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FOREWORD

(to the First Edition)

It is a great honour to be asked by Mr Ong to write a Foreword to his annotations of the Bankruptcy Ordinance. I presume that he has asked me to do so because for nearly a decade I have been involved in Insolvency Law reform. The Law Reform Commission reference on Insolvency Law Reform began towards the end of 1990 and still continues as I write this Foreword in early May 1999. The background to the Bankruptcy reform is covered in Mr Ong's Introduction.

The Bankruptcy (Amendment) Ordinance 1996 was a major piece of legislation and made major changes in bankruptcy law and practice. By the time the Ordinance was brought into force on 1 April 1998 the economic downturn in Hong Kong had begun to bite. Consequently there has been a very large increase in insolvency petitions, both personal and corporate. So Mr Ong's book could hardly have come at a more opportune time. Practitioners are struggling to master the new law and the amount of insolvency work has increased dramatically.

Until the publication of this work there has been no major text on Hong Kong Bankruptcy Law. With the amendments the law now is not dissimilar to the Bankruptcy provisions of the UK Insolvency Act 1986. But there are differences, one practical example of which is that the Bankruptcy Rules though enlarged by the 1996 amendments, are still not as detailed as the UK rules. So the many UK texts on Bankruptcy, while helpful, are not necessarily conclusive on all matters. Having said that, it would seem clear from the latest judgments coming through from the Bankruptcy Judge that the UK cases will continue to be cited and, where appropriate, relied upon.

I can recommend this text to practitioners and others needing to investigate Bankruptcy Law and Practice in Hong Kong. There is a wealth of information in the Introduction and the annotations and Mr Ong is to be congratulated in making this material, hitherto not readily available, accessible to us. I am sure that this will be the first of many editions and that the book will become an essential tool for all bankruptcy practitioners.

Professor Ted Tyler

City University of Hong Kong

PREFACE

(to the Third Edition)

In the five years which have lapsed since the previous edition of this Handbook, bankruptcy law in Hong Kong has become more and more important. Not only is there an increase in the number of bankruptcy cases that have received judicial consideration in various provisions of the Bankruptcy Ordinance, the concept of individual voluntary arrangement (IVA) is also widely used as a means of debt restructuring for individuals. This serves as a catalyst for the introduction of the Bankruptcy (Amendment) Bill 2004. The Bill was first introduced to the Legislative Council on 13 October 2004 and was passed on 6 July 2005. The Bankruptcy (Amendment) Ordinance 2005 has yet to come into effect, though it is expected that it will take effect in the foreseeable future. All the amendments in this Bankruptcy (Amendment) Ordinance 2005 have been included in this edition with indications.

The highlights of the Bankruptcy (Amendment) Ordinance 2005 include:

- (a) empowering the Official Receiver to outsource bankruptcy cases to private sector insolvency practitioners in specified circumstances;
- (b) providing for the powers and duties of a provisional trustee;
- (c) following the introduction of the outsourcing regime, adjusting or further providing for the respective powers and duties of the Official Receiver and a trustee;
- (d) amending the priority of payment of costs and charges out of a bankrupt's estate as set out in s 37 of the Bankruptcy Ordinance (Cap 6) to bring the section in line with rule 179(1) of the Companies (Winding-up) Rules (Cap 32H);
- (e) adopting ss 38, 75 and 91 of the Bankruptcy Ordinance (Cap 6) to bring them into conformity with the Basic Law and with the status of Hong Kong as a Special Administrative Region of the People's Republic of China; and
- (f) updating certain outdated provisions and making other amendments related to or consequent upon the matters set out in paragraphs (a), (b) and (c).

Another development, though less sensational, is the recent case, *Chan Wing Hing & Another v Chan Wing Hing & Another & Secretary for Justice (Intervener)* [2006] 3 HKLRD 687 (CFA), where it was held that s 30(10)(b)(ii) of the Bankruptcy Ordinance was unconstitutional and contravened Article 31 of the Basic Law, which provides that Hong Kong residents ... shall have freedom to travel and to enter or leave the Region. Bankruptcy law is a complex but practical area. It is felt that more and more bankruptcy cases will receive judicial consideration and this justifies a new edition incorporating all important cases both in Hong Kong and the United Kingdom.

Last but not least, I wish to take this opportunity to thank my wife, Sam, for her love and support for me in completing this Handbook.

