

HONG KONG / JUDGMENT

CHANG HYUN CHI v. OFFICIAL RECEIVER AND ANOTHER

COURT

Court of Appeal

DECIDED

17 December 2014

CASE / FILE NUMBER

CACV110/2013

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CACV 110/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 110 OF 2013

(ON APPEAL FROM HCB 5227 OF 2006)

BETWEEN

CHANG HYUN CHI

Appellant

and

OFFICIAL RECEIVER

1st Respondent

JOINT AND SEVERAL TRUSTEES

OF THE ESTATE OF

CHANG HYUN CHI,

THE BANKRUPT

2nd Respondent

Before : Hon Cheung, Yuen and Barma JJA in Court

Date of Hearing : 11 December 2014

Date of Judgment : 11 December 2014

Date of Reasons for Judgment : 17 December 2014

REASONS FOR JUDGMENT

Hon Cheung JA :

The issue in this appeal is whether section 30A(10)(a) of the Bankruptcy Ordinance ('BO') (Cap. 6) which suspends the commencement of the bankruptcy period during the time when a bankrupt is not in Hong Kong infringes the 'right to travel' provisions of the Basic Law and the Bill of Rights ('BOR') (Cap. 383) and is unconstitutional. Chung J held against Mr Chang Hyun Chi, the bankrupt's contention that it is unconstitutional. The bankrupt appealed and at the conclusion of the appeal we allowed the appeal and declared the section unconstitutional.

Background

There is no controversy to the background of the case. The bankrupt is a South Korean national. He came to Hong Kong in 1993 and obtained Hong Kong permanent resident status in 2000. He left Hong Kong on 9 August 2003 and lived in the USA until 26 April 2006. From 4 December 2006 to 11 April 2008 the bankrupt lived in Korea.

In the period from April 2006 to May 2012, on his travels, the bankrupt had stopped by Hong Kong for durations of a few hours to a few days.

On 20 December 2006 a bankruptcy order was made against him. On 2 July 2011, an order was made by Poon J for his examination under section 29 of the BO. The hearing was adjourned on 14 November 2011. On 3 May 2012 a prohibition order and warrant of arrest were issued against him. On 10 May 2012, the bankrupt was arrested as he entered Hong Kong from Macau. It is the bankrupt's evidence that he was not aware of the bankruptcy order until his arrest.

On 26 July 2012, the bankrupt acting in person applied by summons for a declaration that he had been discharged from bankruptcy since 21 December 2010 by the automatic discharge provision under section 30A(1) and (2)(a) of the BO, that section 30A(10)(a) was unconstitutional and that section 29 had no application to him. His application was dismissed by Chung J on 2 May 2013.

Right to travel

Article 31 of the Basic Law provides that Hong Kong residents :

‘

... shall have freedom to travel and to enter or leave the Region.’

Article 8(2) of the BOR provides that :

‘

Everyone shall be free to leave Hong Kong.’

These two provisions are known as ‘the right to travel’ provisions.

The statutory scheme

The relevant statutory scheme for the purpose of the issue in this appeal is found in the provisions of section 30A of the BO. Section 30A(1) provides that a bankrupt is discharged from bankruptcy (upon which he is released with certain exceptions, from all debts provable in bankruptcy (Section 32(2)) by the expiration of the relevant period which for the purpose of this appeal is four years beginning with the commencement of the bankruptcy (section 30A(2)(a)). Section 30A(1) is subject to Section 30A(10) which suspends the operation of the bankruptcy period.

Section 30A(10)(a) and (b) deal respectively with suspension of the bankruptcy period before and after its commencement. Section 30A(10) is as follows :

‘

(10)

Notwithstanding subsections (1) to (3), where a bankrupt—

(a)

has, before the commencement of the bankruptcy, left Hong Kong and has not returned to Hong Kong, the relevant period under subsection (1) shall not commence to run until such time as he returns to Hong Kong and notifies the trustee of his return;

(b) after the commencement of his bankruptcy—

(i)

leaves Hong Kong without notifying the trustee of his itinerary and where he can be contacted; or

(ii)

fails to return to Hong Kong on a date or within a period specified by the trustee,

the relevant period under subsection (1) shall not continue to run during the period he is absent from Hong Kong and until he notifies the trustee of his return.’ (emphasis added)

Under this scheme, as Ms Linda Chan SC, counsel for the Official Receiver submits, the bankrupt is under a positive duty to cooperate with the trustee in bankruptcy (‘trustee’) and provide assistance in the administration of his estate which include :

Submitting a sworn statement of affairs : section 18 of the BO.

