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Work Accident Claims and Insolvency

Work Accident Claims and Insolvency: A whistlestop tour

A range of issues are thrown up in a work accident claim where either the claimant or defendant becomes insolvent. Less common, but it does come up in work accident claims is the insolvency of the claimant employee either before the claim is issued, during the claim or after judgment/ settlement and some implications on certain procedures and orders such as PPO. More commonly faced issues are the insolvency of the employer as an individual or a company and often in occupational illness claims a long dissolved company.

It is important to remember that the law of insolvency is almost exclusively statute based. Just about everything you need to know is set out in the Insolvency Act 1986 and the Insolvency Rules 1986.

In this article, Gaurang Naik and Maurice Rifat examine the issues raised where either the claimant or defendant becomes insolvent.

WORK ACCIDENT CLAIMS AND INSOLVENCY

By Gaurang Naik and Maurice Rifat

Claimant's Insolvency

Pre-Action

Where a potential claimant becomes bankrupt, prima facie any claims for damages he may have pass to his trustee in bankruptcy on the basis that they are things in action vested in him. Thus, a right of action for damages for breach of contract, negligence or some other tort is automatically vested in the trustee where the only damages claimed are for interference with property or for other financial loss.

There is, however, an important exception to this. A right to sue for damages in respect of entirely non-pecuniary loss remains vested for all purposes in the bankrupt, as do its proceeds when recovered. Therefore, damages for pain and suffering remains vested in the bankrupt; *Ord v Upton* [2000] Ch AllER 193. This rule does not apply to the proceeds of a personal accident insurance policy. *Cork v Rawlins* [2001] CH 792.

Where the cause of action is 'hybrid' – that is, includes claims for both pecuniary and non-pecuniary loss, as with a claim for personal injury involving both lost earnings and pain and suffering? Here the position is more complicated, since a claim for personal injury is on principle indivisible. A hybrid claim vests at law entirely in the trustee, so that the bankrupt himself will have no title to sue for non-pecuniary loss in the absence of an assignment by the trustee. However, the bankrupt's interests are protected in that the trustee will hold the right to sue for, and any recovery in respect of, non-pecuniary loss on trust for the bankrupt personally.

If the claim is for personal injuries only, then the claim will not vest in the Trustee. A matter to consider in a relatively modest claim for special damages.

Where the cause of action has accrued but no claim has been issued the Trustee in Bankruptcy has to determine whether to issue proceedings in the interest of the creditors. Where a Trustee refuses to sue on the bankrupt's behalf s/he could be forced to do so provided a suitable indemnity for the costs is provided. *Ord v Upton*.

The trustee in bankruptcy may assign the cause of action to the bankrupt so that the bankrupt is able to bring or continue proceedings. This will involve delay and expense.

Any proceedings brought by the bankrupt where the cause of action is vested in the Trustee in bankruptcy is an abuse of the court's process and could be struck out or stayed, if it can be remedied see *Eaton v Mitchells & Butler*.

Bankruptcy ends with the discharge of the bankrupt after a year. The bankrupt is released from all the bankruptcy debts at the point of discharge. However, at the point of discharge, existing personal injury claims remain with the Trustee in Bankruptcy. It therefore continues to fall to the Trustee to determine whether or not the personal injury claim should be brought, even if the bankruptcy has been discharged at the point of issuing court proceedings.

CFAs

Frequently, claimants in personal injury claims will have a Conditional Fee Agreement (CFA) in place. If the Trustee in Bankruptcy takes over the claim when the claimant becomes bankrupt, an issue may arise as to whether the benefit of the CFA remains with the bankrupt. To avoid this consequence, the Trustee in Bankruptcy can transfer the CFA to themselves. It seems likely, although there is no case law on the effectiveness of such a transfer, that the original CFA can be transferred to the Trustee in bankruptcy. The problem, among others, is that the Trustee in Bankruptcy is not a party to the original CFA and the Claimant may not agree.