Stephen Chan

Nov 2006

PREFACE

(to the Second Edition)

Since the Bankruptcy (Amendment) Ordinance 1996 came into force on 1 April 1998, there has been a sharp increase in the number of bankruptcy petitions filed in the court and the number of petitions filed by the debtors themselves. In respect of the former, the number as at 14 August 2001, stood at 5,724 as compared to 492 for the entire year of 1998 (*Official Receiver's Statistics: website; <http://www.info.hk/oro/statistics/index.htm>*). In respect of the latter, the number was 1,271 as compared to 112 in 1998. This phenomenon is attributable to five factors. First, the impact of the Asian financial crisis of 1997-1998 and the subsequent weak economic conditions and high unemployment in Hong Kong. Secondly, the easy availability of credit cards to consumers. Although statistics were not available, it was generally acknowledged that consumer credit card holders constituted an alarming percentage of the debtors (see '*Bankruptcies hit a record \$35b of debt*': South China Morning Post Business, 7 November 2000, p 2; '*Share more credit risk data, urges Joseph Yam*': South China Morning Post Business, 10 August 2001, '*Credit-card defaults alarm banks*': South China Morning Post Business, 14 August 2001, p 2. Thirdly, change in the general public's perception of bankruptcy brought by the Bankruptcy (Amendment) Ordinance 1996. The social stigma that society once seriously associated with bankruptcy has been obviated by the underlying spirit of the Ordinance, i.e. bankruptcy should no longer be regarded as a 'criminal' sanction of the insolvent debtor but rather a rehabilitation process of enabling the bankrupt to resume a normal life in society (see *Re Hui Hing Kwok* [1999] 3 HKC 683, 687, per Le Pichon J (as she then was)). Fourthly, the new discharge from bankruptcy provision that allows a bankrupt to be automatically discharged after 4 years of being adjudicated bankrupt. This is a strong incentive to a hopelessly insolvent debtor to become bankrupt. Bankruptcy frees him from the pressure of his creditors, and he is assured of an automatic discharge as a matter of course, except by his own failings. Even if the bankrupt is guilty of some failings, his automatic discharge should not be delayed, if he had been adequately punished for his failings (see *Re Hui Hing Kwok*, above). Fifthly, the reluctance of the banks, for economic and administrative reasons, to take advantage of the mechanism of the Individual Voluntary Arrangements (i.e. the alternative route to bankruptcy) introduced by the Bankruptcy (Amendment) ordinance 1996, to allow their debtors to repay the debt under a repayment scheme. As a consequence, the number of Individual Voluntary Arrangements are only a handful.

Another development, though less sensational, is that there was also an increase in the number of bankruptcy cases that have received judicial consideration on various provisions of the Ordinance, particularly on the provisions relating to automatic discharge from bankruptcy. However, there was a large number of reported cases in the United Kingdom on corresponding provisions of the Ordinance. It is felt that this development justifies a second edition incorporating these new cases in Hong Kong and the United Kingdom.

CA Ong

1 June 2001

confirmed by a judicial decree. If the debtor could not be found or if he was found but there was nobody to settle his debts, the sealed properties would be sold to satisfy the debt or he would be kept in custody. However, according to a text, the latter rarely happened, as guarantors were often found on the solidarity of family and clan. This remedy of arrest and imprisonment for debt was basically similar with the English statutory remedy of imprisonment for debt that was introduced in England by legislation in the 13th century: see Cohen J, 'The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy', (May 1982) 3 JLH 153, at pp 154-155. See also Holdsworth W, *A History of English Law* (Reprint, 1971) Vol III, at pp 231-232. The English remedy for imprisonment for debt became part of Hong Kong law when the territory was ceded to the British in 1843. Basically, English common law and legislation in existence at that date were in full force in the colony except where they were inapplicable to the local circumstances or inhabitants of the colony: see s 3 of Ordinance No 15 of 1844, which was subsequently repealed and the terms of the section were re-enacted in subsequent legislation, the last being the Application of English Law Ordinance (Cap 88), which was repealed by the Hong Kong Reunification Ordinance 1997. The application of English law is currently defined in Article 8 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and s 7 of the Hong Kong Reunification Ordinance 1997.

The first insolvency legislation was enacted by the local legislature in 1846, and was referred to as "The Ordinance for the Relief of Insolvent Debtors in the Colony" (Ordinance No 3 of 1846). It came into force on 1 June of the same year. The purpose of the legislation was to provide relief from imprisonment for an insolvent debtor. According to the Ordinance, an imprisoned debtor or the creditor of such debtor could apply to the court for an order of discharge, see s 1 of that Ordinance, and have his assets vested in the official assignee for the benefit of his creditors, see s 2 of that Ordinance.

