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HONG KONG HIGH COURT SHEDS LIGHT ON ITS BANKRUPTCY JURISDICTION

INTRODUCTION

In the recent judgment in *Re Gregory ("G") and Bottomley ("B") (Debtors)*¹ typical bankruptcy petitions presented by The Hongkong and Shanghai Banking Corporation Ltd ("HSBC") against G and B based on their personal guarantees of Can Build Management Limited's ("CBM")² debts were dismissed when the Court concluded it had no jurisdiction over them.

FACTS

CBM's banking relationship with HSBC resulted in various loans, overdraft, performance bonds and credit card facilities which were secured by a guarantee limited to US\$8,149,660 from G and B executed in November 2015.

In due course CBM had payment issues leading to HSBC's High Court proceedings against it³ and a judgment for over HK\$23 million and US\$900,000. While CBM repaid HSBC over HK\$14 million towards the foregoing, after its judgment payments dried up because of Covid-19, HSBC

successfully petitioned to put the company into liquidation in February 2022.

HSBC turned to G and B for the shortfall. Statutory Demands were issued in 2021 but could not be served personally with G and B no-longer being in Hong Kong. By 2024 HSBC was owed: (i) HK\$8,401,937.88 and US\$260,825.89 by G; and (ii) HK\$11,167,628.77 and US\$1,144,847.81 by B. In May 2024 HSBC obtained leave to petition to bankrupt G and B who did not dispute the debt but instead opposed the Court's jurisdiction in respect of the petitions.

BANKRUPTCY ORDINANCE ("BO")

Section 4(1) Bankruptcy Ordinance ("BO") sets out the debtor's connections to Hong Kong that need satisfying for the Court to have jurisdiction to hear a bankruptcy petition. The section provides the debtor:

- (a) Must be domiciled in Hong Kong; or
- (b) Must be personally present in Hong Kong on the day the petition is presented; or

¹ [2025] HKLRD 816.

² CBM was a Hong Kong company and G and B were its directors and beneficial owners.

³ HCA 1224/17.



- (c) Must be ordinarily resident or had a place of residence or carried on business in Hong Kong at any time in the three years before the petition (being from 10 May 2021 to 9 May 2024).

HSBC relied on (a) and (c).

G and B were both born in the United Kingdom, held British passports and were (and remain) Hong Kong permanent residents.

G came to Hong Kong in 1982 and lived in the city as a base while working globally. To work on a large CBM project in the United Kingdom, G decided to leave Hong Kong in March 2018 and based himself back in the United Kingdom. He'd lived in a rented apartment in Hong Kong which was emptied of his personal belongings and vacated in January 2020. Since then, he visited Hong Kong 4 times staying 24 days in total in various hotels. In total, he had been a director of 17 Hong Kong companies. All such appointments predated 10 May 2021. By the time of the case, most of these companies were dissolved.

With respect to B, he came to Hong Kong in 1990 where he married, bought a property which was repossessed in 2018 by HSBC (he and his family lived in rented accommodation thereafter) and held 13 Hong Kong directorships. At the time of the case, only 2 companies still existed. For work reasons, B and his family departed from Hong Kong in 2020, and their possessions were shipped from Hong Kong in the summer of that year. Thereafter he'd visited Hong Kong 5 times and stayed for 32 days in various hotels.

DOMICILE⁴

G's and B's domicile of origin was the United Kingdom where they were born. A 'domicile of choice' could then be acquired elsewhere by living in a new place with the requisite intention to reside there permanently or indefinitely. The issue in the case was whether G and/or B had

chosen to be domiciled in Hong Kong and if so, had this been abandoned by 2024.

By establishing CBM and other businesses in Hong Kong and obtaining Hong Kong permanent identity cards, the Court was satisfied that G and B both had acquired Hong Kong as a domicile of choice by at least since 1993.

B stated he intended to retire in the United Kingdom, but such a statement was too vague to negate his domicile of choice. Afterall he'd bought a property in Hong Kong in 2003 and would have remained there but for its repossession 2018. The foregoing was synonymous with permanent and indefinite residence.

G and B argued they'd left Hong Kong no-longer intending to reside in the city and had abandoned their domicile of choice on doing so. The Court agreed. G had left Hong Kong in 2018 for work and gave up his apartment in January 2020, which is the date he'd abandoned his domicile of choice on.

With respect to B, he'd left Hong Kong to set up home in the United Kingdom in January 2020 and by the summer his family had surrendered their flat and moved there to be with him. The Court held he'd abandoned his domicile of choice since March 2020.

Once their domicile of choice was abandoned, G's and B's domicile of origin was revived. Short visits to Hong Kong thereafter where G came for rugby related matters or minor corporate roles held where B had two quiet directorships, did not serve to show a domicile of choice in Hong Kong.

ORDINARY RESIDENCE

As an alternative to its domicile argument, HSBC asserted that G and B were 'ordinarily resident' in Hong Kong since 10 May 2021.

⁴ For the Hong Kong Court to have bankruptcy jurisdiction one test is that a debtor needed to be domiciled in Hong Kong. The burden of proof was on HSBC.



Such residence concerns habitual, normal residence for settled purposes, assessed as a matter of fact and degree. The test was not satisfied because both G and B had relinquished their properties in Hong Kong in 2020 and left the jurisdiction for the United Kingdom in that year.

CARRYING ON BUSINESS

Finally, HSBC argued G and B had carried on business in Hong Kong after 10 May 2021.

The argument was expected to succeed with G and B running CBM until its liquidation in February 2022 and B having two Hong Kong directorships throughout.

But the Court held the BO was not satisfied by merely directing or controlling a company. This surprising finding was based on section 4(2) BO which states ‘carrying on business’ is being a member of a firm of partnership carrying on business in Hong Kong personally or by means of an agent or manager.

The separate legal personality of a company was not the same as carrying on one’s own business and to found bankruptcy jurisdiction under section 4(1)(c) BO there must be activities “over and above those attributable to the company” to show such a personal business.

The above explains why the petitions were dismissed.



CONCLUSIONS

Banks, financial institutions and money lenders who typically petition to bankrupt debtors could easily find themselves in a similar position as HSBC did so they need to be mindful of the case’s facts and the reasoned judgment, in particular

how and when a domicile of choice could be abandoned and what is and is not carrying on a business.

If HSBC had been able to issue its petitions in 2022 or 2023, then G and B would have come within section 4(1)(c) BO having ordinarily resided in Hong Kong within the last 3 years. This would have been the easiest way for it to establish the Court’s jurisdiction.

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