The Trustee in Bankruptcy could enter into a new CFA to include payment for past as well as future work. This might work provided it is not pre-LASPO CFA and the solicitors or the Trustee in

Bankruptcy don't want to preserve the obligation on the Defendant to pay success fee and ATE premiums.

Claimant's Insolvency during Litigation

The procedure which is usually followed in the event of a claimant becoming bankrupt during the course of proceedings is for the Trustee in Bankruptcy to be afforded an opportunity to be substituted into the claim in place of the bankrupt. If the Trustee in Bankruptcy wishes to pursue the claim in the interests of the creditors as a whole, then they may do so. If, on the other hand, they conclude that the claim is not worth pursuing, it can be discontinued. The Trustee in Bankruptcy may assign the cause of action for the bankrupt to continue.

Damages & PPOs

Damages awarded for pain, suffering and loss of amenity (and Bereavement awards) are personal to the bankrupt and would be held for the benefit of the bankrupt rather than falling into the estate for the benefit of the creditors.

Where there is a Periodical Payments Order made then the relevant provisions are section 310 of the Insolvency Act 1986 which deals with Income Payment Orders and s 101(4) of the Courts Act 2003 which deals with the position where the Claimant in receipt of periodical payments becomes bankrupt:

(4) Where an individual who has a right to receive periodical payments becomes bankrupt-

> (a) the payments shall be treated for the purposes of the bankruptcy as income of the bankrupt (but without prejudice to section 329AA of the Income and Corporation Taxes Act 1988 (c. 1)),
>
> (b) neither the right to receive periodical payments, nor any property or arrangement designed to protect continuity of the periodical payments, shall form part of the bankrupt's estate for the purposes of the Insolvency Act 1986 ((c. 45) or the Insolvency (Northern Ireland) Order 1989 (SI 1989/2405 (N.I. 19)),
>
> (c) an income payments order may not be made in respect of any part of the periodical payments identified (in the order or agreement under which the payments are made) as relating wholly to expenditure likely to be incurred by or for the individual as a result of the personal injury concerned
>
> (d) nothing in section 2 of the Damages Act 1996 (c. 48) shall prevent a court from making an income payments order (subject to paragraph (c)), and
>
> (e) nothing in section 2 of that Act shall prevent entry into an income payments agreement.

(5) In subsection (4)-

> The "Income Payments Order" means an order under section 310 of the IA 1986 and "periodical payments" means periodical payments awarded or agreed, or in so far as awarded or agreed, as damages for future pecuniary loss by-

Those orders providing for necessary *expenditure* as a result of the injury itself, such as orders intended to provide for care, as opposed to other heads such as those compensating for loss of income, are afforded additional protection in the event of the claimant's bankruptcy. CPR 41.8 requires the identification of the purpose of the periodical payments (respectively) within the order. Whilst periodical payments may generally become the subject of income payments orders under s 310 of the Insolvency Act 1986, this is not so if and to the extent that the orders fall within s 101(3)(c) of the CA 2003. These types of periodical payments would merit restriction under s 310(2) in any event.

Defendant's Insolvency

A company is insolvent where either it is unable to pay its debts as they fall due or where the value of the company's assets is less than the amount of its liabilities. Although less explicit in the Insolvency Act 1986 (IA 1986), the same criteria would also determine whether or not an individual is insolvent. In the case of a company, the principal processes are liquidation and administration. In the case of an individual, the principal process is bankruptcy.

Where the Defendant is an Individual

Court proceedings cannot be commenced against an undischarged bankrupt or where an Individual

Voluntary Arrangement (IVA) has been made without the permission of the court. A claimant cannot simply issue proceedings in the usual manner to seek compensation for the injury. An application for permission should be made, supported by evidence. As with company liquidation the application can be made retrospectively.

