

FACV Nos. 7 and 8 of 2006

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 7 OF 2006 (CIVIL)
(ON APPEAL FROM CACV NO. 153 OF 2005)**

Between:

**THE OFFICIAL RECEIVER AND TRUSTEE IN
BANKRUPTCY OF CHAN WING HING, a bankrupt**

Appellant

- and -

CHAN WING HING, a bankrupt

Respondent

- and -

SECRETARY FOR JUSTICE

Intervener

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 8 OF 2006 (CIVIL)
(ON APPEAL FROM CACV NO. 154 OF 2005)**

Between:

**THE OFFICIAL RECEIVER AND TRUSTEE IN
BANKRUPTCY OF LIN HAI SAN, a bankrupt**

Appellant

- and -

LIN HAI SAN, a bankrupt

Respondent

- and -

SECRETARY FOR JUSTICE

Intervener

Court: Chief Justice Li, Mr Justice Bokhary PJ,
Mr Justice Chan PJ, Mr Justice Ribeiro PJ and
Sir Anthony Mason NPJ

Date of Hearing: 6 July 2006

Date of Judgment: 20 July 2006

J U D G M E N T

Chief Justice Li:

1. In 1996, the bankruptcy legislation was amended to introduce a new scheme regulating discharge from bankruptcy. Under the previous scheme, a court order for discharge was necessary and it was extremely difficult for a bankrupt to obtain one. The aim of the new scheme is to facilitate discharge of the bankrupt. Its central feature is the concept of automatic discharge. The bankrupt is to be discharged after the expiration of a prescribed period subject to the court ordering extension on specified grounds subject to a statutory maximum. These appeals are concerned with a statutory provision which relates to the extension of the prescribed period in circumstances where the bankrupt leaves Hong Kong without notifying his trustee. Questions of its proper interpretation and its constitutionality arise for consideration. These are important questions affecting the operation of the scheme regulating discharge.

The bankrupts

2. Bankruptcy orders were made against Mr Chan Wing Hing ("Mr Chan") on 4 October 2000 and against Mr Lin Hai San ("Mr Lin")

on 1 November 2000. Both were adjudged bankrupt for the first time and the Official Receiver is their trustee in bankruptcy. They were present in Hong Kong on the dates of their respective bankruptcy orders. Subsequently, both made frequent trips to the Mainland without notifying the Official Receiver. They are both permanent residents enjoying the right of abode. These are the essential facts for the purposes of the present appeals.

Mr Chan

3. After the bankruptcy order, Mr Chan attended an interview with the Official Receiver on 23 October 2000 when he was given various documents for which he signed a receipt. The documents given to him included a booklet entitled "A Simple Guide to Bankruptcy" which set out a list of the bankrupt's duties and the receipt acknowledged that his attention had been drawn to his duties. The statement of affairs he initially returned was incomplete. He attended the Official Receiver's Office on 21 March 2001 to finalise it.

4. Subsequently, the Official Receiver lost contact with Mr Chan. The Official Receiver made various efforts to contact him but these were unsuccessful. In September 2004, the Official Receiver received a facsimile from a lady claiming to be Mr Chan's wife which stated that he had been arrested in Shenzhen on 19 July 2004 and was detained in prison there.

5. According to the Immigration Department's computer reports for arrival/departure obtained by the Official Receiver, Mr Chan was in Hong Kong on 4 October 2000, the day of the bankruptcy order. Since then, he made frequent trips to the Mainland. Between that date

and 19 July 2004, the number of his trips ranged from 23 to 34 trips per month. For the great majority of trips, he was absent for less than 24 hours. For the remaining trips, he stayed away for no more than a couple of days. On 19 July 2004, he departed from Hong Kong and as at 3 November 2004, when the Official Receiver filed his third report, there was no record that he had returned to Hong Kong since 19 July 2004. He did not notify the Official Receiver of any of his trips or his departure on 19 July 2004. It should be noted that Mr Chan attended the hearing in the Court of Appeal on 7 September 2005.

6. In Mr Chan's bankruptcy, proofs of debts were received from two creditors totalling \$77,230.84. Bank balances totalling \$409.66 were recovered.

Mr Lin

7. After the bankruptcy order, Mr Lin attended at the Official Receiver's Office on 7 May 2001 when he was given similar documents including the booklet and signed a similar receipt as Mr Chan. His statement of affairs was filed on 13 August 2001. Subsequently, the Official Receiver lost contact with him.

8. According to the Immigration Department's computer reports for arrival/departure obtained by the Official Receiver, Mr Lin was in Hong Kong on 1 November 2000, the day of the bankruptcy order. Between that date and 2 June 2004, he made frequent trips to the Mainland ranging from 10 to 15 trips per month. For the great majority of trips, he was absent for less than 24 hours. For the remaining trips, he stayed away from a couple of days to a week, except on two occasions

when he was away for 22 days and 11 days. Mr Lin did not notify the Official Receiver of any of his trips.

9. According to the statement of affairs filed by Mr Lin, his liabilities amounted to \$127,945,019.93. Proofs of debts were submitted totalling \$114,252,833.90 and US\$221,993.57. Assets amounting to \$1,483.49 were recovered.

The Scheme

10. The scheme regulating discharge is contained in ss. 30, 30A and 30B of the Bankruptcy Ordinance, Cap. 6 ("the Ordinance"). Save where otherwise stated, references to sections are to sections in the Ordinance. Section 30 provides that the bankruptcy of a person against whom a bankruptcy order has been made (a) commences with the day on which the order is made and (b) continues until he is discharged under s. 30A or 30B.

11. The concept of automatic discharge is implemented in ss. 30A(1) and (2). Section 30A(1) provides that:

"Subject to this section, a bankrupt is discharged from bankruptcy by the expiration of the relevant period under this section."

