HCB 992/2000

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

IN BANKRUPTCY

NO. B 992 OF 2000

RE: LAI YIN SHAN

EX PARTE: THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED

Before: Hon Yuen J in Chambers

Date of hearing: 29 June 2001

Date of Decision handed down in Court : 11 July 2001

DECISION

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1. In March 2001, in the course of the hearing held in open court of a contested bankruptcy petition before Deputy Judge S. Kwan (as she then was), the learned judge raised the question with the solicitor representing the Petitioner whether he had the right of

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audience in those proceedings. This issue was then transferred for hearing before me as the judge responsible for the Companies and Bankruptcy List.

Representation at the hearing

2. At the hearing before me, submissions were made on behalf of the Petitioner, the Bar Council and the Law Society.

3. The Official Receiver has also been served with the Notice of Hearing. He has adopted a neutral stance and has not attended the hearing.

4. The debtor did not attend. The Court was informed by the solicitors for the Petitioner that whilst the debtor was aware that the issue had been raised by Deputy Judge Kwan, the debtor had not been notified of this hearing. In my view, the debtor should have been notified, but in order not to waste the time reserved by the Court for the hearing and the costs of attendance of legal representatives, the hearing proceeded upon the undertaking of the Petitioner's solicitors to inform the debtor of the hearing by close of business on 3 July 2001 and to ask if she had any submissions on the issue.

5. The Court was subsequently informed that the debtor has indicated that she had no submissions on the issue.

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History of position in England

6. It may be helpful to first consider the historical position, first in England to understand the relevant background, and then in Hong Kong.

7. The position in England was that a Court of Bankruptcy was first established by the Bankruptcy Act 1831. This Act was enacted to appoint a Chief Judge, Judges and Commissioners of the Court of Bankruptcy, to avoid the delays that ensued hitherto when bankruptcy suits were heard only by the Lord Chancellor personally.

8. Section 10 of that Act specifically provided that solicitors may be admitted and have their names enrolled in the Court of Bankruptcy and "may appear and plead in any proceedings in the said Court without being required to employ Counsel". It may be that in accordance with the stated purpose of the Act , this was to enable the rights of creditors and bankrupts to be "enforced with little expense, delay and uncertainty".

9. This right of audience was expressly preserved in the Bankruptcy Act 1847 and in subsequent revisions of the statutes.

10. By the Bankruptcy Act 1883, the Bankruptcy Court was united and consolidated with and formed part of the Supreme Court of Judicature.

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11. Section 151 of that Act provided that nothing in that act or in any transfer of jurisdiction effected thereby would take away or affect any right of audience that any person might have had at the commencement of the Act and "all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the like right of audience in Bankruptcy matters in the High Court".

12. This right of audience does not include a right to appear in the Court of Appeal in bankruptcy matters (*In re Elderton ex p Russell* (1887) 4 Morr 36).

13. The current position in England is provided for in the Insolvency Rules, which at rule 7.52, preserves the right of audience in insolvency proceedings as that which obtained before the coming into force of those Rules.

14. It is clear from the above that the right of solicitors in England to appear in open court in the High Court in contested bankruptcy proceedings was founded in statute.

History of position in Hong Kong

15. As for the position in Hong Kong, it is likely that, at least before the enactment of the Application of English Laws Ordinance (since repealed), the Bankruptcy Act 1831 would have applied in

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Hong Kong. This is by reason of the principle enunciated by the Chief Justice in *Re Tse Lai-chiu, deceased* [1969] HKLR 202 (a judgment given in 1893) that generally the law in England would be immediately brought into force in a new colony unless it is excluded by the law itself being meant for England alone or by the circumstances of the acquisition of the colony or its subsequent history being such as to afford strong proof that the law could never have been in actual operation there.

16. This principle was pronounced by statute in Ordinance VI of 1845 which provided that "the law of England shall be in full force in the colony of Hong Kong except when the same shall be inapplicable to the local circumstances of the colony or its inhabitants". By s. 3 of Ordinance II of 1846, the English law thus adopted was limited to "such of the laws of England only as existed when the Colony obtained a local legislature, that is to say, on the 5th April, 1843".

17. As the colonization of Hong Kong was (at least in part) for the benefit of British commerce, it would have been highly improbable that the bankruptcy law as at 5 April 1843 would have been excluded. Accordingly, it is likely that the Bankruptcy Act 1831 applied in Hong Kong from the commencement of the court system here.

18. The practice of the courts in England was applied to Hong Kong by s.17 Supreme Court Ordinance and its predecessors, the earliest

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of which was in 1845. This provision stipulated that subject to rules of court, the practice of the Supreme Court of Judicature in England for the time being in force there shall be in force in the Supreme Court here. (This section was repealed in 1987).

19. Hong Kong passed its first Bankruptcy Ordinance in 1864. No separate Court of Bankruptcy was established; hence, the jurisdiction is exercisable by all judges of the High Court (although the practice has been, since the 1980's at the latest, that one judge would take charge of all bankruptcy matters). There was and is no legislation similar to the English bankruptcy statutes *expressly* granting solicitors the right of audience.

