

Additional material for Chapter 13 – Civil courts

Section numbers from the book are used where relevant. Its content provides fuller explanations and context.

Bankruptcy

Many bankruptcies are of no news value, though they may be 'human interest' material. Others are stories of wild extravagance at the expense of creditors or the accumulation of large bills for unpaid tax. Although there can be no criminal prosecution for debt alone, the spotlight a bankruptcy throws on a person's financial affairs may reveal criminal conduct. The older generation of journalists will recall that questions put in the public examination in bankruptcy of architect John Poulson in 1972 led to substantial disclosures of corruption in the affairs of local councils and other public bodies, and eventually to jail sentences for several men. But a public examination in bankruptcy is not held automatically, see below.

Reporters should note the different procedures for insolvent companies and individuals. Companies go into liquidation, see below, while individuals are made bankrupt.

For journalists, a useful source of information on bankruptcy and insolvency is the website of the Government's Insolvency Service. See Useful Websites, below.

Bankruptcy petitions and procedure

A petition can be filed at the county court for a bankruptcy order to be made by a district judge against an individual who owes at least £5,000. A creditor will file a petition if this seems the best way to get the debt – or some of it – repaid. This is because making someone bankrupt enables the 'realising' – the seizing and selling on behalf of creditors – of that debtor's assets. A creditor may know that a debtor has no assets but may nevertheless file a petition to put a brake on his/her financial recklessness. A bankruptcy order will be granted unless the debtor's offer to repay the debt has been unreasonably refused. Instead of bankruptcy, an alternative solution may be adopted – for example, an 'individual voluntary arrangement' may be made if it is believed the debtor can pay off the debt gradually. In those circumstances, the district judge may make only an interim bankruptcy order and may refer the matter to a licensed insolvency practitioner from a firm of accountants, in the hope that the debtor could avoid bankruptcy through voluntary arrangements for a schedule for payment, if the creditors agree.

A debtor may apply for his/her own bankruptcy to stop the hassle of bailiffs and creditors calling at his/her home, because after bankruptcy he/she can refer them to the Official Receiver, see below. A debtor may apply for his/her own bankruptcy because this offers the prospect of starting anew, with debt wiped out, when the bankruptcy is discharged – that is, when the duration of the bankruptcy ends, see below. A debtor wanting to become bankrupt applies online to an adjudicator employed by the Insolvency Service, who – if the application is approved – issues a bankruptcy order. There is no minimum amount of debt required for the application to be approved, but the value of the unsecured debt must be greater than the value of the person's belongings.

After a bankruptcy order the district's Official Receiver (a civil servant in the Insolvency Service, who is also an officer of the court) takes over legal control of all the debtor's property, apart from basic domestic necessities, tools, and other items necessary for the bankrupt to work. The bankrupt must within 21 days submit a statement of affairs setting out his/her assets, liabilities, and the deficiency. When the prospects of the creditors getting a substantial proportion of what is owed to them are fairly bright, the creditors appoint a licensed accountant as the trustee in bankruptcy, who is responsible to the court for the management of the bankrupt's affairs. In such a case, the trustee and not the Official Receiver supervises the sale of any assets and repayment of debt.

Creditors' meetings and public examinations

There may be a meeting of the bankrupt's creditors, although it is no longer the default position in law that there will be physical meeting – it could be 'virtual' (held online). There is no statutory right for the press to attend. But if the bankrupt owes money to a media organisation, such as a local paper, it can send a journalist to a physical meeting to represent it as a creditor, and as a creditor will get official, written communications about the bankruptcy, including possibly at the meeting (though ethically the journalist should consider making clear at the outset of the meeting to people attending it if he or she intends to report what is said there). The media can be formally admitted to a creditors' meeting if the Official Receiver so rules. But it should be remembered that a report of such a meeting does not have statutory privilege in defamation law, and so there should be caution about including in the report any defamation allegations aired at the meeting – for example, alleging dishonesty.

