

*Chi Chuen* [2005] HKCFI 956; [2005] HKCU 1481, a writ of *fi fa* was issued prior to the presentation of a petition against the debtor but not executed against the debtor until after the presentation of the petition. Execution against the debtor was returned only partially satisfied after the presentation of the petition. The court held that the deeming provision under s 6A merely provides a way in which the conclusion 'inability to pay' can be reached, but if no execution has been levied at that time that a petition has been presented, it is difficult, if not impossible, to see how a subsequent post-petition attempt to execute the judgment debt in question can give rise to a conclusion that the debtor was, at the time the petition presented, unable to pay his debts.

**[6A.10] Sub-paragraph (2)(c): The demand has ... been neither complied with nor set aside in accordance with the rules**

For duration for the setting aside of a statutory demand, see the Bankruptcy Rules, r 47(2) in the Appendix below.

For form and content of the application, see Form 161 of the Bankruptcy (Forms) Rules in the Appendix below, and the Bankruptcy Rules, r 47(4) in the Appendix below.

For power of the court to dismiss an application to set aside a statutory demand, see the Bankruptcy Rules, r 48(1) in the Appendix below.

For circumstances under which the court may grant an application for dismissal, see the Bankruptcy Rules, r 48(1) and (5) in the Appendix below.

An application to set aside a statutory demand is not a trial or hearing on the merits, consequently additional evidence is admissible on appeal from the result of the application: see *Norman Laurier v United Overseas Bank Ltd, Re a Debtor* (223 SD of 1995) [1996] BPIR 635, and *Royal Bank of Scotland v Binnell* [1996] BPIR 352. In these cases, it was held that the 3 criteria laid down in *Ladd v Marshall* [1954] 3 All ER 745 at p 748, per Denning LJ, for determining the admissibility of further evidence on appeal were not applicable to proceedings to set aside statutory demands.

It is a long-established principle that in disputing the debt, the debtor must show a bona fide dispute on substantial grounds, by sufficient precise evidence which is believable, and must establish that he actually has a defence of substance, not just a fair probability of one (see *Re ICS Computer Distribution Ltd* [1996] 1 HKLR 181 per Rogers J; *Periwin Development Ltd v Granfield Pacific Hotel Ltd* [2002] HKCU 124 (unreported, HCCW 29/2001, 3 January 2002, Kwan J); *Re Vong Pak Cheong alias Wong Pak Cheung* [2004] HKCU 437 (unreported, HCB 16256/2002, 2 April 2002, To J).

But if there is a real dispute turning to a substantial extent on disputed questions of fact which require viva voce evidence, the bankruptcy court is not the forum for resolving whether the debt is due, and it ought to be resolved by ordinary litigation (see *Re Lympne Investments Ltd* [1972] 2 All ER 385; [1972] 1 WLR 523 per Megarry J; *Re Bylamson & Associates (Enterprises) Ltd* [1983] 1 HKC 510 per Jones J). Indeed, in *Re Leung Cherrng Jiunn* [2016] 1 HKLRD 850, [2015] HKCFI 877, [2015] HKCU 3209, the Court held that '[i]t is well-established that

bankruptcy proceedings are summary in nature and are not intended to be used for the purpose of debt collection. The jurisdiction to make a bankruptcy order will only be exercised in very clear cases. If the court is satisfied that there is a bona fide dispute on the debt, the court will not usurp the function of a civil court and decide the disputes between the parties. The usual practice of the court is to dismiss the petition, leaving the petitioner to establish himself as a creditor by judgment to be obtained in the civil court (...)' (para 17).

For a court to reject a petition because of the existence of an unlitigated cross-claim, it has to be shown that the cross claim is genuine and one of substance, the debtor has been unable to litigate, and that it must be an amount exceeding the amount of the petitioner's debt (see *Seawind Tankers Corporation v Bayoil SA* [1999] 1 All ER 374, [1999] 1 Lloyd's Rep 211; *Re SY Engineering Co Ltd* [2002] HKCU 185 (unreported, CACV 1896/2001, 27 February 2002, Le Pichon JA).

In *Bank of Communications v Au Wai Ming* [2005] HKCU 184 (unreported, HCB 4016/2004, 8 February 2005) the court found that the cross-claim of the debtor unbelievable and unsubstantiated and thus adjudicated the debtor to be bankrupt.

If a debtor would like to apply to set aside a statutory demand served on him, he must do so within 18 days after receiving the statutory demand. Ignorance of the law is not a defence and the court will not allow late application to be set aside.

In *Ling Kam Chung v Comsec Nominee Ltd* [2003] HKCU 1114 (unreported, HCB 12052/2003, 25 August 2003), the court held that there could be no excuse for a layman to say that he does not know the law and procedure, does not know that he should apply to have the statutory demand set aside if he wishes to dispute liability to the debt stated in the demand, does not know the appropriate court for making the application and does not know the consequence of not applying to have the statutory demand set aside.

In order to set aside a statutory demand, the burden rests squarely on the debtors to satisfy the court with cogent evidence. If the court is not so satisfied on the evidence before it, the court will not set aside the statutory demand. See *Wah Tat Foundation & Engineering Ltd v Kam Kin Bun & Yip Shiu Ching* [2003] HKCU 666 (unreported, HCSD 5&6/2003, 7 May 2003) and *Tang Wai Yee Sylvia v He Shimeng & Anor* [2003] HKCU 488 (unreported, HCSD 24/2002, 27 March 2003).

In *Lincoln Serejo Venancio v CWT Beheermaatschappij BV* [1999] HKCU 233 (unreported, HCSD 14/1998, 15 February 1999), the debtor argued that the contract under which the debt was incurred was governed by Swiss Law instead of Hong Kong Law. The court held, on the evidence, there was a genuine triable issue and set aside the statutory demand.

In *Re William Henry Woo* [2002] HKCU 653 (unreported, HCB 276/2002, 31 May 2002), the debtor argued that the loan agreement under which the debt was incurred was in contravention of the Money Lenders Ordinance (Cap 163). The court held that there was no genuine triable issue and granted a bankruptcy order.

A bona fide dispute is not a trivial or insubstantial dispute but one based on solid grounds disputable both in law and on the facts of the case. In *Re ICS Computer Distribution Ltd* [1996] 3 HKC 440, the test of bona fide dispute in company

**[6B.03] General note**

This section incorporates the substance of the old s 6(2) of the Bankruptcy Ordinance which gave a secured creditor alternative courses in relation to his securities in the event of bankruptcy. The secured creditor has an unfettered right to choose any of the courses provided in this section: see *Re Chan Yiu Yam, ex p Peter Woo* (unreported, HCB 108/1980, 31 January 1981).

A secured creditor is a person holding a mortgage, charge or lien or the property of the debtor or any part thereof as a security for a debt due to him from the debtor: see s 2 of the Ordinance, ante. Thus, as between a creditor and the guarantor of the principal debt, the creditor is not a creditor with security, for the personal guarantee is not a secured arrangement within s 2: see *Re Kwok Chok Yee* [2000] 2 HKC 543, 546, per Le Pichon J.

If a debt is a secured debt, a creditor may present a petition in respect of the unsecured part of the debt, which is in the nature of a liquidated sum: see *Re a Debtor* (64 of 1992) [1994] 1 WLR 264, followed in *Re Kwok Chok Yee* (above).

In *Re Au Kam Ming* [2001] HKCU 735 (unreported, HCB 3234/2001, 13 August 2001), the court held that a Mareva injunction over a debtor's assets is not a security for the purpose of s 6B. The court also doubted that a creditor may be regarded as a creditor with security if the creditor has obtained an order for interim payment.

**[6B.04] Sub-paragraph (1)(a): Give up his security**

The words 'give up his security' mean that 'the trustee in bankruptcy is put in the same position as the mortgagee who gives up his security, and the consequences is that there is no annihilation of the security of the prior mortgagee which can avail to accelerate or advance the securities, change the rights, or improve the positions of the subsequent mortgagees, but the whole matter remains as it was, except that the trustee stands in the place of the prior mortgagee': see *Cracknell v Janson* (1877) 6 Ch D 735 at p 739, per Hall VC.

**[6B.05] Sub-paragraph (1)(b): Estimated value**

The petitioning creditor makes the estimate at his own risk; the court will not inquire into the correctness of a genuine estimated value and the petitioning creditor will be bound by it when he subsequently comes to prove his debt, and he cannot take any benefit in the administration in bankruptcy except on the basis of that estimate, unless if he can show that there was a genuine mistake on the estimation: see *Re Button, ex p Voss* [1905] 1 KB 602 (CA). The petitioning creditor may, however, apply to the court to amend the valuation: see the Proof of Debts Rules, r 13 in the Appendix below.

In *Wong Ho Ming Kenneth v The Hong Kong Chinese Bank Ltd* (unreported, HCSD 17/1999, 13 April 2000), the court held that the value of the security is the value as at the date of the demand, and later valuations are of little use in determining whether that value was so inaccurate as to justify setting aside the demand. A 'forced sale', being a sale with a time limit, such as by a mortgagee, rather than a sale on the open market, would reduce the value by between 15%

and 30%. The court followed *Platts v Western Trust & Savings Ltd* [1996] BPIR 339 and held that the correct basis of valuation of a security is on the 'forced sale' basis. See also *Wong Fung Florence v The Hong Kong Chinese Bank Ltd* (unreported, HCSD 18/1999, 13 April 2000).

In *Re Choi Wing Cheong* [2004] HKCU 1513 (unreported, HCB 16148/2003, 22 December 2004) the security provided by the debtor is some shares in a private company and the creditor was unable to give any accurate estimation of the value of the security held by him as he had no access to the books and accounts of the company. The creditor then gave a rough estimation of HK\$ 500,000. The debtor complained that inaccurate estimation would annul the bankruptcy order. However, the court disagreed and held that the creditor had tried his best to estimate the true value of the security. The non-compliance with s 6B was not serious enough to warrant annulling the bankruptcy order.

In *Re Kwok Chok Yee* [2000] 2 HKC 543, the debtor argued that unless and until the properties mortgaged have been sold and the proceeds applied towards satisfying the debt, the sum due and owing by the debtor under the guarantee could not be ascertained and therefore the amount specified in the statutory demand and the petition could not be a debt for a liquidated sum. A similar argument had been advanced and rejected in *Re a Debtor* (64 of 1992) [1994] 1 WLR 264, where the court had to consider the meaning of a 'liquidated sum' for the purposes of s 267(2)(b) of the Insolvency Act 1986 and r 6.1(5) of the Insolvency Rules. In that case, the creditor held security provided by the debtor. In the statutory demand served on the debtor, the creditor had subtracted from the debt an unspecified value as estimate of the value of the security at the date of the demand. The court rejected the submission that the sum claimed was merely 'an inchoate anticipated loss' and not a 'liquidated sum' and held that r 6.1(5) of the Insolvency Rules recognised that it is competent for a secured creditor to put a value on its security and to serve a statutory demand for the amount of the total debt less such value. Therefore, the net figure resulting from that exercise must be in the nature of a liquidated sum for the purposes of s 267(2)(b). If not, a demand prepared in compliance with r 6.1(5) could never be a valid demand. Secondly, it must have been within the obvious contemplation of r 6.1(5) that the value which the creditor puts on his security will be a value with which the debtor may disagree. But the emergence of any such disagreement cannot by itself, and without more, provide a basis for a challenge to the validity of the statutory demand. It cannot result in the sum claimed in the demand ceasing to be a demand for a liquidated sum and becoming one for an unliquidated sum. Any disagreement as to the value of the security might be of important significance and might even justify the setting aside of the demand if the debtor was able to claim by credible evidence that the creditor had undervalued the security and that its true value either equalled or exceeded the full amount of the debt. The court in *Re Kwok Chok Yee* agreed with this reasoning. The court pointed out that, for practical purposes, s 6B of the Bankruptcy Ordinance (Cap 6) is substantially similar to r 6.1(5) of the Insolvency Rules. So even where the debt is a secured debt, a petition may be presented in respect of the unsecured part of the debt which is in the nature of a liquidated sum notwithstanding disagreement as to the value of the security.

In bankruptcy, it was held that, if 'a secured creditor wants to prove, he must do one of three things: he may give up his security altogether and prove for the full amount, or he may get his security valued and prove for the difference, or he may

whether or not there is an application to set aside the statutory demand but to rule out the exception after the three-week period even though the creditor finds himself in jeopardy but is not in a position to present any petition because of any outstanding application to set aside the statutory demand.

### [6C.05] Definitions

For "creditor's petition", see s 6(1) above; and for 'statutory demand', see s 6A above.

## 6D Proceedings on creditor's petition

Expanded Cross Reference:

6, 6A, 6B, 6C

- (1) The court shall not make a bankruptcy order on a creditor's petition unless it is satisfied that the debt, or one of the debts, in respect of which the petition was presented is either-
  - (a) a debt which, having been payable at the date of the petition or having since become payable, has been neither paid nor secured nor compounded for; or
  - (b) a debt which the debtor has no reasonable prospect of being able to pay when it falls due.
- (2) In a case in which the petition contains such a statement as is required by section 6C, the court shall not make a bankruptcy order until at least 3 weeks have elapsed since the service of any statutory demand under section 6A.
- (3) The court may dismiss the petition if it is satisfied that the debtor is able to pay all his debts or is satisfied-
  - (a) that the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented;
  - (b) that the acceptance of that offer would have required the dismissal of the petition; and
  - (c) that the offer has been unreasonably refused,
 and, in determining for the purposes of this subsection whether the debtor is able to pay all his debts, the court shall take into account his contingent and prospective liabilities.
- (4) In determining for the purposes of this section what constitutes a reasonable prospect that a debtor will be able to pay a debt when it falls due, it is to be assumed that the prospect given by the facts and other matters known to the creditor at the

time he entered into the transaction resulting in the debt was a reasonable prospect.

- (5) Nothing in sections 6 to 6C or this section prejudices the power of the court, in accordance with the rules, to authorise a creditor's petition to be amended by the omission of any creditor or debt and to be proceeded with as if things done for the purposes of those sections had been done only by or in relation to the remaining creditors or debts. <\* Note - Exp. X-Ref.: Sections 6, 6A, 6B, 6C \*>

(Added 76 of 1996 s 4)

### [6D.01] Enactment history

This section was added pursuant to s 4 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

### [6D.02] England

Cf s 271 of the Insolvency Act 1986 c 45 (UK).

### [6D.03] General note

This section replaced the obsolete two-stage process of a receiving order and an adjudication order in bankruptcy under the pre-amendment bankruptcy system with a single 'bankruptcy order'. The bankruptcy order is made immediately upon the creditor satisfying all conditions at the hearing of the petition.

At the hearing of the bankruptcy petition, unless a change of circumstances has occurred since the dismissal of the application to set aside the statutory demand, all the petitioning creditor is required to do is to show that he has made a statutory demand, that either no attempt has been made to set it aside or an unsuccessful attempt has been made, and that the amount of the debt has neither been paid or secured; the debtor cannot go back and re-argue the very grounds on which he has unsuccessfully sought to have the statutory demand set aside: see *Brillouet v Hachette Magazines Ltd, Re a Debtor* (27 of 1990) [1996] BPIR 518 (CA); see also *King v Commissioners of Inland Revenue, Re a Debtor* (960 SD of 1992) [1996] BPIR 414. The proper place to re-argue the grounds is at the Court of Appeal on appeal, if at all: see *Brillouet v Hachette Magazines Ltd, Re a Debtor* (27 of 1990) (above).

An appeal against the court's decision dismissing the debtor's application to set aside the statutory demand and set down for hearing does not operate as a stay of the hearing of the bankruptcy petition: see *Re Li Wan Man* [2000] 3 HKC 265.

