupt appealed the decision, challenging whether a bankrupt is liable to have his period of bankruptcy extended more than once on the application of the trustee or his creditors.

The Court of Appeal stated that the construction of section 30A(3), in particular that the wording that was chosen was 'the application' instead of 'an application' or 'the applications', and 'such period' instead of 'such periods', indicated that section 30A(3) did not envisage multiple postponements. Accordingly, the Court of Appeal held that there was no jurisdiction to make a further postponement of the bankruptcy order, and therefore allowed the appeal.

The Court Must Consider All Grounds of the Application

In *Osman Mohammed Arab & Anors v Lam Ying Ho* [2015] HKCU 168, the trustees made an application to the Court for suspension of discharge on two grounds, namely (i) the bankrupt had failed to co-operate in the administration of his estate; and (ii) his conduct, both before and after the commencement of the bankruptcy has been unsatisfactory. One of the grounds advanced as post-bankruptcy unsatisfactory conduct was that the bankrupt should have utilized his earning capacity better, instead of working for a company in the family business for only RMB13,000 a month.

At First Instance, the Court took the view that the only ground of unsatisfactory conduct established by the trustees was the bankrupt's failure to utilize his earning capacity, and in the exercise of its discretion the Court suspended the discharge of bankruptcy by 12 months. The trustees appealed.

The trustees argument was that the Court had failed to before and after the commencement of the bankruptcy has been unsatisfactory. One of the grounds advanced

as post-bankruptcy unsatisfactory conduct was that the bankrupt should have utilized his earning capacity better, instead of working for a company in the family business for only RMB13,000 a month.

At First Instance, the Court took the view that the only ground of unsatisfactory conduct established by the trustees was the bankrupt's failure to utilize his earning capacity, and in the exercise of its discretion the Court suspended the discharge of bankruptcy by 12 months. The trustees appealed.

The trustees argument was that the Court had failed to consider the s.30A(4)(c) ground, namely that the bankrupt had failed to co-operate with the trustees, and had only considered the ground relating to unsatisfactory conduct.

The Court of Appeal took the view that the order should be set aside and considered that a period of 24 months was appropriate.

Unsatisfactory conduct

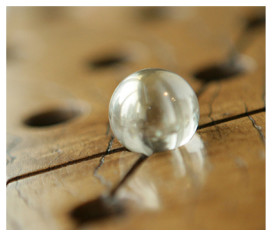
Re Lo Yiu Chuen [2014] HKCU 1272 is a case concerning a judgment obtained by the petitioning creditor against the bankrupt and his elder brother after trial for a sum exceeding HK\$3.09 million together with interest and costs. On 13 November 2009, a petition for bankruptcy was filed and a bankruptcy order was made against the bankrupt on 20 January 2010.

The trustees mainly relied on the ground that the conduct of the bankrupt before the commencement of his bankruptcy was unsatisfactory:

- the bankrupt entered into a transaction to dispose of his interest in a property just 3 days after the date of the Judgment; and
- the bankrupt incurred substantial losses from gambling in Macau and used the sales proceeds of the transaction to pay off gambling debts.

The trustees only recovered HK\$65,187.50 from the bankrupt's estate. The Court considered that with the bankrupt's knowledge that Judgment was being entered against him, his conduct in selling all his interest in the property after 3 days was unsatisfactory.

The Court of Appeal took the view that the order should be set aside and considered that a period of 24 months was appropriate.



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The bankrupt's conduct of paying off the gambling debt may not have amounted to unfair preference under section 50 of the Ordinance, but that is not to say that such conduct is accepted. The Court took the view that society would not be prepared to condone such conduct.

The automatic discharge of the bankrupt was suspended for 6 months.

Re Surani Bhupendra Jivarajbhai (HCB 12522/2009)

In a very recent case in which we acted for the trustees, Mr Surani was adjudged bankrupt on 13 January 2010 and would have automatically been discharged from bankruptcy on 13 January 2014. The trustees submitted an application under section 30A(3) of the Ordinance and, in summary, the trustees' case was that:

- (1) The bankrupt had concealed his assets in India and Hong Kong, and failed to cooperate with the trustees in the recovery of his assets;
- (2) The bankrupt had siphoned off substantial amount of funds to his father and brother shortly prior to the bankruptcy;
- (3) There were on-going criminal investigations;
- (4) The trustees alleged that the bankrupt had committed offences under various provisions of the Ordinance;
- (5) The bankrupt had failed to submit his annual statements of earnings and acquisitions; and
- (6) The bankrupt left Hong Kong in late 2010 and failed to return despite requests by the trustees for him to meet with them.

Master's decision

The Court held that the bankrupt had been deliberately evasive towards the trustees and failed to assist the trustees in the administration of his estate. In particular, the bankrupt had failed to:

- i) provide full and frank disclosure of his assets;
- ii) notify the trustees promptly that he was involved in legal proceedings in India and that he had tried to negotiate with the other party;
- iii) provide specific information regarding the companies in which he was beneficially interested (directly or otherwise) and the value ascribed to such shareholding;
- iv) meet the trustees in India upon the trustees request.

In his concluding remarks, the Master confirmed that a bankrupt has a positive duty towards the trustees, and is not permitted to selectively choose which information to disclose. He confirmed that Mr Surani's conduct had been unsatisfactory and therefore a suspension of the automatic discharge was appropriate.

In exercising his discretion as to the length of suspension, the Master noted that the bankrupt rendered some assistance to the trustees, such as filing a statement of affairs (although incomplete), and therefore decided to suspend Mr Surani's discharge for a period of 3 years and 6 months.

Conclusion

As Le Pichon J (as she then was) noted in the case of *Re Hui Hing Kwok* [1999] 3 HKC 683, p 687, "*Rehabilitation in the sense of enabling the bankrupt to resume a normal life in society is a key, if not the key, consideration. It should only be delayed by a bankrupt's own failing.*" The automatic discharge of bankruptcy is aimed to effect this key objective, and to enable the bankrupt to be discharged with minimum trouble and expense.

The Court has a wide discretion under the Ordinance and, as can be seen from the case examples above, will take into account all relevant circumstances in deciding whether to suspend the relevant period.

At Tanner De Witt, we strongly advise bankrupts to adopt a proactive and cooperative approach when dealing with trustees in bankruptcy. It is imperative that evasive or uncooperative conduct, or giving an impression of such conduct, be actively avoided. Any difficulties experienced by the trustees in the collection and retrieval of information relating to the bankruptcy as a result of the bankrupt's actions, or actions which are seen to prejudice creditors, will be looked upon unfavourably by the Court, and could well result in the bankruptcy being extended for some considerable time.

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