The relevant period is set out in s.30A(2) ("the relevant period"). For a person adjudged bankrupt for the first time ("a first-time bankrupt"), the relevant period is four years beginning with the commencement of the bankruptcy, that is, the day of the bankruptcy order. For a person who has been previously adjudged bankrupt ("a previous bankrupt"), the relevant period is five years.

12. But on the application of the trustee or a creditor, the court may order that the relevant period shall cease to run for such period as may be specified in the order ("the further period") up to a maximum period of four years in the case of a first-time bankrupt and of three years in the case of a previous bankrupt. This is provided for in s. 30A(3) which reads:

- "(3) Where the court is satisfied on the application of the trustee or one of the bankrupt's creditors that a valid objection based on one or more of the grounds set out in subsection (4) has been made, the court may order that the relevant period under this section shall cease to run for such period, not exceeding, in the case of a person who –
- (a) has not previously been adjudged bankrupt, 4 years; or
 - (b) has previously been adjudged bankrupt, 3 years,
- as may be specified in the order."

The effect of an order under this provision is to postpone the time of discharge beyond the relevant period by the further period specified in the order. Thus, where the court makes an order specifying the maximum further period of four years for a first-time bankrupt and of three years for a previous bankrupt, the bankrupt would only be discharged after a total of eight years. Where such an order has been made, the court may, on the bankrupt's application at any time, having regard to the interests of all the parties, lift the suspension or shorten the period of suspension. Section 30A(7).

13. The eight grounds on which the court may make an order under s.30A(3) are set out in s.30A(4) as follows:

- "(a) In the case of a discharge [of a person who has not been previously adjudged bankrupt], that the bankrupt is likely within 5 years of the commencement of the bankruptcy to be able to make a significant contribution to his estate;
- (b) that the discharge of the bankrupt would prejudice the administration of his estate;

- (c) that the bankrupt has failed to co-operate in the administration of his estate;
- (d) that the conduct of the bankrupt, either in respect of the period before or the period after the commencement of the bankruptcy, has been unsatisfactory;
- (e) without limiting paragraph (c) or (d), that the bankrupt has departed from Hong Kong and has failed forthwith to return to Hong Kong following a request to do so from the Official Receiver or the trustee;
- (f) that the bankrupt has continued to trade after knowing himself to be insolvent;
- (g) that the bankrupt has committed an offence under section 129 or any of sections 131 to 136;
- (h) that the bankrupt has failed to prepare an annual report of his earnings and acquisitions for the trustee."

14. To remind creditors of their right to object, the trustee must advise them not less than three months before the end of the relevant period of their right and whether the trustee himself intends to object. Section 30A(5). An objection must be lodged and an application for an order must be made not less than 14 days before the end of the relevant period. Section 30A(6).

15. These appeals concern the operation of a limb of s.30A(10) which provides:

"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."

16. As has been noted, both Mr Chan and Mr Lin were in Hong Kong on the day of their respective bankruptcy orders which marked the commencement of their bankruptcy. Subsequently, they made numerous trips to the Mainland without notifying the Official Receiver. Indeed he had lost contact with them. In the circumstances, the limb relevant in these appeals is s. 30A(10)(b)(i) and this judgment is only concerned with this limb.

17. The scheme regulating discharge confers on the court a limited power to grant an early discharge on the application of a bankrupt, even before the expiry of the relevant period of four years in the case of a first-time bankrupt, subject to objection by the trustee or a creditor. Section 30B. However, it is not open to the court to grant early discharge on a number of specified grounds, including where the bankrupt has previously entered into a voluntary arrangement or where the bankrupt has unsecured liabilities that exceed 150% of his income during the year preceding the bankruptcy order. Section 30B(2)(a)(ii) and (b). By reason of these grounds, the possibility of early discharge is, in practice, only available in a very limited number of cases.

18. Notwithstanding discharge, the bankrupt must continue to give such information respecting his affairs and attend on the trustee at such times and do such other things, as the trustee requires for the purpose of completing the administration of the estate. If the

discharged bankrupt does not comply, he is guilty of contempt of court. Section 30A(8).

The applications

19. On 31 August and 14 September 2004, a few months before the expiration of the relevant period of four years when Mr Chan and Mr Lin would respectively be discharged from bankruptcy, the Official Receiver applied for an order under s.30A(3) that the respective relevant periods should cease to run for such period as the court may think fit ("the applications"). In both cases, the Official Receiver relied on the bankrupt's failure to prepare an annual report of his earnings and acquisitions for the trustee. In the case of Mr Chan, the Official Receiver relied on the further ground that his conduct had been unsatisfactory. Section 30A(4)(d) and (h).

1st instance

20. When the applications came before Master Kwang, he raised the preliminary point whether, in view of the trips made by Mr Chan and Mr Lin to the Mainland without notification to the Official Receiver, s.30A(10)(b)(i) applied. Mr Chan and Mr Lin were absent before the Master. On 18 April 2005, after considering the Official Receiver's submissions and reports, the Master dismissed the applications with no order as to costs. He held that on the proper interpretation of s.30A(10)(b)(i), a bankrupt is required to notify his trustee of his itinerary and where he can be contacted, if he intends to leave Hong Kong for whatever period; failing which his period of bankruptcy would cease to run until the bankrupt physically returns to Hong Kong and notifies the trustee of his return. As Mr Chan and Mr Lin had left Hong Kong frequently without notification of their departure or return, their

respective periods of bankruptcy had ceased to run from the very first day they left. Accordingly, their periods of bankruptcy had not expired and the applications were premature.