*Ka Lun Grand* (unreported, HCB 17553/2002, 23 December 2002).

If a debtor wishes his proposals to be looked at with sympathy, it is incumbent on him to be full, frank and open with the petitioner in respect of his statements of his position: *Re a Debtor* (32 of 1993) [1995] 1 All ER 628, see also *Re Lau Chi Kwong, ex p Khoo Beng Kang* [2000] HKLRD (Yrbk) 47 3 October 2000 (CFI).

In considering a debtor's ability to repay the debt, no regard should be given to future contingencies such as profit or income from future contracts if he is permitted to carry on his business: *Re Phillip and Lion Far East Ltd* (unreported, HCCW 130/1991, 17 May 1991); *Re Lam Ngai Fung Tony* (unreported, HCB 4641/2001, 3 December 2001).

Future income may be relevant only as part of the total circumstances to be considered regarding whether a debtor's offer to secure or compound for a debt has been unreasonably refused by the petitioner: *Re Lam Ngai Fung Tony* (above). See also, *Re Lam Kwok Hing Wilfred* (unreported, HCB 3560/2003, 21 November 2003).

As the position has to be considered only as between the actual creditor and debtor without regard to the position of the other possible creditors, the fact that a different creditor might have accepted the debtor's offer would not render the actual creditor's refusal unreasonable: see *Re a Debtor* (32 of 1993) [1995] All ER 628. See also *The Commissioner of Inland Revenue v The Debtor, Re a Debtor* (6349 of 1994) [1996] BPIR 271, applied in *Cheung Wah v China State Bank* [1999] 21 HKC 185; and also *Re Lau Chi Kwong, ex p Khoo Beng Kang* [2000] 3 HKLRD L2.

In *Re Li Chi Ho* (unreported, HCB 10975/2001, 18 March 2002), the court was asked whether the offer to compound for the debt by the debtor was unreasonable; rejected. The court held that, in order to come to the view that the creditor's refusal is unreasonable, the court has to be satisfied that no reasonable hypothetical creditor would have refused the offer and that the refusal of the offer was beyond the range of possible reasonable actions in the context. It is also relevant to look at the past repayment history when considering the reasonableness or otherwise of the creditor's refusal. In *Re Li Chi Ho*, taking into account the repayment history, that the debtor had defaulted in making punctual repayment in the past, and that his best offer is to pay HK\$2,000 a month towards a debt which stood at over HK\$ 1 million, the court did not agree that the refusal by the petitioner to accept his offer was unreasonable.

## [6D.08] Definitions

For 'bankruptcy order', see s 3(1) above; for 'creditor's petition', see s 6(1) above; for 'statutory demand', see s 6A above; for 'rules', see the Bankruptcy Rules r 1 in the Appendix below.

## 7 Liability of firm to have bankruptcy order made against it

- (1) The following provisions shall have effect in the case of a firm carrying on business in Hong Kong-
  - (a) (Repealed 76 of 1996 s 5)
  - (b) it shall be sufficient that a bankruptcy order against the firm be made in the firm name, without mentioning the names of the partners, and such bankruptcy order shall affect the joint and separate property of all the partners; (Amended 76 of 1996 s 5)
  - (c) the right of a creditor to present a bankruptcy petition against the firm, and the jurisdiction of the court to make a bankruptcy order against the firm, shall not be affected by the fact, if it is so, that all or any of the partners of the firm are not resident or domiciled in Hong Kong. (Amended 76 of 1996 s 5)
- (2) The provisions of this section shall, so far as the nature of the case will permit, apply to any person carrying on business in Hong Kong in a name or style other than his own name.
- (3) A creditor may present a petition for a bankruptcy order against a firm in the same way as he may present such a petition against a debtor provided that the conditions set out in sections 4(1)(c)(ii), 5, 6, 6A and 6B are met in respect of the firm. (Added 76 of 1996 s 5)

(Amended 47 of 1984 s 16)

## [7.01] Enactment history

This section was amended pursuant to s 16 of the Bankruptcy (Amendment) Ordinance 1984 (No 47 of 1984). This section was subsequently added to and amended pursuant to s 5 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

## [7.02] General note

The amendment brings this section in line with the reforms introduced by the Bankruptcy (Amendment) Ordinance 1996. Section 5 of the Bankruptcy (Amendment) Ordinance 1996 repealed the concept of 'acts of bankruptcy' previously found under s 7(a), and replaced it with the presentation of statutory demands. Section 5 of the amendment Ordinance further deleted the obsolete expression of 'British subjects' from s 7(1)(c). This subsection presupposes that the preliminary conditions laid down in s 4(2) above have been satisfied.

**[7.03] Subsection (1): Firm**

It is submitted that this word should be narrowly interpreted for the purposes of this section, as opposed to the broad interpretation given to it under s 4(2)(a) above.

**[7.04] Sub-paragraph (1)(b): Joint and separate property**

'Joint' estate of partners comprises property which the partners have constituted between themselves. 'Separate' estate comprises property which belongs to the partners personally. It should be noted that until the abolition of the doctrine of reputed ownership by s 43 of the Bankruptcy (Amendment) Ordinance 1996, the separate property of one partner was sometimes treated as property of the joint estate.

Although a bankruptcy order affects both the joint and separate property of all the partners, property which constitutes the joint and separate estates is separate and distinct for the purpose of distribution of the estates: see *Re a Debtor (5 of 1967), ex p National Westminster Ltd* [1971] 2 WLR 1477. Therefore, s 38(7) below, which embodies the general rule on the distribution of a bankrupt's property, provides that in the case of partners, the joint estate is applicable in the first instance in the payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. See further notes to s 38 below.

**[7.05] Definitions**

For 'bankruptcy order', see s 3(1) above; and for 'carrying on business', see s 4(2) above.

**8 Powers of Official Receiver and duties of debtor on petition being filed**

- (1) Immediately on the filing of any petition the Official Receiver may, in cases where he has reason to believe that any offence under this Ordinance or any fraud has been or is about to be perpetrated, by notice sent by messenger or by ordinary post, summon the debtor to attend before him to give such information as he requires, and may, either by himself or his agent authorised by him in writing, enter on any premises occupied by the debtor between the hours of 8 a.m. and 6 p.m. for the purpose of inspecting his property, stock in trade and books of account.
- (2) It shall be the duty of the debtor to furnish the Official Receiver with all such information as it is in the debtor's power to give or to obtain.
- (3) If the debtor fails without reasonable cause to attend on the Official Receiver as aforesaid or to furnish him with such

information as aforesaid, or if the debtor obstructs the search of the premises or the production of any book or document required in connection therewith, or authorises or permits any such obstruction, the debtor shall be liable on summary conviction to imprisonment for any term not exceeding 6 months, and every person who takes any part in any such obstruction, whether authorised or permitted by the debtor or not, shall be liable to the like penalty.

**[8.01] General note**

The objective of this section is to ensure a smooth bankruptcy proceeding by discouraging attempts by the debtor to frustrate it, for example, by the dissipation of his assets before a bankruptcy order is made. This section strengthens the powers of the Official Receiver by imposing criminal sanctions on the debtor or any other person who attempts to obstruct investigations conducted by the Official Receiver. See *Re Yuen Wai Ying t/a Man Ying Seafood* (unreported, HCB 4570/2001, 3 December 2001).

**[8.02] Definitions**

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

**9 Creditor's petition and order thereon**

- (1) A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served in the prescribed manner. (Amended 39 of 1987 s 2)
- (2) At the hearing the court shall require proof of the debt of the petitioning creditor and of the service of the petition, and, if satisfied with the proof, may make a bankruptcy order in pursuance of the petition. (Amended 76 of 1996 s 6)
- (3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts or has a reasonable prospect of being able to pay them, or considers that for other sufficient cause no order ought to be made, the court may dismiss the petition. (Amended 45 of 1986 s 2; 76 of 1996 s 6)
- (4) (Repealed 76 of 1996 s 6)
- (5) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an

see *Re Lennox, ex p Lennox* (1885) 16 QBD 315 at p 324, per Lord Esher MR. See also *Eberhardt & Co Ltd v Mair* [1996] BPIR 143 (allegation that there was no debt at all); *Re Flatau, ex p Scotch Whisky Distillers, Ltd* (1888) 22 QBD 83 (CA) (allegation of fraud or collusion); and *Re Onslow, ex p Kibble* (1875) 10 Ch App 373 (allegation that no consideration was given for the debt).

A Court of Bankruptcy has the power to go behind a judgment debt and inquire into the validity of the debt, not only at the instance of the trustee in bankruptcy upon the question of proof of the debt, but also at the instance of the judgment debtor himself upon the hearing of a petition by the judgment creditor for a bankruptcy order, even though the debtor has consented to the judgment: see *Re Lennox, ex p Lennox*. This power is exercisable by a Court of Bankruptcy even though the judgment debt is subsequently affirmed on appeal: see *Re Fraser, ex p Central Bank of London* [1892] 2 QB 633, [1891-1894] All ER Rep 939. See also *McCourt and Siequien v Baron Meats Ltd and the Official Receiver* [1997] BPIR 114.

For a detailed discussion of the origin of the power of the Court to inquire into a judgment debt: see *Corney v Brien* (1951) 84 CLR 343.

The issue of whether an affidavit of continuing debt is required before any order may be made on a petition was addressed by the Court in *Re Boon Voon King & Ors* [1998] 3 HKC 537 at p 541, per Le Pichon J. It was held that, when a petition is presented, r 56 of the Bankruptcy Rules (see Appendix below) requires that it be verified by affidavit; and s 9(2) of the Ordinance requires the debt to be proved. While an affidavit would put matters beyond doubt, it is entirely a matter for the court seized of the matter to decide whether or not it is satisfied, *inter alia*, that the 'debt has been neither paid, nor secured, or compounded for', whether the evidence is sufficient or whether an affidavit of continuing indebtedness is required, for there is no practice direction in Hong Kong requiring a hearing affidavit to be filed.

However, the Court suggested that serious consideration should be given as to whether Hong Kong should adopt a similar practice as the current English practice set out in *Practice Note (Bankruptcy: Certificate of Debt)* [1987] 1 WLR 120.

**[9.07] Subsection (3): ...is satisfied by the debtor that he is able to pay his debts or has a reasonable prospect of being able to pay them...**

A debtor bears the burden of establishing that he has a reasonable prospect of being able to pay off the debt. In *Re Pai Chung Ying* (unreported, HCB 413/2001, 26 October 2001), the debtor failed to make out a case under this subsection that he was able or had a reasonable prospect of being able to pay off the debt. See also *Re Lau Wing* [2005] HKCU 1496 (unreported, HCB 10760/2004, 31 October 2005); *Re Mak Kam Ling* [2004] 4 HKC 202; and *Re Mak Kam Mun* (unreported, HCB 8607/2001, 28 July 2004).

**[9.08] Subsection (3): Other sufficient cause**

The Court may dismiss the petition if it is satisfied that there is sufficient cause that no bankruptcy order ought to be made: see s 9(3) above. There is sufficient

cause if the presentation of the petition is an abuse of the process of the court: see *Re a Debtor* (883 of 1927) [1927] All ER Rep 267. As to abuse of the process of the Bankruptcy Court: see *Halsbury's Laws of England*, Vol 3(2) (4<sup>th</sup> Ed Reissue, 2002), para 185.

For example of cases where a petition was dismissed on ground of abuse of process of the court: see *Re a Debtor* (883 of 1927) (above) (attempt of petitioner to use the bankruptcy proceedings to obtain a collateral advantage over debtor); *Re Otway, ex p Otway* [1895] 1 QB 812, (proceedings used to extort money from debtor to which the creditor is not properly entitled); and *Re Majory, A Debtor, ex p the Debtor v FA Dumont Ltd* [1955] Ch 600, [1955] 2 All ER 65, followed in *Malayan Banking Bhd v Datuk Lim Keng Khim* [1992] 2 MLJ 540; *Re Chan Tsz Cheuk, ex p Ho To Shang* [1927] HKLR 125 (where the order was refused by the court on the ground that the sum involved did not constitute substantial assets for division among the creditors). It should be noted that the 'substantial assets' criteria has since been repealed by Ordinance No 45 of 1986 s 2, and the Bankruptcy (Amendment) Ordinance 1996 s 24.

A Court of Bankruptcy may also strike out a petition under O 18 r 19(1)(d) of the Rules of the High Court (formerly known as the Rules of the Supreme Court). It was held in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 at p 384, per Yong Pung How CJ, that the term 'abuse of process of the Court' in O 18 r 19(1)(d) should be given a wide interpretation; it includes considerations of public policy and the interests of justice; the term signifies that the process of the court must be used bona fide and properly and must not be abused. Therefore, an action brought not for the purpose of obtaining relief but for some other ulterior or collateral purpose would be judicially acknowledged as an abuse of the process of the court and might be struck out on that ground. See also *Lonrho PLC & Ors v Fayed & Ors (No 5)* [1993] 1 WLR 1489.

For cases where the Court of Bankruptcy has found that there was no abuse of the process of the court so as to disentitle the petitioning creditor to a bankruptcy order: (a) *King v Henderson* [1898] AC 720 (JC), where the petition was filed with an indirect motive, for a purpose other than the equal distribution of the debtor's assets, for example, to exclude the debtor from a partnership; (b) the mere fact that the costs of the proceedings appear likely to absorb the whole of the assets does not amount to a sufficient ground for the refusal of a bankruptcy order: see *Re Jubb, ex p Burman and Greenwood* [1897] 1 QB 641 at p 644, per Vaughan Williams J; and (c) *Re Sunderland* [1911-1913] All ER Rep 291, where a creditor presented a petition despite knowing that his debtor was in pecuniary difficulties and unable to pay all his creditors.

**[9.09] Subsection (5): On such security**

In determining whether security ought to be given, the Court must have regard to the question of the debtor's solvency, as well as to the possibility of his establishing his defence. The requirement of providing security is a matter of judicial discretion and the decision will not be interfered with on appeal unless it is clear that the discretion has been improperly exercised: see *Re Marshall, ex p Marshall* (1877) 5 Ch D 873 at p 878, per Jessel MR.

If the debtor is unable to provide security, the court should, before making the bankruptcy order, investigate the account and satisfy itself that there is a debt sufficient to support the order: see *Re Harris, ex p Harris* (1875) 10 Ch App 264. Although as a general rule security should not be required for an amount greater than that of the debt on which the petition was founded, in special circumstances security for a greater amount could be required: see *Re Evans, ex p Evans* (1883) 50 LT 158 (CA).

### [9.10] Subsection (5): Stay all proceedings

The mere lodging of an appeal does not render it obligatory for the court to stay the petition: see *Re Flatau, ex p Scotch Whisky Distillers, Ltd* (1888) 22 QBD 83. See also *Re Walter Su, ex p United Malayan Banking Corpn Bhd* [1987] 1 MLJ 44. Neither does filing of a notice of intention by a secondary debtor (eg, guarantor of a loan) to oppose the creditor's petition: see *Bank Bumiputra Malaysia Bhd v Esah Binti Abdul Ghani* [1986] 1 MLJ 16.

The court will not grant a stay of proceedings on the ground that the judgment in default on which the petition is based merely alleges that there is a proposed application to the court by the debtor to set aside the judgment but the fact that the debt is due and owing is not contested by the debtor: see *Re Tang Wai Yee Sylvia (A bankrupt)* [1998] 1 HKC 736.