Attending the trustee at such time and place appointed by the trustee to be interviewed for the purpose of investigating his affairs : rule 150 of the Bankruptcy Rules (‘BR’) (Cap. 6A).

Providing information about his assets and financial affairs to the trustee as well as handing over his assets, books and records : section 26(2) of the BO.

Aiding to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors : section 26(3) of the BO.

Attending the general meetings of creditors if requested by the trustee and submitting to such examination and giving such information as the meeting may require : section 26(1)-(2) of the BO.

Submitting annual statements of earnings and acquisitions to the trustee on each anniversary of the making of the bankruptcy order against him : section 43A(6) of the BO.

Case of Chan Wing Hing

The Court of Final Appeal in *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing & Another v Chan Wing Hing & Another & Secretary for Justice* (2006) 9 HKCFAR 545 had considered the constitutionality of section 30A(10)(b)(i) which requires a bankrupt to notify the trustee of his departure from and return to Hong Kong. It held by a majority of four to one that it is unconstitutional as being contrary to the 'right to travel' provisions of the Basic Law and BOR.

The majority of the Court of Final Appeal held that the constitutional right must be generously interpreted. They considered the restriction on the right to travel imposed by Article 8(3) of the BOR which provides that any restriction on the right to leave Hong Kong must satisfy certain requirements. The relevant one for the purpose of that case is that the restriction must be necessary to protect the rights of others. They held that the restriction to the right to travel does not satisfy the proportionality test.

The relevant considerations of the proportionality test is that,

the restriction must be rationally connected to the protection of the rights of others.

the means used to impair the right to travel must be no more than necessary to protect the rights of others.

In respect of the 'rational connection' limb, all members of the Court held that this test is satisfied. Li CJ (with the agreement of Bokhary PJ, Chan PJ and Mason NPJ) held that the purpose of the restriction is to ensure that bankrupts stay within the radar of the trustee so that the trustee could if required obtain his co-operation in the administration of his estate. With discharge, apart from certain exceptions under section 32, the bankrupt would be relieved from his debts and liabilities and would be rehabilitated. Discharge would obviously affect the rights of creditors. So it is important that the trustee is able to administer the bankrupt's estate effectively with his co-operation. Having the bankrupt on the trustee's radar would facilitate effective administration of the bankrupt's estate. So, the restriction on the right to travel for the purpose of keeping the bankrupt on the trustee's radar is rationally connected to the protection of the rights of creditors. Further, there is a public interest in the proper administration of a bankrupt's estate

in accordance with bankruptcy law. As such the rights of members of the public cannot be ignored and may also be regarded as within ‘the rights of others’ for the protection of which the restriction is rationally connected [paragraphs 42 and 43].

On the ‘necessity’ requirement, the majority held that the restriction fails the test on the following grounds :

apart from section 30A(10)(b)(i) there are weapons, such as section 30A(4) available to the trustee and the creditors when faced with the bankrupt’s failure to co-operate in the context of the scheme regulating discharge [paragraph 45].

the sanction provision namely the suspension of the bankruptcy period by reason of the bankrupt’s absence from Hong Kong and failure to notify the Official Receiver on his return operates indiscriminately because :

(i)

the sanction applies irrespective of the reason for the bankrupt’s failure to notify;

(ii)

the sanction applies to all situations; and

(iii)

there is no discretion vested in the Court to disapply the sanction or to mitigate the consequence [paragraphs 47, 48 and 49].

Ribeiro PJ who dissented, upheld the proportionality of the restriction on the basis that the only requirement which it imposes upon a bankrupt who wishes to exercise his freedom to travel is the requirement of notifying the trustee of his itinerary and contact details. If he does so, the section has no further impact on his freedom to travel [paragraph 84]. The requirement of notification prior to departure or, in default, upon return, is unobjectionable. It is a minimal impairment on the freedom to travel rationally linked to securing the bankrupt’s cooperation with a view to facilitating the proper administration of the bankrupt estate and part of the process by which the bankrupt secures for himself the substantial benefit of an automatic discharge. Further even if the bankrupt did not comply with the prior notification on his departure, one must not assume that the bankrupt will let the period of suspension run on, failing to bring it to an end by the simple expedient of informing the trustee of his return [paragraph 86].

The Court of Final Appeal did not address the constitutionality of section 30A(10)(a).