The Court of Appeal

21. The Court of Appeal (Yeung, Yuen JJA and Waung J) [2006] 2 HKLRD 475 held that:

- (1) The Master's interpretation of s.30A(10)(b)(i) is essentially correct.
- (2) However, absences of less than a day should not be counted.
- (3) Section 30A(10)(b)(i) is constitutional. Although it restricts the freedom to travel, the restriction is not disproportionate to the need to protect the rights of others.
- (4) But the Master's summary dismissal of the applications, simply on the ground that the four years period had not expired, was not a proper exercise of discretion. The applications should have been considered.
- (5) Accordingly, the Court of Appeal allowed the Official Receiver's appeals, set aside the Master's Orders and remitted the cases to another Master to determine the period of absence and then whether the relevant period should be extended.

Leave to appeal was obtained by the Official Receiver from the Court of Appeal.

The Official Receiver

22. The operation of s.30A(10)(b)(i) as interpreted by the Court of Appeal would mean that in every bankruptcy the relevant facts would have to be investigated in order to determine when the relevant period

would expire; whether the bankrupt had left Hong Kong, if so whether he had notified the trustee and if not, the length of his absence and whether and when he had notified the trustee of his return. The Official Receiver would have to obtain the information of the bankrupt's movements from the Immigration Department and to search his own records. Having regard to the substantial number of bankruptcies, this would involve an exceedingly onerous administrative burden on the Official Receiver. Mr Strachan appearing with Mr Beresford for the Official Receiver contends that : (1) the Court of Appeal's interpretation of s.30A(10)(b)(i) is incorrect; and (2) if contrary to its contention, such interpretation is correct, then the provision is unconstitutional.

The Secretary for Justice

23. The Court permitted the Secretary for Justice to intervene having regard to the public interest in the matter. Mr Clifford Smith SC for the Secretary argues that s.30A(10)(b)(i) as correctly interpreted by the Court of Appeal is constitutional. If it is held to be unconstitutional, he submits that by a process of reading down or severance, the words at the end of the provision "and until [the bankrupt] notifies the trustee of his return" should be left out so that the relevant period would be suspended only by the period of the bankrupt's absence from Hong Kong in the event that he failed to notify the trustee on departure.

24. Ms Linda Chan appearing as Amicus Curiae put submissions to assist the Court. Mr Chan and Mr Lin were absent. The Court is indebted to all counsel for their submissions.

The issues

25. The issues on this appeal are:

- (1) What is the proper interpretation of s.30A(10)(b)(i)? (“the interpretation issue”)
- (2) Whether s.30A(10)(b)(i) as properly interpreted is constitutional? (“the constitutional issue”)

The interpretation issue

26. In interpreting a statute, the court’s task is to ascertain the intention of the Legislature as expressed in the statute. Words are primarily to be construed in their ordinary meaning. Sections 30A(1), (2) and (3) provide for the bankrupt’s automatic discharge after the expiration of the relevant period, subject to its suspension by the court on objection by the trustee or a creditor. Section 30A(10)(b)(i) then provides that *notwithstanding* subsections (1), (2) and (3), where a bankrupt after the day of his bankruptcy order:

“(i) leaves Hong Kong without notifying the trustee of his itinerary and where he can be contacted; ...

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.”

27. There can be no doubt that s.30A(10)(b)(i) overrides ss.30A(1), (2) and (3). This is plain from the use of the word “notwithstanding”. Where the circumstances trigger its operation, its effect is that irrespective of ss.30A(1), (2) and (3), the relevant period “shall not continue” for the period specified therein.

28. It is also clear how s.30A(10)(b)(i) is intended to operate. The event which triggers its operation is the bankrupt’s departure from

Hong Kong without notifying the trustee of his itinerary and where he can be contacted. In computing time, the law usually ignores fractions of a day. So, as was rightly held by the Court of Appeal, absences of less than a day should be disregarded. But subject to this, the words "leaves Hong Kong" on their ordinary sense simply mean departing Hong Kong whatever may be the length of the absence.

29. Where this events occurs, the relevant period shall not continue to run during the period he is absent from Hong Kong *and* until he notifies the trustee of his return. So, the relevant period is suspended not only until the bankrupt's return to Hong Kong but also for such further period until he notifies the trustee of his return. Where the bankrupt does not notify the trustee of his return, the relevant period continues to be suspended indefinitely until he does.

30. Mr Strachan for the Official Receiver submits that s.30A(10)(b)(i) only operates as part of the objection system provided for in ss. 30A(3) and (4). He argues that the provision in effect contains a ground of objection to the bankrupt's discharge which may be advanced by the trustee or a creditor and that the relevant period would only be suspended if the court so orders under s.30A(3). And the period of suspension ordered would be subject to the statutory maximum. In support of his argument, he relies on para. 17.49 of the Law Reform Commission's Report on Bankruptcy (May 1995) which refers to Australian bankruptcy legislation under which absence from Australia is dealt with as part of the objection system.

31. This submission must be rejected. The intent of s.30A(10)(b)(i) as expressed in its language is clear. It prevails over

ss. 30A(1), (2) and (3) and plainly cannot be treated merely as a ground of objection. Paragraph 17.49 of the Law Reform Commission's Report is of no assistance. This passage clearly contemplates that in certain circumstances where the bankrupt has been absent from Hong Kong, the bankrupt should not be discharged after the maximum period. But irrespective of how this paragraph should be read, the Report only represented the very initial stage in the enactment history of the relevant legislation. As the matter moved on, the legislation was formulated and enacted in its present form. As discussed above, the meaning of s. 30A(10)(b)(i) is clear.

32. Accordingly, the Court of Appeal's interpretation of s.30A(10)(b)(i) is correct.

The constitutional issue

33. Article 31 of the Basic Law in so far as material provides that Hong Kong residents:

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

The Hong Kong Bill of Rights Ordinance, Cap.383 setting out the Bill of Rights ("the BOR") incorporates the provisions of the International Covenant on Civil and Political Rights ("the ICCPR") as applied to Hong Kong in accordance with Article 39(1) of the Basic Law. Article 8(2) of the BOR provides that:

"Everyone shall be free to leave Hong Kong".