### [9.11] Definitions

For 'affidavit', see s 2 above; for 'bankruptcy order', see s 3(1) above; for 'creditor's petition', see s 3(1)(a) above; for 'being able to pay', see s 6A(1) above; and for 'reasonable prospect', see s 6A(2) above.

## 10 Grounds of debtor's petition

- (1) A debtor's petition may be presented to the court only on the ground that the debtor is unable to pay his debts.
- (2) The petition shall be accompanied by a statement of the debtor's affairs containing-
  - (a) such particulars of the debtor's creditors and of his debts and other liabilities and of his assets as may be prescribed; and
  - (b) such other information as may be prescribed.
- (3) A debtor's petition may be presented whether or not the aggregate amount of indebtedness is equal to or exceeds the amount provided for a creditor's petition under section 6(2)(a).

(Replaced 76 of 1996 s 7)

### [10.01] Enactment history

This section was substituted pursuant to s 7 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

### [10.02] England

Cf s 272 of the Insolvency Act 1986 c 45 (UK).

### [10.03] General note

The debtor's petition can be founded only on the ground that the debtor is unable to pay his debts, see s 10(1) above. For advantages of a debtor's petition, see para [3.07] above.

If it is clear that the debtor is able to pay his debts, the petition has to be dismissed on the ground that it is an abuse of the process of court: see *Re Painter, ex p Painter* [1895] 1 QB 85, *Re Betts, ex p Official Receiver* [1901] 2 KB 39; *Re Dunn, ex p Official Receiver v Dunn* [1949] Ch 640; and *Re a Debtor (17 of 1966), ex p the Debtor v Allen* [1967] Ch 590, [1967] 1 All ER 668. See also *Re Chow Man Kwong, ex p Chow Man Kwong* [2000] 1 HKLRD 482, where the court held that a petition presented by himself was not an abuse of the process of the court and granted the bankruptcy, for the objecting unsecured creditor was unable to establish that the debtor was able to pay all his debts.

The law has long recognised that there are genuine advantages to permitting an insolvent debtor to invoke the bankruptcy jurisdiction on his own motion where he is unable to pay his debts. By doing so, the debtor gives up virtually all his property in return for being freed from the accumulated burdens of his debts and for being given a chance, in due course, to make a fresh start. This avoids 'the inconvenience and dissipation of resources caused by multiple executions and other forms of enforcement process.' More importantly, it ensures that all creditors 'will be dealt with in the most equitable way through the collective process of bankruptcy, whereby such assets as he has for distribution among his creditors will be rateably shared by them in proportion to the debts which they are owed.' See *Ian F Fletcher, The Law of Insolvency* (2<sup>nd</sup> Ed, Sweet & Maxwell, 1996), p 117.

There have also been exceptional cases where, because it was entirely clear that the debts could be met, the petition has been dismissed. The example usually cited is *Re a Debtor (17 of 1966), ex p the Debtor v Allen* [1967] Ch 590, [1967] 1 All ER 668 where an infant caused another infant to lose an eye and had Judgment for £2,400 damages entered against him, but subject to an order to pay at the rate of 25p per week. The infant petitioned for his own bankruptcy on the basis that he could not pay the £2,400 debt. However, Goff J (as he then was) held that only the 25p weekly instalments were relevant for the purpose of determining ability to pay debts and the debtor was clearly able to pay the weekly instalments. Accordingly, in such circumstances, the court held that he had no reasonable grounds for alleging that he was unable to pay his debts, and rescinded a receiving order that had been made under s 29 of the Bankruptcy Act, 1914.

In *Re Chow Man Kwong, ex p Chow Man Kwong* [2000] 1 HKLRD 482, a creditor

of the debtor opposed the bankruptcy petition on the ground that the debtor failed to make frank and full disclosure of his assets and financial circumstances. However, the court still granted a bankruptcy order against the debtor and held that there was no abuse of the process. In *Chow Man Kwong*, the court pointed out that there was no doubt that the debtor owed very significant sums which could only be met to any meaningful degree if the property in dispute was sold and the proceeds representing the debtor's entitlement applied to the discharge of such debts. There was a real possibility that such proceeds will not cover all the debtor's liabilities. This would certainly be the case if his interest in the disputed property was limited to a half-share and may well be the case even if he was entitled to the whole of its proceeds.

The court held that uncertainty of this nature did not deprive the debtor of his locus to petition. The court explained and pointed out in *Re Dunn, ex p Official Receiver v Dunn* [1949] Ch 640, where a bookmaker had issued a writ against the debtor, causing the debtor to petition for a receiving order. There was from the outset doubt as to whether the bookmaker's debt was legally enforceable and was a matter that required investigation. In such circumstances, the English Court of Appeal held that the order was rightly made (even though, subsequently, it became clear that the bookmaker was not proposing to seek enforcement of the debt). Lord Evershed MR, dealing with the possible unenforceability of the debt, stated at p 645 as follows:

Whether or not that contention is right seems to me to be a matter at any rate requiring some investigation. It is to be observed that one party to the alleged debt, namely, the creditor, the bookmaker, is not now before the court. If it was so clear on the face of the writ that we could say: 'There is manifestly no debt which is enforceable, this writ is really a piece of waste paper,' then it might be right for the court to say: 'There never was a debt and the order which was made on September 13, 1948, adjudicating the debtor a bankrupt ought not to have been made because the statement that he could not pay his debts has been shown to be inaccurate.' But that is going much further, as it seems to me, than we are now or the court below were entitled to go. However doubtful the success of the bookmaker's claim might be, it is, as I say, a matter requiring some argument. I think it is understandable that the debtor, on the issue of the writ, might well have been advised that the case might not be within the ambit of the Gaming Act. He might have been seriously perturbed as to what he ought to do - whether he was going to raise the Gaming Act and fight the action which was obviously going to be a matter causing expenses which were beyond the limits of his financial resources.

His Lordship accordingly upheld the decision below, stating:

It seems to me, therefore, that the learned judges in the court below were right in saying that on the face of that writ they could not say that there was here, beyond all doubt, no debt at all. (at p 645)

He expressly rejected the suggestion that a petition in such circumstances might amount to an abuse of process, stating as follows:

There is nothing, I think, in the policy of the Act which disentitles a debtor to say: 'I will go bankrupt and protect myself from these possibilities and

get rid, whether or not they be provable debts, of any claims which are made against me.' I think there is no ground for saying that attitude amounts to an abuse of the process of the court, and no ground for saying that (without amounting to an abuse of the process of the court) it can be treated as sufficient reason for the court exercising its powers under s 29 and annulling the order. (at p 647)

Denning LJ, as he then was, took the same view. He made the following remarks at p 648:

Mr Aronson strongly urged that here there was no debt which was enforceable in the courts, and that on that ground the adjudication should be annulled. He said it would be a misuse of bankruptcy proceedings if they were allowed to be used in cases where there was no enforceable debt. It is probably correct to say that here there was no enforceable debt.

Even if the debt was unenforceable nevertheless if the debtor honestly believed on reasonable grounds 'that he was unable to pay his debts' the adjudication was good and should not be annulled *ab initio*.

It now turns out, indeed, that there are no debts, but that only means that the bankruptcy proceedings will have to be wound up. This will have the result that the debtor will get his discharge free from any possibility of a claim by the bookmaker. If the bankruptcy were annulled, it would mean that a claim could be still made against him.

Sommervell LJ agreed.

In the present case, the evidence is far from establishing that the debtor is plainly able to pay all his debts. It is accordingly my view that the petition does not constitute an abuse of process and that a bankruptcy order should be made.

The court in *Chow Man Kwong* followed *Re Dunn* and made a bankruptcy order against the debtor.

Rule 52 of the Bankruptcy Rules requires the debtor to pay the Official Receiver a deposit of HK\$ 8,650 before he can petition for his own bankruptcy. This requirement may prevent some debtors who wish to petition for bankruptcy from doing so because they are unable to raise money to pay the deposit. Does this deposit requirement impede such a debtor's fundamental right of access to the court (see Article 35 of the Basic Law of the Hong Kong Special Administrative Region ('Hong Kong')), so as to render the Bankruptcy Rule *ultra vires*? Presently, there is no Hong Kong authority on this point. According to the English case of *R v Lord Chancellor, ex p Lightfoot* [1999] 4 All ER 53 (CA), which concerned a similar payment of deposit requirement (see Insolvency Fees Order 1986), the Court of Appeal held that such requirement did not interfere with the right of access to the court, for the mandatory deposit is not for access to the court but rather towards the costs of services being provided by others for the petitioner's benefit.

In *Re Cheuk On Ching* [2004] 3 HKC 192, the court held that even though a debt due to a 'creditor' (the ex-wife of the debtor who was entitled to a periodical payment made by the debtor in this case) is not provable in bankruptcy and the debt would not be discharged by reason of the debtor's bankruptcy, the 'creditor'

may still have *locus* to oppose a bankruptcy petition against the debtor.

It was submitted that the creditor in this case had an interest in the bankruptcy proceedings because although the creditor's liability to pay the periodical payments would not be released by the discharge of his bankruptcy, the claims of the trustee in bankruptcy would prevail over the order of the Family Court during the bankruptcy: *Albert v Albert* [1996] BPIR 232, [1997] 2 FLR 791. The court further held that annulment of a bankruptcy order was available to 'any person interested': see s 33(6) of the Bankruptcy Ordinance.

The ex-wife in this case, who was entitled to periodic payment made by the debtor, may be an 'interested party' with locus to apply for annulment of the bankruptcy order: *Holliday v Holliday* [1981] 1 Ch 405, [1980] 3 All ER 385, [1981] 2 WLR 996.

However, in contrast to *Re Cheuk On Ching* [2004] 3 HKC 192, in *Re Lo Man Hong* [2014] 2 HKC 75, the Court "found it difficult to envisage circumstances in which it would be appropriate to make a bankruptcy order on a petition founded on an unprovable debt, since the petitioner, by definition, has no interest in the distributions in the bankruptcy and has no right as a proving creditor vis-à-vis the trustee in bankruptcy. The trustee, whose function is to get in, realise and distribute the bankrupt's estate 'among the creditors in respect of the bankruptcy debts which they have respectively proved' (see s 67(1) of the Bankruptcy Ordinance), has no duties to perform in relation to such a petitioner." (para 31).

#### [10.04] Subsection (1): Debtor's petition

The debtor's petition must be in Form 3 of the Bankruptcy (Forms) Rules: see the Bankruptcy Rules, r 50 in the Appendix below. This Form was substituted pursuant to r 2(b) of the Bankruptcy (Forms) (Amendment) Rules 1998, commencing 1 April 1998.

As to the form and contents of the debtor's petition: see the Bankruptcy Rules, r 50 and Form 3 of the Bankruptcy (Forms) Rules in the Appendix below. The petition has to be accompanied by the debtor's statement of affairs.

#### [10.05] Subsection (2): Statement of the debtor's affairs

The statement of affairs has to be in Form 28C of the Bankruptcy (Forms) Rules (see the Appendix below). It must be verified by affidavit.

#### [10.06] Subsection (3): Whether or not ... equal or exceeds the amount provided for

This subsection indicates that there is no requirements as to a minimum amount on a debtor's petition.

#### [10.07] Definitions

For "creditor's petition", see s 3(1)(a) above; and for 'amount provided for', see s 6(5) above.

#### 11 Appearance of Official Receiver on petition

On the hearing of any creditor's or debtor's petition it shall be lawful for the Official Receiver to appear and to call, examine and cross-examine any witness and, if he so thinks fit, to support or oppose the making of a bankruptcy order.

(Amended 76 of 1996 s 73)

#### [11.01] Enactment history

This section was substituted pursuant to s 73 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

#### [11.02] Definitions

For 'Official Receiver', see s 2 above; for 'bankruptcy order', see s 3(1) above; for "creditor's petition", see s 3(1)(a) above; and for "debtor's petition", see s 10 above.

#### 12 Effect of bankruptcy order

(1) On the making of a bankruptcy order, the Official Receiver shall thereby become the provisional trustee of the property of the bankrupt, and thereafter, except as directed by this Ordinance, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, nor shall proceed with or commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose. (Amended 76 of 1996 ss 8 and 72; 18 of 2005 s 3)

(1A) In the case of a debtor's petition, the Official Receiver as the provisional trustee may at any time appoint any person to act as the provisional trustee of the property of the bankrupt in his place if he considers that—

- (a) the value of the property of the bankrupt is unlikely to exceed \$ 200000; and
- (b) the person has the qualifications prescribed in

## Schedule 3. (Added 18 of 2005 s 3)

- (1B) The power of the Official Receiver to appoint a person as provisional trustee 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 3)
- (1C) The Secretary for Financial Services and the Treasury may, by notice published in the Gazette, amend Schedule 3. (Added 18 of 2005 s 3)
- (2) This section shall not affect the power of any secured creditor to realise or otherwise deal with his security.

[cf. 1914 c 59 s 7 U.K.]

**[12.01] Enactment history**

Subsection (1) was amended pursuant to ss 8 and 72 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

Subsections (1A), (1B) and (1C) were added pursuant to s 3 of the Bankruptcy (Amendment) Ordinance 2005 (No 18 of 2005).

**[12.02] England**

Cf s 7 of the now repealed Bankruptcy Act 1914 c 59 (UK).

**[12.03] Subsection (1): Making of a bankruptcy order**

A bankruptcy order takes effect on the day on which it was pronounced, even though the order has yet to be formally drawn up. Thus the debtor is protected as from that date: see *Re Manning* (1885) 30 Ch D 480. This principle is given statutory effect by s 30 below.

Upon the making of a bankruptcy order and until a trustee is appointed, the property of the bankrupt is vested in the Official Receiver: see s 58 below. The effect of this is that the bankrupt ceases to have an interest in either his assets or his liabilities except in so far as there may be a surplus to be returned to him upon his discharge. Besides certain causes of action personal to the bankrupt (eg, defamation and assault), all other causes of action which were vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or unliquidated damages, vest in the trustee, and the bankrupt cannot commence any proceedings based on a cause of action which no longer vests in him, and if the proceedings have already been commenced, he ceases to have sufficient interest to continue them: see *Heath v Tang & Anor* [1993] 1 WLR 1421 at p 1423, per Hoffmann LJ, followed in *Re Tang Wai Yee Sylvia (A bankrupt)* [1998] 1 HKC

736. See also *Nelson v Nelson and Others* [1997] 1 All ER 970, [1997] 1 WLR 233 (where it was held that since a bankrupt was entitled to bring any action except one relating to his property, he had the capacity and the authority to retain a solicitor; and since the solicitor had authority to commence the proceedings, he was consequently not in breach of his duty to the court); and *Church of Scientology Advanced Organisation Saint Hill Europe and South Africa v Scott and Others* [1997] BPIR 418. See also *Dr Andrew Kee-suan Koh v Dr Vincent Kay-lo Ip* [2001] 3 HKLRD 439 followed *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124.

If the bankrupt is a trustee of property, the bankrupt may bring an action in his name in respect of the property, but the bankrupt's statement of claim must plead that the bankrupt holds his interest in the property on trust for the named beneficiary: see *Choi Sze Fai v Pretty Full Development Ltd & Ors* [1999] 3 HKC 261, and see also O 15 r 14 of the Rules of the High Court (Cap 4 Sub Leg A). See also s 43(3) below, which excludes from the bankrupt's estate.

The Official Receiver is still the trustee in bankruptcy of the debtor even if a stay of the bankruptcy order has been granted by the court under s 104 of the Ordinance. The Official Receiver is not discharged from that office. A stay order is only to stay the bankruptcy order for a limited time, pending the determination of the debtor's appeal. The bankruptcy order is not stayed altogether or permanently. The opening words of s 12(1) read: 'on the making of a bankruptcy order the Official Receiver shall be thereby constituted receiver of the property of the bankrupt.' A stay order has not altered or affected that. See *Re Chow Shun Yung, ex p Wei Pih Stella & Anor* (unreported, HCB 5334/2004, 10 June 2005).

