

BUTTERWORTHS HONG KONG

Bankruptcy Law
HANDBOOK

Eighth Edition



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Bankruptcy Law Handbook

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The commentary in this book states the law as at 1 October 2024.

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PART IV

OFFICIAL RECEIVER

(Format changes—E.R. 1 of 2019)

75. Appointment of Official Receiver and other officers

- (1) The Chief Executive may appoint an Official Receiver and such other officers to hold any of the offices specified in Schedule 2 as may be required to assist the Official Receiver in the performance of his duties. (Amended 18 of 2005 s. 19)
- (2) No person shall be appointed Official Receiver or to any of the offices specified in Part I of Schedule 2 unless on the date of such appointment he is qualified to practise as a legal practitioner in Hong Kong, the United Kingdom or in a jurisdiction listed in Schedule 2 to the Legal Officers Ordinance (Cap. 87). (Amended 42 of 2000 s. 21)
- (3) The Official Receiver and the holder of an office specified in Part I of Schedule 2 shall be deemed to be legal officers for the purpose of the Legal Officers Ordinance (Cap. 87) and shall have all rights conferred upon legal officers by that Ordinance.
- (4) The holder of an office specified in Schedule 2 may, subject to subsection (5) and any instructions of the Official Receiver, exercise the powers or perform the duties of the office of the Official Receiver.
- (5) The holder of an office specified in Part II of Schedule 2 shall not exercise any right conferred by subsection (3) on the holder of an office specified in Part I of Schedule 2.
- (6) The Official Receiver shall act under the general authority and direction of the Chief Executive and shall also be an officer of the court. (Amended 18 of 2005 s. 19)
- (7) The Chief Executive may, by order published in the Gazette, amend Schedule 2. (Amended 18 of 2005 s. 19)

(Replaced 39 of 1992 s. 3)

[75.01] Enactment history

This section was substituted pursuant to s 3 of the Bankruptcy (Amendment) Ordinance 1992 (39 of 1992).

Subsections (1), (6) and (7) were amended pursuant to s 19 of the Bankruptcy

[75.02] General note

The Official Receiver is appointed by the Chief Executive. His duties relate both to the investigation of a debtor's conduct and to the administration of a debtor's estate: see s 76(1) below. He is also an officer of the court and has to report to the court on the debtor's conduct. He has to take part in the public examination of the debtor and acts as receiver and manager of the debtor's estate in the initial stages of the proceedings and perform other duties in the conduct of the bankruptcy: see ss 77 and 78 below. It has been held that it is not necessary for the Official Receiver to obtain the sanction of the court to do anything which is legitimate for the Official Receiver to do, such as making use of a former officer's front knowledge of the bankruptcy in issue: see *The Official Receiver v Tan Cher Sia* (unreported, Bankruptcy No 69/1992 and No 71/1992).

When no estate or interest is vested in him, he is in the same position as an ordinary trustee: see *Re Duncan, ex p Dunnean* [1892] 1 QB 331. He cannot bring or defend actions relating to the estate of the bankrupt: see *Re Berry, Duffield v Williams* (1906) 1 Ch 939.

As an officer of the court, the Official Receiver's acts, observations and reports made in the discharge of his statutory duties and obligations under the Bankruptcy Ordinance (Cap 6) or court order (eg, preparing and circulating a report to court and the creditors' committee) are the subject of absolute privilege against any action in defamation. This would also apply to a trustee in bankruptcy performing the same duties. See *Li Ngan-shui Brumen v Official Receiver* [1995] 1 HKC 133, [1995] 2 HKLR 248 (CA), at 253–255 applying *Burr v Smith* [1909] 2 KB 306 (CA, Eng).

[75.03] Subsection (1): The Chief Executive may appoint an Official Receiver and such other officers

The power to appoint an Official Receiver and such other officers is only exercisable by the Chief Executive; the power cannot be exercised by the court, or to do so would tantamount to a usurpation of the power expressly reserved for the Chief Executive: see *The Official Receiver v Tan Cher Sia, Edward* (unreported, Bankruptcy No 69/1992 and No 71/1992).

[75.04] Definition

'Official Receiver', see s 2 above.

Status of Official Receiver

The duties of the Official Receiver shall have relation both to the conduct of the debtor and to the administration of his estate.

The Official Receiver and the holder of an office specified in Schedule 2 may take any affidavit required by any Ordinance

to be made before or produced or delivered to or filed with the Official Receiver or the holder of an office specified in Schedule 2 notwithstanding any Ordinance requiring the taking of such affidavit by or before any other person. (*Replaced 39 of 1992 s. 4*)

- (3) All provisions in this or any other Ordinance referring to the trustee in a bankruptcy shall, unless the context otherwise requires or the Ordinance otherwise provides, include the Official Receiver when acting as trustee.
- (4) The trustee shall supply the Official Receiver with such information, and give him such access to and facilities for inspecting the bankrupt's books and documents, and generally shall give him such aid, as may be requisite for enabling the Official Receiver to perform his duties under this Ordinance.