Article 8(3) provides that any restriction on the right to leave Hong Kong must satisfy certain requirements. The relevant one for present purposes is that the restriction must be necessary to protect the rights of others. The difference between the terms of Article 31 of the Basic Law and Article 8(2) of the BOR is immaterial for present purposes.

The right engaged is the right to travel and to leave in Article 31 and the right to leave in Article 8(2). It will be convenient to refer to the right in both instruments simply as "the right to travel".

34. As the right to travel is guaranteed by both the Basic Law and the BOR, by virtue of Article 39(2) of the Basic Law, any restriction on the right must satisfy two requirements. First, it must be prescribed by law. In the present case, no issue arises in relation to this requirement which is plainly satisfied. Secondly, any restriction must be necessary to protect the rights of others. This is a legitimate purpose for restricting the right which is specified in Article 8(3) of the BOR. *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480 at para.27.

35. As the legitimate purpose for restricting the right to travel is constitutionally specified, the following proportionality test should be applied in considering whether the restriction is necessary : (1) The restriction must be rationally connected to the protection of the rights of others. (2) The means used to impair the right to travel must be no more than is necessary to protect the rights of others. *Leung Kwok Hung v. HKSAR* (2005) 8 HKCFAR 229 at para.36.

36. In considering the constitutional issue, it is important to bear in mind the well established approach that a generous interpretation should be given to the constitutional right whilst any restriction on the right should be narrowly construed. *Leung Kwok Hung* at para.16.

III. The restriction

37. Before discussing the application of the proportionality test, the nature of the restriction on the right to travel contained in

s.30A(10)(b)(i) must first be examined. Where a bankrupt leaves Hong Kong, the provision does not impose on him an express duty to notify the trustee of his itinerary and where he can be contacted. The bankrupt may freely leave without giving the notification. What the provision does is to impose a sanction for non-notification, namely, the relevant period for automatic discharge shall cease to run during the period of his absence and until he notifies the trustee of his return. Where he exercises his right to travel and leaves Hong Kong without giving the notification, he suffers the adverse consequence provided for by statute. The sanction of suspension provides the incentive for the bankrupt to notify and may be regarded as a constraining measure to seek to ensure notification. The bankrupt needs to notify in order to avoid the sanction.

38. Where the bankrupt leaves Hong Kong, it is obviously in his own interests to notify the trustee so as to avoid the sanction. The giving of notification is of course entirely within the bankrupt's control and is not an onerous matter for him. No formality is prescribed. He may do so in writing or orally. Where the bankrupt travels outside Hong Kong frequently on short trips for business, leisure or any other reason, he may, if he is in a position to do so, give an overall notification in advance covering all his intended trips over a forthcoming period. He need not separately give a notification for each trip.

39. The restriction on the right to travel is contained in s.30A(10)(b)(i) which provides for both notification and the sanction in the event of non-notification. It is the need to notify, taken together with the sanction for failure to notify, which should properly be regarded as constituting the restriction on the right. The exercise of the right to travel triggers the need to notify and the sanction in the event of failure to

notify. The burden on the right consists not only of the need to notify but also the sanction for failure to notify. It would be artificial to isolate the need to notify from the sanction and to regard only the former as constituting the restriction. In substance, the sanction for non-notification is integral to the need to notify and they together constitute the restriction on the right to travel. Different considerations would apply if failure to notify carries no sanction.

40. The decision in *The Association of Expatriate Civil Servants of Hong Kong v. The Chief Executive* [1998] 1 HKLRD 615 (Keith J) provides an illustration of the approach that in considering the restriction on the right to travel, the relevant requirement must be taken together with the sanction for its non-compliance as constituting the restriction. That case concerned the Chief Executive's Executive Order relating to the public service which prohibits an interdicted officer from leaving Hong Kong without the Chief Executive's permission and provides for possible disciplinary proceedings if the officer leaves without obtaining permission. It was held that the requirement for permission together the sanction of possible disciplinary proceedings where it is not obtained constitute the restriction on the right to travel. See 624I – 625A.

IV. Rational connection

41. The first stage of the proportionality test is that the restriction on the right to travel must be rationally connected to the protection of the rights of others.

42. The purpose of the restriction is clear. As Yuen JA aptly put it in the Court of Appeal (at para.91), its purpose 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 (see s.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.

43. Bankruptcy law is part of the legal structure for the conduct of business. There is a public interest in the proper administration of bankrupt's estates in accordance with bankruptcy law. See *Re Paget* [1927] 2 Ch 85 at 87 - 88 and *Totterdell v. Nelson* (1990) 97 ALR 341 at 343 - 344. So, although in this context, it is primarily the rights of creditors which are at stake, 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.

V. Necessary

44. Turning to the second stage of the proportionality test, the question is whether the restriction on the right to travel contained in s.30A(10)(b)(i) is no more than is necessary to protect primarily the rights of creditors.

45. As has been discussed, the purpose of the restriction is to ensure that the bankrupt stays on the trustee's radar so that the trustee can seek his co-operation when required. In considering whether the

restriction is no more than is necessary, it is important to bear in mind that, leaving s.30A(10)(b)(i) aside, there are weapons available to the trustee and the creditors when faced with the trustee's failure to co-operate in the context of the scheme regulating discharge. Under the scheme, 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 s.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 maximum period.

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. Three points should be made in this regard.

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.