Chung J’s decision

The Judge decided that the restriction under section 30A(10)(a) is not disproportionate and upheld the constitutionality of the provision. The underlining theme of the Judge’s decision is that it is highly probable a bankrupt’s absence from Hong Kong, which would effectively mean

his cooperation would be unavailable, would render the administration of his estate difficult in most cases, although the Judge recognized there may be estates which are extremely simple and easy to administer, so that a bankrupt's total absence will not render such administration any less easy. He upheld the subsection on the following basis :

The more limited application of section 30A(10)(a) as compared to section 30A(10)(b)(i). He held that section 30A(10)(a) can only be invoked once, whereas section 30A(10)(b)(i) can be engaged from time to time as and when a bankrupt fails to comply with it during the whole period for automatic discharge.

The likely practical effect of a bankrupt's absence before the commencement of bankruptcy on the administration of his estate. There is a major distinction between the two provisions. In the case of section 30A(10)(a), the adverse effect of a bankrupt's absence from Hong Kong before the commencement of bankruptcy on the administration work relating to his estate would have been much more profound. On the other hand, the bankrupt's absence under section 30A(10)(b)(i) may take place at the less critical stage(s).

The likely practical effect on the bankrupts who may be affected by section 30A(10)(a). The Judge considered the empirical data provided by the Official Receiver which showed that :

- (a) of the bankrupts who were caught by this provision, almost 90% have not returned to Hong Kong after they left before the commencement of bankruptcy (as at 14 June 2011, 1,807 out of 2,085 bankrupts (or 87%) did not return);
- (b) hence, if this provision had not been enacted, these 'absent bankrupts' would have their bankruptcy discharged despite not having performed their duties as bankrupts (for example, section 30A(4)) (as at the date of the hearing, 1,885 out of 2,133 bankrupts (or 88%)).

My view

In this appeal the only contentious issue is on the proportionality of the restriction. Ms Margaret Ng, counsel for the bankrupt (who did not appear below) does not challenge the rational connection of the restriction. She argues that the majority view in Chan Wing Hing applies to the section under consideration as well.

Indiscriminate application

1

This is what the Court of Final Appeal said about the disproportionate nature of the sanction imposed by section 30A(10)(b)(i) :

,

47.

First, the sanction operates irrespective of the reason for the bankrupt's failure to notify which triggers it. A wide variety of causes may account for the failure. At one end, the reason may be wholly innocent such as a sudden departure in a situation of family emergency or mere inadvertence which in the nature of things is bound to arise in situations of this kind. At the other end, the reason may be wilful such as the bankrupt's deliberate and dishonest intent to evade his obligations under bankruptcy law. Between these extremes, the causes for the failure to notify may include negligence and those which are excusable when objectively judged.

48.

Secondly, the sanction applies indiscriminately to all situations. It is statutorily imposed, whenever the bankrupt leaves Hong Kong without notification, irrespective of the stage already reached in the relevant period and even when the end of that period is virtually reached. And it is imposed whatever the circumstances, irrespective of whether it has occasioned any prejudice to the administration of the estate and even where the bankrupt's co-operation is not required or where the administration of his estate has already been satisfactorily completed.

49.

Thirdly, the sweeping application of the sanction means that there is no discretion vested in the court to disapply the sanction or to mitigate its consequences, however meritorious or deserving the circumstances. Nor could the trustee or the creditors assist the bankrupt in this regard, even where they wish and it is in their interests to do so.'

In my view the reasoning applies equally to section 30A(10)(a) as well with necessary modification because of the difference in wording of the two sections :

The sanction operates irrespective of the reason for the bankrupt's absence from Hong Kong. The two extreme situations of absence for an innocent reason and absence due to wilful default are all treated alike and will attract the sanction.

The sanction operates indiscriminately once the bankrupt is absent from Hong Kong irrespective of whether he has communicated with the trustee or had assisted him with information by other means.

There is no discretion vested in the Court to disapply the sanction or to mitigate its consequence. Likewise the views of the trustee or creditors who may wish to assist the bankrupt will be irrelevant.

2)

Difficulty with administration

1

Ms Chan (whose submission on the constitutional issue is adopted by Ms Pauline Leung, counsel for the trustees) supports the Judge's view on the difficulty of administration without sanction. She submits that the Official Receiver is the provisional trustee of all bankrupts upon the making

of a bankruptcy order (section 12 of the BO) and the trustee of most of the bankruptcies with few or no assets. Unless the bankrupt returns to Hong Kong and contacts his trustee, it will be very difficult, if not impossible, for the bankrupt to be available for interviews and to assist in the realisation of his property. The bankrupt's preliminary examination/interview under rule 150 of the BR is a particularly crucial step, as the bankrupt would be briefed on what is required of him by law, and provided with the papers and forms that he needs to fill in with information about his assets and financial circumstances. This also enables the trustee to confirm the bankrupt's identity. Ms Chan argues that as the trustee is a complete stranger to the bankrupt's affairs, unless he can get in contact with the bankrupt and obtain the basic information regarding the property, affairs and dealings of the bankrupt, the trustee cannot even begin to identify the estate of the bankrupt, let alone properly administer it. Nor can the trustee begin his investigation of the bankrupt's conduct and affairs. This means that the very purposes of the bankruptcy scheme, viz., to recover assets for distribution to the creditors and to investigate the conduct of the bankrupt in the interest of the public, would effectively be frustrated or defeated.