[*cf. 1914 c. 59 s. 72 U.K.*]

[76.01] Enactment history

Subsection (2) was substituted pursuant to s 4 of the Bankruptcy (Amendment) Ordinance 1992 (39 of 1992).

[76.02] England

cf. s 72 of the now repealed Bankruptcy Act 1914 (c 59) (UK).

[76.03] General note

This section describes the general duties of the Official Receiver and the holder of an office specified in Sch 2 below. See also general note in [75.02] above.

[76.04] Definitions

For 'Affidavit', 'Official Receiver' and 'trustee', see s 2 above.

76A. Transitional provision

- (1) Any thing done before the commencement* of the Bankruptcy (Amendment) Ordinance 1992 (39 of 1992) by the Registrar General in the capacity of Official Receiver shall be regarded as having been done by the Official Receiver at the time when the thing was done.
- (2) Any document which contains a reference to the Registrar General in the capacity of Official Receiver shall have effect

on and after the commencement* of the Bankruptcy (Amendment) Ordinance 1992 (39 of 1992) with the substitution for such reference of a reference to the Official Receiver.

- (3) In any legal proceedings pending on the commencement* of the Bankruptcy (Amendment) Ordinance 1992 (39 of 1992) to which the Registrar General in the capacity of Official Receiver is a party, the Official Receiver shall as from such commencement be substituted as a party thereto in lieu of the Registrar General and the proceedings shall continue as if the Official Receiver had always been that party.
- (4) In this section, **Registrar General** (註冊總署署長) means the Registrar General appointed under section 2(1) of the Registrar General (Establishment) Ordinance (Cap. 100)[@].

(*Added 39 of 1992 s. 5*)

Editorial Note:

* Commencement date: 1 June 1992.

[@] The Registrar General (Establishment) Ordinance (Cap. 100) was repealed by s. 14 of the Registrar General (Establishment) (Transfer of Functions and Repeal) Ordinance (Cap. 479).

[76A.01] Enactment history

This section was added pursuant to s 5 of the Bankruptcy (Amendment) Ordinance 1992 (39 of 1992).

[76A.02] Definitions

For 'Official Receiver' and 'trustee', see s 2 above.

77. Duties of Official Receiver as regards the bankrupt's conduct

As regards the conduct of a bankrupt, it shall be the duty of the Official Receiver— (*Amended 18 of 2005 s. 20*)

- (a) to consider any report submitted to him under section 86A and take such action on the report as he considers appropriate; (*Replaced 18 of 2005 s. 20*)
- (b) (*Repealed 18 of 2005 s. 20*)
- (c) to take such part and give such assistance in relation to the prosecution of any bankrupt as the Secretary

(Amended 33 of 1939; G.N. 840 of 1940 Supp. Schedule; 20 of 1948
s. 4; 76 of 1996 s. 72)
[cf. 1914 c. 59 s. 73 U.K.]

[77.01] Enactment history

This section was amended pursuant to s 20 of the Bankruptcy (Amendment) Ordinance 2005 (18 of 2005).

Paragraph (b) was repealed pursuant to s 20 of the Bankruptcy (Amendment) Ordinance 2005.

[77.02] England

cf, s 73 of the now repealed Bankruptcy Act 1914 (c 59) (UK).

[77.03] Paragraph (a): Investigate the conduct of the debtor

As to the conduct of the debtor which may constitute an indictable offence: see ss 129–135 below.

[77.04] Paragraph (a): Justify the court in refusing, suspending or qualifying an order for his discharge

As to the courts discretion to refuse, suspend or qualify an order for the discharge of the debtor's bankruptcy, see s 30A above.

[77.05] Paragraph (c): Public examination

As to the Official Receiver's conduct of public examination, see s 19 above.

[77.06] Definition

For 'Official Receiver', see s 2 above.

78. Duties of Official Receiver as to bankrupt's estate

(1) As regards the estate of a bankrupt, it shall be the duty of the Official Receiver— (Amended 76 of 1996 s. 72)

(a) to act as interim trustee if so appointed by the court:
(Replaced 18 of 2005 s. 21)

(b)–(e) (Repealed 18 of 2005 s. 21)

(f) to advertise the bankruptcy order; (Amended 76 of 1996 ss. 72 & 73)

(g) to act as trustee during any vacancy in the office of trustee;
(Repealed 18 of 2005 s. 21)

(h) For the purpose of his duties as interim trustee, the Official Receiver shall have the same powers as if he were a receiver appointed by the court, but shall, as far as practicable, consult the wishes of the creditors with respect to the management of the bankrupt's property, and may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors, and shall not, unless the court otherwise orders, incur any expense beyond such as is requisite for the protection of the bankrupt's property or the disposing of perishable goods. (Amended 76 of 1996 s. 72)

(2) (Repealed 18 of 2005 s. 21)

(3) (Repealed 18 of 2005 s. 21)

(Amended 18 of 2005 s. 21)

[cf. 1914 c. 59 s. 74 U.K.]

[78.01] Enactment history

This section was amended pursuant to ss 45, 72 and 73 of the Bankruptcy (Amendment) Ordinance 1996 (76 of 1996), commencing 1 April 1998.