50. Applying a generous approach to the interpretation of the right to travel, having regard to the harshness of the sanction, the restriction on the right cannot be regarded as no more than is necessary to protect primarily the rights of creditors. The protection of their rights require that the trustee is able to administer the bankrupt's estate effectively with the co-operation of the bankrupt. Taking into account that the trustee and the creditors are already able to object to the bankrupt's discharge at the expiration of the relevant period on grounds including his failure to co-operate and his unsatisfactory conduct, the harsh sanction for failure to notify cannot be justified. The restriction goes beyond what is necessary for the protection of the rights of creditors. Accordingly, s.30A(10)(b)(i) is unconstitutional and a declaration should be made accordingly.

51. Mr Clifford Smith SC for the Secretary for Justice contends that in the event of that s.30A(10)(b)(i) is found to be unconstitutional, the Court should leave out the words "and until [the bankrupt] notifies the trustee of his return" by a process of reading down or severance. This contention is plainly untenable. The process of reading down or severance cannot be deployed in the way suggested. In any event, it would not assist. Having regard to the discussion above, the provision, even with the exclusion of the words as suggested, would remain unconstitutional.

Other parts of s.30A(10)

52. Neither s.30A(10)(a) nor s.30A(10)(b)(ii) arises for consideration and no views are expressed on their constitutionality. The latter provision may have some linkage to s.30A(10)(b)(i). It assumes that the trustee is able to contact the bankrupt out of Hong Kong and this

may be as a result of notification pursuant to s.30A(10)(b)(i). But with the trustee having specified a date or period for the bankrupt's return, which decision may be challenged in court under s.83, s.30A(10)(b)(ii) may be said to involve an element of culpability on the part of the bankrupt. However, it should be noted that the suspension is for the entire period of his absence until he notifies the trustee of his return and not merely from the date of return specified by the trustee.

Orders

53. Accordingly, (1) the appeal should be allowed. (2) A declaration should be made that s.30A(10)(b)(i) is unconstitutional. (3) The matter should be remitted to the Master so that the Official Receiver's applications objecting to discharge may be considered.

Costs

54. As the questions involving important points in bankruptcy law are of public importance, an order nisi should be made that there be no order as to costs before the Court and in the courts below. Any party seeking a different costs order should within 28 days of the handing down of this judgment inform the Registrar in writing who will then give directions for the filing of submissions on costs.

Mr Justice Bokhary PJ :

55. I agree with the judgment of the Chief Justice.

Mr Justice Chan PJ :

56. I agree with the judgment of the Chief Justice.

Mr Justice Ribeiro PJ :

57. I have had the benefit of reading in draft the judgment of the Chief Justice and respectfully agree with the reasoning and conclusion it reaches in relation to the interpretation issue. However, I find myself with the greatest respect unable to agree with the conclusion that the impugned provision is unconstitutional as a disproportionate limitation on the freedom to travel.

How this appeal arises

58. This case began with the Official Receiver applying to Master Simon Kwang for orders under s 30A(3) of the Bankruptcy Ordinance (Cap 6) ("the Ordinance") against two bankrupts for an extension in each case of the four-year period which is the qualifying period for an automatic discharge of a bankruptcy (HCB 2084/2000 and HCB 2848/2000; 18 April 2005). The grounds relied on against Mr Chan Wing Hing ("Chan") were that his conduct had been unsatisfactory (for the purposes of the Ordinance): s 30A(4)(d); and that he had failed to prepare an annual report of his earnings and acquisitions for the trustee: s 30A(4)(h). Only the second ground was relied on against the other bankrupt, Mr Lin Hai San ("Lin").

59. A bankruptcy order had been made against Chan on 4 October 2000. On 23 October 2000, he attended at the offices of the Official Receiver where he was given a booklet entitled "A Simple Guide to Bankruptcy" which set out the duties of a bankrupt prior to discharge. He signed to acknowledge receipt. He also attended at those offices on 21 March 2001 but thereafter the Official Receiver lost contact with him despite several attempts to contact him. In September 2004, someone purporting to be his wife informed the Official Receiver that Chan had

been arrested and imprisoned in Shenzhen in July of that year. Proofs totalling HK\$77,230.84 had been filed in his bankruptcy but only HK\$409.66 was recovered. Records kept by the Director of Immigration showed that Chan had made frequent trips to the mainland between the date of the bankruptcy order and 19 July 2004 when he is said to have been arrested.

60. Lin, who was made the subject of a bankruptcy order on 1 November 2000, was in a similar position although he had left far larger debts, the proofs filed in his case amounting to HK\$114,252,833.90 and US\$221,993.57. The amount recovered was a mere HK\$1,483.49. He too acknowledged receiving the booklet when he attended the Official Receiver on 7 May 2001. That was the last the Official Receiver saw or heard of him despite various efforts at getting in touch. Immigration records showed that he had made frequent trips to the mainland between the date of the bankruptcy order and 1 November 2004.

61. When the Master ascertained that Chan and Lin had left the HKSAR on various occasions without having informed the Official Receiver either before departure or upon return to Hong Kong, he concluded that, by virtue of s 30A(10)(b)(i) (the terms of which are set out below), time had ceased to run in the computation of the qualifying period since the date of their first such departures. He held that it was accordingly unnecessary and premature to seek orders to stop time running based on objections pursuant to s 30A(4) of the Ordinance.

62. The Official Receiver appealed to the Court of Appeal (CACV 153/2005 and CACV 154/2005; Yeung and Yuen JJA, Waung J, 16 January 2006), which held that departures involving absences from Hong Kong for less than a day were to be ignored for s 30A(10)(b)(i) purposes. The Official Receiver submitted that the s 30A(10) requirements (particularly those created by s 30A(10)(b)(i)) are unconstitutional as a disproportionate impairment of the freedom to travel guaranteed by Article 31 of the Basic Law and Article 8 of the Bill of Rights. That argument was rejected and the restrictions were held to be legitimate and proportionate. The court, however, granted the Official Receiver leave to appeal to this Court under s 22(1)(b) of the Court's statute.