**[12.04] Subsection (1): Debt provable in bankruptcy**

The restraint of proceedings against a debtor is limited to debts provable in bankruptcy only: *Cobham v Dalton* (1875) 10 Ch App 655. A bankruptcy order has no restraining effect on any proceedings for recovery of debts owing to the Government, such as a fine or monetary penalty imposed on the 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* [2005] HKCU 388 (unreported, CACV 272/2004, 28 September 2005), the court pointed out that by reason of this 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 s 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 Ltd* [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 harmed. 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 (Cap 112) 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 (Cap 112). 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 his 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 conduct and dealings, if the bankrupt should depart from Hong Kong in the meantime and never return. In the circumstances, it would be in the public interest to keep a bankrupt taxpayer within the jurisdiction for a further period of time, after the making of a bankruptcy order, in order to enable the Official Receiver to carry out proper and thorough investigation into the conduct and dealings of the bankrupt and his assets, so as to reasonably eliminate the possibility of the taxpayer having hidden assets or yet to be revealed ability to satisfy the outstanding tax or a significant portion thereof. On that basis, the court held that the continuation of a departure prevention direction may be allowed.

See also *戴瑞廷訴稅務上訴委員會及另一人* [2006] 3 HKLRD 297, where the court held that, upon a person being declared bankrupt, the Official Receiver would be constituted receiver of the bankrupt's property and the bankrupt would not be entitled to bring an appeal against any order on his assets. Only the Official Receiver could decide whether or not to bring such an appeal. In *Tai Yu Ting*, there were disputes over tax liability and tax assessments were clearly related to the bankrupt's assets, and hence, in the absence of authority and consent of the Official Receiver, the bankrupt had no *locus standi* to bring an appeal against the tax assessment or take out an application under s 69 of the Inland Revenue Ordinance (Cap 112) on his own accord (see *Koh Kee Suan v Ip Kay Lo* [2001] 3 HKLRD 439, [2001] 2 HKC 161; *Chung Kau v The Hong Kong Housing Authority* [2004] 2 HKLRD 650, [2004] HKCU 398 followed).

**[43A.01] Enactment history**

This section was added pursuant to s 31 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

**[43A.02] England**

Cf s 307 of the Insolvency Act 1986 c 45 (UK).

**[43A.03] General note**

This section is based on the recommendation contained in the *Report on Bankruptcy* (May 1995) of the Law Reform Commission of Hong Kong, at pp 130-132. It was felt by the Law Reform Commission of Hong Kong that the provisions of the old s 43 dealing with property acquired by a bankrupt after bankruptcy, were difficult to enforce as it was difficult for the Official Receiver to ascertain the extent of a bankrupt's assets several years after the commencement of bankruptcy, and the old s 43 also unnecessarily burdened the trustee with onerous after-acquired property without his knowledge. Under the old s 43, the trustee had to disclaim onerous after-acquired property of the bankrupt. Accordingly, the new section abolished the automatic vesting of property in the trustee and gives him a discretion to claim the property selectively by serving notice in writing on the bankrupt. In order to bolster the position of the trustee, this section imposes new obligations on the bankrupt, namely, the obligation to prepare an annual report of his earnings and acquisitions for the trustee. Failure to do so would subject the bankrupt to criminal sanction and affect his application for discharge. The section also affords protection to persons who acquired any after-acquired property of the debtor in good faith, for value and without notice of the bankruptcy.

**[43A.04] Subsection (1): The trustee may by notice in writing claim for the bankrupt's estate**

The notice describing the property must be served within 42 days beginning with the day on which it first came to the knowledge of the trustee that the property had been acquired by, or devolved upon the bankrupt: see s 43C(1)(a) below.

If the trustee in bankruptcy takes possession of any after-acquired property without first serving notice on the bankrupt, the trustee is not liable for conversion, if the trustee subsequently serves notice on the bankrupt, for once the notice is given, according to subs (3) it is effective and relates back to the date on which the bankrupt acquired the property: see *Pike (A bankrupt) v Cork Gully* [1997] BPIR 723 (CA).

Although a trustee may not have acquired knowledge of the fact at the time of his appointment, he is deemed to have such knowledge, if his predecessor had such knowledge, or he had knowledge before his appointment as trustee took effect, or he was an Official Receiver, before becoming the trustee: see s 43C(2)(a) and (b) below.

The trustee may however with the leave of the court serve the notice out of time: see s 43C(1) below.

As to the effect of the notice, see subs (3) above.

**[43A.05] Subsection (2): Acquired by, or devolved, upon the bankrupt**

The word 'acquired' covers transactions of a purely passive nature and means little more than property received by the bankrupt: see *Congreve and Congreve v Inland Revenue Commissioners* [1946] 2 All ER 170 at p 183, per Wrottesley J, on appeal it was reversed on other grounds in [1947] 1 All ER 168.

The word 'devolved' (and its associated word 'devolution') means property which passes to the bankrupt from a person dying: see *Halsbury's Laws of England*, Vol 17 (4th Ed Reissue), para 1073.

**[43A.06] Subsection (3): Property shall ... vest in the trustee as part of the bankrupt's estate; and the trustee's title to that property has relation back, etc**

The notice confers upon the trustee an indefeasible title on the relevant after-acquired property, and the trustee cannot later revoke the notice so as to re-vest the property on the bankrupt: see *Hill v Settle* [1917] 1 Ch 319.

The trustee's title will relate back to the date upon which the bankrupt acquired the property except the situations specified in subs (4) above.

**[43A.07] Sub-paragraphs (4)(a) and (b): A person who acquires property in good faith, for value and without notice of the bankruptcy, or a banker enters into a transaction in good faith and without such notice ... or any person whose title to any person derives from that person or banker**

Subsection (4) provides special protection to the above three classes of persons whether they have acquired the property from the bankrupt before or after service of the trustee's notice.

The protection embodies, but in a modified form, the rule in *Cohen v Mitchel* (1890) 25 QBD 262 at p 266 (CA), where Lord Eshers stated that: '... until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of his bankruptcy, are valid against the trustee'.

It should be noted that the above statement is not concerned with the vesting of the property, but as to the powers of the bankrupt and the protection of bona fide purchasers.

There is a distinct difference between the rule under this and the rule in the *Cohen v Mitchel*'s case in that under the former, the first acquirer or banker's notice of the bankruptcy will defeat the protection, but in the latter, notice was not relevant. However, under this subsection in relation to a third party who acquires the property from the first acquirer or the banker, notice is not relevant.

As the statutory protection is derived basically from the rule in the *Cohen v Mitchell*'s case, some of the decisions on the rule may provide helpful guide on its effect on after-acquired property. The following principles seem clear; (i) the property must be strictly after-acquired property: see *Re De Marney* [1943] Ch 126; (ii) save in the case of a person who acquires a derivative title, there must be a dealing with the bankrupt: see *Re Bennett, ex p Official Receiver* [1907] 1 KB 149; and (iii) the person or banker acts in good faith if he acts honestly: see *Re Spratt, ex p Wilde & Ors* (1986) 67 ALR 485. See also [42.05] above, for a general discussion on the expression. The word 'value' appears to mean real and substantial and not merely trivial or colourable: see *Rimar Pty Ltd v Pappas* (1986) CLR 13. The after-acquired property may be real or personal property for subs (1) above uses the phrase 'any property'.

The word 'notice' is not defined in this Ordinance, however it is submitted that it means both actual notice and constructive notice: see *Hope v Meek* (1855) 10 Exch 829; and *Re Dalton, ex p Herrington & Charmichael (A Firm) v The Trustee* [1963] Ch 336; [1962] 2 All ER 499.

The word 'transaction' is also not defined in the Ordinance. According to the third paragraph of s 47 of the now repealed Bankruptcy Act 1914 c 59 of England, the expression includes the receipt of any money, security or negotiable instrument, from, or by the order or direction of, a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction of a bankrupt by his banker. However, it has been held that a charging order granted by the court is not a transaction for value: see *Hosack v Robins (No 2)* [1918] 2 Ch 339, and see also *Financial and Investment Services for Asia Ltd v Baik Wha International Trading Co Ltd* [1985] HKLR 103.

The word 'banker' ('bank') means a company which holds a valid banking licence, see the Banking Ordinance (Cap 155), s 2.

#### [43A.08] Definitions

For 'bankrupt', 'property' and 'trustee', see s 2 above; for 'discharge', see s 30A above; and for "bankrupt's estate", see s 43 above.

### 43B Vesting in trustee of certain items of excess value

#### (1) Where-

- (a) property is excluded by virtue of section 43(2) from the bankrupt's estate; and
- (b) it appears to the trustee that the realisable value of the whole or any part of that property exceeds the cost of a reasonable replacement for that property or that part of it,

the trustee may by notice in writing claim that property or, as the case may be, that part of it for the bankrupt's estate.

#### (2) Upon the service on the bankrupt of a notice under this

section, the property to which the notice relates vests in the trustee as part of the bankrupt's estate; and, except against a purchaser in good faith, for value and without notice of the bankruptcy, the trustee's title to that property has relation back to the commencement of the bankruptcy.

- (3) The trustee shall apply funds comprised in the estate to the purchase by or on behalf of the bankrupt of a reasonable replacement for any property vested in the trustee under this section; and the duty imposed by this subsection has priority over the obligation of the trustee to distribute the estate.
- (4) For the purposes of this section, property is a reasonable replacement for other property if it is reasonably adequate for meeting the needs met by the other property.

(Added 76 of 1996 s 31)

#### [43B.01] Enactment history

This section was added pursuant to s 31 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

#### [43B.02] England

Cf s 308 of the Insolvency Act 1986 c 45 (UK).

#### [43B.03] General note

This section is based on the recommendation contained in the *Report on Bankruptcy* (May 1995) of the Law Reform Commission of Hong Kong, at pp 127 and 132. The report considered that in relation to the domestic property of a bankrupt, the trustee should be given a wide discretion to decide what property the bankrupt and his family should be allowed to retain after having considered their needs and circumstances. In order to complement this discretion of the trustee, this section confers upon the trustee the power to sell any property that has a realisable value which would exceed the cost of replacement by property of a similar nature. For example, an expensive car can be replaced by a cheap car but which would serve the same needs of the bankrupt and his family. The trustee may claim such property by notice in writing served on the bankrupt. There was no such discretion under the pre-amended Ordinance.

#### [43B.04] Subsection (2): notice

As to time limits for notices under this subsection, see s 43C below.

**[43D.02] General note**

This section is based on the recommendation contained in the *Report on Bankruptcy* (May 1995), of the Law Reform Commission of Hong Kong, at p 132. The Law Reform Commission of Hong Kong expressed the view that a bankrupt or the creditors should be allowed to apply to the trustee or the court if they want any specific items of domestic property to be included or excluded from forming part of the bankrupt's estate. It is submitted that if a bankrupt or the creditors want any item to be excluded from the bankrupt's estate, they should bear the burden to establish that the items are unnecessary for the domestic needs of the bankrupt and his family.

**[43D.03] Definitions**

For 'bankrupt', 'court' and 'trustee', see s 2 above; and for 'creditors', see s 3 above.

**43E Income payments orders**

- (1) The court may, on the application of the trustee, make an order (*an income payments order*) claiming for the bankrupt's estate so much of the income of the bankrupt during the period for which the order is in force as may be specified in the order.
- (2) The court shall not make an income payments order the effect of which would be to reduce the income of the bankrupt below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family.
- (3) An income payments order shall, in respect of any payment of income to which it is to apply, either-
  - (a) require the bankrupt to pay the trustee an amount equal to so much of that payment as is claimed by the order; or
  - (b) require the person making the payment to pay so much of it as is so claimed to the trustee, instead of to the bankrupt.
- (4) Where the court makes an income payments order it may, if it thinks fit, discharge or vary any attachment of earnings order that is for the time being in force to secure payments by the bankrupt.
- (5) Sums received by the trustee under an income payments order form part of the bankrupt's estate.
- (6) For the purposes of this section the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to

time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment.

(Added 76 of 1996 s 31)

**[43E.01] Enactment history**

This section was added pursuant to s 31 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

**[43E.02] England**

Cf s 310 of the Insolvency Act 1986 c 45 (UK).

**[43E.03] General note**

This section replaces with modifications the rather complicated s 56 of the present Ordinance. Section 56 below was repealed by s 39 of the Bankruptcy (Amendment) Ordinance 1996. Under this new section, the trustee may apply to the court to make an 'income payments order' against the bankrupt. It should be constantly remembered that the basic objective of the Bankruptcy Ordinance is that, in the absence of misconduct on the part of the bankrupt, he should be a free man again, able to earn his livelihood and having the ordinary inducement: see *Re Gaskell* [1904] 2 KB 478 at p 482, per Vaughan Williams J and see also *Re Hui Hing Kwok* [1999] 3 HKC 683; 687 per Le Pichon J (as she then was). Thus, this section should be cautiously applied so as to avoid it being used as a process of execution. The payments will form part of the bankrupt's estate. It appears that the order will not automatically cease on the discharge of the bankrupt for this section is silent on this matter. Note that s 310(6) of the English Insolvency Act 1986 c 45 (UK), which is identical to this section, expressly provides that the order automatically ceases on the discharge of the bankrupt unless the court orders it to continue or replaced it with another 'income payments order' as a condition of a bankrupt's discharge.

**[43E.04] Subsection (1): The application of the trustee**

As to the rule governing the application of trustee for income payments order, see the Bankruptcy Rules, r 128 in the Appendix below. As to the rule governing the action to be taken after the making of the order, see the Bankruptcy Rules, r 128A in the Appendix below. As to the rule governing the application of the trustee for a variation of any income payments order, see the Bankruptcy Rules, r 128B in the Appendix below. As to the rule governing the administration of income payments, see the Bankruptcy Rules, r 128C in the Appendix below. As to the rule governing the application for review of the income payment order, see the Bankruptcy Rules, r 128D in the Appendix below.

**[43E.05] Subsection (1): Income of the bankrupt**

The word 'income' is a large word that denotes a person's receipt: see *Jones v Ogle* 42 LJ Ch 336. The word has been widely defined by the Ordinance to include every payment in the nature of income which is from time to time made to him or to which from time to time he becomes entitled, including any payment in respect of the carrying on business or in respect of any office or employment: see subs (6) above. As it is not an exhaustive definition some helpful guide can be obtained from the Inland Revenue Ordinance (Cap 112), s 9(1), which defines income from any office or employment.

**[43E.06] Subsection (2): The court shall not make an income payments order etc**

Under this subsection, the court will not make an income payments order if the order will reduce the income of the bankrupt below the reasonable domestic needs of the bankrupt and his family.

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* (unreported, HCB 3486/2002, 30 September 2004), 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* (above).

**[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, ie '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)

**[43F.01] Enactment history**

This section was added pursuant to s 31 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

**[43F.02] General note**

When the bankrupt's family home passes to the trustee, he is entitled to evict them and sell the home. However, to avoid any personal hardship to the bankrupt and particularly to his family, this section has been enacted to provide the bankrupt's family a temporary reprieve. The section is based on the recommendation contained in the *Report on Bankruptcy* (May 1995) of the Law Reform Commission of Hong Kong, at p 132. The first period of reprieve is 6 months. When the bankrupt makes an application for an extension of a further 6 months, the onus lies on the bankrupt to establish that there are exceptional circumstances which outweighs the interests of the creditors. It has been suggested that in deciding whether or not to grant the extension, the court may take into consideration the following factors: (i) the welfare of the bankrupt's children; (ii) alternative accommodation; (iii) the amount to be realised from the sale of bankrupt's interest in the family home; (iv) the need for the family to remain in a specific area; (v) hardship caused to an individual creditor by a postponement; and (vi) whether the relevant members of a bankrupt's family would be able to remain in occupation of the property despite the realization of the bankrupt's property: see the *Report on Bankruptcy* (May 1995) of the Law Reform Commission of Hong Kong, para 13.43, at p 129.