IA 1986, s 285(2) provides that:

> *'Any court in which proceedings are pending against any individual may, on proof that a bankruptcy application has been made or a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit.'*

Where the Defendant is a Company

Where the intended defendant in a personal injury claim is a company, it is necessary to consider which type of insolvency process the company is in.

If it is in administration

- no legal proceedings may be instituted or continued against the company except with the consent of the administrator or the permission of the court
- it is important to note that this not only prevents a claim being issued against a company in administration, it has the effect of staying proceedings already issued at the point the defendant enters administration

This moratorium can, however, be waived, either by obtaining the consent of the administrator or by seeking permission of the court. For circumstances in which permission may be granted, see *Re Atlantic Computers*.

If the defendant company has been placed into compulsory liquidation, following a petition by a creditor of the company:

- an automatic moratorium takes effect by virtue of IA 1986, s 130(2)
- this moratorium prevents court proceedings both from being issued and from continuing
- this moratorium can be avoided only with permission of the court (for guidance on the factors the court will take into account when faced with an application to lift the moratorium, see *Re Atlantic Computers)*

Where the company is placed into voluntary liquidation, including the common Creditors' Voluntary Liquidation (CVL):

- there is no equivalent statutory moratorium although the court may approach voluntary liquidation in the same way as compulsory liquidation
- in practice, what often happens is that the liquidator of a company in CVL will apply to the court for a stay of any proceedings brought against the company
- the claimant is of course entitled to oppose any application for a stay (the court will carry out a balancing exercise between the rights and interests of the applicant against the rights and interests of the other creditors)

It is, therefore, reasonably safe to assume that if the defendant is an undischarged bankrupt (or subsequently becomes one) or a company which is now in an insolvency process, it will be necessary to persuade a court (or perhaps an administrator) that special circumstances exist which justify progressing the claim to have it determined judicially.

Once a company has not only been liquidated but dissolved, its assets, including any claims for damages, pass to the Crown as bona vacantia. However, the court has a discretionary jurisdiction.

Insurance

In most cases the defendant in a workplace accident claim is insured and the insurer is the intended paying party in the event that damages are awarded. As a result, from the financial perspective of the claimant, the insolvency of the defendant may be largely incidental. If there was an extant policy of insurance but the insolvency event and the event giving rise to the insured's liability (the accident or cause of injury) both occurred prior to 1st August 2016, then the Third Party (Rights Against Insurers) Act 1930 will most likely apply. This provides a mechanism for a Claimant to have a direct right of 'enforcement' against an insurer following a successful claim, but only where the Claimant had first established liability against the insolvent Defendant. So, the Claimant would still have to pursue the defendant directly to prove liability which would mean they would have to jump through the procedural hurdles as set out above. This scenario would most likely apply in the context of "legacy" type claims where a s.33 Limitation Act 1980 extension was required, or perhaps in relation to claims by minors.

Where there is a relevant policy of insurance and either the insolvency event or accident occurred after 31st July 2016, then the Third Party (Rights Against Insurers) Act 2010 will apply which makes things far more straightforward for claimants. Following implementation of the 2010 Act a Claimant can claim against an insolvent company's insurer directly. At the moment of the insolvency event, the claimant has a direct right to sue the insurer without joining the insolvent insured as a party. There was no requirement that the claimant first establish and quantify the insured's liability by a separate claim against the insured. The claimant is not required to sue the insolvent or dissolved company. In practice, this means that the Claimant does not need to apply to lift the automatic stay or to apply to restore a dissolved company to the register. It also means that in one set of proceedings against the insurer, the Claimant can seek a declaration from the Court as to both the liability of the tortfeasor company and the enforcement of that liability.

The 2010 Act provides Claimants with an important tool, namely the right to seek from the Insurer, or broker, details of the identity of the insurer, the policy terms, and other details of the insurance policy including the extent of the cover and deductibles. Insurers are required to provide those details within 28-days of request by the claimant.

