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55. Second or subsequent bankruptcies

Chapter content

Introduction

Relationship between estates

Deceased estates and partnerships

Introduction

55.1 Second or subsequent bankruptcies

Before the introduction of the Enterprise Act 2002 where a bankruptcy order was made against an individual who had previously been an undischarged bankrupt during the fifteen years prior to that bankruptcy order, they would not be entitled to an automatic discharge from the later bankruptcy unless the prior bankruptcy was annulled. To obtain a discharge from the second or subsequent bankruptcy, the bankrupt would have had to apply to the court for an order of discharge and would not have been able to make such an application until five years had elapsed from the date of the latest bankruptcy order.

Under the Enterprise Act 2002, a previous bankruptcy had no direct bearing on an individual's right to automatic discharge. Thus, where a bankruptcy was made against an individual on or after 1 April 2004 from which he was discharged and a subsequent/second bankruptcy order was made against him, he would be automatically discharged one year from the date of the second/subsequent bankruptcy order (see chapter 47).

The Enterprise Act 2002 also introduced a provision for a bankrupt to obtain an early discharge. A bankrupt may be discharged earlier if the official receiver follows the early discharge process or later if the court makes an order suspending the bankrupt's discharge following an application by the official receiver or trustee.

This early discharge provision was repealed by the Enterprise and Regulatory Reform Act 2013, which came into force on 1 October 2013. Bankruptcy orders made on or after 1 October 2013 are not eligible for early discharge (see chapter 47).

If the first bankruptcy order was made before 1 April 2004 the transitional provisions will apply (see chapter 55.3).

55.2 BROs and BRUs

The Enterprise Act 2002, whilst imposing a shorter term for bankruptcy, sought to protect against the minority of bankrupts who abuse the system or whose conduct has been dishonest, reckless or otherwise culpable by introducing Bankruptcy Restrictions Orders (BROs) and Bankruptcy Restrictions Undertakings (BRUs).

If the official receiver makes application for a bankruptcy restrictions order (BRO) or accepts a bankruptcy restrictions undertaking (BRU) then the second time bankrupt; will still be discharged one year after the bankruptcy order; however, they will be subject to the restrictions imposed under the terms of the BRO/BRU.

In determining whether an application for a BRO is appropriate, the court will consider whether the bankrupt was an undischarged bankrupt at some time during the period of 6 years prior to the current bankruptcy order. Similarly, in determining whether to accept a BRU the official receiver should have regard to whether the individual was an undischarged bankrupt in the previous 6 years.

A previous failure is not listed in the grounds for a BRO application¹ but is a matter for consideration when making an application. The official receiver cannot therefore make application for a BRO solely as a result of the bankrupt having a previous failure. There needs to have been unfit conduct in respect of the current bankruptcy before an application is made. If, however, it can be shown that a bankrupt has failed to learn from previous mistakes, the court may take this into account when making a BRO and make it for a higher period.

For further information on discharge see chapter 47 and for further information on BROs see the Enforcement Investigation Guide.

1. Schedule 4A para 2(3)

55.3 Transitional provisions for second time bankruptcies (under the Enterprise Act 2002) which applies to cases where the bankruptcy order was made before 1 April 2004

Where an individual (who was adjudged bankrupt before 1 April 2004 and remained undischarged on that date) was also an undischarged bankrupt at any time during the 15 years before the second or subsequent bankruptcy order was made, the transitional provisions did not apply. A pre-commencement second time bankrupt who had not been discharged (either absolutely or conditionally) from the second bankruptcy before 1 April 2004 was discharged under the transitional provisions¹;

- at the end of the period of five years from 1 April 2004, or
- earlier if the court made an order under section 280 of the Insolvency Act 1986 after 1 April 2004

Pre-commencement bankrupt – this term applies where an individual had a bankruptcy order made against them before 1 April 2004 and they remained undischarged from the bankruptcy at that date.

For further information on suspension of discharge for second time bankruptcy for those bankrupts which fall under the transitional provisions see chapter 47.

