Notes on Bankruptcy



1. ASK THE CLIENT WHETHER THEY ARE BANKRUPT

A client may not think it relevant, or not appreciate the significance. They have to be asked, specifically. Not only in relation to bankruptcy but in as to any other form of arrangement with their creditors.

2. EVEN IF THE CLIENT SAYS THEY ARE NOT BANKRUPT – CHECK ANYWAY

The bankruptcy and insolvency register can be found on www.insolvencydirect.bis.gov.uk

3. TELL THE CLIENT TO INFORM YOU IF THEY DO GO BANKRUPT

In the Eaton case, discussed below, the claimant went bankrupt after being injured. It is not clear whether he failed to inform his solicitors, or no-one appreciated the significance of this.

4. IF THE CLIENT GOES BANKRUPT YOU HAVE TO CONSIDER THE POSITION OF THE TRUSTEE IN BANKRUPTCY

The situation here is complex:

- 1. The right of action vests in the trustee in bankruptcy.
- 2. The general damages vest in the claimant personally and do not form part of the trustee's find.
- 3. If the claim contains any element of special damages the whole claim passes to the trustee. Any general damages recovered will belong to the bankrupt.

5. READ Eaton -v- Mitchells & Butler PLC (30th April 2015)

In that case the consequences of the claimant were only raised after the trial on liability, and after various interim payments had been made. The defendant then took the point that the proceedings were invalid. It was held that proceedings issued by a bankrupt were not a nullity. The proceedings were, potentially, an abuse of process. However, the judge granted a three-month adjournment to allow the claimant to regularise the position.

"It is remarkable that the case had proceeded all the way to a twoday trial, conducted (as I am told) by leading counsel for the claimant, without the point ever being noticed."

6. CONSIDER THE VALIDITY OF ANY RETAINER/ATE INSURANCE AFTER BANKRUPTCY

This point considered by Kerry Underwood who pointed out that there is no authority on this point. "However, it seems to me that if the chose of action can be assigned, then the retainer, which is undoubtedly parasitic upon the chose, must also be capable of assignment"

7. READ THE INSOLVENCY DIRECT GUIDANCE

There is useful guidance in the <u>Insolvency Direct technical manual</u> "31.9.41 Special damages and general damages Often, in correspondence or papers relating to a claim, the official receiver will see reference to 'special damages' and 'general damages.

Generally speaking, for the purposes of deciding who owns which part of any claim, special damages are 'property' which vest as part of a bankruptcy estate and general damages are 'personal' and thus remain in the ownership of the bankrupt.

31.9.42 Actions which involve damage to both the bankrupt's person and property (amended July 2012)

Many events lead to damage to the bankrupt's property and their person. For example, a typical road accident may lead to an injury to the bankrupt's body (for example, whiplash) and, also, damage to the bankrupt's property (damage to the car) and/or the need to incur additional (and otherwise unnecessary) expenses (damage to the financial position – which is a property damage). Following the relevant case law (see <u>paragraph 31.9.37</u>), this may cause a problem in deciding whether the action vests in the official receiver, as trustee, or not.

It used to be the case that such an action would be, effectively, 'split' between the personal damage and the property damage, and each claim pursued separately (one by the bankrupt and the other by his/her trustee) [note 11]. This way of deciding matters is not, however, considered good law any longer (see <u>paragraph 31.9.43</u>).

31.9.43 Current approach to actions which involve damage to both the bankrupt's person and property – a 'hybrid' claim.

It has been held that where a right of action involves damage to both the person and property of the bankrupt, there is only one cause of action, with different 'heads' of damage. The right cannot be split [note 12] (see paragraph 31.9.44 for a limited exception to this principle).

This position was confirmed, and somewhat advanced upon, in a later case [note 13], where such an action (referred to in the judgment as a 'hybrid' claim) was held to be an action that would vest in a bankrupt's estate, with any damages awarded for the personal element of the claim being held on a constructive trust (see paragraph 31.9.200) for the benefit of the bankrupt by his/her trustee."