**[43F.03] Subsection (1): Notwithstanding anything in this Ordinance**

On the plain wordings of s 43F, it is unclear whether the rights of the secured creditors would be affected. Further, as the section starts with 'Notwithstanding anything in this Ordinance', it appears that the section may override other provisions of the Ordinance, in particular s 12 which deals with the effect of bankruptcy order and reads as follows:

- (1) On the making of a bankruptcy order the Official Receiver shall be thereby constituted receiver of the property of the bankrupt, and thereafter, except as directed by this Ordinance, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, nor shall proceed with or commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.
- (2) This section shall not affect the power of any secured creditor to realise or otherwise deal with his security.

In *Nanyang Commercial Bank Ltd v Lam Man Ki & Anor* [2003] 2 HKLRD 432, the court held that, the opening phrase 'Notwithstanding anything in this Ordinance' only intends to override the rights of the trustee in bankruptcy to take immediate possession of the family home under other parts of the Ordinance. This interpretation is in accordance with the recommendations of the Cork and the Harmer Reports, which only recommended protecting the rights of the bankrupt and his dependants to the family home against the rights of the trustee in bankruptcy. The Law Reform Report did not suggest expanding such protection to override the rights of the secured creditors.

In coming to the above conclusion, the court in *Nanyang Commercial Bank Ltd v Lam Man Ki & Anor* considered the wordings of s 43(5) of this Ordinance which was also added to the Ordinance at the same time with s 43F. In order to obtain the protection under s 43F, apart from proving that he normally resides in the premises, the bankrupt has to prove that the premises are comprised as part of his estate. Therefore, it is appropriate for the court to consider s 43 of this Ordinance which defines the bankrupt's estate.

Section 43(1) provides:

Subject to this and sections 43A to 43E, a bankrupt's estate comprises --

- (a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy; and
- (b) any property which by virtue of any of the provisions of this Ordinance is comprised in that estate or is treated as falling within paragraph (a).

The section goes on to provide for properties which are excepted from the estate. Section 43(5) then provides:

For the purposes of any provision in this Ordinance, property comprised in a bankrupt's estate is so comprised subject to the rights of any person other than the bankrupt (whether as a secured creditor of the bankrupt or otherwise) in relation thereto ...

Although under s 43(1), the family home of the debtor would still be comprised in the bankrupt's estate, by virtue of subs (5), it will be subject to the rights of a secured creditor. It is not the practice of the Official Receiver to take possession of any mortgaged property which is subject to the prior interest of a secured creditor especially in falling market unless the secured creditor agrees to surrender possession voluntarily.

The court then concluded that s 43(5) clearly provides to preserve the interest of the secured creditors over the bankrupt's property. When reading ss 43(5) and 43F together, the court had little doubt in concluding that it is not the intent of the legislature to take away the rights of the secured creditors to the mortgaged property by means of the provision of s 43F. At least, the wordings of s 43F are not as clear and express to do so.

#### [43F.04] Subsection (1): Normally resides in premises

In order to give effect to the object of this section, it is submitted that the word 'premises' must mean a 'family home' as stated in the marginal note to this section. See also the discussion on 'family home' in the *Report on Bankruptcy* (May 1995), of the Law Reform Commission of Hong Kong, at pp 128-129.

The word 'home' cannot be precisely defined. It has been described as somewhat of a nebulous concept, incapable of precise definition: see *Herbert v Bryne* [1964] 1 All ER 882 at p 887 (CA), per Salmon LJ. However, the following basic essentials of a 'home' can be discerned from authorities: (i) there must be a substantial degree of regular occupation: see *Herbert v Bryne* (above) at p 887; (ii) where there is a degree of regular occupation the bankrupt can have two homes: see *Re Estlin, Prichard v Thomas* (1903) 72 LJ 687, *Re Y (minors)* [1985] 3 All ER 33; (iii) a place where an individual ordinarily eats in the morning and at night, and where he usually sleeps: see *Todd v Nicoll* [1957] SASR 72; and (iv) occupation of a place as a convenience for occasional visits would not amount to occupation as a home: see *Beck v Scholz* [1953] 1 All ER 814.

It is submitted that the word 'normally' has to be given its ordinary meaning in this and it refers to something which is in contradistinction to abnormal or exceptional use of the premises: see *Peak Trailer & Chassis* [1967] 1 All ER 172 at p 176, per Widgery J. Indeed the use of the word 'normally' appears to reinforce the earlier submission that the word 'premises' means 'home' as the ordinary meaning of 'normally' is consistent with the basic elements of 'home'.

The word 'resides' bears a different meaning when use in different contexts. In view of the objective of this section, it is submitted that it means the place where the bankrupt and his family normally eat, drink and sleep. For general discussion of the word, see *Words and Phrases* (3rd Ed, 1989) Vol 2 at p 75.

#### [43F.05] Definitions

For 'bankrupt', see s 2 above.

### 44 Provisions as to second bankruptcy

- (1) Where a second or subsequent bankruptcy order is made against a bankrupt, or where an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceedings consequent upon any such order the trustee in the last preceding

bankruptcy shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable against the property of the bankrupt in that bankruptcy. (Amended 76 of 1996 s 73)

- (2) In the event of a second or subsequent bankruptcy order being made against a bankrupt, or in the event of an order being made for the administration in bankruptcy of the estate of a deceased bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall subject to any disposition thereof made by the Official Receiver or trustee in that bankruptcy, without knowledge of the presentation of the subsequent petition, and subject to the provisions of section 52, vest in the trustee in the subsequent bankruptcy or administration in bankruptcy as the case may be. (Amended 76 of 1996 ss 32 and 73)
- (3) Where the trustee in any bankruptcy receives notice of a subsequent petition in bankruptcy against the bankrupt or after his decease of a petition for the administration of his estate in bankruptcy, the trustee shall hold any property then in his possession which has been acquired by the bankrupt since he was adjudged bankrupt until the subsequent petition has been disposed of, and if on the subsequent petition an order of adjudication or an order for the administration of the estate in bankruptcy is made, he shall transfer all such property or the proceeds thereof (after deducting his costs and expenses) to the trustee in the subsequent bankruptcy or administration in bankruptcy, as the case may be.

[cf. 1926 c 7 s 3 U.K.]

#### [44.01] Enactment history

Subsection (1) was amended pursuant to s 73 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

Subsection (2) was amended pursuant to ss 32 and 73 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

#### [44.02] England

Cf s 39 of the now repealed Bankruptcy Act 1914 c 59 (UK) and s 3 of the Bankruptcy (Amendment) Act 1926 c 7 (UK).

**[44.03] General note**

In England the original s 39 of the now repealed Bankruptcy Act 1914 c 59 (UK) was substituted by s 3 of the Bankruptcy (Amendment) Act 1926 c 7 (UK). The cases decided under the old s 39 of the Bankruptcy Act 1914 are generally still relevant for the purpose of the present s 39 of that Act (equivalent of the above s 44): see *Williams and Muir Hunter on Bankruptcy* (19th Ed), at p 313.

The present s 39 of the Bankruptcy Act 1914 c 59 was enacted on the recommendations of the *Bladgen Committee* (Cmnd 221/1957), which commented that it was inequitable that the assets available for distribution in the second bankruptcy should be given to creditors of the first bankruptcy, when the assets were usually proceeds of credit given by the bankrupt's subsequent creditors who have successfully proved in the second bankruptcy. Thus, under the present s 39 of the Bankruptcy Act 1914 (equivalent of s 44 above) although the trustee of the first bankruptcy can prove the unsatisfied balance debts in the second bankruptcy, he cannot claim any payments from the estate of the second bankruptcy before all the debts and interest of the second bankruptcy have been fully satisfied and there is a surplus.

When a petition for a second adjudication is made and the first trustee has notice of it, he must not distribute or dispose of any of the assets which will form part of the second bankruptcy estate in the event of a second adjudication: see subs (3) above. Such assets will vest in the second trustee upon his appointment.

Where properties are acquired after the first bankruptcy, they must be treated as assets in the first bankruptcy and cannot go to the benefit of the creditors in the second bankruptcy until the creditors in the first bankruptcy have been paid in full or until the bankrupt has obtained a discharge in the first bankruptcy: see *Re Othman Bin Abu Bakar, ex p Official Assignee* [1954] MLJ 75. The undistributed or undisposed property will vest in the trustee of the second bankruptcy: see subs (2) above.

Section 44 above, applies only to undischarged bankrupts who again are made bankrupt in Hong Kong. Where a bankrupt is adjudicated in Hong Kong, and while remaining undischarged, he is adjudicated bankrupt in another jurisdiction, the section does not apply: see *Re Temple* [1947] Ch 345; [1947] 1 All ER 592; followed in *Re Othman Bin Abu Bakar, ex p Official Assignee* [1954] MLJ 75.

**[44.04] Subsection (1): The trustee in the last preceding bankruptcy shall be deemed to be a creditor**

The creditors in the first bankruptcy cannot prove in the second bankruptcy, it is the trustee of the first bankruptcy who is the proper person to prove in the second bankruptcy. His proof must be confined to the debts actually proved in the first bankruptcy, but his proof can be amended if further debts are admitted by him in the first bankruptcy: see *Re Coombes, ex p Official Receiver v Trustee* (1935) TLR 258.

**[44.05] Subsection (1): Debts provable**

The words 'debts provable' means debt properly provable: see *Re Coombes, ex p Official Receiver v Trustee* (1935) 51 TLR 258.

**[44.06] Subsection (2): Order for administration**

As to the order for the administration of a deceased bankrupt, see s 112 below.

**[44.07] Definitions**

For 'Official Receiver', 'trustee' and 'property', see s 2 above; and for 'bankruptcy order', see s 3(1) above.

**45 Restriction of rights of creditor under execution or attachment**

Effect of bankruptcy on antecedent and other transactions

- (1) Where a creditor has issued execution against the property of a bankrupt or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee of the bankrupt unless he had completed the execution or attachment before the date of the bankruptcy order and before notice of the presentation of any bankruptcy petition by or against the bankrupt. (Amended 76 of 1996 ss 33 and 73; 18 of 2005 s 13)
- (2) For the purposes of this Ordinance-
  - (a) an execution against goods is completed by seizure and sale or by the making of a charging order under section 20 of the High Court Ordinance (Cap 4); (Amended 25 of 1998 s 2)
  - (b) an attachment of a debt is completed by the receipt of the debt; and
  - (c) an execution against land is completed by seizure, by the appointment of a receiver, or by the making of a charging order under the said section 20. (Replaced 52 of 1987 s 44)
- (3) (Repealed 76 of 1996 s 33)
- (4) The rights conferred by this section on the trustee in relation to executions against the property of the bankrupt and attachment of debts due to the bankrupt may be set aside by the court in favour of the creditor to such extent and subject

to such terms as the court may think fit. (Added 47 of 1984 s 6. Amended 76 of 1996 s 33)

[cf. 1914 c 59 s 40 U.K.]

### [45.01] Enactment history

Subsections (1) and (4) were amended pursuant to s 33 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

Subsection (1) was further amended pursuant to s 13 of the Bankruptcy (Amendment) Ordinance 2005 (No 18 of 2005).

Sub-paragraph (2)(a) was amended pursuant to s 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance 1998 (No 25 of 1998).

Sub-paragraph (2)(c) was amended pursuant to s 44 of Ordinance No 52 of 1987.

Subsection (3) was repealed pursuant to s 33 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

Subsection (4) was added pursuant to s 6 of the Bankruptcy (Amendment) Ordinance 1984 (No 47 of 1984). Subsection (4) was subsequently amended pursuant to s 33 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

### [45.02] England

Cf s 40 of the now repealed Bankruptcy Act 1914 c 59 (UK).

### [45.03] General note

According to subs (1), if the specified execution and attachment have been issued by a creditor, but has yet to be completed by him, the goods seized or moneys attached will pass to the trustee in bankruptcy. The onus of proving that an execution or attachment has been completed, rests on the execution or attachment creditor: see *Pearson v Moore Brothers* [1894] 2 QB 690, *Re Mantanle, ex p Schulte* (1874) 9 Ch 409; and *Re Joy, ex p Cartwright* (1881) 44 LT 883 (CA).

### [45.04] Subsection (1): A creditor ... shall not be entitled to retain the benefit of the execution or attachment ... unless he had completed the execution or attachment, etc

It has been held that the words 'benefit of an execution' did not mean the fruits or proceeds received by the creditor, prior to the date and notices specified in the section, in consequences of the execution; they referred only to the charge on a bankrupt's goods which the creditor obtained under the execution; and this would be so, whether the bailiff had withdrawn absolutely or conditionally: see *Re Andrew, ex p The Official Receiver (Trustee)* [1937] Ch 122. Consequently, the

execution creditor is entitled to keep the moneys paid through the bailiff or directly to him against the trustee in bankruptcy.

In respect of attachment of debts, it was held that the words included the right to take the necessary steps to complete the execution and any moneys received after the specified date and notices were moneys received pursuant to the right: see *Re Caribbean Products (Yam Importers) Ltd; Tickler v Swains Packaging Ltd* [1966] Ch 331; [1966] 1 All ER 181 (CA). Note that this case overruled the contrary view expressed in the case of *Re Rainbow Tours Ltd* [1964] Ch 66; [1963] 2 All ER 820.

The meaning of the phrase 'completed the execution or attachment' is defined in sub-para (2)(b)(c). An execution against goods is completed by seizure and sale or by the making of a charging order under the High Court Ordinance (Cap 4) s 20 (note that the High Court was formerly known as the 'Supreme Court'): see sub-para (2)(a) above. Execution was held to have been completed when a third party obtained an interpleader order on the bankrupt's goods but defaulted in giving security and the bailiff sold and paid the proceeds into court: see *Heathcote v Livesley* (1887) 19 QBD 285. Payment by the debtor to the bailiff of the full or part amount of the debt to avoid sale does not amount to completion of the execution: see *Re Fairley* [1922] 2 Ch 792; and *Re Andrew ex p Official Receiver (Trustee)* [1937] Ch 122. It should be noted that such payment may be caught by s 46(2) below.

An attachment of a debt is completed by the receipt of the debt: see sub-para (2)(b). Thus, it seems that the word 'receipt of the debt' means 'payment or its commercial equivalent, such as cash, a postal or money order, an accord and satisfaction, or possibly a cheque payable forthwith, but not the giving of security, an attornment as debtor to the creditor, or even the stepping by the creditor into the bankrupt's shoes by means of a garnishee order absolute': see *Williams and Muir on Bankruptcy* (19th Ed) at p 324.