63. Pausing there, one might well ask why it is that the Official Receiver has brought these appeals and is seeking to raise an issue of unconstitutionality. The Official Receiver's freedom to travel is, of course, not in issue. Indeed, there is no party before the Court claiming that his or her freedom to travel has been infringed. Two undischarged bankrupts are named as parties, but they did not appear at any hearing. And, as we have seen, the Official Receiver is not suggesting that their freedoms are being infringed but, on the contrary, he is objecting to their automatic discharge from bankruptcy by reason of their uncooperative conduct. There is accordingly a certain air of artificiality about this case, with the Court being invited to consider the operation of the impugned provision on a purely hypothetical basis. It is also highly unusual to find a government agency, particularly one which played a major role in promoting the legislation in question, asserting that a provision of the resulting Ordinance is unconstitutional.

64. Mr Mark Strachan (who, with Mr Roger Beresford, represents the Official Receiver) frankly told the Court that the Official Receiver is worried that the construction given to s 30A(10)(b)(i) of the Ordinance by the courts below is likely to impose a very heavy additional administrative burden on his office. It would mean that a check would have to be made (no doubt mainly from Immigration Department records) to see if bankrupts have left Hong Kong without informing the Official Receiver either before leaving or upon returning in order to determine whether they have attained the qualifying period for an automatic discharge. Evidence was filed indicating that in mid-2005, there were some 75,730 undischarged bankrupts, of whom some 72,352 were being dealt with by the Official Receiver. Figures were also given showing that in the first half of 2005, an average of 852 bankruptcy orders were being made each month.

65. The fact that an Ordinance imposes severe and perhaps unmanageable administrative burdens may present an excellent reason for its amendment. But by no means does it follow that this provides a basis for contending that the provision is unconstitutional although, of course, if the court concludes that a particular provision is unconstitutional, it is bound to declare it so.

The Official Receiver's constitutional objection

66. The Official Receiver's case on unconstitutionality rests on the argument that s 30A(10)(b)(i) is a disproportionate measure in that it imposes a harsh or Draconian consequence upon a bankrupt who exercises his freedom to travel by leaving Hong Kong, but without informing the Official Receiver beforehand. The harsh consequence in question is said to be the automatic subjection of the bankrupt to a

prolonged and open-ended extension of the period of his bankruptcy, possibly by a number of years, depriving him of the benefit of the normal four-year qualifying period for automatic discharge.

67. While the Official Receiver accepts that requiring a bankrupt to remain contactable for the purposes of managing the bankruptcy is a rational requirement which advances the legitimate purpose of protecting the rights of the bankrupt's creditors, he likens the imposition of the aforesaid consequence to using a sledgehammer to crack a nut.

68. Consideration of whether the Official Receiver's argument should be accepted is assisted by an examination of the role played by s 30A(10)(b)(i) in the statutory scheme for managing bankruptcies.

The place of s 30A(10)(b)(i) in the bankruptcy scheme

69. In 1996, the Ordinance effected a radical change to the duration of bankruptcies, taking up (with some modifications) recommendations made in the Report on Bankruptcy published by the Law Reform Commission of Hong Kong in May 1995 ("the Report").

The previous position, as described in the Report was as follows:

"... for the overwhelming majority of bankrupts bankruptcy is a life sentence. At present, the only effective way for a bankrupt to achieve discharge is to make his own application to the court. The present provisions make this virtually impossible..." (§17.1)

70. The present scheme aims at striking a balance between the proper protection of the creditors' interests and enabling a bankrupt to achieve financial rehabilitation within a reasonable time. The Commission recommended that a person's bankruptcy be automatically

discharged after three years, but the Ordinance settled on a period of four years in the case of a person who has not previously been adjudged bankrupt and five years where there has been a previous bankruptcy adjudication: s 30A(1) and (2). Such periods run from the day on which the bankruptcy order is made: s 30.

71. The justifications advanced by the Commission for automatic discharge were two-fold:

“... Firstly, bankrupts would have a greater incentive than at present to co-operate with the trustee, as failure to co-operate could result in the trustee objecting to a bankrupt's discharge. Secondly, the rehabilitation of a bankrupt from bankruptcy would be assured, subject to rehabilitation being delayed as a consequence of a bankrupt's own failings.” (§17.16)

72. An automatic discharge is obviously highly beneficial to the bankrupt since a discharge releases him from all the bankruptcy debts (with certain exceptions relating to secured creditors, fraud, orders to pay damages, etc): s 32. And as Lord Woolf CJ (giving the judgment of a Court of Appeal of five members) noted in *A-G's Reference (No 1 of 2004)* [2004] 1 WLR 2111 at 2140, in the context of examining the use of reverse onuses in connection with insolvency offences:

“In the case of individual insolvency, the law relieves the bankrupt of personal liability for his debts, which are met out of his estate. These benefits drastically affect the rights and remedies of creditors.”

73. It is therefore not surprising that no bankrupt has an unconditional right to such discharge. To obtain such a release, the bankrupt is required to abide by the requirements of the Ordinance during the qualifying period. This was the basis of the Law Reform Commission's recommendation stated as follows:

“The introduction of automatic discharge would shift the emphasis from discharge being a privilege to its being a right. This right,

however, must be set alongside a bankrupt's duty to co-operate with the trustee in the administration of the estate. If he fails to co-operate with the trustee after bankruptcy, or if a bankrupt's conduct before bankruptcy was unsatisfactory, he should not be automatically discharged." (§17.24)

74. The cooperation required is spelt out in the Ordinance as duties applicable to the bankrupt prior to discharge backed, in some cases by liability to punishment for contempt: s 18(4) and s 26(4). Such duties, which comprise duties to cooperate in the administration of the bankruptcy in various ways, include the following:

- (a) After the order is made (and time begins to run), the bankrupt must submit a statement of his affairs containing particulars of his creditors, his debts and other liabilities and of his assets (s 18).
- (b) By s 26 the bankrupt is made subject to an extensive range of duties regarding the discovery and realization of his property. He must, among other things, attend creditors' meetings, subjecting himself to examination and providing them with full information as to his assets and liabilities; he must "wait at such times on the Official Receiver ... and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the Official Receiver"; and he is under a general duty to "aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors".
- (c) And by s 30A(10)(b)(i) (the provision under challenge and whose terms are set out below), a bankrupt who wishes to

leave Hong Kong must notify the trustee of his itinerary and where he can be contacted.