This section was amended pursuant to s 21 of the Bankruptcy (Amendment) Ordinance 2005 (18 of 2005).

Section (3) was repealed pursuant to s 21 of the Bankruptcy (Amendment) Ordinance 2005.

[78.02] England

cf, s 74 of the now repealed Bankruptcy Act 1914 (c 59) (UK).

[78.03] General note

This section confers upon the Official Receiver special duties in defined situations.

[78.04] Subparagraph (1)(a): As interim trustee ... as

As to the Official Receiver acting as interim trustee see s 13 above.

An Official Receiver, when acting as an interim trustee, ought not to realise or encumber the bankrupt's estate, save to protect it or to dispose of perishable goods;

and before acting out of the ordinary practice he should consult the creditor's committee, and if necessary apply to the court: see *Re Wells and Croft, ex p Official Receiver* (1895) 72 LT 359; and *Turquand v Board of Trade* (1886) 11 AC 286 (HL).

[78.05] Subparagraph (1)(d): Forms of proxy

As to the form of general and special proxy, see Forms 50 and 51 of the Bankruptcy (Forms) Rules (Cap 6B) in the Appendix below. As to the rules governing signature of proxy and filing in when a creditor is blind, see the Bankruptcy Rules (Cap 6A), rr 120 and 121 in the Appendix below.

[78.06] Subparagraph (1)(h): Statement of affairs

As to the bankrupt's duty to prepare his statement of affairs, see s 18 above.

[78.07] Definitions

For 'Official Receiver' and 'trustee', see s 2 above; and for 'meetings of creditors', see ss 17A and 17B above.

PART V

TRUSTEES AND PROVISIONAL TRUSTEES

(Replaced 18 of 2005 s. 22)
(Format changes—E.R. 1 of 2019)

Official name

Official name of trustee and provisional trustee

- (1) The official name of a provisional trustee shall be "the provisional trustee of the property of _____ a bankrupt" (inserting the name of the bankrupt).
- (2) The official name of a trustee shall be "the trustee of the property of _____ a bankrupt" (inserting the name of the bankrupt).
- (3) By his official name, a provisional trustee or trustee may do all acts that are required or authorized to be done by him in the execution of his office.

(Replaced 18 of 2005 s. 23)

[79.01] Enactment history

This section was repealed and sub-ss (1), (2) and (3) were substituted pursuant to s 23 of the Bankruptcy (Amendment) Ordinance 2005 (18 of 2005).

[79.02] England

ss 76 of the now repealed Bankruptcy Act 1914 (c 59) (UK).

[79.03] General note

According to the present Bankruptcy Ordinance (Cap 6), the administration of a bankrupt's estate is to be carried out mainly through the office of the trustee, and in certain circumstances he has to act under the control of the creditors' committee and the court. As the trustee in bankruptcy is an officer of the court, he is bound to carry out its orders: see *Re Engleheart* (1864) 12 WR 387.

As to the power to make appointment of trustee, see s 17 above.

As to the summoning of meeting to appoint first trustee, see s 17A above.

As to the security to be given by the trustee and notification of the appointment to the Official Receiver, see s 23(1)(a) above.

As to the duties and powers of the trustee in relation to the realisation of the bankrupt's estate, see ss 53–66 above.

As to the trustee's power to institute proceedings or defend any action, see s 61 above.

[79.04] Definitions

For 'property' and 'trustee', see s 2 above.

Appointment

79A. Disqualification for appointment as trustee

No person being an undischarged bankrupt and no body corporate shall be qualified for appointment to the office of trustee, and—

- (a) any appointment made in contravention of this section shall be void; and
- (b) where any such person or any body corporate acts as trustee, such person or body corporate shall be liable to a fine at level 2. (Amended E.R. 3 of 2021)

(Added 47 of 1984 s. 11)

[79A.01] Enactment history

This section was added pursuant to s 11 of the Bankruptcy (Amendment) Ordinance 1984 (47 of 1984).

[79A.02] Definition

For 'trustee', see s 2 above.

79B. Corrupt inducement affecting appointment as trustee

Any person who gives or agrees or offers to give to any creditor of a debtor or bankrupt any valuable consideration with a view to securing his own appointment or nomination, or to securing or preventing the appointment or nomination of some person other than himself, as the trustee shall be liable to a fine at level 2.

(Added 47 of 1984 s. 11. Amended E.R. 3 of 2021)

[79B.01] Enactment history

This section was added pursuant to s 11 of the Bankruptcy (Amendment) Ordinance 1984 (47 of 1984).

[79B.02] Valuable consideration

The expression 'valuable consideration' according to its general meaning means some right, interest, profit, detriment, loss or responsibility given, suffered or undertaken by the other: see *Currie v Misa* (1875) LR 10 Exch 153. See also [79B.05] above, for a discussion on the relationship of the expression 'valuable consideration' with the narrower statutory term of 'valuable consideration in money or monies worth'.

[79B.03] Definitions

For 'bankrupt' and 'trustee', see s 2 above; and for 'creditor' and 'debtor', see s 3 above.