Thus, in so far as garnishee orders are concerned, the test is, not whether there has or has not been a garnishee order absolute, but whether the garnishee proceedings has resulted in actual payment before the making of the bankruptcy order: see *George v Thompson's Trustee* [1949] Ch 322; [1949] 1 All ER 554, followed the cases of *Re Lupkovic* [1954] 1 WLR 1234, and *Re Low Nai Bros & Co, ex p Official Assignee v Guthrie & Co (M) Ltd & Ors* [1970] MLJ 238. In the *George v Thompson's Trustee's case* (above), the judgment creditor obtained a garnishee order and the money was paid into court, but the money owing to the court's lack of funds was not paid to the creditor until after the adjudication of the bankrupt, it was held that as the debtor had not 'received' the money prior to the date, there was no completion and the money passed to the trustee in bankruptcy. Thus, if a garnishee order nisi is made but before the order is made absolute, a bankruptcy order is made or the garnishor receives notice of presentation of a bankruptcy petition, any money received by the garnishor after the order is made absolute must be handed to the trustee in bankruptcy.

In relation to execution against land, it is completed by seizure, by the appointment of a receiver, or by the making of a charging order under the High Court Ordinance (Cap 4) s 20: see sub-para (2)(c) above. A charging order is only completed when it is made absolute and the order relates back to the date of the making of the order nisi: see *Burston Finance Ltd v Godfrey* [1976] 1 QLR 719; [1976] 2 All

ER 976 (CA); and followed in the Hong Kong case of *Dah Sing Bank Ltd v Daylight Industrial Co Ltd & Anor* [1987] 3 HKC 25, on appeal in [1987] 3 HKC 29, the Court of Appeal upheld the decision of the Court of First Instance, but by another approach, without commenting on correctness of the relation back principle. It should be noted that although the House of Lords decision of *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1983] 1 All ER 564 (HL), appears to doubt the case of *Burston Finance Ltd v Godfrey* (above), the Court of First Instance in the *Dah Sing Bank Ltd's* case thought that the House of Lords had not in any way undermined the relation back principle. In the *Roberts Petroleum's* case, the House of Lords held that the court will not make a charging order absolute if in between an order nisi and a further consideration, the execution creditor had notice of the presentation of the petition or the debtor is adjudicated bankrupt. The Court of First Instance in the *Dah Sing Bank Ltd's* case thought that this was not relevant if the charging order had already been made absolute and no appeal is made against the order. It thus seems that the validity of the principle of relation back remains an open issue in Hong Kong. See also *Oldham, Li & Nie, Solicitors v Wong Lin Chooi* [2006] HKCU 245 (unreported, DCC) 5076/2004, 13 February 2006).

As to the 'date of bankruptcy of the bankruptcy order', see [12.03] above.

#### [45.05] Notice of the presentation of any bankruptcy petition

The word 'notice' has not been judicially defined in the context of this section. However, it is submitted that the word appears to mean actual and constructive notice: see the Malaysian case of *Re Kong Mun Cheong & Anor* [1975] MLJ 224 at p 227, per Abdul Hamid J (although this case was concerned with the phrase 'notice of acts of bankruptcy'). But see however the Malaysian case of *Re Low Nai Bros & Co, ex p Official Assignee v Guthrie & Co (M) Ltd & Ors* [1999] MLJ 238, which seems to suggest that 'notice of presentation of petition' means actual notice.

#### [45.06] Subsection (4): The rights conferred by this section ... may be set aside by the court

This section gives the court the discretion to set aside the trustee's right against the bankrupt's property. The court will only exercise its discretion, under this section if the creditor was unfairly kept out of his money, or he had been unfairly delayed and deprived of his rights: see *Re Grosvenor Metal Co Ltd* [1950] Ch 63; *Tickler v Swains Packaging Ltd* [1966] 1 All ER 181 (CA). Note that although these cases were concerned with s 325 of the now repealed Companies Act 1948 c 38 (UK), it is submitted that these principles would also apply to individual bankruptcy. It has been noted that the discretion is sparingly exercised by the courts in England: see Ian F Fletcher, *The Law of Insolvency* (3rd Ed, Sweet & Maxwell, 2002) at p 256, para 8-105.

#### [45.07] Definitions

For 'court' and 'trustee', see s 2 above; and for 'bankruptcy petition', see s 5 above; and for 'execution', see s 14(1) above.

#### 46 Duties of bailiff as to goods taken in execution

- (1) Where any movable property or negotiable instruments or money of a debtor are taken in execution, and before the receipt or recovery by the judgment creditor of the full amount of the levy, notice is served on the bailiff that a bankruptcy order has been made against the debtor, the bailiff shall on request deliver the movable property, negotiable instruments or money, or any money received in satisfaction or part satisfaction of the execution, to the trustee, but the costs of the execution shall be a first charge on the property so delivered and the trustee may sell the movable property or negotiable instruments, or an adequate part thereof, or apply the money, for the purpose of satisfying the charge. (Amended 76 of 1996 s 73)

Where, under an execution in respect of a judgment for a sum exceeding \$ 100, the property of a debtor is sold or money is paid in order to avoid sale, the bailiff shall deduct his costs of the execution from the proceeds of sale or the money paid and pay the balance into court, and if within 14 clear days of such sale or payment as aforesaid a bankruptcy petition is presented by or against the debtor, the said balance shall remain in court and if the debtor is adjudged bankrupt the balance shall be paid out to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise it shall be dealt with as if no bankruptcy petition had been presented.

- (3) The rights conferred by this section on the trustee in relation to executions against any movable property or negotiable instruments or money of the debtor may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit. (Added 47 of 1984 s 7)

(Amended 18 of 2005 s 14)

[cf. 1914 c 59 s 41(1) U.K.]

**[46.01] Enactment history**

Subsection (1) was amended pursuant to s 73 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1998.

Subsection (3) was added pursuant to s 7 of the Bankruptcy (Amendment) Ordinance 1984 (No 47 of 1984).

Subsections (1) and (3) were further amended pursuant to s 14 of the Bankruptcy (Amendment) Ordinance 2005 (No 18 of 2005).

**[46.02] England**

Cf s 41 of the now repealed Bankruptcy Act 1914 c 59 (UK).

**[46.03] General note**

This section has to be considered with s 45 above. This section imposes certain duties on the bailiff when a bankruptcy order is made against the debtor. Subsection (1) is concerned with the situation, where notice is served on the bailiff of the bankruptcy order before the property is sold. Subsection (2) directs the bailiff as to the application of the money received when the property is sold, or money paid in order to avoid a sale. For illustrations of the operation of subs (2), see *Re Pollock* (1902) 87 LT 238; and *Re Godwin* [1935] Ch 213.

**[46.04] Subsection (1): Any movable property or negotiable instruments**

The words 'movable property' mean property of every description except immovable property: see the Interpretation and General Clauses Ordinance (Cap 1) s 3. See also s 3 of that Ordinance for the definition of 'immovable property'.

The words 'negotiable instruments' are neither defined in the present Ordinance nor in the Bills of Exchange Ordinance (Cap 19). In *Crouch v Credit Foncier* (1873) LR 8 QB 374 at p 381, Blackburn J described the meaning of these words as follows: 'It may, therefore, be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a "negotiable instrument" and the property in it passes to a bona fide transferee for value ...'. Examples of 'negotiable instruments' are bills of exchange, promissory notes and bills of lading.

**[46.05] Subsection (1): Notice is served on the bailiff**

The notice must be in writing: see the Bankruptcy Rules r 9 in the Appendix below. The word 'bailiff' means a bailiff of the court and any person lawfully authorised to execute the process of the court: see O 1 r 4 of the Rules of the High Court 1988 (formerly known as the Rules of the Supreme Court).

**[46.06] Subsection (1): The bailiff shall on request deliver the movable property ... to the Official Receiver**

If after a bankruptcy order is made, the Official Receiver does not request the delivery of the movable property and the bailiff proceed to sell the movable property, the trustee cannot afterwards impeach the sale: see *Re Greer; Napper v Fanshaw* [1895] 2 Ch 217, and also *Re a Debtor* (2 of 1977) [1979] 1 All ER 870.

**[46.07] Subsection (1): The costs of execution shall be a first charge**

The costs of execution do not include the costs of a bailiff's interpleader summons nor the costs of a creditor's issuing and delivering the writ of seizure: see *Re Rogers* [1911] 1 KB 641; and *Re Woods (Bristol) Ltd* [1931] 2 Ch 320. The Official Receiver or trustee may sell the movable property or negotiable instruments, or an adequate part thereof, or apply the money to satisfy the charge: see *Re Woods (Bristol) Ltd*.

**[46.08] Subsection (2): Judgment for a sum exceeding \$ 100**

The words 'judgment for a sum exceeding \$ 100' mean the amount of the judgment: see *Re Bullen, ex p Liverpool Loan Co* (1872) LR 7 Ch 732.

**[46.09] Subsection (2): If within 14 days of such sale or payment aforesaid**

The period of 14 days is intended to give fair notice of the time within which a petition in bankruptcy must be presented and if 14 days are allowed to pass without the presentation of a petition, the legislature considers that the execution creditor should reap the benefit of his diligence: see *Re Cripps, Ross & Company* (1882) 21 QBD 472 at p 475, per Cave J; and see also *DR Binwani & Co v The Sheriff of Singapore* [1938] MLJ 1.

**[46.10] Subsection (2): Money is paid in order to avoid sale**

The expression 'to avoid sale' does not include 'seizure' and as the wording of this subsection does not include the latter, any payment made by the debtor to avoid seizure can be retained by the creditor: see *Ex parte Re Hassall* (1874) LR 9 Ch 301.

**[46.11] Subsection (3): The rights conferred by this section ... may be set aside by the court**

As to the discretion of the court under this subsection, see [45.06] above.

**[46.12] Definitions**

For 'court', 'Official receiver' and 'trustee', see s 2 above; for 'bankruptcy order', see s 3(1) above; and for 'execution', see s 14(1) above.

**47 (Repealed 76 of 1996 s 34)****[47.01] Enactment history**

This section was repealed pursuant to s 34 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing from 1 April 1998.

**48 Avoidance of general assignments of book debts unless registered**

- (1) Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts or any class thereof and is subsequently adjudicated bankrupt, the assignment shall be void against the trustee as regards any book debts which have not been paid before the date of the bankruptcy order, unless the assignment has been registered with the Registrar in a register to be kept by him for that purpose: (Amended 76 of 1996 s 35)

Provided that nothing in this section shall have effect so as to render void any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made bona fide and for value, or in any assignment of assets for the benefit of creditors generally.

- (2) For the purposes of this section, **assignment** (轉讓) includes assignment by way of security and other charges on book debts.

[cf. 1914 c 59 s 43 U.K.]

**[48.01] Enactment history**

Subsection (1) was amended pursuant to s 35 of the Bankruptcy (Amendment) Ordinance 1996 (No 76 of 1996), commencing 1 April 1996.

**[48.02] England**

Cf s 43 of the now repealed Bankruptcy Act 1914 c 59 (UK).

**[48.03] General note**

Under subs (1) above, where a person makes a general assignment of his book debts and subsequently becomes bankrupt, the assignment is unenforceable against the trustee in bankruptcy unless the assignment is registered with the High Court. The policy behind this subsection is that a purely general assignment of book debts may make it impossible or difficult for an accounting exercise to see whether the transaction is in any way impugnable, such as the assignment was given at undervalue, or given for a loan at extortionate rates, or given at extortionate costs: see *Hill v Alex Lawrie Factors* [2000] BPIR 1038; 1042, per Jacob J.

However, under the proviso of this subsection, registration is not required in respect of certain specific assignments. Thus, although a general assignment of book debts given by a bankrupt is void against the trustee for default in registration, a pre-bankruptcy specific assignment of the book debts is valid: see *Hill v Alex Lawrie Factors* (above).

It was argued in *Hallmark Cards Incorporated v Yun Choy Ltd (In Compulsory Liquidation) & Another* [2011] HKCU 1180 (unreported, HCMP 1330/2009, 16 June 2011) that whether s 264 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) may incorporate this section into the winding up of a company.

Section 264 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) provides: 'In the winding up of an insolvent company the same rule shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.'

It was argued that s 48 falls within the ambit of s 264 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) as s 48(1) concerns the respective rights of secured and unsecured creditors.

However, the court referred to *Re Count D'Epineuil* (1881) 20 Ch D 217 at 219 where Fry J considered s 10 of the Judicature Act, 1875, which was the forerunner of s 264. The learned judge said: '... the section is not intended to enlarge the assets to be administered, but only to vary the rights of the persons entitled to the estate.' The court then concluded that s 48 of the Bankruptcy Ordinance is not within the scope of s 264 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) as it is not the purpose of s 264 to enlarge the pool of assets available to the unsecured creditors.

**[BR(r) 47.02] England**

Cf r 6.4 of the English Insolvency Rules 1986 (SI 1986/1925).

**[BR(r) 47.03] General note**

Cf s 6A(2)(c) of the present Ordinance.

Under this rule, the debtor must within 18 days of service of the statutory demand apply to the court to set aside the demand. The application must in Form 161 of the Bankruptcy (Forms) Rules (see below) and supported by an affidavit, containing the information specified in sub-r (4)(a)(b) above. The 3 weeks period specified in s 6A(1)(a) of the present Ordinance, during which the debtor has to comply with the statutory demand ceases to run upon the filing of the application to set aside the statutory demand.

**48 Hearing of application to set aside**

- (1) On receipt of an application under rule 47, the court may, if satisfied that no sufficient cause is shown for it, dismiss it without giving notice to the creditor.
- (2) Starting with the date on which the application is dismissed, the time limited for compliance with the statutory demand runs again.
- (3) If the application is not dismissed under subrule (1), the court shall fix the date, time and place for it to be heard, and shall give at least 7 days' notice thereof to- (L.N. 150 of 2014)
  - (a) the debtor or, if the debtor's application was made by a solicitor acting for him, the solicitor;
  - (b) the creditor; and
  - (c) whoever is named in the statutory demand as the person with whom the debtor may enter into communication with reference to the demand (or, if more than one person is so named, the first of them).
- (4) On the hearing of the application, the court shall consider the evidence then available to it, and may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.
- (5) The court may grant the application if-
  - (a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;

- (b) the debt is disputed on grounds which appear to the court to be substantial;
  - (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either rule 44(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
  - (d) the court is satisfied, on other grounds, that the demand ought to be set aside.
- (6) Where the creditor holds some security in respect of his debt, and rule 44(5) is complied with in respect of it but the court is satisfied that the security is under-valued in the statutory demand, the creditor may be required to amend the demand accordingly (but without prejudice to his right to present a bankruptcy petition by reference to the original demand).
  - (7) If the court dismisses the application, it shall make an order authorizing the creditor to present a bankruptcy petition either forthwith, or on or after a date specified in the order.
  - (8) A copy of the order shall be sent by the applicant forthwith to the creditor.

(L.N. 77 of 1998)

**[BR(r) 48.01] Enactment history**

This rule was substituted pursuant to r 15 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

Subsequently, this section was amended pursuant to Legislation Publication (Revision) Order 2014 (LN 150 of 2014), whereby the word 'paragraph' was replaced by 'subrule'.

**[BR(r) 48.02] England**

Cf r 6.5 of the English Insolvency Rules 1986 (SI 1986/1925).

**[BR(r) 48.03] General note**

Cf s 6A(2)(c) of the present Ordinance.

This rule sets out the procedure for the hearing of the application to set aside a statutory demand. If the court dismisses the application, the 3 weeks period for compliance with the demand by the debtor begins to run again and the court will must make an order authorizing the creditor to present the bankruptcy petition forthwith or on or after a date specified in the order. It appears that when calculating the revived 3 weeks period, any period which has elapsed after service of the

statutory demand has to be included for the provisions of s 6A(1)(a) and (2)(b) of the present Ordinance do not provide for a fresh period.

The grounds upon which the court may dismiss the statutory demand under sub-r (5) is aimed to ensure fairness to the debtor.