Although the Ordinance was not a bankruptcy legislation and did not contain the words 'bankrupt' and 'bankruptcy', it nevertheless created a mechanism which allowed the property of the insolvent debtor to be taken and administered in nearly the same way as in modern bankruptcy practice. The Ordinance was however limited in its application. Its provisions could only be used by an insolvent debtor or creditor when the former was imprisoned for non-payment of his debts or any other pecuniary liability. Furthermore, the statutory discharge did not free the debtor from his debts and liabilities.

The Ordinance for the Relief of Insolvent Debtors in the Colony (Ordinance No 3 of 1846) was later repealed by the Bankruptcy Ordinance (Ordinance No 5 of 1864), which came into force on 1 July 1865. The Ordinance was a long legislation with some 201 and sections 16 schedules. It embodied the law and rules which formed the framework of the current bankruptcy laws. Subsequently, the Bankruptcy Ordinance was repealed by the Bankruptcy Ordinance of 1891, a piece of legislation based on the English Bankruptcy Act of 1883.

The present Ordinance (Ordinance No 10 of 1931, now designated as Chapter 6) superceded the Bankruptcy Ordinance of 1891 and came into force on 1 January 1932. The 1931 ordinance was modelled on the then English Bankruptcy Act 1914 c 59. However, although the United Kingdom bankruptcy laws had been substantially reformed by the Insolvency Act of 1986 c 45, the bankruptcy laws of Hong Kong had remained somewhat stagnant and thus no longer suitable to the present modern commercial environment in Hong Kong, especially when bankruptcy was no longer viewed as a 'criminal' sanction of the insolvent debtor but a process to enable the victims of misfortune to make a fresh start in the commercial industry. As it was observed in *Re Fung Hing Cheung Kenneth, ex p the Debtor* [1995] 3 HKC 136 at p 140, per Waung J:

'The Bankruptcy Ordinance of Hong Kong is based on very old law going back into the last century where the harsh disapproval of bankruptcy by society was reflected in the severe restrictions on the court's power to grant absolute discharge. It is much to be regretted that in respect of the law on bankruptcy, Hong Kong has fallen very much behind the rest of the civilized common law world...'

However, in November 1990, with a view to reform the insolvency laws of Hong Kong, the Law Reform Commission of Hong Kong appointed a Sub-Committee on Insolvency to review the bankruptcy laws of Hong Kong. The first consultative document on bankruptcy was published in August 1993, and the bankruptcy laws of other Commonwealth Countries, particularly, the United Kingdom, Australia, New Zealand and Singapore were considered. In May 1995, the final recommendations of the Law Reform Commission of Hong Kong were published.

In 1996, on the basis of the recommendations, the Bankruptcy Ordinance (Cap 6) (hereinafter referred to as the 'Bankruptcy Ordinance') was substantially amended by the Bankruptcy (Amendment) Ordinance (76 of 1996) (hereinafter referred to as 'the Bankruptcy (Amendment) Ordinance'). The reforms largely adopted provisions of the Insolvency Act 1986 c 45 (UK) and, to a very small extent certain provisions of the Singapore Bankruptcy Act 1995 (Cap 20): see paragraph 3 of the explanatory memorandum of the Bankruptcy (Amendment) Bill 1996 for the derivation table of the relevant provisions of the Insolvency Act 1986 (UK) and the Singapore Bankruptcy Act 1995. Subsequently, consequential amendments to the Bankruptcy Rules entitled the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998) (hereinafter referred to as the 'Bankruptcy (Amendment) Rules') were approved by the Provisional Legislative Council in February 1998. The rules were again largely derived from the Insolvency Rules of the United Kingdom.

The principal reforms introduced by the Bankruptcy (Amendment) Ordinance and the Bankruptcy (Amendment) Rules (see the Explanatory Memorandum to the Bankruptcy (Amendment) Bill 1996, and Explanatory Note to Bankruptcy (Amendment) Rules 1998) can be summarized as follows:-

debtor under any Ordinance because they are not provable in bankruptcy: see s 34(3A) below. See also *R v Barnett Justices, ex p Phillippou* [1997] BPIR 134.

A claim for the costs of the disciplinary proceedings is not a "debt provable in bankruptcy", as it is a demand in the nature of unliquidated damages arising otherwise than by reason of contract, tort, promise or breach of trust. See s 34; and *Law Society of Hong Kong v Wong Siu Ki Oswald & Ors* [2001] 4 HKC 636 (CFI).