80. Power to appoint joint or successive trustees and provisional trustees

(1) When 2 or more persons are appointed as provisional trustees, the appointment shall state whether any act required or authorized to be done by a provisional trustee is to be done by all or any one or more of such persons, but all such persons are in this Ordinance included under the term *provisional trustee*, and shall be joint tenants of the property of the bankrupt. (Replaced 18 of 2005 s. 24)

(1A) When 2 or more persons are appointed as trustees, the appointment shall state whether any act required or authorized to be done by a trustee is to be done by all or any one or more of such persons, but all such persons are in this Ordinance included under the term *trustee*, and shall be joint tenants of the property of the bankrupt. (Added 18 of 2005 s. 24)

(2) The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee or failing to give security, or of the appointment of any such person not being approved by the court.

[cf. 1914 c. 59 s. 77 U.K.]

[80.01] Enactment history

Subsection (1) was substituted pursuant to s 24 of the Bankruptcy (Amendment) Ordinance 2005 (18 of 2005).

Subsection (1A) was added pursuant to s 24 of the Bankruptcy (Amendment) Ordinance 2005 (18 of 2005).

[80.02] England

cf, s 77 of the now repealed Bankruptcy Act 1914 (c 59) (UK).

[80.03] Definitions

For 'property' and 'trustee', see s 2 above.

81. Proceedings in case of vacancy in office of trustee

- (1) If a vacancy occurs in the office of a trustee the creditors in general meeting may appoint a person to fill the vacancy and thereupon the same proceedings shall be taken as in the case of a first appointment. (*Amended E.R. 1 of 2019*)
- (2) The Official Receiver shall, on the requisition of any creditor, summon a meeting for the purpose of filling any such vacancy.
- (3) If the creditors do not within 3 weeks after the occurrence of a vacancy appoint a person to fill the vacancy, the Official Receiver shall report the matter to the court, and the court may appoint a trustee.
- (4) During any vacancy in the office of trustee the Official Receiver shall act as trustee.

[cf. 1914 c. 59 s. 78 U.K.]

[81.01] England

cf, s 78 of the Bankruptcy Act 1914 (c 59) (UK).

[81.02] Definitions

For 'Official Receiver' and 'trustee', see s 2 above.

81A. Vacancy in office of provisional trustee

- (1) If a vacancy occurs in the office of a provisional trustee, the Official Receiver shall—

- (a) in a case where the Official Receiver considers that the value of the property of the bankrupt is unlikely to exceed \$200,000, either appoint another person to fill the vacancy or act as the provisional trustee; or in any other case, act as the provisional trustee.
- (b) The power of the Official Receiver to appoint another person to fill a vacancy may be exercised without a creditors' meeting, and it includes power to appoint 2 or more persons as joint provisional trustees; but such an appointment must make provision as to the circumstances in which the provisional trustees must act together and the circumstances in which one or more of them may act for the others.

(*Added 18 of 2005 s. 25*)

[81A.01] Enactment history

This section was added pursuant to s 25 of the Bankruptcy (Amendment) Ordinance 2005 (18 of 2005).

[81A.02] Definitions

For 'Official Receiver' and 'trustee', see s 2 above.

Control over trustee**82. Discretionary powers of trustee and control thereof**

- (1) Subject to the provisions of this Ordinance, the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting or by the creditors' committee, and any directions so given by the creditors at any general meeting shall, in case of conflict, be deemed to override any directions given by the creditors' committee. (*Amended 76 of 1996 s. 74*)
- (2) The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, and it shall be lawful for

any creditor, with the concurrence of one-fourth in value of the creditors (including himself), at any time to request the trustee to call a meeting of the creditors, and the trustee shall call such meeting accordingly within 14 days:

Provided that the person at whose instance the meeting is summoned shall, if so required, deposit with the trustee a sum sufficient to pay the costs of summoning the meeting, such sum to be repaid to him out of the estate if the court so directs. (Amended 18 of 2005 s. 26)

- (3) The trustee may apply to the court in manner prescribed for directions in relation to any particular matter arising under the bankruptcy.
- (4) Subject to the provisions of this Ordinance the trustee shall use his discretion in the management of the estate and its distribution among the creditors.

[cf. 1914 c. 59 s. 79 U.K.]

[82.01] Enactment history

Subsection (1) was amended pursuant to s 74 of the Bankruptcy (Amendment) Ordinance 1996 (76 of 1996), commencing from 1 April 1998.

Subsection (2) was amended pursuant to s 26 of the Bankruptcy (Amendment) Ordinance 2005 (18 of 2005).

[82.02] England

cf. s 79 of the now repealed Bankruptcy Act 1914 (c 59) (UK)

[82.03] Subsection (2): Call a meeting of the creditors

If the trustee refuses to call a meeting when requested by the creditors, the court may refuse to order the trustee to convene a meeting, if the meeting would serve no useful purpose: see *Re Burn, ex p Dawson, McClellan and Trustee* [1932] 1 Ch 247, [1931] All ER Rep 389. See also the earlier case of *Re Poole, ex p Cocks* (1882) 21 Ch D 397 (CA, Eng), at 404, per Brett LJ, who expressed the view that it was not mandatory for the trustee to obey the creditor's directions. Note that it has also been suggested that these views should not be followed: see Ian F Fletcher, *The Law of Insolvency* (3rd edn, Sweet & Maxwell, 2002 Reissue), at p 186, note 66.