75. In line with the two-fold objective espoused by the Report, the Ordinance makes the punctual attainment of an automatic discharge conditional upon the bankrupt's compliance with such duties. Thus, s 30A(3) provides that failure to comply makes the bankrupt liable to an objection to his discharge (on the grounds set out in s 30A(4)), putting him at risk of having his qualifying period extended by another three or four years (making a maximum bankruptcy period of 8 years).

76. The grounds for objection contained in s 30A(4) include the following:

“...

- (b) that the discharge of the bankrupt would prejudice the administration of his estate;
- (c) that the bankrupt has failed to co-operate in the administration of his estate;
- (d) that the conduct of the bankrupt, either in respect of the period before or the period after the commencement of the bankruptcy, has been unsatisfactory;
- (e) without limiting paragraph (c) or (d), that the bankrupt has departed from Hong Kong and has failed forthwith to return to Hong Kong following a request to do so from the Official Receiver or the trustee;
- (f) that the bankrupt has continued to trade after knowing himself to be insolvent;
- (g) that the bankrupt has committed an offence under section 129 or any of sections 131 to 136;
- (h) that the bankrupt has failed to prepare an annual report of his earnings and acquisitions for the trustee.”

77. Section 30A(10)(b)(i) provides as follows:

“(10) Notwithstanding subsections (1) to (3) [which provide for automatic discharge and objections as noted above], where a bankrupt –

(b) after the commencement of his bankruptcy –

(i) leaves Hong Kong without notifying the trustee of his itinerary and where he can be contacted; ...

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.”

78. The object of this duty is obvious. Hong Kong is where the bankrupt's estate is being administered. And, as Yuen JA put it in the Court of Appeal: “... [s 30A(10)(b)(i)] is a means to ensure that bankrupts stay within the ‘radar’ of the trustee, so that the trustee could if required obtain the bankrupt's cooperation in the administration of his estate”. (§91)

79. Section 30A(10)(b)(i) is therefore concerned with securing the bankrupt's cooperation in the particular context of his leaving Hong Kong. And as with the other duties imposed, it makes compliance with its requirements a condition for progressing towards automatic discharge.

Is s 30A(10)(b)(i) unconstitutional?

80. The applicable principles are not in dispute. Article 31 of the Basic Law guarantees Hong Kong residents “freedom to travel and to enter or leave the Region” and, since s 30A(10)(b)(i) attaches a condition to the exercise of that freedom in the context of the administration of a bankruptcy, it is only valid if it constitutes a legitimate and proportionate limitation on the freedom. It is unnecessary to deal separately with provisions in the Bill of Rights.

81. In *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229 at 253, the Court (there dealing with the right of peaceful assembly) formulated the proportionality test which, adapted to refer to the freedom to travel, may be expressed in these terms:

“(1) the restriction must be rationally connected with one or more of the legitimate purposes; and (2) the means used to impair the [freedom to travel] must be no more than is necessary to accomplish the legitimate purpose in question.”

82. As previously noted, it is accepted that the relevant legitimate purpose in the present case involves protection of “the rights and freedoms of others”, meaning the rights of the bankrupt’s creditors, and that the s 30A(10)(b)(i) restriction is rationally connected to that purpose. These are propositions which I consider to be plainly correct.

Proportionality

83. Therefore the single issue calling for determination is as to whether s 30A(10)(b)(i) constitutes a disproportionate impairment of the freedom to travel, imposing a greater burden than necessary to achieve the aforesaid legitimate purpose.

84. In my view, looked at in the overall bankruptcy context discussed above, s 30A(10)(b)(i) constitutes a legitimate and proportionate limitation on the freedom. 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. He can come and go while continuing to build up his qualifying period. That requirement is not onerous. It does not even require the bankrupt to give a notification each and every time he leaves

Hong Kong. If he has to make regular and frequent trips abroad, say to the mainland, it is met by him providing an itinerary of the intended trips and providing a means of contact during this period, such as the number of his mobile telephone. And even if, for any reason, he omits to give prior notification to the trustee, s 30A(10)(b)(i) permits him to reactivate the running of time towards his automatic discharge by the simple expedient of notifying the trustee of his return to Hong Kong. I consider the requirement of notification prior to departure or, in default, upon return, 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. It operates alongside the provisions enabling the trustee to apply to the court under s 30A(3), on one or more of the grounds set out in s 30A(4), for an extension of the qualifying period, providing the framework of a bankrupt's responsibilities prior to discharge.

85. Mr Strachan contended that one should not view the impairment of the freedom as confined to the requirement of notification for the purposes of assessing proportionality. He argued that the freedom is also burdened by what he termed the Draconian consequences of non-compliance with s 30A(10)(b)(i). As noted above, he portrayed such consequences as the automatic subjection of the bankrupt to an open-ended extension of the period of his bankruptcy, possibly for a number of years, thus depriving him of the benefit of the normal four-year qualifying period for automatic discharge.

86. I cannot accept that argument. The proportionality of the provision should not, in my view, be judged on the footing that it attaches severe adverse consequences to the exercise of the freedom to travel on the hypothetical assumption that the bankrupt does not avail himself of the simple means provided by the provision itself for avoiding any adverse consequence at all, let alone the Draconian consequences proposed. Moreover, even if one does assume non-compliance with the requirement of prior notification, I fail to see why one should make the assumption 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.