55.4 How does the official receiver know if the bankrupt has been subject to proceedings before?

As part of the OR's initial procedure when a bankruptcy order is made, a search should be made of the Case Search Facility on ISCIS using all of the name(s) of the individual included in the description. This is to check whether that person has been made bankrupt previously or is subject to an individual voluntary arrangement.

In adjudicator cases there is a question in the bankruptcy application asking about previous insolvency actions in the last 2 years.

In creditor petition cases, the bankrupt is also required to state whether they have been made bankrupt before as part of the bankruptcy preliminary information questionnaire (PIQ). If so, the bankrupt should provide details of the court and OR's office which dealt with those proceedings.

The previous case should always be examined, especially in relation to the cause of failure, in the earlier bankruptcy and the pattern of events preceding it. Often this will provide a guide to particular areas of conduct which may also feature in the subsequent failure. Additionally the cases should be linked on ISCIS using the Linked Cases Tab and selecting the same debtor insolvency on the linked case type.

55.5 Foreign bankruptcies

Any bankruptcy orders made in "foreign" countries, and that includes Scotland and Northern Ireland, do not count as earlier bankruptcies for the purposes of determining the bankrupt's discharge. A second or subsequent bankruptcy refers only to those orders made in England and Wales. Where the bankrupt is involved in a similar type of insolvency elsewhere the respective trustees will normally have no title to undistributed assets in the other jurisdiction and no right to prove in the other proceedings.

Relationship between estates

55.6 Claim of earlier trustee

When a bankruptcy order is made and the bankrupt has not been discharged from prior bankruptcy proceedings, the trustee in the earlier bankruptcy is entitled to prove in the later bankruptcy for:

- the unsatisfied balance of the provable debts in the earlier bankruptcy,
- interest payable on that balance, and
- any unpaid expenses in the earlier bankruptcy.

Where the bankrupt has been discharged from the earlier proceedings the trustee is not entitled to make such a claim.

NB Any claim by the trustee in the earlier bankruptcy would rank for payment only after all other proved debts have been paid in full with interest in the later bankruptcy².

Where the official receiver becomes aware that a bankrupt is undischarged from previous bankruptcy dealings, they should inform the trustee (in the earlier proceedings) of the making of the bankruptcy order to ensure that any undistributed assets relating to any after-acquired property and/or monies paid under an IPA, are transferred to the later proceedings^{3, 4}. The official receiver should also ensure that the claim of the trustee in the earlier bankruptcy is noted in ISCIS.

1. Section 335(5)

2. Section 335(6)

3. Section 334

4. Rule 10.151

55.7 Assets from a previous bankruptcy

In circumstances where a bankruptcy order is made against an undischarged bankrupt any assets (including income) acquired by them after the date of the earlier bankruptcy and not yet distributed by the trustee are to be transferred to the later bankruptcy^{1, 2}. Any such money or property will then form part of the estate in the later bankruptcy but subject to a first charge in favour of the earlier trustee for any expenses they may have incurred in dealing with those assets³.

Where, on receiving notice of a bankruptcy petition, a trustee has any after-acquired property they should hold and protect the property until the petition is disposed of. Any disposal after receipt of notice is void unless the consent or ratification of the court dealing with the earlier bankruptcy is obtained⁴.

Assets belonging to a subsequent bankrupt who is discharged from an earlier bankruptcy would vest in the subsequent bankruptcy estate and should be dealt with in the usual way. The official receiver should be aware that, particularly with properties, the trustee of the earlier bankruptcy may have transferred the bankrupt's beneficial interest to a third party.

When the official receiver is trustee in the earlier bankruptcy they must ensure that all appropriate fees and remuneration have been charged under the Insolvency Fees Order and the Insolvency Regulations and are deducted from the proceeds of any property before being transferred.^{5, 6}

For further information on after acquired property generally see chapter 36.

1. Section 334(3)

2. Section 335(1)

3. Section 335(3)

4. Section 334 (2)

5. Rule 10.151

6. Rule 10.152

55.8 Payments regarding conditional discharge from prior bankruptcy

On occasion, the second time bankrupt may have been conditionally discharged from a previous bankruptcy, which means that the discharge was given subject to certain conditions regarding income or property being met¹ (see chapter 47).

