Practitioners' Affairs

Solicitors' Higher Rights of Audience (Part 6) – The Case of *Lai Yin Shan*

In a series of articles, the Law Society's Working Party on Solicitors' Higher Rights of Audience will clarify the changes sought to current practice in Hong Kong. This is the sixth article in the series. Members are invited to let the Working Party have their thoughts on this important and pressing issue

In the recent High Court case of *Lai Yin Shan* [2001] 3 HKC 232, the judge ruled that solicitors may continue to represent their clients in contested bankruptcy proceedings before the High Court. The court faced a number of questions. In answering these questions, the court referred to the previous history of the Bankruptcy Court in England, the adoption of the English practice into Hong Kong and the undisputed fact that for a very considerable period solicitors have actually exercised a right of audience in contested bankruptcy cases.

Historical Background

The court's analysis of the history of solicitors' rights of audience in the Bankruptcy Courts may be summarised as follows.

Background in England

The court pointed out that, under s 10 of the Bankruptcy Act of 1831, solicitors could 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 retain Counsel'.

Further, s 151 of the Bankruptcy Act of 1883 confirmed that 'all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the right of audience in Bankruptcy matters in the High Court'.

Finally, the current position in England under r 7.52 of the Insolvency Rules preserves the right of audience in insolvency proceedings as that which obtained before the coming into force of those Rules.

Background in Hong Kong

Ordinance VI of 1845 provided that 'the Law of England shall be in full force in the colony of Hong Kong except where the same shall be inapplicable to the local circumstances of the colony or its inhabitants'. It was therefore likely that the Bankruptcy Act 1831 would have applied in Hong Kong. Section 17 of the Supreme Court Ordinance also provided that, subject to rules of court, the practice of the Supreme Court of Judicature in England should be in force in the courts in Hong Kong.

Further, s 12 of the Hong Kong Reunification Ordinance provides that 'Every person who immediately before 1 July 1997 enjoyed a right of audience before any Court, magistrate, statutory tribunal or statutory board shall on or after the date continue to enjoy such right before the corresponding court, magistrate, tribunal or board of the HKSAR'.

The court also pointed out that solicitors had for many years appeared in open court as advocates in contested bankruptcy proceedings. Thirteen reported cases from 1908 to 1997 reflected such representation.

The Bar's Argument

The Bar, which was represented at the hearing by solicitors and Counsel, made submissions against the right of solicitors to appear in contested bankruptcy proceedings in open court. The Bar sought to explain away the position prior to 1987 by reference to s 17 of the Supreme Court Ordinance. Since that date there had been no collegiate decision of the judiciary to establish the practice that solicitors could appear in open court in such cases. Hence, the Bar contended, the practice should be the same as in other civil proceedings, with the result that such rights of audience would have ceased to exist after 1997.

The Bar further argued that s 99(1) of the Bankruptcy Ordinance required that representation be limited in the same way as in other High Court proceedings. Section 49(1) provides that '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'.

The Court's Decision

The court found as a fact that solicitors did enjoy a right of audience in contested bankruptcy proceedings in open court before 1 July 1997. The repeal of s 17 of the Supreme Court Ordinance in 1987 did not destroy this pre-existing right – after the repeal, the judges continued to follow the existing practice. While a collegiate decision would have been needed to modify the practice, no such decision was required to maintain the status quo.

As to s 99(1) of the Bankruptcy Ordinance, given the unique practices of the Bankruptcy Court, the ordinary rules and practice of the High Court did not apply. The language of s 99(1) was plainly broad enough to accommodate this practice.

Accordingly, the court decided that the proceedings could continue with the petitioner being represented by its solicitors in open court.

Comment

The court held that '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' (at p 235E).

This commentary is no place for an exegesis on the (extremely complex) development of the bankruptcy law as a result of the rapid expansion of economic activity flowing from the Industrial Revolution in the United Kingdom. It is, however, important to bear in mind in considering rights of audience that, prior to the Supreme Court of Judicature Act 1873, there existed in England a plethora of separate courts each having its own procedural rules.

The London Bankruptcy Court certainly existed by 1831 since under the 1831 Act referred to in the court's judgment Official Assignees (the ancestor of the Official Receiver) were attached to it by that statute. There is no particular reason to think that rights of audience in that court were limited to counsel in cases that had to be heard in open court. Compare by way of analogy the Mayor's and City of London Court.

The position is further complicated by the fact that until 1842 bankruptcy proceedings were initiated not by petition but by suing out a commission under the Great Seal to take over the affairs of the bankrupt and to make a distribution of his/her property. The Bankruptcy Act 1842 established a new Court of Bankruptcy and Court of Review and also vested limited jurisdiction in bankruptcy in the County Courts.

The Supreme Court of Judicature Act 1873 'transferred to and vested in' the High Court of Justice the jurisdiction that was capable of being exercised by, among others, the London Court of Bankruptcy (s 16(8)) and assigned to the Exchequer Division of the High Court all matters pending in the London Court of Bankruptcy at that time (s 34, third (3)). By s 87 of the 1873 Act, all persons admitted as solicitors, attorneys or proctors of any court were to be called 'Solicitors of the Supreme Court' and were to be entitled to 'the same privileges and be subject to the same obligations…as if this Act had not been passed'.

This right of audience was, of course, subsequently confirmed expressly, as the court in *Lai Yin Shan* explained, by the Bankruptcy Act 1883. However, it seems likely that solicitors would in any event have had this right prior to the repeated modifications and clarifications of the law during the 19th Century.

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