[82.04] Subsection (3): Apply to the court

When the trustee applies to the court under this subsection for directions, the court may give directions which will overrule the previous directions given by the

creditors: see *Re Poole, ex p Cocks* (1882) 21 Ch D 397 (CA, Eng).

[82.05] Subsection (3): Manner prescribed for direction

As to the rule governing the application for direction under this subsection, see the Bankruptcy Rules (Cap 6A), r 174 in the Appendix below. As to the Forms applicable, see Forms 131 and 132 of the Bankruptcy (Forms) Rules (Cap 6B) in the Appendix below.

[82.06] Subsection (4): Discretion

Generally, the court will not interfere with the trustee's exercise of his discretion unless his actions are utterly unreasonable and absurd that no reasonable man would do so: see [60.04] above; or there was fraud: see *Re Debtor ex p Debtor v Dewell (Trustee)* [1949] Ch 236; and *Leon v York-O-Matic Ltd* [1966] 3 All ER 777, [1966] 1 WLR 1450.

[82.07] Definitions

For 'Official Receiver', 'property' and 'trustee', see s 2 above.

83. Appeal to court against trustee

If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order in the premises as it thinks just.

[cf. 1914 c. 59 s. 80 U.K.]

[83.01] England

s 80 of the now repealed Bankruptcy Act 1914 (c 59) (UK).

[83.02] General note

This section allows the bankrupt, a creditor, or any other person aggrieved by any act or decision of the trustee to challenge that act or decision of the trustee by way of appeal to the court. It seems that the act or decision of the trustee complained of must relate to the trustee's administration of the bankrupt's estate: see *Re Tyndall* (1977) 30 FLR 6; and *Re Wheeler, ex parte Wheeler v Halse* (1994) 54 FCR 166.

When an application is brought under s 83, it would be inappropriate and unjust for the court to interfere with the decision of the trustee unless it is shown that the trustee's actual decision was perverse or clearly wrong. In other words, unless the trustee's act or petition was utterly unreasonable and absurd and that no reasonable

trustee would so act, the court would not interfere. See *Re Chung Kau* [2004] 1 HKLRD C3, [2004] HKCU 218 (CFI), at para 13; *Lau Chun Ming v Deloitte Touche Tohmatsu (a firm)* [2019] HKCU 4133, [2019] HKCFI 2722, at para 73; *Re Ho Suet Hung (何雪紅), a bankrupt* [2022] 1 HKLRD 233, [2021] HKCU 6232, [2021] HKCFI 3836, at para 17; and *Re Tyndall* (above), at 10, per Deane J.

In *Port v Augur* [1994] 1 WLR 862, Harman J commented (at 874E–F), in relation to the equivalent section in the UK legislation, that the court would be cautious in allowing applications to be made against trustees, as it is the court's duty to protect an insolvent estate against unnecessary expense. A wide discretion such as that conferred by the section should not be invoked lightly or without any proper and substantial cause.

The bankrupt cannot be regarded as a person aggrieved by any act or decision of the trustee unless he can show that he would be entitled to a surplus if not for the trustee's act or decision: see *Re A Debtor, ex p Debtor v Dodwell (Trustee)* [1949] Ch 239, [1949] 1 All ER 510.

For an example of where s 83 was invoked, see *Koh Kee Suan Andrew v Ip Kay Lo Vincent* [2001] 2 HKC 161, [2001] 3 HKLRD 439 (CA), where the trustee had declined to proceed with an action in which the bankrupt had been involved prior to his bankruptcy. The bankrupt then applied under s 83 to compel the trustee to proceed with the action. DHCJ Kwan ordered that the bankrupt be allowed to proceed with the action using the trustee's name (albeit on condition that the bankrupt provide an indemnity for the trustee's costs): see pp 441J–442E. In *Re Wan Po Jun Mary Pauline* [2013] HKCU 999 (unreported, HCB 144/2011, 3 May 2013) (CFI), the bankrupt similarly invoked s 83 in an attempt to challenge the trustee's non-pursuit of certain actions that the bankrupt had commenced before his bankruptcy. However, To J rejected the application, because there was no money to fund the actions and because the trustee had reasonably assessed that the actions were unmeritorious: see paras 12–14. In *Re Jora Sisi Omar* [2023] HKCU 2749, [2023] HKCFI 1668, Au-Yeung J similarly rejected an application by the bankrupt to reverse or modify the decision of the Official Receiver and trustee in bankruptcy to consent to the bankrupt's continuation of an action on similar grounds.