Insurers are able to rely upon any defence that their insolvent insured would have had against the Claimant, including arguments of limitation and contributory negligence. Also, and importantly, the Insurer can rely upon any policy defences it would have had in a claim brought against it by the insolvent Defendant or avail itself of any limits on cover, including breaches of conditions precedent, deductibles and self-insured retentions. It is necessary to bear in mind that limitations on cover would apply, even in the event of a successful personal injury claim. This might mean, for example, that policy deductibles may exceed the value of the damages claim, leaving the Claimant unable to pursue the insurer and having to join the ranks of unsecured creditors of the insolvent Defendant.

Closure and insolvency of businesses will inevitably result in the loss of key documents and witnesses and there is a risk of speculative and fraudulent personal injury claims. Insurers should ensure that records relating to their policyholders are maintained and accurate, especially where the insurer is aware of a pending insolvency.

A point to note is that the limitation period continues to run in claims against liability insurers under the 2010 Act (see *Rashid v Direct Savings Ltd [2022]) 8 WLUK 108)*. Accordingly, claims against the insurers were likely to be time-barred even if the limitation period had not expired when the insured was wound up. The pause on limitation recognised in *Financial Services Compensation Scheme v Larnell (Insurances) Ltd (in liquidation) [2005] EWCA Civ 1408* as applying under the 1930 Act, is not available under the 2010 Act, due to their fundamental difference being the 1930 Act merely enabled the enforcement of an award as an auxiliary right in the insolvency process of a company, while the 2010 Act allows the complete action for damages to be laid against the insurer without the participation of the insolvent company.

The provisions of the 2010 Act are permissive rather than mandatory and a third party retains the option of applying to the court (under CA 2006, s 1029) to have a dissolved company or LLP restored to the register.

Given that it is no longer necessary for a potential claimant to restore a company to the register before making a personal injury claim against it and recovering damages, this means that if an insurer of that company wishes to seek contributions from others who shared liability for the injury, it must make its own application for restoration. A company will often have been dissolved many years before a personal injury claim is made, particularly if it relates to exposure to asbestos or noise induced hearing loss, so an application by an insurer to restore a company to the register will often be out of time (i.e. more than six years after its dissolution).

The Third Parties (Rights Against Insurers) Act 2010 (Consequential Amendment of Companies Act 2006) Regulations 2018 address this timing issue for insurers by amending CA 2006, s 1030 by adding a further purpose for which an application to restore a company may be made at any time, namely, for the purpose of an insurer bringing proceedings against a third party in the name of that company in respect of that company's liability for damages for personal injury.

However, if TP(RAI)A 2010 does not apply, it will be necessary to maintain a legal entity against whom court proceedings can continue until judgment is enforced. If the person controlling the insolvency process does not agree to defer the dissolution of the company, the court has the power to do so.

Restoring the Company to the Register

If the intended defendant has been dissolved before the claim has been issued sections 1029 to 1034 of the Companies Act 2006 (CA 2006) provide a mechanism by which a prospective claimant may restore a company to the register to enable personal injury litigation to be brought. Company restoration by court order may well be required in the event of a long-delayed insurance claim ("long tail insurance claim") where a latent disease, such as mesothelioma, manifests itself many years later after causative employment ceases. This is worthwhile only if the insurer can be traced. This does no more than allow a claimant to make use of a name carved on a tombstone (per *Lord Templeman Bradley v Eagle Star* [1989]). Ordinarily such an application must be brought within six years of dissolution, however, in personal injury cases, no time limit applies. This is in order to allow claimants whose injuries are discovered only much later to still bring claims.

However, it should be noted that CA 2006, s 1030 (2) states:

> *'No order shall be made on such an application if it appears to the court that the proceedings would fail by virtue of any enactment as to the time within which proceedings must be brought.'*

In order to restore a company to the register the claimant will therefore need to persuade the court that the personal injury claim will not fail due to the expiry of the limitation period.