[12.05] Subsection (1): Any action

The word 'action' means a civil proceeding commenced by writ of summons or in such other manner as may be prescribed by any law: see s 2 of the High Court Ordinance (Cap 4) (formerly known as the Supreme Court Ordinance).

In *Brand Farrar Buxbaum LLP v Samuel-Rozenbaum Diamond Ltd and Samuel-Rozenbaum HK Ltd* (CACV 272/2004, 28 September 2005, unreported), the court pointed out that by reason of this section and s 58(1) of this Ordinance, the property of a debtor is vested in the Official Receiver upon the debtor being adjudged bankrupt. This means in practical terms that a bankrupt has no further status to lodge an application for leave to appeal against any judgment against him: see *Heath v Tang and Another* [1993] 1 WLR 1421 and *Re Tang Wai Yee Sylvia (a bankrupt)* [1998] 1 HKC 736. Even if a bankrupt has lodged an appeal against the bankruptcy order, this does not affect the applicable principle.

The practical effect of this section is that upon an adjudication of bankruptcy, the Official Receiver takes charge of a bankrupt's property and as far as rights of suit are concerned, subject to one exception, it is the Official Receiver who determines whether or not a right of action vested in the bankrupt should proceed. Rights of suit or action are choses in action thus coming within the definition of "property" in section 2 of this Ordinance.

Personal claims exception

In *Chung Kau v The Hong Kong Housing Authority & Ors* [2004] 2 HKLRD 650 at 654, Ma CJHC explained the exception:

"The one exception is that a bankrupt retains the right, without any interference from the Official Receiver as trustee in bankruptcy, to bring or continue any proceedings (including appeals) relating to claims which are personal to him: see *Heath v Tang* [1993] 1 WLR 1421, at 1423. By 'personal' are meant claims which relate to the bankrupt's body, mind or character without immediate reference to his rights of property: see *Beckham v Drake* (1849) 2 HL Cases 579, at 604; *Wilson v United Counties Bank Limited* [1920] AC 102, at 130. *Heath v Tang* at 1423A-B. Thus, personal claims include claims for damages for personal injuries and defamation. The rationale here is that compensation awarded for personal injuries or defamation will represent, in monetary terms, that part of a person (for example, his limbs or the use of them) or his reputation that has been lost or

harmful. These types of claim do not involve his property. And where a bankrupt seeks, for example, to appeal against an injunction against him to curtail a nuisance said to have been committed by him, he can do so: this would be a claim against him personally in contradiction to one that involved his property (such as, for example, an injunction to prevent a breach of contract).

"There may of course be many situations in which it may not always be easy to draw the distinction. Equally difficult are those hybrid claims involving both a bankrupt's person and his property (see for example in this context *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193.)"

[12.06] Subsection (1): Other legal proceedings

These words are not defined in the Ordinance. However, in *Re The Vexatious Actions Act 1896, Re Bernard Boaler* [1915] 1 KB 21 at p 28, Buckley LJ observed that the words 'legal proceedings' are general words and are applicable to and include both criminal and civil proceedings.

According to the Court in *Chan Foo v The Queen* [1958] HKLR 349 at p 356, per Reece J, the expression 'or other proceeding' in s 103 of the Magistrates Ordinance (Cap 227) must be construed according to the *ejusdem generis* rule of interpretation, and therefore should be read as comprehending only things of the same kind as those designated by the words which precede the particular expression viz. 'action'. Since the word 'action' in this Ordinance refers to civil proceedings and not criminal proceedings, it is submitted that the words 'other legal proceedings' should also be restricted to civil proceedings only.

In *Wen Shang Kuang v Commissioner of Inland Revenue* [2003] 2 HKLRD 31 (CFI), the bankrupt appealed against a departure prevention order and asked the court to set it aside as a bankruptcy order has been granted against him and no creditor shall have any remedy against him. The court held that nothing in s 12(1) of the Ordinance would prevent the Commissioner of Inland Revenue from applying for a departure prevention direction under s 77(1) of the Inland Revenue Ordinance against a bankrupt taxpayer intending to emigrate or who has already emigrated from Hong Kong. This cannot have been the true intention behind s 12(1) and s 77 of the Inland Revenue Ordinance. *A fortiori*, the subsequent bankruptcy of a defaulting taxpayer under a departure prevention direction should not automatically by itself entitle the taxpayer to appeal against the departure prevention direction, asking for its setting aside. The court pointed out that the making of a bankruptcy order by the court must be very good evidence that the bankrupt taxpayer is unable to pay his debts. However, until the Official Receiver has properly done his job, there must still remain a distinct possibility of the taxpayer having hidden assets or other yet to be revealed ability to satisfy the outstanding tax or a meaningful portion thereof. If the departure prevention direction is lifted immediately after the making of a bankruptcy order, with the result that the taxpayer can leave the jurisdiction at anytime, the Official Receiver may not be able to complete his investigation into the bankrupt's