In 有關鄧添柱的事宜 [2023] 2 HKLRD 1289, [2022] HKCU 3149, [2022] HKCA 909 the HK Court of Appeal dismissed the bankrupt's appeal in relation to a s 83 application for reversing the trustee's decision not to proceed with a High Court action concerning an alleged unlawful sale of a land by a manager of the Tso of the Tuen Mun District, on the basis that:

- (1) the bankrupt had no locus standi to make the s 83 application because the bankrupt failed to prove that he was aggrieved by the decision in that the land belongs to the Tso and he would not have received any damages from the action should his claim be established; and
- (2) the trustee's decision was not perverse, clearly wrong or utterly unreasonable and absurd given the action had no reasonable ground and prospect of success and the bankrupt's estate was not enough to cover the costs of the action.

[83.03] Subsection (1): Aggrieved by any act or decision

As to the meaning of 'person aggrieved' by any act or decision, see [34.12] above. In *Brake & Anor v Chedington Court Estate Ltd* [2023] UKSC 29, the UK Supreme Court reiterated that a bankrupt party whose rights and interests were not directly affected by matters arising from the trustee under the statutory insolvency regimes have no standing to challenge the trustee's transactions. See also, 有關鄧添柱的事宜 [2023] 2 HKLRD 1289, [2022] HKCU 3149, [2022] HKCA 909 as discussed in [83.02] above.

[83.04] Subsection (2): Frivolous and vexatious

As to the meaning of 'frivolous and vexatious', see [19.06] above.

[83.05] Costs

In *Re Ho Suet Hung (何雪紅), a bankrupt* [2022] 1 HKLRD 233, [2021] HKCU 6232, [2021] HKCFI 3836 the bankrupt appealed unsuccessfully against the decision of the trustee pursuant under s 83. The trustee declined to seek costs against the bankrupt, on the basis that the bankrupt has the right to appeal against the trustee's decision pursuant to s 83. Linda Chan J (at para 41) described the trustee's position on costs as 'fair and reasonable'.

[83.06] No right of action against trustee for breach of statutory duty

There is no civil right of action against a trustee in bankruptcy for breach of statutory duty. Any claim for damage in respect of such breach must be brought under ss 83 or 84. See *Li Ngan-shui Brumen v Official Receiver* [1995] 1 HKC 333, [1995] 2 HKLR 248 (CA), at 251–253; applied in *Lam Ching Sheung v Official Receiver* [2009] 5 HKLRD 263 (CFI), at paras 62–65 (upheld on appeal with *norm 林微端 v 破產管理署署長* [2010] HKCU 1229 (unreported, CACV 171/2009, 7 May 2010) (CA), at paras 67, 70).

[83.07] Definitions

For 'bankrupt' and 'trustee', see s 2 above.

84. Control of court over trustee

- (1) The court shall take cognizance of the conduct of trustees, who shall act in a fiduciary capacity and deal with property under their control honestly, in good faith, with proper skill and competence and in a reasonable manner, and in the event of any trustee not faithfully performing his duties and duly observing all the requirements imposed on him by Ordinance, rules or otherwise with respect to the performance of his duties, or in the event of any complaint being made to the court by any creditor, the Official Receiver, the bankrupt or

any other person in regard thereto by notice duly served on the trustee at least 8 clear days before the date of hearing, the court shall inquire into the matter and take such action thereon as may be deemed expedient. (Amended 76 of 1996 s. 46)

- (1A) Without limiting the generality of the duties imposed on a trustee by subsection (1), in realizing the assets of a bankrupt's estate it shall be the duty of a trustee to take all reasonable care to realize the best price reasonably obtainable in the circumstances. (Added 76 of 1996 s. 46)
- (2) The court may either of its own motion or on the application of the Official Receiver at any time require any trustee to answer any inquiry made by it or him in relation to any bankruptcy in which the trustee is engaged and may examine on oath the trustee or any other person concerning the bankruptcy.
- (3) The court may also direct an investigation to be made of the books and vouchers of the trustee.
- (4) Where on an application under this section the court is satisfied—
- that the trustee has misapplied or retained, or become accountable for, any money or other property comprised in the bankrupt's estate; or
 - that a bankrupt's estate has suffered any loss in consequence of any misfeasance or breach of fiduciary or other duty by a trustee in the carrying out of his functions,

the court may order the trustee, for the benefit of the estate, to repay, restore or account for money or other property (together with interest at such rate as the court thinks just) or, as the case may require, to pay such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just, and liability under this section is without prejudice to any liability arising apart from this section. (Added 76 of 1996 s. 46)

[cf. 1914 c. 59 s. 81 U.K.]

[84.01] Enactment history

This section was amended pursuant to s 46 of the Bankruptcy (Amendment) Ordinance 1996 (76 of 1996), commencing 1 April 1998.

See also the Report on Bankruptcy (May 1995) of the Law Reform Commission of Hong Kong, at paras 9.32–9.37.

[84.02] England

s 81 of the now repealed Bankruptcy Act 1914 (c 59) (UK).

[84.03] General note

In addition to the general power and duty of the court to supervise the administration of the bankruptcy under the present Bankruptcy Ordinance (Cap 6), this section vest upon the court, the power to ensure that the trustee properly discharge his duties as defined by this section. These duties are mainly fiduciary in nature, but also include other duties, such as the duty of care to the creditors and the state.