(The notes)

1. <u>Stock v London Underground 30 July 1999 CA, Times August 13</u>

8. KNOW ABOUT "HYBRID" CLAIMS

Most personal injury claims will be "hybrid" claims. Useful examples are given in the Insolvency Direct manual.

"31.9.46 Examples of hybrid actions (amended July 2012)

Examples of hybrid actions are as follows:

- An assault causing a bodily injury (personal) and damage to spectacles or clothing (property).
- A car crash causing a broken ankle (personal) and the resultant need to pay a third party to carry out household tasks such as shopping/cleaning/gardening (property)
- A car crash causing whiplash (personal), damage to a vehicle (property) and the need to use public transport at additional cost whilst the car was being repaired (property).
- A fall causing a strained back (personal), the need to spend money travelling to the hospital (property) and to pay for a private physiotherapist (property).
- Medical negligence leading to an arm injury (personal) and loss of earnings (property).
- An assault on a taxi driver causing a bodily injury (personal), posttraumatic stress (personal), damage to the taxi (property) and an inability to work (loss of earnings – property).
- A fall in the street leading to a broken arm (personal) and damage to a laptop computer (property).
- A wrongful arrest (personal) where the bankrupt's front door was destroyed in the arrest (property).

An action would be a hybrid action even if the property damages were directly connected to the personal damages – as in the second and fourth examples above.

31.9.47 Getting the bankrupt's advisors to agree to the position in a hybrid claim where the official receiver is dealing with a 'hybrid' claim he/she should, as a first step, write to the bankrupt's advisors, setting out the position outlined in paragraphs 31.9.42 to 31.9.45, asking them to form a view on whether the claim vests in the trustee of the bankruptcy estate, or not. Ideally, the position should be agreed. The official receiver may use the letter attached at <u>Annex C</u> to this chapter for this purpose."

9. REMEMBER THAT IF THE ACTION STARTS/CONTINUES WHILST THE CLAIMANT IS BANKRUPT YOU WILL HAVE TO RECTIFY THE SITUATION IMMEDIATELY

In <u>Eaton</u> it was decided that such proceedings were not a nullity. If the claimant had been litigating in the full knowledge that something was amiss it could have been an abuse of process. However, the action was adjourned to allow either:

- The annulment of the bankruptcy.
- The trustee to file an application for an order substituting him as bankrupt.
- The claimant to take an assignment of the cause of action and make an application notice for an order giving him permission to amend the claim form and/or particulars of claim to plead his right by assignment.

If any of these things did not happen within a three-month period then the action would be struck out as an abuse of process.

10. THIS APPLIES TO FATAL ACCIDENT CLAIMANTS TOO

This is made clear in the Insolvency Direct manual.

"31.9.67 Claims under the Fatal Accidents Act 1976

Where a death is caused by a wrongful act or neglect such as would (if death had not ensued) have entitled the deceased to bring an action for damages, the person liable shall still be liable to an action for damages despite the death of the person [note 30]. Such an action is for the benefit of the dependents of the person whose death was caused [note 31].

An action may include (or consist entirely) of a claim for damages for bereavement [note 32]. A claim which is entirely for bereavement is personal to the bankrupt and would not form part of the bankruptcy estate. Where a claim is partly in respect of bereavement and partly in respect of a claim for financial losses resulting from the death, it would be a hybrid claim (see paragraph 31.9.43) and would vest in the official receiver, as trustee."

11. THIS MAY NOT JUST APPLY TO CLAIMANTS BUT ALSO TO CARERS WHO GO BANKRUPT

There have been several cases where a carer in a personal injury has been made bankrupt and the trustee has sought to claim that part of the damages which are, technically, held on trust for the carer. This highlights the importance of identifying, precisely, what the care element of a settlement is, even in circumstances where the claimant has no real interest in this because the carer does not want the damages.



Expert training for Expert Practitioners

The Knowledge Hub, Frenkel Topping Group's training academy, delivers free face-to-face and virtual training to our professional clients. Helping you stay up to speed and informed.



If you have any further questions or wish to book a private session with our expert trainers, don't hesitate to get in touch

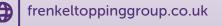


Frenkel Topping Group @FrenkelTopping

Follow us



Get in touch



contactus@frenkeltopping.co.uk