If those discharge conditions have not been satisfied at the time of the later bankruptcy, the trustee in the earlier case is entitled to retain any payments made in accordance with these conditions including amounts yet to be distributed, unless the order of discharge is subsequently rescinded.

Where the bankrupt's failure to comply with the conditions on which the order of discharge was made² results in the discharge being rescinded on the application of the first trustee, or where the second/subsequent bankruptcy order prevents the bankrupt from complying with those conditions, any funds held will be transferred to the later bankruptcy and the first trustee will submit a claim in the later proceedings.

1. Section 280 (2)

2. Rule 10.162

55.9 Creditors and proof of debts

Individual creditors in the earlier bankruptcy do not become creditors individually in the subsequent bankruptcy for any debt relating to the earlier proceedings. Where the bankrupt is not discharged from the earlier proceedings, the original trustee should prove in the later bankruptcy for the unsatisfied balance of the total provable debts in the earlier bankruptcy¹.

The trustee may also prove for interest payable on that balance and any unpaid expenses, such as petition costs¹. As with any other claim, the amount claimed may be varied at a later stage if circumstances were to change, for instance, where assets realised and distributed may reduce the outstanding balance. (See chapter 49)

1. Section 335(5)

55.10 Claims in the earlier bankruptcy

If the official receiver as trustee in an earlier bankruptcy needs to submit a claim in the later proceedings, they should establish all claims in so far as possible before lodging a proof of debt. The official receiver does not need to obtain formal proofs of debt for this purpose; a notice to creditors outlining the circumstances and requesting early indication of their claims would suffice.

However, in undertaking this work, the official receiver should bear in mind that a distribution will only be made in respect of the debts, etc. of an earlier bankruptcy, after all of the proved debts in the later bankruptcy have been paid in full with interest¹. The likelihood of such a distribution being made is thus remote and the official receiver should rely on existing information wherever possible for this purpose.

In spite of this proviso, should a further provable debt come to light after the earlier trustee has proved for the unsatisfied balance, the trustee in the earlier bankruptcy should notify the later trustee and amend their proof of debt accordingly.

1. Rule 10.153

55.11 Distribution of funds received from first trustee

Funds received by way of dividend from the later proceedings must be distributed to all proved creditors in the earlier bankruptcy, whether or not their claims were included in the proof lodged by the original trustee. If the funds have already been distributed when a late claim is received, the usual rule applies and the distribution will not be disturbed. The additional claim will only be paid if and when further funds are received.

55.12 Proposal for a voluntary arrangement

Where a proposal for an IVA is made in the later bankruptcy, and the official receiver is trustee in either of or both bankruptcies, they should ensure that the rights of the creditors in the earlier bankruptcy are dealt with specifically together with the disposal of any undistributed after-acquired property or income in the hands of the second trustee or supervisor.

Where the official receiver is trustee in the earlier bankruptcy, they should attempt to make it a condition of their agreement to vote for the proposal (as creditor in the later bankruptcy) that either the undistributed after-acquired property remains in the earlier bankruptcy or that the creditors in the earlier bankruptcy are paid the same proportion of their claims as those in the later bankruptcy. It is only fair that the proposal should contain some provision to achieve something for the creditors in the earlier bankruptcy. See chapter 51 for more information on voluntary arrangements.

Deceased estates and partnerships

55.13. Administration of Insolvent Estates of Deceased Persons Order 1986.

All of these provisions relating to second bankruptcies also apply where an insolvency administration order is made under the Administration of Insolvent Estates of Deceased Persons Order 1986.

For further information about deceased insolvents generally see chapter 56.

55.14 Partnerships

If the earlier bankruptcy involved a partnership, the proof for the unsatisfied balance will comprise the balances due both in the separate estate of the partner and the joint estate of the partnership. However, any dividend received on the proof must be

applied to the liabilities of the separate estate first and only if there is a surplus once that balance has been paid in full, can it be transferred to the joint estate.

For further information see chapters 52 and 49.