There is ample Australian authorities (see *Re Alafaci, Registrar in Bankruptcy v Hardwick* (1976) 9 ALR 262; *Gault v Law* (1981) 57 FLR 165; *Registrar in Bankruptcy v Bradby* (1983) 73 FLR 231; and *Wilson v Commonwealth of Australia* [2000] BPIR 207, on almost similar s 176 of the Australian Bankruptcy Act 1966) that the court will not (though not a rule of universal application) ordinarily initiate an inquiry under its general power unless satisfied that a proper case for an inquiry has been demonstrated. There will, however, ordinarily be a proper case for inquiry where there is a reasonable cause to believe that a trustee may have failed to act in relation to a bankruptcy in the manner required by the Ordinance or the general law.

If a trustee defaults in compliance with any order made by the court under this section, he can be committed for contempt by the court: see *Re Nicholson, ex p Board of Trade* (1890) 63 LT 322.

Subsection (4) above, appears to be strict in relation to the personal liability of the trustee for default in the discharge of his duties. It is however submitted that the court's power to impose personal liability is discretionary. On the basis of earlier authority concerned with the trustee's breaches of general duty, the trustee should not be personally liable if the breach was committed *bona fide*: see *Re Pilling, ex p Ogle, ex p Smith* (1873) 8 Ch App 711 (CA, Eng).

In *Choy Bing Wing v Official Receiver & Trustee of the Bankrupt Ng Yat Chi, discharged bankrupt and Anor* [2003] HKCU 1223 (unreported, CACV 164/2003, 6 November 2003) (CA), the Court of Appeal agreed with Yuen J's decision in the court below, who pointed out that this section, though derived from s 81 of the Bankruptcy Act 1914 (UK), was different from that s 81:

... it is clear that when s 84 of the [Bankruptcy Ordinance] was enacted in Hong Kong, important changes were made which have ramifications on the course open to a creditor when he is dissatisfied with a trustee in bankruptcy, which in turn has costs implications ... In my view, it is clear from the above changes that in so modifying s 81 [of the Bankruptcy Act], the legislature here has turned a complaint from what was originally an administrative procedure in England undertaken by a government arm into legal proceedings undertaken in Court ... That is not the situation with a complaint

under s 84 [of the Bankruptcy Ordinance]. A hearing is definite and assumed. The trustee is served with the notice, so it cannot be an *ex parte* hearing. All *inter partes* hearings have costs implications for both parties, and so it would be surprising if the court hearing it had *no* jurisdiction to award costs ... It is therefore clear from the true construction of s 84 that the court has jurisdiction to award costs against a complainant applicant. It would be surprising if that were not so, because the scope of persons who can complain under s 84 is unrestricted and a hearing is unavoidable, whatever the grounds of the complaint. It cannot be right that a trustee would invariably have to bear the costs personally, or that the estate would have to do so ... Finally, rule 32A Bankruptcy Rules provides that the general rule is that the costs of an application to the court which is opposed shall follow the event. Nothing that has been said has persuaded me to deviate from the general rule.

[84.04] Subparagraph (4)(b): Misfeasance

It submitted that the word 'misfeasance' means misfeasance in the nature of a breach of trust, ie, it refers to something which the trustee has done wrongly, such as misapplying or retaining in his own hands any moneys of the bankrupt's estate, and it must result in some actual loss to the estate (by analogy to the observation made in the case of *Re Canadian Land Reclaiming & Colonizing Co, Coventry & Dixon's Case* (1880) 14 Ch D 660 (CA, Eng), at 670, per James LJ concerning s 165 of the now repealed Companies Act 1862 (UK)). However, on the basis of *Re Kingston Cotton Mills Co, No 2* [1896] 1 Ch 331, the word 'misfeasance' covers every misconduct of the trustee for which he can be sued.

[84.05] No right of action against trustee for breach of statutory duty

See [83.06] above.

[84.06] Whether trustee owes a common law duty of care to bankrupt

In addition to the statutory routes for recourse against a trustee under ss 83 and 84, it is theoretically possible for a trustee to owe a *common law* duty of care to the bankrupt.

In *Chung Sun Kwan (鍾新坤) v The Official Receiver* [2021] 2 HKLRD 292, [2021] HKCU 1211, [2021] HKCFI 712. Peter Ng J rejected a submission (from the trustee's counsel) that as a matter of principle, a trustee does not owe a common law duty of care to the bankrupt, on the basis that ss 83 and 84 already provide a detailed statutory mechanism for recourse against a trustee. Peter Ng J held that the authorities were not sufficiently clear and convincing to negate the possibility of such common law duty of care. The particular facts of each case would have to be examined to see if such a duty of care arose. In doing so, the court would apply the following principles:

- (1) a common law duty of care would only arise if a defendant (here, the trustee) and a plaintiff (here, the bankrupt) are in a 'special relationship'

- eg. as a result of voluntary assumption or undertaking of responsibility by the defendant towards the plaintiff;
- (2) the mere fact that the defendant was subject to statutory duties as trustee is *per se* insufficient to give rise to a common law duty of care;
 - (3) a common law duty of care usually arises from the acts of a defendant, rather than omissions; and
 - (4) in light of the detailed statutory regime in ss 83–84 of the Bankruptcy Ordinance, that should ordinarily exclude the existence of a common law duty of care.