The circumstances which normally will be required before a court can set aside a statutory demand under sub-r (5)(d) are circumstances which would make it unjust for the statutory demand to give rise to those consequences in a particular case: see *Re a Debtor (1 of 1987)* [1989] 1 WLR 271 at p 276 (CA), per Nicholls LJ. Thus, it has been held that although a dispute as to liability to pay part only of a debt did not enable the debtor to have the whole demand set aside under sub-r (5)(b), the court had a residual discretion under sub-r (5)(d) to deal with a situation in which the undisputed part of the debt was less than the bankruptcy level which was to be properly exercised if the consequence would otherwise be to allow the presentation of A bankruptcy petition that was bound to fail: see *Re a Debtor (49 and 50 of 1992)* [1994] 3 WLR 847.

However, the fact that the amount of money still outstanding had been calculated incorrectly but within the bankruptcy level, is not a ground for the court to exercise the residual discretion under sub-r (5)(d): see *Re a Debtor (1 of 1987)* [1989] 1 WLR 271 (CA).

Mutuality between the same parties and in the same interest was required for the purpose of rule 48(5)(a) irrespective of the fact that the debtor appeared to have a counterclaim or cross demand rather than a set-off: *Wong Wai Lin Lana v Heung Wah Wing & Ors* [2001] 3 HKC 649. For a case on the issue of set off, please see *Sy Chin Mong Stephen v Xian Karkiu Electric Power Ltd Co* [2009] 6 HKC

#### 49 Proof of service of statutory demand

- (1) Where under section 6A of the Ordinance the petition must have been preceded by a statutory demand, there must be filed in court, with the petition, an affidavit proving service of the demand.
- (2) Every affidavit must have exhibited to it a copy of the demand as served.
- (3) Subject to subrule (4), if the statutory demand has been served personally on the debtor, the affidavit must be made by the person who effected that service. (L.N. 150 of 2014)
- (4) If service of the statutory demand (however effected) has been acknowledged in writing either by the debtor himself, or by some person stating himself in the acknowledgment to be authorised to accept service on the debtor's behalf, the affidavit must be made either by the creditor or by a person acting on his behalf, and the acknowledgment of service must be exhibited to the affidavit.
- (5) If neither subrule (3) nor (4) applies, the affidavit must be

made by a person having direct personal knowledge of the means adopted for serving the statutory demand, and must- (L.N. 150 of 2014)

- (a) give particulars of the steps which have been taken with a view to serving the demand personally;
  - (b) state the means whereby (those steps having been ineffective) it was sought to bring the demand to the debtor's attention; and
  - (c) specify a date by which, to the best of the knowledge, information and belief of the person making the affidavit, the demand will have come to the debtor's attention.
- (6) The steps of which particulars are given for the purposes of subrule (5)(a) must be such as would have sufficed to justify an order for substituted service of a petition. (L.N. 150 of 2014)
  - (7) If the affidavit specifies a date for the purposes of compliance with subrule (5)(c), then unless the court otherwise orders, that date is deemed for the purposes of these rules to have been the date on which the statutory demand was served on the debtor. (L.N. 150 of 2014)
  - (8) Where the creditor has taken advantage of rule 46(3), the affidavit must be made either by the creditor himself or by a person having direct personal knowledge of the circumstances; and there must be specified in the affidavit-
    - (a) the means of the creditor's knowledge or (as the case may be) belief required for the purposes of that rule; and
    - (b) the date or dates on which, and the newspaper in which, the statutory demand was advertised under that rule, and there shall be exhibited to the affidavit a copy of any advertisement of the demand.
  - (9) The court may decline to file the petition if not satisfied that the creditor has discharged the obligation imposed on him by rule 46(2).

(L.N. 77 of 1998)

#### [BR(r) 49.01] Enactment history

This rule was substituted pursuant to r 15 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

Subsequently, this section was amended pursuant to Legislation Publication (Revision) Order 2014 (LN 150 of 2014), whereby the word 'paragraph' was replaced by 'subrule'.

### [BR(r) 49.02] England

Cf r 6.11 of the English Insolvency Rules 1986 (SI 1986/1925).

### [BR(r) 49.03] General note

Cf ss 6A and 6D of the present Ordinance.

This rule applies when the bankruptcy petition is based on non-compliance with the statutory demand. It requires the petitioner, at the time of presenting a petition, to file an affidavit of service together with the served statutory demand. The information which the affidavit has to contain will vary according to circumstances. For instance, if there was no personal service but substituted service, the affidavit must contain information specified in sub-r (5)(a)(b)(c). However, the Court will not accept assertions of absconding and evasion of service unless there is concrete evidence to support them (*Re To Cho Ping* [2012] 1 HKC 192 (para 36)).

As to the form of the creditor's bankruptcy petition on the debtor's failure to comply with a statutory demand for a liquidated sum payable immediately, see r 50 below.

## Division 2

### Petitions

(L.N. 150 of 2014)

## 50 Description and address of debtor

Cross-heading repealed L.N. 150 of 2014

- (1) Where a petition is presented by a debtor, he shall, besides inserting therein his name, description, Hong Kong Identity Card number or passport number and his address at the date when the petition is presented, further describe himself as lately residing or carrying on business at the address or several addresses, as the case may be, at which he has incurred debts and liabilities which at the date of the petition remain unpaid or unsatisfied. (L.N. 77 of 1998)
- (2) Where a petition is presented against a debtor who resides or carries on business at an address other than the address at which the debtor was residing or carrying on business at the time of contracting the debt or liability in respect of which

the petition is presented, the petitioning creditor, in addition to stating in the petition the description of the debtor as of his then present address and description, shall in the petition describe the debtor as lately residing or carrying on business at the address at which he was residing or carrying on business when the debt or liability was incurred.

- (3) A petitioner who is not the debtor shall state the debtor's Hong Kong Identity Card number or passport number in the petition unless he does not have such information and cannot reasonably obtain it. (L.N. 77 of 1998)

[cf. R 146]

### [BR(r) 50.01] Enactment history

This rule was amended pursuant to r 16 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

### [BR(r) 50.02] England

Cf r 146 of the now repealed English Bankruptcy Rules 1915.

### [BR(r) 50.03] General note

Cf s 9 of the present Ordinance.

As to the statutory form of the debtor's bankruptcy petition, see Form 3 of the Bankruptcy (Forms) Rules (Cap 6B) (see below).

As to the statutory form of the creditor's bankruptcy petition on the debtor's failure to comply with a statutory demand for a liquidated sum payable immediately, see Form 10 of the Bankruptcy (Forms) Rules (see below).

As to the statutory form of the creditor's bankruptcy petition on the debtor's failure to comply with a statutory demand for a liquidated sum payable at a future date, see Form 10A of the Bankruptcy (Forms) Rules (see below).

As to the statutory form for creditor's bankruptcy petition where execution or other process on a judgment has been returned in whole or part, see Form 10B of the Bankruptcy (Forms) Rules (see below).

As to the form for bankruptcy petition for default in connection with voluntary arrangement, see Form 10C of the Bankruptcy (Forms) Rules (see below).

## 51 Attestation

Every bankruptcy petition shall be attested. If it be attested in Hong Kong, the witness must be a solicitor or the Official Receiver or the Registrar. If it be attested out of Hong Kong,

the witness must be a judge or magistrate or a Chinese consular officer or a notary public of the jurisdiction where the attestation takes place.

(L.N. 231 of 1984; L.N. 77 of 1998)  
[cf. R 148]

### [BR(r) 51.01] Enactment history

This rule was amended pursuant to r 17 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

### [BR(r) 51.02] England

Cf r 148 of the now repealed English Bankruptcy Rules 1915.

### [BR(r) 51.03] General note

Cf ss 9 and 10 of the present Ordinance.

As to the relevant bankruptcy petitions, see r 50 above.

There is authority that a defect in attestation can be remedied at the hearing: see *Re a Debtor (3 of 1902)* (1902) 86 LT 688.

## 51A Copies of documents filed in bankruptcy proceedings to be served on Official Receiver

Where a petitioner presents or files at court any document in connection with any bankruptcy proceedings, he or his solicitor shall, within 24 hours of such presentation or filing, serve a copy of the document presented or filed on the Official Receiver

(L.N. 272 of 1977)

## 52 Deposit by petitioner

- (1) Upon the presentation of a petition, the petitioner shall pay to the Official Receiver a deposit of—
  - (a) in the case of a debtor's petition, the sum of \$ 8000; or
  - (b) in the case of a creditor's petition, the sum of \$ 11250. (L.N. 169 of 2013)
- (2) No petition shall be received unless the receipt of the Official Receiver for the deposit payable under subrule (1) is produced to the Registrar. (L.N. 150 of 2014)

- (3) After presenting a petition, the petitioner shall deposit with the Official Receiver such further sum as the court may, on the application of the Official Receiver, from time to time direct.
- (4) The deposit and any further deposit paid shall be applied to cover the fees, charges and percentages prescribed in the Bankruptcy (Fees and Percentages) Order (Cap 6 sub leg C) and payable to the Official Receiver, and costs, charges and expenses incurred or authorised by the Official Receiver, whether acting as trustee or otherwise, including the costs of any person properly employed by him.
- (5) After the deposit and any further deposit have been so applied, the Official Receiver shall—
  - (a) in the case of a debtor's petition where a provisional trustee is appointed under section 12(1A) of the Ordinance—
    - (i) retain any balance of the deposit and further deposit, which shall be applied in accordance with section 37(1) of the Ordinance; and
    - (ii) after complying with subparagraph (i), account for and pay any unexpended balance of the deposit and further deposit to the trustee; or
  - (b) in the case of a debtor's petition other than that referred to in paragraph (a) and in the case of a creditor's petition, account for and pay any unexpended balance of the deposit and further deposit to the trustee. (L.N. 150 of 2014)
- (6) The trustee shall account for any unexpended balance of the deposit and further deposit paid to him under subrule (5)(a)(ii) or (b)— (L.N. 150 of 2014)
  - (a) in the case of a debtor's petition, to the bankrupt's estate; or
  - (b) in the case of a creditor's petition, to that creditor.
- (7) For the purposes of subrule (6)(b), the trustee shall— (L.N. 150 of 2014)
  - (a) pay any unexpended balance of the deposit and further deposit to that creditor; and
  - (b) repay the amount of the deposit and further deposit expended and applied under subrule (4) to that creditor out of the assets of the bankrupt in

accordance with section 37(1) of the Ordinance.  
(L.N. 150 of 2014)

(L.N. 123 of 2007)

### [BR(r) 52.01] Enactment history

This rule was substituted by r 11 of the Bankruptcy (Amendment) Rules 2007 (LN 123 of 2007), commencing 10 December 2007.

Subsequently, this section was amended pursuant to Legislation Publication (Revision) Order 2014 (LN 150 of 2014), whereby the word 'paragraph' was replaced by 'subrule', the word 'paragraphs' was replaced by the word 'subrules', the word 'sub-subparagraph' was replaced by 'subparagraph' and the word 'subparagraph' was replaced by 'paragraph'.

### [BR(r) 52.02] England

Cf r 149 of the now repealed English Bankruptcy Rules 1915.

### [BR(r) 52.03] General note

Cf ss 9 and 10 of the present Ordinance.

## 52A Deposits in respect of voluntary arrangements

- (1) Unless the applicant is also the nominee, where an application is made for an interim order under section 20A of the Ordinance, the applicant or some other person on his behalf shall, at the time of making the application, deposit with the nominee the sum of \$ 12150, and such further sum (if any) as the applicant and nominee may agree to or as the court may from time to time direct, to cover the fees, expenses and remuneration to be incurred by the nominee in connection with the work done by him in respect of the voluntary arrangement.
- (2) This rule applies whether or not the voluntary arrangement is approved by the creditors.

(L.N. 77 of 1998)

### [BR(r) 52A.01] Enactment history

This rule was substituted pursuant to r 19 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

### [BR(r) 52A.02] General note

Cf s 20 of the present Ordinance.

## 53 Registration of petition in Land Registry

When a petition is filed, the Official Receiver may register a memorial of the petition in the Land Registry against any property registered therein in the name of the debtor or in any alias of his or in his t'ong name, or in the name of any t'ong in which he has any share or interest, or in the name of any spouse of the debtor. This provision shall so far as the nature of the case will admit apply in the case of any person carrying on business in a name or style other than his own.

(8 of 1993 s 30; L.N. 77 of 1998; 20 of 2002 s 5)

### [BR(r) 53.01] Enactment history

This rule was amended pursuant to r 20 of Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

This rule was amended pursuant to s 5 of the Land Registration (Amendment) Ordinance (No 20 of 2002), commencing 12 February 2005.

### [BR(r) 53.02] General

As to the meaning and function of "t'ong", see the New Territories Ordinance (Cap 97) s 15.

## 54 Registration of petition in Land Registry against partner

The Official Receiver may in either of the cases mentioned in rule 133 or 135 register a memorial of the petition in the Land Registry against any property registered in the name or names of any partner or partners in the debtor firm or in any alias of his or theirs or in any t'ong name of his or theirs, or in the name of any t'ong in which he or they has or have any share or interest, or in the name of the spouse of any of them.

(8 of 1993 s 30; L.N. 77 of 1998; 20 of 2002 s 5)

### [BR(r) 54.01] Enactment history

This rule was amended pursuant to r 21 of the Bankruptcy (Amendment) Rules 1998 (L.N. 77 of 1998), commencing 1 April 1998.

This rule was amended pursuant to s 5 of the Land Registration (Amendment) Ordinance (No 20 of 2002), commencing 12 February 2005.

## Division 3

## Creditor's Petition

(L.N. 150 of 2014)

**55 Security for costs**

Cross-heading repealed L.N. 150 of 2014

A petitioning creditor who is resident out of the jurisdiction, or whose estate is vested in a trustee under any law relating to bankruptcy, or against whom a petition is pending under the Ordinance, or who has made default in payment of any costs ordered by any court to be paid by him to the debtor, may be ordered to give security for costs to the debtor.

[cf. R 150]

**[BR(r) 55.01] England**

Cf r 150 of the now repealed English Bankruptcy Rules 1915.

**56 Verification**

Every creditor's petition shall be verified by affidavit, and when it is filed there shall be lodged with it one copy to be sealed and issued to the petitioner.

[cf. R 151]

**[BR(r) 56.01] England**

Cf r 151 of the now repealed English Bankruptcy Rules 1915.

**[BR(r) 56.02] General note**

Cf s 9 of the present Ordinance.

As to the form of affidavit, see Forms 11 and 12 of Bankruptcy (Forms) Rules (Cap 6B) (see below).

When a bankruptcy petition is amended under an order of the court, the judge has the discretion in requiring the amendment to be verified by affidavit, and if the alteration is an immaterial one, an affidavit will not be required: see *Re Ritso*, ex p *Ritso* (1883) 22 Ch D 529.

**57 Who to verify**

When the petitioning creditor cannot himself verify all the statements contained in his petition, he shall file in support of the petition the affidavit of some person who can depose to them.

[cf. R 152]

**[BR(r) 57.01] England**

Cf r 152 of the now repealed English Bankruptcy Rules 1915.

**[BR(r) 57.02] General note**

Cf s 9 of the present Ordinance.

**58 Joint petitioners**

Where a petition is presented by 2 or more creditors jointly, it shall not be necessary for each creditor to depose to the truth of all the statements which are within his own knowledge, but it shall be sufficient that each statement in the petition is deposed to by someone within whose knowledge it is.

[cf. R 153]

**[BR(r) 58.01] England**

Cf r 153 of the now repealed English Bankruptcy Rules 1915.