22.2

In my view the argument on the difficulty of administration begs the question whether the sanction satisfies the proportionality test. In other words whether the means i.e. the restriction to travel to achieve the purpose of administering the bankruptcy scheme (for the protection of creditors) is no more than is necessary. In my view the reasoning of the Court of Final Appeal that it exceeds the permissible limit is unassailable and is respectfully adopted.

3) Distinction between the two provisions

1

Further, the distinction drawn by the Judge between the two provisions cannot, on analysis, provide a proper basis for upholding the proportionality requirement.

3.1) Single and Multiple application

That section 30A(10)(a) can be invoked only once while section 30A(10)(b)(i) can be invoked more than once is irrelevant. Both are drastic provisions. If anything the effect of section 30A(10)(a) is even more drastic and cannot be avoided simply by notification.

3.2) Departure before and after commencement and abuse

As to the distinction on the effect of departure before or after the commencement of the bankruptcy, Ms Chan argues that unlike section 30A(10)(b)(i) there is no indiscriminate application of the sanction because section 30A(10)(a) applies only to a bankrupt who never gets in touch with the trustee in Hong Kong. A bankrupt who never gets in touch with the trustee would invariably have failed to assist the trustee in administering the estate or to perform any of the duties under the BO. A bankrupt who has done nothing to earn his discharge cannot expect to enjoy the relevant period to run and expire during the time when he is away from Hong Kong and out of reach of the trustee.

The empirical data provided by the Official Receiver further shows that of those bankrupts who were caught by section 30A(10)(a) and have not been discharged, almost 90% have not returned to Hong Kong after they left before the commencement of bankruptcy order or have returned but never notified the trustee of their return. As at 30 March 2011, this was 1,818 out of 2,085 (87%). As at 22 October 2012, this was 1,890 out of 2,133 (89%). As at 13 October 2014, this was 1,969 out of 2,173 (90.6%). Ms Chan argues that if section 30A(10)(a) is declared unconstitutional, 90% of these ‘absconded’ bankrupts would have been automatically discharged under section 30A(1), even though they have done nothing to earn their discharge. This is an argument on the abuse of the statutory scheme.

Ms Chan further submits that the change to the duration of bankruptcies was effected in 1996 based on the recommendation on the Report on Bankruptcy published by the Law Reform Commission of Hong Kong (‘Commission’) in May 1995 (‘LRC Report’). The Commission was mindful of the ‘unique position of Hong Kong and the transient nature of some of its residents’. When recommending the legislature to enact specific provisions dealing with absconding debtors, the Commission was concerned that the right to automatic discharge would be abused by the cynical behaviour of unscrupulous persons and recommended that there be no limit to the extension of the bankruptcy period for absconding debtors, which would be an exception to the normal maximum period of 8 years.

The legislative history of section 30A is set out in the judgment of Ribeiro PJ at paragraphs 69 to 75.

This is a powerful submission but in my view the answer to this argument is that section 30A(10)(a) is not the only provision which will prevent an abuse of the statutory scheme. There is an objection provision in the BO which would prevent the automatic expiration of the bankruptcy period. As Li CJ observed, the trustee or any creditor may object to the discharge of the bankrupt at the expiration of the relevant period on the grounds specified in section 30A(4). The statutory grounds include

that his discharge would prejudice the administration of his estate [b],

that the bankrupt has failed to co-operate in the administration of his estate [c],

that the bankrupt’s conduct before or after the bankruptcy order has been unsatisfactory [d], and

that without limiting the grounds [c] or [d], the bankrupt has departed from Hong Kong and has failed forthwith to return to Hong Kong following a request from his trustee [e]. Depending on the facts in a particular case, the circumstances that may be relied on to establish the grounds of objection [b], [c] and [d] may include the bankrupt’s conduct in leaving Hong Kong without notifying the trustee of his itinerary and where he can be contacted. The Court has to determine whether the ground of objection is established and has a discretion to suspend the running of the relevant period up to the prescribed period [paragraph 45].

In the present case the trustee had lodged a section 30A(4) objection. This application can no longer be proceeded with because under section 30A(3), even if the objection is made out, the Court may only order the period of bankruptcy to be extended by four years, and the period has now expired. In my view the limited period of extending the bankruptcy period under the section 30A(4) objection mechanism cannot be a legitimate basis for upholding the sanction.