In determining the amount payable under the order, it has been held that whether a particular expenditure by the bankrupt was necessary to meet the reasonable needs of the bankrupt or his family must depend on an examination of all the relevant circumstances of a case, and in so doing, the court should take a realistic and humane attitude regarding the position of the bankrupt and his family, and the bankrupt should not be made the slave of his creditors: see *Re Rayatt (A Bankrupt)* [1998] BPIR 495. In this case, it was held that expenditure for the private education of the bankrupt's children constituted 'reasonable domestic needs of the bankrupt and his family'. In coming to this decision, the court appears to be influenced by two factors. First, the principle that the choice which a parent makes as to the education of his children is an important decision and when it has been made, it should be accorded a degree of respect. Secondly, a change in the settled form of private education would cause serious disadvantage to the children in terms of education and emotion.

[43E.07] Subsection (2): Reasonable domestic needs

In *Re Lau Nga Yee Christine* (HCB 3486/2002, 30 September 2004, unreported), the court was asked whether expense for overseas education is a "reasonable domestic need". The court pointed out that the test is not whether there is a legal duty, but whether an expense is a reasonable domestic need. Where a legal duty to contribute maintenance exists, that may point to the contribution being a reasonable need. But it does not follow that, where there is no duty, an expense is unreasonable.

"In principle the education of one's children can constitute a 'domestic need' of the bankrupt and her family. The expense is 'domestic' in the sense that the education of sons and daughters is a conventional incident of maintaining a family and home. It is a 'need' in the sense that, especially in Hong Kong, the education (including the tertiary education) of one's offspring is regarded as an important parental and social responsibility, irrespective of any obligations imposed by the letter of the law.

"The question is whether it is reasonable in the circumstances of [a particular case for the bankrupt] to claim for the expense of educating his children outside Hong Kong. I believe that it is.

"In Hong Kong, university education is regarded as crucial to a child's personal development and career prospects. The Hong Kong Government strongly encourages the education of its youth in the interests of improving our society in general.

"It is wholly understandable and reasonable that a mother should want to ensure that her children are equipped with at least a college degree so as to deal with the challenges of modern life. Armed with a college education, the children can more effectively contribute to society as a whole and to their parents' well-being in particular, possibly including assisting in the discharge of the burden of debt on [the bankrupt].

"It is self-evident that the disruption of one's studies is bound to cause some distress and disorientation. The child will be abandoning one's course unfinished, in the middle of things, abruptly leaving the friends one has come to know, and starting all over again in some different endeavour.

"More fundamentally, university places in Hong Kong are limited. Competition is intense. Not everyone who is qualified and wishes to attend university can get a place here. If [the children of the bankrupt have already secured places at an overseas university, especially when that university] is well-known for the quality of its educational programmes, it does not make sense to require the children of a bankrupt to disrupt their studies and return to Hong Kong."

In *Re Lau Nga Yee Christine*, the court held that expense for overseas education is a "reasonable domestic need".

Expense of part-time domestic helper, emergency taxi fare, support for bankrupt's parents and job-related expenses may be regarded as reasonable domestic needs. See *Re Lau Nga Yee Christine* (supra).

[43E.08] Subsection (2): Family

English authorities are not helpful in the construction of the word 'family' of the bankrupt for the corresponding English s 385(1) of the Insolvency Act 1986 uses a broader term, i.e. 'the persons (if any) who are living with him and dependant on him.' The word 'family' in s 43E(2) excludes a former spouse, but includes the bankrupt's children although they may not live with him/her: see *Re Lam Cham Ho* [1999] 3 HKC 688.

[43E.09] Definitions

For 'bankrupt', 'court' and 'trustee', see s 2 above; for 'business', see s 4 above; and for "bankrupt's estate" and 'family', see s 43 above.

43F. Continuing occupation of family home

- (1) Notwithstanding anything in this Ordinance, where a bankrupt normally resides in premises which comprise part of his estate, he shall be entitled to continue residing in such premises for a period of 6 months after the making of the bankruptcy order and the court may, on application before the expiry of the 6 month period, make an order extending the entitlement for a further period not exceeding 6 months.
- (2) Where the bankrupt makes an application for an extension, the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.