The court may give directions to place the company and all other persons in the position they would have been in (as far as possible) if the company had not been dissolved or struck off the register. A direction typically sought is a 'limitation direction', namely a direction that the period during which the company was dissolved should not count for the purposes of limitation. An appeal decision in *County Leasing Asset Management Limited v Mark Glenn Hawkes* provides guidance on the circumstances in which a limitation direction may be given and the principles that the court should consider when exercising its discretion to order that the period of dissolution should not count for limitation purposes.

In addition to the power to make limitation directions following restoration, the court has a discretionary power to extend the time limit for personal injury claims under section 33 of the Limitation Act 1980 (LA 1980). The Court of Appeal in *Smith v White Knight Laundry*[2001] 2AllER 862 held that the restoration of a dissolved company to the Register of Companies had the effect that the dissolution was void ab initio. Accordingly, a cause of action in a claim for personal injuries would accrue as at the date of knowledge notwithstanding that the company was in dissolution at that date. Guidance was given by the Court of Appeal as to when it was appropriate to make a direction under section 651 of the Companies Act 1985 where the restoration order was sought by a prospective claimant in a personal injuries action. The Court held that as a matter of

general practice in the Companies Court by a prospective claimant directions should not normally be made unless

- notice had been given to those parties who may be expected to oppose such a direction
- the court is satisfied all the evidence has been made available that would be before the court on an application under LA 1980, s 33, and
- a LA 1980, s 33 application would have been bound to succeed

The criteria determined within *Smith* remain sound even under Section 1032(3) of the 2006 Act.

In *Holmes v S & B Concrete Ltd*, the High Court followed the approach in the case of *Smith*. Where a claimant seeks to pursue a claim against a dissolved defendant company and where the question of limitation is disputed (date of knowledge or LA 1980, s 33 discretion), whether the company should be restored should not be determined unless and until those other issues have been resolved.

Where a claimant has already successfully applied to restore a defendant company to the register but the defendant company's liability insurer was unaware of this and such an order was made without consideration being given to a possible defence under LA 1980, it may be necessary for the defendant insurer to apply to court to set aside the order for restoration.

Process of Restoration of a Company to the Register

The Treasury solicitor has produced a detailed guidance on the court's restoration process and it is worthwhile referring to it. The application for restoration is made by Part 8 claim form that must be issued and filed at court together with supporting evidence, usually in the form of a witness statement made by the Applicant. It is mandatory to use electronic filing (e-filing) in all jurisdictions of the Rolls Building including the Companies Court in London. The evidence required is set out in the Guidance note. In most cases, Treasury solicitor will issue a letter confirming that it has no objection to the restoration. It may ask for undertakings to be given to court so to ensure that certain actions are taken. The letter should be annexed to the application.

Where the requirements of the registrar have been met and the Treasury solicitor gives its consent to the restoration, it may be possible to obtain the court order without a hearing.

The effect of the restoration by the court is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.

S 1032 was also considered by the Court of Appeal in *Joddrell v Peaktone*. The Court of Appeal held at that the effect of the section was to retrospectively validate an action which had been commenced during the period of the dissolution. The company is therefore deemed to have continued in existence as if it had not been dissolved or struck off the register. This means that the subsequent restoration retrospectively validates any proceedings issued against the company or LLP when it was dissolved.

The Court of Appeal also considered the subsidiary issue of whether the restoration order also retrospectively validated service of the claim form. It held that, as service had taken place at what had, prior to dissolution, been the defendant's registered office, the restoration order also retrospectively validated service of the claim form. The Court of Appeal also noted that under CA 2006, s 1032(3), the Companies Court could cure any service issues by a direction or by the application of the relevant provisions in the CPR. See more recently the case of *Cowley v L W Carlisle* [2020] where the Court of Appeal held that a judge had not erred in the exercise of his case management powers under CPR r.3.4 in striking out a claim against a dissolved company where no timely steps had been taken to restore it to the Register of Companies.