See paras 34–49. After examining the evidence in that case, Peter Ng J held that there was nothing which would justify the imposition of a common law duty of care on the part of the trustee towards the bankrupt: see para 89.

[84.07] Definitions

For 'trustee' and 'Official Receiver', see s 2 above; and for 'bankrupt's estate', see s 43 above.

Remuneration and costs

85. Remuneration of trustee

- (1) Where the creditors appoint any person to be trustee of a bankrupt's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors, or, if the creditors so resolve, by the creditors' committee. (*Amended 76 of 1996 ss. 72 & 74*)
- (2) Where the remuneration of the trustee is to be a commission upon the amount received by the trustee, then one part shall be payable on the amount realized by the trustee, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend.
- (3) If one-fourth in number or value of the creditors apply to the Official Receiver or the Official Receiver is of the opinion that the remuneration of a trustee should be reviewed, the Official Receiver may apply to the court and thereupon the court may confirm, increase or reduce the remuneration of the trustee.
- (4) The resolution or the creditors' committee, as the case may be, shall specify the expenses which the remuneration is to cover, and no liability shall attach to the bankrupt's estate, or

- to the creditors, in respect of any such expenses. (Amended)
- (5) Where a trustee acts without remuneration he shall be allowed out of the bankrupt's estate such proper expenses incurred by him in or about the proceedings of the bankruptcy as the court may approve.
- (6) A trustee shall not under any circumstances whatever make any arrangement for or accept from the bankrupt, or any solicitor, auctioneer or any other person who may be employed about a bankruptcy, any gift, remuneration or pecuniary or other consideration or benefit whatever beyond his said remuneration payable out of the estate, nor shall he make any arrangement for giving up, or give up, any part of his remuneration, whether as receiver, manager or trustee, to the bankrupt or any solicitor or other person who may be employed about a bankruptcy.

(Replaced 26 of 1985 s. 2)

[85.01] Enactment history

This section was substituted pursuant to s 2 of the Bankruptcy (Amendment) Ordinance 1985 (26 of 1985).

This section was later amended pursuant to ss 72 and 74 of the Bankruptcy (Amendment) Ordinance 1996 (76 of 1996), commencing 1 April 1998.

[85.02] England

cf, s 82 of the now repealed Bankruptcy Act 1914 (c 59) (UK).

[85.03] General note

Except as provided under the present Bankruptcy Ordinance (Cap 6) or any rules made under the present Ordinance, no trustee is entitled to any remuneration out of the estate for services rendered to the estate: see the Bankruptcy Rules (Cap 6A), r 167 in the Appendix below. The court may disallow the trustee any remuneration if he fails to discharge the duties imposed on him: see *Re Lister, ex p Simmons* (1876) 2 Ch D 749.

Any agreement as to remuneration which gives some creditors an advantage over others, or the trustee to give up any part of his remuneration to the bankrupt, solicitor or any other person employed in connection with the bankruptcy is illegal and unenforceable: see *Farmers' Mart Ltd v Milne* [1915] AC 106 (HL).

[85.04] Definition

For 'ordinary resolution', see s 2 above.

112A. Remuneration of provisional trustee and the first trustee constituted under section 112A

- (1) The remuneration of the following persons shall be fixed by the Official Receiver in accordance with a scale of fees or on such other basis as the Official Receiver may from time to time approve in writing—
- a provisional trustee other than the Official Receiver;
 - in a case where section 112A applies and the first trustee constituted under subsection (1)(i) of that section is not the Official Receiver, that first trustee.
- (2) If one-fourth in number or value of the creditors apply to the Official Receiver or the Official Receiver is of the opinion that the remuneration of the provisional trustee or first trustee referred to in subsection (1) should be reviewed, the Official Receiver may apply to the court and thereupon the court may confirm, increase or reduce such remuneration.
- (3) Where the provisional trustee or first trustee referred to in subsection (1) has not received any remuneration, the court may, on application, order the payment out of the bankrupt's estate to him of such amount as the court considers sufficient to reimburse him for any necessary disbursements incurred by him in the course of the administration of the estate. Such application may be made by the trustee or the Official Receiver.
- (4) The provisional trustee or first trustee referred to in subsection (1) shall not under any circumstances whatever make any arrangement for, or accept from the bankrupt, or any solicitor, auctioneer or any other person who may be employed in relation to the bankruptcy, any gift, remuneration or pecuniary or other consideration or benefit whatever to be made or payable to him beyond his said remuneration payable out of the estate, and he shall not make any arrangement for giving up, or give up, any part of his remuneration, whether as receiver, manager or trustee, to the bankrupt or any solicitor, auctioneer or any other person who may be employed in relation to the bankruptcy.

(Added 18 of 2005 s. 27)