(Added 76 of 1996 s. 31)

operate to determine the liability of the original lessee or of his guarantor under the lease: see *Hindecastle Ltd v Barbara Attenborough Associates Ltd* [1996] 2 WLR 262, HL (this case was decided under the identical s 178(4) of the English Insolvency Act 1986 c 45 (UK)). The rights and liabilities of others were to remain as though the lease had continued and not been determined: see the *Hindecastle Ltd v Barbara Attenborough Associates Ltd* (above), at p 273, per Lord Nicholls of Birkenhead.

In the context of company shares, when the trustee disclaims an onerous company shares, he does not destroy the shares. Thus, the bankrupt's rights as a registered member of the company and contributory to petition to winding up of the company are not destroyed by the disclaimer. If the shares are held on trust, these rights of the bankrupt can only be exercised by the bankrupt on behalf of the beneficiary, whose equitable interest is recognised and protected by s 35 of the ordinance (see below): see *Ng Yat Chi v Max Share Ltd & Another* [1998] 1 HKLRD 866, following *Wise v Lansdell* [1921] 1 Ch 420.

[59.07] Subsection (3): The trustee shall not be entitled to disclaim a lease without leave of the court, except ... prescribed by the general rules

The words 'general rules' mean the rules prescribed by the Bankruptcy Rules. As to the circumstances under which a lease can be disclaimed without the leave of the court and the rules relating thereto, see the Bankruptcy Rules rule 130 in the Appendix below.

[59.08] Subsection (3): The court may, before or on granting such leave ... impose such terms as a condition to granting leave etc

This subsection confers upon the court wide powers to impose conditions on granting leave. For example, when granting leave to disclaim a lease it can make an order that the landlord take over any fixtures or the bankrupt's improvements at a valuation: see *Re Moser* (1884) 13 QBD 738.

[59.09] Subsection (4): Any person interested in the property

It has been mentioned in [20K.04] above, that the words 'person interested' have to be given a restricted meaning. In this subsection it is submitted that in order to constitute a 'person interested in the property' that person must have some proprietary right, and not a purely personal right in the property: see *Stevens v Hutchinson* [1953] Ch 299; *Mullane v Mullane* [1982-83] 158 CLR 436; and *Re Ng (A Bankrupt), Trustee of the Estate of Ng v Ng* [1997] BPR 267.

[59.10] Subsection (4): Requiring him to decide whether he will disclaim or not ... for a period of 28 days

The operation of this subsection has the effect of shortening the time allowed by subs (1) above: see *Re Solomon, ex p Dressler* (1878) 9 Ch D 252, [1878-80] All ER Rep 1194. According to this subsection the trustee cannot

disclaim onerous property if he does not within the 28 days period or extended period disclaim the property and in the case of contract, he is deemed to have adopted it. Consequently, in the case of contract, if the trustee does not perform the contract, the better view is that the estate is liable and the court may award damages provable in the bankruptcy: see *Williams and Muir Hunter on Bankruptcy* (19th Ed) at pp 394-395; and also *Re Jewell* (1897) 4 Mans 28. It is submitted that this view is correct for the words 'adopted it' must mean adopted for and on behalf of the estate. There is however an inconsistency where leases are concerned. There is authority holding that the trustee remains personally liable for the rent during the whole of the remainder of the lease: see *Re Solomon, ex p Dressler* (above). The only solution for the trustee in such situation is to claim indemnity from the estate: see *Lowrey v Barker and Sons* (1880) 5 Ex D 170 (CA). The distinction appears artificial and can only be remedied by legislation.

[59.11] Subsection (5): Benefit ... or ... burden of a contract

As to the meaning of 'benefit', see [51A.05] above.

[59.12] Subsection (5): The court may ... make an order rescinding the contract on such terms

This subsection only applies to contracts capable of being adopted by the trustee. It empowers the court, on the application of the other party to the contract with the bankrupt to rescind the contract and to award damages to either party for non performance of the contract. The damages awarded to the other party may be proved as a debt in the bankruptcy: see *Re Castle* [1917] 2 KB 725.