## Division 4

## Service of Creditor's Petition

(L.N. 150 of 2014)

**59 Service**

Cross-heading repealed L.N. 150 of 2014

- (1) Service of a creditor's petition shall be effected by the creditor or his solicitor, or a person in their employment, delivering a sealed copy of the petition to the debtor.
- (2) If the court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the

debtor is evading service of the petition or any other legal process, or for any other cause, it may order substituted service to be effected in such manner as it thinks fit.

- (3) Where an order under subrule (2) has been carried out, the petition shall be deemed to have been duly served on the debtor. (L.N. 150 of 2014)

(L.N. 194 of 1987)

#### [BR(r) 59.01] Enactment history

Subsection (3) was amended pursuant to Legislation Publication (Revision) Order 2014 (LN 150 of 2014), whereby the word 'paragraph' was replaced by 'subrule'.

#### [BR(r) 59.02] General note

As to the form of affidavit of service of petition, see Form 14 of the Bankruptcy (Forms) Rules (Cap 6B) (see below).

According to this rule a creditor's petition must be personally served, but the court may make an order for substituted service if it is satisfied that the debtor is avoiding service, or for some other reason personal service cannot be promptly effected.

As to the court's order for substituted service of a petition, see Form 16 of the Bankruptcy (Forms) Rules (see below).

As the form of notice in newspaper in pursuance of an order for substituted service, see Form 15 of the Bankruptcy (Forms) Rules (see below).

If the court is not satisfied as to the service of the petition because there is a slip in the matter of service, the proper course is to fix a different date for the hearing to allow the petition to be properly served and not to dismiss the petition: see *Re a Debtor* (441 of 1938) [1938] 4 All ER 92 (CA).

#### 60 Death of debtor before service of petition

If a debtor against whom a bankruptcy petition has been filed dies before service thereof, the court may order service to be effected on the personal representatives of the debtor or on the Official Administrator or on such other persons as the court may think fit.

[cf. R 159]

#### [BR(r) 60.01] England

Cf r 159 of the now repealed English Bankruptcy Rules 1915.

#### [BR(r) 60.02] General note

Cf s 9 of the present Ordinance.

### Division 5

#### Interim Trustee

(L.N. 150 of 2014)

#### 61 Form and contents of order

Cross-heading repealed L.N. 150 of 2014

Where an order is made appointing the Official Receiver to be interim trustee of the property of the debtor, such order shall state the nature and, so far as it is known, the locality of the property of which the Official Receiver is ordered to take possession.

(L.N. 123 of 2007)

[cf. R 161]

#### [BR(r) 61.01] Enactment history

This rule was amended pursuant to rr 12 and 13 of the Bankruptcy (Amendment) Rules 2007 (LN 123 of 2007), commencing 10 December 2007.

#### [BR(r) 61.02] England

Cf r 161 of the now repealed English Bankruptcy Rules 1915.

#### [BR(r) 61.03] General note

Cf s 13 of the present Ordinance.

As to the form for application of interim trustee, see Form 13 of Bankruptcy (Forms) Rules (Cap 6B) (see below).

As to the form of order made in pursuant to the application, see second part of Form 13 of Bankruptcy (Forms) Rules (see below).

#### 62 Deposit

Before any such order is made, the person who has made the application therefor shall deposit with the Official Receiver the sum of \$ 3000 towards the prescribed fee for the Official

either dismiss the petition or make a bankruptcy order on such proof of the statements in the petition and of the amount of assets and liabilities as the court thinks sufficient.

(L.N. 77 of 1998)  
[cf. R 170]

### [BR(r) 69.01] Enactment history

This rule was amended pursuant to r 22 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

### [BR(r) 69.02] England

Cf r 170 of the now repealed English Bankruptcy Rules 1915.

### [BR(r) 69.03] General note

Cf s 9 of the present Ordinance.

As to the form of order if the petition is dismissed, see Form 23 of the Bankruptcy (Forms) Rules (Cap 6B) (see below).

As to the form of order if a bankruptcy order is made in pursuance of a debtor's petition, see Form 25 of the Bankruptcy (Forms) Rules (see below).

As to the form of order if a bankruptcy order is made in pursuance of a creditor's petition, see Form 26 of the Bankruptcy (Forms) Rules (see below).

As to whether an affidavit of continuing debt is required before any order may be made on a petition, see *Re Boon Voon King & Ors* [1998] 3 HKC 537 and [9.06] above.

### 70 Hearing of petition

On the hearing of the petition, the amount of assets and liabilities, and in the case of a creditor's petition any matters which the debtor has given notice that he intends to dispute, shall be proved.

[cf. R 171]

### [BR(r) 70.01] England

Cf r 171 of the now repealed English Bankruptcy Rules 1915.

### 71 Non-appearance of creditor

If any creditor neglects to appear on his petition, no subsequent petition against the same debtor or debtors, or any

of them, either alone or jointly with any other person, shall without the leave of the court be presented by the same creditor in respect of the same debt.

(L.N. 77 of 1998)  
[cf. R 172]

### [BR(r) 71.01] Enactment history

This rule was amended pursuant to r 23 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

### [BR(r) 71.02] England

Cf r 172 of the now repealed English Bankruptcy Rules 1915.

### [BR(r) 71.03] General note

It has been held that a petitioning creditor did not 'neglect' to appear after he had formally discontinued the petition, thus he could present a second petition without the leave of the court: see *Re Gentry* [1910] 1 KB 825.

### Application to withdraw petition

No application to withdraw a petition shall be heard except upon proof that notice of the intended application and a copy of the affidavits in support thereof have been duly served upon the Official Receiver not less than 7 days before the day named in the notice for hearing the application.

### [BR(r) 72.01] General note

Cf s 52 of the present Ordinance. As to the effect of failure to comply with the period of 7 days, see r 204 below.

### Division 7

### Bankruptcy Order, etc.

(L.N. 150 of 2014)

### 72A Drawing up and contents of bankruptcy order

Cross-heading repealed L.N. 150 of 2014

- (1) It shall be the duty of the petitioner, or his solicitor, and of all other persons who have appeared on the hearing of the

petition, at latest on the day following the day on which a bankruptcy order is pronounced in court, to leave with the Registrar a draft of the order and all other documents required for the purpose of enabling the Registrar to complete the order forthwith.

- (2) It shall not be necessary for the Registrar to make an appointment to settle an order unless in any particular case the special circumstances make an appointment necessary.
- (3) A bankruptcy order, or an order for the appointment of an interim trustee shall contain at the foot thereof a notice stating that it will be the duty of the petitioner or the debtor to attend on the interim trustee, provisional trustee or trustee, as the case may be, at such time and place as he may appoint and to give him all information he may require. (L.N. 123 of 2007)

(L.N. 272 of 1977; L.N. 77 of 1998)

#### [BR(r) 72A.01] Enactment history

This rule was amended pursuant to r 18 of the Bankruptcy (Amendment) Rules 2007 (LN 123 of 2007), commencing 10 December 2007.

#### [BR(r) 72A.02] General note

Cf s 9 of the present Ordinance.

### 73 Registration of bankruptcy order in Land Registry

Where a bankruptcy order is made, the trustee may register a memorial of such bankruptcy order in the Land Registry against any property registered therein in the name of the debtor or in any alias of his or in his t'ong name, or in the name of any t'ong in which he has any share or interest, or in the name of the spouse of the debtor.

(8 of 1993 s 30; L.N. 77 of 1998; 20 of 2002 s 5;  
L.N. 123 of 2007)

#### [BR(r) 73.01] Enactment history

This rule was amended pursuant to r 19 of the Bankruptcy (Amendment) Rules 2007 (LN 123 of 2007), commencing 10 December 2007.

This rule was amended pursuant to s 5 of the Land Registration (Amendment)

Ordinance (No 20 of 2002), commencing 12 February 2005.

### 74 Registration of bankruptcy order in Land Registry against partner

Where a bankruptcy order is made against a firm, the trustee may register a memorial thereof in the Land Registry against any property registered in the name of any partner or partners in the debtor firm or in any alias of his or theirs or in any t'ong name of his or theirs, or in the name of any t'ong in which he or they has or have any share or interest, or in the name of the spouse of any partner.

(8 of 1993 s 30; L.N. 77 of 1998; 20 of 2002 s 5;  
L.N. 123 of 2007)

#### [BR(r) 74.01] Enactment history

This rule was amended pursuant to r 20 of the Bankruptcy (Amendment) Rules 2007 (LN 123 of 2007), commencing 10 December 2007.

This rule was amended pursuant to s 5 of the Land Registration (Amendment) Ordinance (No 20 of 2002), commencing 12 February 2005.

### 75 Service of bankruptcy order

The trustee shall cause a sealed copy of a bankruptcy order to be served on the debtor.

(G.N.A. 124 of 1955; L.N. 77 of 1998; L.N. 123 of 2007)

#### [BR(r) 75.01] Enactment history

This rule was amended pursuant to r 21 of the Bankruptcy (Amendment) Rules 2007 (LN 123 of 2007), commencing 10 December 2007.

#### [BR(r) 75.02] General note

Cf s 9 of the present Ordinance.

As to the form of bankruptcy order on the debtor's petition, see Form 25 of the Bankruptcy (Forms) Rules (Cap 6B) (see below).

As the form of bankruptcy order on the creditor's petition, see Form 26 of the Bankruptcy (Forms) Rules (see below).

### 76 (Repealed L.N. 77 of 1998)

**[BR(r) 76.01] Enactment history**

Rules 76 and 77 were repealed pursuant to r 28 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

**77 (Repealed L.N. 77 of 1998)****78 Advertisement**

Where a bankruptcy order is made the Official Receiver shall forthwith send notice thereof to the Gazette and to such local newspaper or newspapers as he may think fit.

(L.N. 77 of 1998)  
[cf. R 186]

**[BR(r) 78.01] Enactment history**

This rule was amended pursuant to r 29 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

**[BR(r) 78.02] England**

Cf r 186 of the now repealed English Bankruptcy Rules 1915.

**[BR(r) 78.03] General note**

As to form of notice of bankruptcy order, see Form 27 of the Bankruptcy (Forms) Rules (Cap 6B) (see below).

**79 Costs of petition, etc.**

- (1) Subject to subrules (2), (3) and (4), the costs of all proceedings under the Ordinance down to and including the making of the bankruptcy order shall be borne by the party prosecuting the same. (L.N. 150 of 2014)
- (2) The court may at any time order that the debtor shall pay the whole or any part of the costs.
- (3) Where a bankruptcy order is made on the petition of the debtor while a creditor's petition against him is pending, the court may order that the costs shall be paid out of the estate.
- (4) Where a bankruptcy order is made on a creditor's petition, the costs of the petitioning creditor shall be taxed and paid out of the estate.

(L.N. 39 of 1976; L.N. 77 of 1998)  
[cf. R 187]

**[BR(r) 79.01] Enactment history**

This rule was amended pursuant to r 30 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

Subsection (1) was amended pursuant to Legislation Publication (Revision) Order 2014 (LN 150 of 2014), whereby the word 'paragraphs' was replaced by 'subrules'.

**[BR(r) 79.02] England**

Cf r 187 of the now repealed Bankruptcy Rules 1952.

**[BR(r) 79.03] General note**

It appears that the costs of the petitioning creditor includes all costs of rehearing of the petition by the Registrar and the Court of Appeal: see *Re Bright, ex p Wingfield & Blew* [1903] 1 KB 735. See also s 98 of the present Ordinance, for powers of review and rehearing of orders made by the Registrar and the Court.

**79A Official Receiver's costs where proceeds of estate insufficient**

When the proceeds of the estate are not sufficient for the payment of any costs necessarily incurred by the Official Receiver in excess of the deposit made under rule 52 after the making of the bankruptcy order the court may order such costs to be paid by the party prosecuting the proceedings.

(L.N. 39 of 1976; L.N. 77 of 1998)  
[cf. S.I. 1952/2113 r 181 U.K.]

**[BR(r) 79A.01] Enactment history**

This rule was amended pursuant to r 31 of the Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998), commencing 1 April 1998.

**[BR(r) 79A.02] England**

Cf r 181 of the now repealed English Bankruptcy Rules 1952.

**80 Application to annul bankruptcy order or to stay proceedings thereunder**

- (1) An application to the court to annul a bankruptcy order or to stay proceedings thereunder, made by any person other than the Official Receiver or trustee shall not be heard except upon proof that notice of the intended application and a copy of the affidavits in support thereof have been duly served upon

the Official Receiver or trustee, as the case may be. Notice of any such application shall be served on the Official Receiver or trustee, as the case may be, not less than 7 days before the day named in the notice for hearing the application. Pending the hearing of the application, the court may make an interim order staying such of the proceedings as it thinks fit.

- (1A) Before an application referred to in subrule (1) is heard by the court, the applicant shall, if he considers that notice of annulment should be advertised or gazetted under section 33(5) of the Ordinance in the event the application is successful, deposit with the Official Receiver or trustee the costs thereof, as estimated by the Official Receiver or trustee. (L.N. 77 of 1998; L.N. 150 of 2014)
- (2) In any case in which any such application is made by the Official Receiver or trustee, 4 days' notice thereof and a copy of any report in support thereof shall be served on the bankrupt and the petitioning creditor (if any) and the trustee where he is not the applicant:  
Provided that where such service is found to be impracticable by reason that the bankrupt or the petitioning creditor is out of Hong Kong or cannot be found at his usual or last known address or place of business no objection shall be taken to the application on the ground of such service not having been effected.
- (3) Where an application is made to the court under section 33(1)(b) of the Ordinance to annul a bankruptcy order, the trustee shall and the Official Receiver (where he is not the trustee) may make and file 4 days before the day appointed for hearing the application a report as to the bankrupt's conduct and affairs, including a report as to his conduct during the proceedings, and the court on the hearing of the application shall hear and consider such report and such further evidence as may be adduced by any party, and any objections which may be made by the Official Receiver, or by or on behalf of the trustee (if any) or any creditor whom the court may order to be served with notice of the application or may permit to appear thereon. For the purposes of the application, any report made by the Official Receiver under this subrule shall be prima facie evidence of the statements therein contained. (L.N. 150 of 2014) [cf. R. 188A]

- (3A) Where an order is made annulling a bankruptcy order, the trustee shall, on application by the former bankrupt, issue to him a certificate confirming such annulment. (L.N. 77 of 1998)
- (4) For the purposes of this rule **creditor** (債權人) includes all creditors mentioned in the bankrupt's statement of affairs or who have notified to the trustee that they have, or at the date of the bankruptcy order had, claims against the bankrupt.  
(L.N. 231 of 1984; L.N. 77 of 1998; L.N. 123 of 2007)  
[cf. R 188]

### [BR(r) 80.01] Enactment history

This rule was amended pursuant to r 22 of the Bankruptcy (Amendment) Rules 2007 (LN 123 of 2007), commencing 10 December 2007.

Subsequently, subs (1A) was amended pursuant to Legislation Publication (Revision) Order 2014 (LN 150 of 2014), whereby the word 'paragraph' was replaced by 'subrule'.

### [BR(r) 80.02] England

Cf r 188 of the now repealed English Bankruptcy Rules 1915.

For sub-r (3), cf r188A of the now repealed English Bankruptcy Rules 1915.

### [BR(r) 80.03] General note

Cf ss 33 and 104 of the present Ordinance.

As to the form of order to stay proceedings on petition, see Form 18 of the Bankruptcy (Forms) Rules (Cap 6B) (see below).

As to the form of bond on stay of proceedings, security etc, see Form 19 of the Bankruptcy (Forms) Rules (see below).

As to the form of application to annul bankruptcy order, see Form 79 of Bankruptcy (Forms) Rules (see below).

## Division 8

### Statement of Affairs

(L.N. 150 of 2014)