20. However it is clear from reported cases that solicitors have for many years appeared in open court as advocates in contested bankruptcy matters. The earliest reported case appears to be one in 1908 (*Re Wei Long Shan ex p Yuen Hing* [1909] 4 HKLR 144). Thereafter, successive judges dealing with bankruptcy matters have heard solicitors in contested cases in open court. Mr Brock, appearing for the Law Society, has referred me to 13 reported cases from 1908 to 1997, in which 7 different judges have heard submissions from solicitors in open court.

Hong Kong Reunification Ordinance

21. The year 1997 is important because s.12 of the Hong Kong Reunification Ordinance provides :-

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> "Every person who immediately before 1 July 1997 enjoyed a right of audience before any court, magistrate, statutory tribunal or statutory board shall on and after that date continue to enjoy such right before the corresponding court, magistrate, tribunal or board of the HKSAR".

22. Therefore the answer to the question posed at this hearing lies in whether solicitors enjoyed the right of audience in open court in contested bankruptcy matters before 1 July 1997. I should add that although evidence has been submitted on behalf of the Petitioner on its preference regarding representation, that does not have a bearing on the above question which is the issue to be determined at this hearing.

Submissions against finding of right of audience

23. It has been submitted on behalf of the Bar Council that whilst reported cases do show that solicitors have argued contested bankruptcy matters in open court for nearly a century, that could, prior to 1987, be explained by the operation of s.17 Supreme Court Ordinance. However after the repeal of that provision in 1987, there was no ground for the establishment of a practice, as that would have required a collective decision.

24. The need for practice and procedure to be modified collectively was affirmed by the Court of Appeal in *Abse v Smith* [1986] 1 QB 536, which held (p.554G-H):-

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> "the public interest requires that there shall be known general practices and procedures in the High Court and these shall not be changed or departed from piecemeal by individual judges on the basis of their personal view of what those practices and procedures should be".

As for the question of how established practices and procedures of the High Court and of the Court of Appeal could be modified if the public interest so required, it held (p555 A-C):-

> "... the well established proposition that every court has inherent power to regulate its own practices, unless fettered by statute, or possibly, by ancient usage, applies to the judges of that court collectively as well as individually and it is for the judges collectively - as a collegiate body - to decide whether or not to *modify* established general practices and to promulgate such modifications by practice directions".

(emphasis added)

25. It was submitted on behalf of the Bar Council that in the absence of any indication that the judges of the High Court (there being no separate Court of Bankruptcy here) had as a collegiate body decided to grant solicitors the right of audience after 1987, the practice should be the same as in other civil proceedings as s.99(1) Bankruptcy Ordinance cap. 6 provides:-

> "the rules and practice of the High Court for the time being for regulating the ordinary civil procedure of the court shall, so far as the same may be applicable and not inconsistent with the provisions of the Bankruptcy Ordinance be applied to bankruptcy proceedings".

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Right of audience

26. I find that solicitors did enjoy a right of audience in contested bankruptcy matters in open court before 1 July 1997. The fact that before 1987, the judges may have been legally bound by s.17 Supreme Court Ordinance to follow the English practice does not detract from the fact that that *was* the practice in Hong Kong as well for at least 80 years before 1987. The repeal of s.17 meant that it was no longer necessary as a matter of law to follow the English practice, and judges in Hong Kong could now as a collegiate body regulate the practice differently. However, the repeal of s.17 did *not obliterate* overnight the practice that had obtained here probably since the commencement of the court system. That being the case, it would have taken a collective decision of the judges to *modify* that established practice. There is no indication that such a decision had been taken.

27. Put another way, it was not necessary for the judge hearing the first bankruptcy petition after the repeal of s.17 to break new ground and *establish* a new practice of granting solicitors a right of audience. His position was not that of a judge hearing the first bankruptcy matter in 1843 had he not been required to apply the English practice. The judge in 1987 would simply have been *following* a practice that had obtained in Hong Kong for well over 80 years and which had not been modified by a collective decision of the judges who now had power to do so.

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28. Section 99 Bankruptcy Ordinance applies the rules and practice of the High Court only "so far as the same may be applicable ... to bankruptcy proceedings". Given this practice unique to bankruptcy proceedings of giving solicitors right of audience in open court, the ordinary rules and practice of the High Court as to representation do not apply. It is not disputed on behalf of the Bar Council that unlike the situation in *Langdale v Danby* [1982] 1 WLR 1123, where it was held that a longstanding practice must yield to a clearly governing rule, the language of s.99 can accommodate a different practice from that governing ordinary civil procedure.

Order

29. In the circumstances, I would direct that these proceedings do continue with the Petitioner being represented by its solicitors in open court should it so wish. I would make an order *nisi* that there be no order as to costs. At the request of the parties, this Decision is to be handed down in open court.

(MARIA YUEN)
Judge of the Court of First Instance
High Court

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Mr R. Tollan of Johnson Stokes & Master for Petitioner

Mr B. Yu SC and Mr G. Lam instructed by Poon Yeung & Li for the Bar Council

Mr D Brock of Clifford Chance for the Law Society of Hong Kong

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