Further as Ms Ng submitted, it is fallacious to argue that the effect of absence after the commencement of bankruptcy is necessarily less serious. Absence without notification under section 30A(10)(b)(i) can occur at a crucial point of the administration. On the other hand, it is not necessarily the case that absence at the commencement of the administration work cannot be fully compensated by other forms of communication with the bankrupt's cooperation.

3.3) Knowledge of the bankrupt

Ms Chan further submits that according to the report of the Official Receiver of the creditor-petition cases where the bankrupts did return and notify their trustee (and have not yet been discharged under section 30A(1)) :

in the majority of cases, the bankrupts knew about their indebtedness and/or the bankruptcy proceedings prior to the commencement of the bankruptcy proceedings.

a large proportion of bankrupts were frequent travellers, and a majority had departed Hong Kong long before the bankruptcy order.

only around 26% and 29% (at the time of the 1st Report and 2nd Report, respectively) of bankrupts did not contact the Official Receiver because they were not aware of the bankruptcy.

Ms Chan submits that these statistics must, of course, be qualified by the fact that the information given to the Official Receiver by the bankrupts may well have been self-serving. Therefore the number of bankrupts who were truly ignorant of their bankruptcy is probably lower than this.

I really do not see how the data would advance the Official Receiver case on proportionality any further.

3.4) Less harsh treatment

Ms Chan further argues that unlike section 30A(10)(b)(i), there is mechanism for disabling the effect of the sanction under section 30A(10)(a) as the sanction can be put to a stop once and for all by the bankrupt returning to Hong Kong and notifying the trustee of his return. Once this is done, the bankrupt is at liberty to enter and leave Hong Kong and no further sanction can be triggered under section 30A(10)(a). This, she submitted, can be contrasted with the harshness of the section 30A(10)(b)(i) sanction.

In my view there is no real distinction in the ‘harshness’ of the sanction. In any event, Li CJ had considered the bankrupt putting an end to the suspension by notifying the trustee on his return. While he had touched upon the harshness of section 30A(10)(b)(i), the real basis of the decision is because of the indiscriminate operation of the sanction irrespective of the circumstances. This is the relevant part of the judgment :

46. As has been discussed, it is the need to notify together with the sanction for failure to notify which constitute the restriction on the right to travel. Once the sanction bites, the relevant period is suspended indefinitely until the bankrupt returns to Hong Kong and notifies the trustee of his return. Notwithstanding that the bankrupt may avoid the sanction of suspension by notification and may put an end to it by notifying the trustee of his return and that notification is not an onerous matter, the sanction is a harsh one. This is because once triggered, it operates indiscriminately at all times and irrespective of the circumstances.’ (emphasis added)

Li CJ then elaborated on the three points which I have set out in paragraph 21.1 of this judgment.

In my view section 30A(10)(a) is unconstitutional.

Section 29

Ms Ng accepts that in the event that section 30A(10)(a) is held unconstitutional, the bankrupt does not challenge that he may still be required to attend an examination. He only contends that the order of Poon J was made on the wrong basis i.e. that he was an undischarged bankrupt.

While Ms Pauline Leung initially argued that there are practical differences and consequence in the examination of the bankrupt if his status was different, she decided not to rely on the differences she set out in her written submission for the purpose of this appeal.

I do not need to comment further on this point.

Conclusion

The appeal was accordingly allowed and the judgment below set aside. We granted a declaration that section 30A(10)(a) is unconstitutional and that the bankrupt’s bankruptcy has been discharged on 21 December 2010. We further ordered that the costs of the appeal and below be to the bankrupt. The bankrupt’s own costs are to be taxed in accordance with Legal Aid Regulations.

In view of the practical implications of our judgment, upon the Official Receiver’s undertaking to lodge an application expeditiously for leave to appeal to the Court of Final Appeal, we granted a stay of the execution of our judgment until the determination of the application.

Hon Yuen JA :

I agree with the reasons for judgment of Cheung JA.

Hon Barma JA :

I agree with the reasons for judgment of Cheung JA.

(Peter Cheung)

(Maria Yuen)

(Aarif Barma)

Justice of Appeal

Justice of Appeal

Justice of Appeal

Ms Margaret Ng, instructed by Yam & Co., assigned by Director of Legal Aid, for the appellant

Ms Linda Chan, SC, instructed by Department of Justice, for the 1st respondent

Ms Pauline Leung, instructed by Chow, Griffiths & Chan, for the 2nd respondent

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