A public examination in bankruptcy – which, as its name implies, can be attended by anyone – may be held next, though these are rare. These are a form of court hearing, so media reports will be protected in defamation law by a privilege defence, if the requirements of the relevant defence are met – see 22.5 and 22.7 in *McNae's*. The purpose of such hearings is to satisfy the county court that the full extent of the bankrupt's assets and liabilities are known, to establish the causes of his/her financial failure, to probe the bankrupt's financial affairs to discover if a criminal offence has been committed, and to establish whether any assets he/she has transferred to another person should be recovered. The public examination usually takes place before a district judge. The bankrupt is examined by the Official Receiver or his/her assistant. Any proven creditor may question the bankrupt. Figures reflecting the size of the bankruptcy will emerge during the hearing.

A public examination in bankruptcy may also take place after a Crown court judge has made a criminal bankruptcy order following the conviction of a defendant.

Bankruptcy documents open to public inspection

Rule 10.47 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024) allows, in the case of a debtor who has successfully applied to be declared bankrupt (that is, applied for a bankruptcy order), any person to request the court's (that is, a judge's) permission to inspect and copy documents in the case file. This will be passed by the adjudicator to the Official Receiver. The rule describes it as 'the bankruptcy file'. The file contains the order and information the bankrupt supplied when seeking the order – for example, about the scale of his/her debt, the details of his/her creditors and what assets he/she has.

Rules 12.39 and 12.40 say that anyone can apply to inspect the court's file after bankruptcy order is made (including an order made after a petition by a creditor/creditors). Anyone permitted to inspect can have copies of documents in the file on payment of the prescribed fee.

A judge may refuse to permit inspection but must take heed of the presumption in *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates Court* that the open justice principle requires journalists to have access to case material unless a legal ground or rule over-rides this. That judgment is referred to in 15.13.1 in *McNae's*.

Case study: In 2012 Michael Bernard McNamara, an Irish citizen, successfully petitioned the High Court in London for his own bankruptcy. Under procedure now replaced by newer rules, the High Court at that time dealt with such petitions when they were of a high value and in some other circumstances. *The Sunday Times* (Ireland) applied under (what was then) rule 7.31A of the 1986 Rules for permission to inspect and copy the court's file in this case. The newspaper said it had been investigating Ireland's financial crisis and the impact of Irish businessmen relocating to the English jurisdiction to avail themselves of its more lenient bankruptcy regime (referred to as 'bankruptcy tourism'). The newspaper said that McNamara, a former Fianna Fail politician, is very well known in Ireland and the UK as a property developer and hotelier, and had been involved in some of the most expensive and controversial land deals conducted in Ireland in the boom there. When the crash occurred his loans of some 1.5 billion euros had been taken over by the National Asset Management Agency set up by the Irish government. He had declared bankruptcy in England shortly before NAMA sought to have a multi-million euro judgment registered against him in the Irish High Court. McNamara and his companies had amassed debts of €1.5 billion largely with banks since bailed out by the Irish or British taxpayers. Despite his bankruptcy it had been reported that McNamara continued to work in property development and to live in relative luxury. The newspaper argued that there was a strong public interest in discovering what security, if any, the banks took from McNamara before issuing these massive loans and what, if any, steps NAMA took to prevent McNamara from dissipating his many assets before he declared bankruptcy. He opposed the newspaper's application, but Mr Registrar Baister ruled it could inspect and copy the court file. The registrar said that the landmark judgment on access to court documents - *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates Court* ([2012] EWCA Civ 420 - means that openness should be the default position of a court confronted with such an application, though the court would need to consider if reasons against disclosure should prevail. The registrar accepted an undertaking from the newspaper that it would not disclose specified private information relating to McNamara and members of his family which might be in the file (*Times Newspapers v Michael McNamara* [2013] EWHC B12 Comm; *Press Gazette* August 14, 2013).