87. The mechanisms of notification serve the very purpose of ensuring that the sanction of suspending the running of time operates as a proportionate incentive to cooperation allowing the sanction to be wholly avoided or promptly mitigated. It cannot, in my view, be right to assess proportionality on the assumption that those features of the provision are inoperative. They are mechanisms placed entirely in the bankrupt's hands and simple to operate. There is no doubt that all bankrupts are told that their cooperation is required, including the requirement that they inform the Official Receiver of any intended absence from Hong Kong. If one assumes that a bankrupt wants to secure the substantial statutory benefit of being released from all the bankruptcy debts, he should also be assumed to be able and willing to comply with such simple conditions for achieving that end. The condition should not be regarded as onerous and therefore disproportionate, not because of what the section actually provides, but because a hypothetical assumption is made that the bankrupt will fail to live up to his responsibilities pending discharge and

then will also fail to avail himself of a simple means for mitigating any adverse consequences.

88. Secondly, the argument involves attacking the notification requirement in s 30A(10)(b)(i) (again making the assumption of non-compliance) as somehow prejudicing the bankrupt's right to automatic discharge. It regards the bankrupt's freedom to travel as impaired because (the assumed) non-compliance with the notification requirement leads to the grave and disproportionate consequence of his being deprived of his right to enjoy the normal qualifying period and being made to suffer a prolonged extension of that period. But that view of the notification requirement is, in my opinion, inaccurate.

89. Non-compliance with the notification requirement does not prejudice any accrued right of the bankrupt to a discharge. He does not enjoy such a right and does not suffer such a consequence. Compliance with the notification requirement is one of the conditions to be met by the bankrupt in the process of acquiring that right, within a statutory scheme aimed at balancing the rights of the unpaid creditors against the financial rehabilitation of the bankrupt.

90. The operation of s 30A(10)(b)(i) discussed above may be contrasted with the operation of a provision considered by Keith J in *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of HKSAR* [1998] 1 HKLRD 615. There, the provision under challenge was s 17 of an Executive Order promulgated to provide for the appointment, dismissal, suspension and discipline of public servants. Section 17 provides: "An officer who is under interdiction may not, without the permission of the Chief Executive, leave HKSAR during the

interval before he is reinstated or dismissed.” Keith J held (at 624) that the right protected by Article 8(2) of the Bill of Rights was “a right to leave Hong Kong without suffering any disadvantage as a result of exercising that right” and identified the relevant “disadvantage” as including all the consequences flowing from the public servant’s leaving without permission, including the fact that this would constitute a disciplinary offence which could lead to disciplinary action, to dismissal and the forfeiting of “all claims to any pension or gratuity.” His Lordship held (at 625) that the validity of s 17 would depend on the circumstances and in particular on whether “requiring the officer to remain in Hong Kong” was necessary for one of the reasons deemed legitimate by Article 8(3)(b), that is, to protect national security or public order or public health or morals or the rights and freedoms of others.

91. Keith J was therefore concerned with a very different provision. Section 17 prohibits the interdicted public servant from exercising his freedom to travel at all unless he first obtains the Chief Executive’s permission to do so. Exercising the freedom without prior permission therefore in itself and without more constitutes a disciplinary offence exposing the officer to disciplinary proceedings and sanctions. It is therefore not surprising that Keith J did not distinguish between non-compliance and the consequences of non-compliance when describing the “disadvantages” attaching to exercise of the freedom to travel in that case.

92. Section 30A(10)(b)(i), unlike s 17, does not create as a starting-point a prohibition against exercising that freedom. It merely requires the bankrupt to notify the trustee of his itinerary and contact details. Non-compliance with s 30A(10)(b)(i) merely suspends the

running of time in the process of the bankrupt acquiring a right to an automatic discharge which the bankrupt can unilaterally reactivate on returning to Hong Kong. It does not immediately expose the bankrupt to sanctions, the nature and severity of which are determined by the executive. Moreover, sanctions under s 17 potentially involve the deprivation of earned pension or gratuity rights while suspension of the qualifying period does not deprive the bankrupt of any accrued rights. Clearly, s 30A(10)(b)(i) interacts with the freedom to travel in a wholly different and far less intrusive manner than s 17.

93. It is therefore my view that in the present context, it is the notification requirement alone, applicable prior to departure or, in default upon return, and not some assumed unmitigated and open-ended adverse consequences flowing from an assumed failure to comply with the requirement, which is to be weighed in the proportionality balance. In my judgment, the notification requirement imposes a minimal impairment to the freedom to travel that is legitimate and proportionate. I would therefore conclude that s 30A(10)(b)(i) is a valid limitation on the exercise of the freedom to travel and dismiss the appeal.

Sir Anthony Mason NPJ :

94. I agree with the judgment of the Chief Justice.

Chief Justice Li:

95. The Court by majority (with Mr Justice Ribeiro PJ dissenting) (1) allows the appeal, (2) makes the declaration that s. 30A(10)(b)(i) is unconstitutional and (3) remits the matter to the Master so that the Official Receiver's applications objecting to discharge may be

considered. The Court makes the order nisi and gives the directions set out in para.54 of my judgment.

(Andrew Li)
Chief Justice

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(R.A.V. Ribeiro)
Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Mr Mark Strachan and Mr Roger Beresford (instructed by the Official Receiver's Office) for the appellant

Mr Chan Wing Hing, the respondent in FACV No. 7 of 2006, in person,
absent

Mr Lin Hai San, the respondent in FACV No. 8 of 2006, in person,
absent

Ms Linda Chan, amicus curiae

Mr Clifford Smith SC (instructed by the Department of Justice) for the
intervener