The effect of subsection (5) (the equivalent of ss 178(6) & 315(5) of the UK Insolvency Act) in the context of a disclaimer of a lease was recently considered in the English case of *Re Park Air Services Plc, Christopher Moran Holdings Ltd v Bairstow and Another* [1999] 1 All ER 673 (HL). There the House of Lords held that when a lease is disclaimed, it operated to bring an end both the tenant's liability to pay rent and the landlord's right to receive it, the landlord cannot prove for future rent. The tenant's obligation to pay it has gone. Consequently, the landlord has no right to claim damages at common law for his loss. Instead the landlord has to exercise his statutory right to compensation under subs (5). The compensation to be paid to the landlord under subs (5) must be assessed in the same way as damages for breach of a contract which has been wrongfully terminated. However, in assessing damages in the case of a disclaimed of a lease, allowance has to be made for accelerated receipt of any sums which had not fallen due at the date of the breach, and which the contract did not make immediately due and payable in the event of the breach. An award of compensation which failed to take into this account would over compensate the landlord. In the *Re Park Air Services* case, the House of Lords held that the liquidator correctly rejected the proof of the landlord who had disclaimed a lease because the landlord's claim did not discount the accelerated receipt.

96. Removal of trustee

- (1) The creditors may by ordinary resolution, at a meeting specially called for that purpose of which 7 days' notice has been given, remove a trustee, other than the Official Receiver, appointed by them, and may at the same or any subsequent meeting appoint another person to fill the vacancy as provided in case of a vacancy in the office of trustee.
- (2) If the court is of opinion—
- that a trustee appointed by the creditors is guilty of misconduct or fails to perform his duties under this Ordinance; or
 - that his trusteeship is being needlessly protracted without any probable advantage to the creditors; or
 - that he is by reason of lunacy or continued sickness or absence incapable of performing his duties; or
 - that his connection with or relation to the bankrupt or his estate or any particular creditor might make it difficult for him to act with impartiality in the interest of the creditors generally; or
 - that the interests of the creditors require it,
- the court may remove him from his office and appoint another person in his place.

[cf. 1914 c. 59 s. 95 U.K.]

Note: Amendment not yet in operation: 18 of 2005 s 35
 Section 96(2)(a) is amended by repealing "appointed by the creditors" and substituting ", other than the Official Receiver,".

[96.01] Enactment history

Subsection (2) will be amended pursuant to s 35 of the Bankruptcy (Amendment) Ordinance 2005 (No 18 of 2005).

[96.02] England

Cf s 95 of the now repealed Bankruptcy Act 1914 c 59 (UK).

[96.03] General note

The standards required from that of a trustee under this section are higher than those ordinarily required even of professional men, and the court has a duty to ensure that the trustees maintain those proper standards: see *Re Ladyman (a debtor)* (1981) 38 ALR 631 at p 642, per Rogerson J.

A trustee can be removed by the creditors under subs (1) or by the court under subs (2). The meeting to consider the propriety of removing the trustee may be summoned at the desire of one-fourth in value of the creditors by the committee of creditors or by the Official Receiver, on the deposit of a sum

sufficient to defray the expenses of summoning such meeting: see the Bankruptcy Rules rule 172 in the Appendix below. However, the court has the jurisdiction to restrain the creditors from holding a meeting to remove a trustee until after the question of expunging has been determined: see *Re Mansel, ex p Sayer* (1887) 19 QBD 679. Notice of such meeting must be served on the trustee: see *Re Bagnall, ex p Wright* (1879) 27 WR 476.

Where a trustee is removed by the court, the order of removal must be filed with the Registrar of the Court and be gazetted: see the Bankruptcy Rules rule 165 in the Appendix below.

When a trustee is removed he is under a duty to deliver over to the Official Receiver or to the new trustee all books kept by him and all other books, papers, documents and accounts in his possession relating to the office of the trustee: see the Bankruptcy Rules rule 194 in the Appendix below.

When the court's jurisdiction under this section is invoked, it needs to be satisfied firstly that one or more of the conditions set out in s 96(2)(a) to (e) are met which justify the removal of the current trustee. The court then decides whom to appoint as trustee in his place. In this regard, the court has a wide discretion. It is not bound by the determinations of the meeting of the creditors, although the court would have due regard to those determinations: see *Re Akai Holdings Ltd & Another* [2001] 2 HKLRD 411 at p 417J. Nor is the court bound by the wish or choice of any individual creditor or the Official Receiver. These are just matters that the court would take into account. In deciding the appointment, the court considers what is in the best interests of all the creditors interested in the bankruptcy: see *Re Akai Holdings Ltd & Another* at p 418B. And the court takes into account all the circumstances. Although circumstances inevitably vary from case to case, the following matters, which are not meant to be exhaustive, are usually relevant:

- The size of the bankrupt's estate.
- The whereabouts of the bankrupt's assets.
- The complexity and difficulties involved in the trustee's discharge of his functions and duties, including the steps to be taken in the investigation of the bankrupt's affairs and the realization of his assets.
- Whether any appointment would result in a saving in the time and costs of investigation of the bankrupt's affairs. If yes, that appointment is to be preferred: see *Re Akai Holdings Ltd & Another* at p 418C.
- Whether the proposed trustee has the requisite expertise and experience that is commensurate with the particular case. The court needs to be satisfied that he is qualified to carry out the job with competency and expediency.
- Independence and impartiality of the proposed trustee. The proposed trustee should not only be independent and impartial but should also be seen to be so. Any conflict of interests or even over-familiarisation should be discouraged. On the other hand, it is not every connection or action that can give rise to an allegation of an

- majority in excess of three-quarters in value of the creditors present in person or by proxy and voting on the resolution.
- (2) The same applies in respect of any other resolution proposed at the meeting, but substituting one-half for three-quarters.
 - (3) In the following cases there is to be left out of account a creditor's vote in respect of any claim or part of a claim-
 - (a) where written notice of the claim was not given, either at the meeting or before it, to the chairman or the nominee;
 - (b) where the claim or part thereof is secured;
 - (c) where the claim is in respect of a debt wholly or partly on, or secured by, a current bill of exchange or promissory note, unless the creditor is willing-
 - (i) to treat the liability to him on the bill or note of every person who is liable on it antecedently to the debtor, and against whom a bankruptcy order has not been made (or, in the case of a company, which has not gone into liquidation), as a security in his hands; and
 - (ii) to estimate the value of the security and (for the purpose of entitlement to vote, but not of any distribution under the arrangement) to deduct it from his claim.
 - (4) Any resolution is invalid if those voting against it include more than half in value of the creditors, counting in these latter only those-
 - (a) to whom notice of the meeting was sent;
 - (b) whose votes are not to be left out of account under paragraph (3); and
 - (c) who are not, to the best of the chairman's belief, associates of the debtor.
 - (5) It is for the chairman of the meeting to decide whether under this rule-
 - (a) a vote is to be left out of account in accordance with paragraph (3); or
 - (b) a person is an associate of the debtor for the purposes of paragraph (4)(c).and in relation to the second of these 2 cases the chairman is entitled to rely on the information provided by the debtor's statement of affairs or otherwise in accordance with this rule and rules 122A to 122Q and 122S to 122ZP.
 - (6) If the chairman uses a proxy contrary to rule 122P, his vote with that proxy does not count towards any majority under this rule.
 - (7) Rule 122Q(5) to (9) applies as regards an appeal against the decision of the chairman under this rule.

[BR(r) 122R.01] Enactment history

This rule was added pursuant to rule 51 of the Bankruptcy (Amendment) Rules 1998 (L.N. 77 of 1998), commencing 1 April 1998.

[BR(r) 122R.02] England

Cf rule 5.18 of the Insolvency Rules 1986 (SI 1986/1925).

[BR(r) 122R.03] General note

The proposal is not binding on all the creditors unless it is approved by not less than three-quarters of the votes. The same majority is required for any modification of the proposal. Resolutions on other matters can be approved by a simple majority.

122S Proceedings to obtain agreement on proposal

- (1) On the day on which the creditors' meeting is held, it may from time to time be adjourned.
- (2) If on that day the requisite majority for the approval of the voluntary arrangement (with or without modifications) has not been obtained, the chairman may, and shall if it is so resolved, adjourn the meeting for not more than 14 days.
- (3) If there are subsequently further adjournments, the final adjournment shall not be to a day later than 14 days after that on which the meeting was originally held.
- (4) If the meeting is adjourned under paragraph (2), notice of the fact shall be given by the nominee forthwith to the court.
- (5) If, following any final adjournment of the meeting the proposal (with or without modifications) is not agreed to, it is deemed rejected.

[BR(r) 122S.01] Enactment history

This rule was added pursuant to rule 51 of the Bankruptcy (Amendment) Rules 1998 (L.N. 77 of 1998), commencing 1 April 1998.

[BR(r) 122S.02] England

Cf rule 5.19 of the Insolvency Rules 1986 (SI 1986/1925).

[BR(r) 122S.03] General note

The adjournments allowed under this rule is to encourage the parties to reach an agreement on the debtor's proposal.