Individual Insolvency Register

Basic detail of court orders still in force for bankruptcy or for individual voluntary arrangements, or for bankruptcies which have ended in the preceding three months, may be found online on the Individual Insolvency Register, run by the Insolvency Service – see Useful Websites, below. If the

surname of a person or a trading name is entered, the register shows whether such orders apply to people using that name. A search can also reveal which insolvency practitioner is dealing with a bankrupt's affairs, and the bankrupt's date of birth and address. However, if a person is concerned that publication of his/her address may lead to violence against them or a member of their family, they can apply to the court for an order that their address is not shown on the register.

Libel danger in wrongly stating someone is bankrupt

- Suggestions that someone is insolvent may well be regarded as defamatory – see 20.2.1 in *McNae's* for definitions of a defamatory statement.
- Therefore it may not be safe, as regards danger of a libel action, for a media organisation to report – until and unless a bankruptcy order is made – the filing of a bankruptcy petition by a creditor, because the county court may find that the alleged debtor is solvent.
- But a debtor who applies to be made bankrupt is admitting insolvency, so it is safe to report that an application has been made, if this is true. If the fact of the application is officially confirmed by the Insolvency Service, publication of the confirmation will be protected by qualified privilege under the Defamation Act 1996, if that defence's requirements are met – see 22.7 in *McNae's*.
- When a bankruptcy order has been made, it is open to public inspection at the court, see above, and is announced in the *London Gazette* (a government newsletter). Back issues of the Gazette, and therefore its records of past bankruptcies, are now searchable online – see Useful Websites, below. Also the online, public register shows who is currently bankrupt. There is no libel risk in reporting the bankruptcy from any of these official sources, as the report is protected by qualified privilege – again, if that defence's requirements are met.

Effects of bankruptcy

A bankrupt cannot obtain credit of £500 or more without disclosing his/her bankruptcy, nor trade under any name other than the name in which he/she went into bankruptcy without disclosing that name and the bankruptcy. A bankrupt may not act as a company director or take part in the management of any company without the leave of the court. He/she cannot sit in Parliament or on a local authority, or take any public office.

Discharge from bankruptcy

One aim of the Enterprise Act 2002 was to reduce the stigma attached to bankruptcy for those making genuine effort to clear debts. Whereas in the past a bankruptcy would not be discharged for at least three years, the Act reduced the normal period to 12 months. One side-effect of the Act was that heavily indebted students were able to use bankruptcy as a means of avoiding repayment of their student loans. But this loophole was closed by the Higher Education Act 2004, so now bankruptcy does not cancel an obligation to repay a student loan.

An Official Receiver who considers that a bankrupt has been dishonest or otherwise blameworthy over debt incurred can ask the court to make a Bankruptcy Restrictions Order, which can increase the duration of the restrictions on the bankrupt to two years or more – up to 15 years - and the online register should show this.

Company liquidation

Care should be taken, when reporting that a limited company has gone into liquidation, to make the circumstances clear. Misuse of terms could create a libel problem.

- 1) A *members' voluntary liquidation* takes place where the company is solvent, but the directors and shareholders decide to close it down, possibly in the case of a small firm because of impending retirement, or because of a merger. To imply that such a company is in financial difficulties in these circumstances is defamatory.
- 2) A *creditors' voluntary liquidation* takes place for a voluntary winding up to proceed under the supervision of a liquidator.
- 3) A *compulsory liquidation* follows a hearing in public in the High Court or county court of a petition to wind up the company. This is usually because a creditor claims it is insolvent, but can also happen when a company fails to file its statutory report or hold its statutory meeting on being set up; where it does not start, or suspends, business; or where members of the company are reduced to below the number required in law. Once a winding-up order is made, a liquidator is appointed to collect the assets and pay off the creditors.

Useful websites

<https://www.gov.uk/government/publications/guide-to-bankruptcy>

The Insolvency Service guide to bankruptcy

<http://www.insolvencydirect.bis.gov.uk/eiir/>

Individual Insolvency Register – shows who is currently bankrupt

<http://www.legislation.gov.uk/uksi/2016/1024/contents/made>

The Insolvency (England and Wales) Rules 2016