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AUSTRALIAN FINANCIAL SECURITY AUTHORITY
PERSONAL INSOLVENCY REGULATOR

September 2016, Volume 14, Issue 3

Supporting better outcomes for consumers, business and the community.

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September 2016, Volume 14, Issue 3

This client newsletter is provided by AFSA's independent Regulation and Enforcement division and is published each quarter to registered trustees, registered debt agreement administrators, controlling trustees, major creditors and financial counsellors.

In keeping with AFSA's fourth corporate goal: quality information, this newsletter aims to inform practitioners of relevant changes to personal insolvency laws, both legislative and case law, and discusses areas of practice and Inspector-General requirements. For more information about AFSA's vision, purpose and goals, see our Corporate Plan 2016–17.

Articles are welcome and can be forwarded by email to neil.unantenne@afsa.gov.au.

AFSA actively seeks contributions from outside parties and the views expressed therein are not necessarily endorsed by, or reflect the views of, the Inspector-General in Bankruptcy, Official Trustee or the Official Receiver.

This issue of the Personal Insolvency Regulator may be cited as (2016)14(3) Personal Insolvency Regulator.

INSPECTOR-GENERAL'S COLUMN

September 2016, Volume 14, Issue 3

International Association of Insolvency Regulators

I recently participated in the annual International Association of Insolvency Regulators (IAIR) conference. This year the conference was hosted by the Official Assignee and Receiver of Singapore. These events provide a valuable opportunity to engage with our international colleagues, to jointly consider the issues faced across jurisdictions and to learn from the experiences of others.

AFSA hosts Middle East and Central Asia delegation

In August, AFSA hosted a delegation from the Middle East and Central Asia, at the request of the World Bank Group. The delegation included senior government officials from Egypt, Uzbekistan, Tajikistan and Azerbaijan, who were interested to learn more about Australia's personal insolvency and personal property securities systems and the benefits of these for the economy.

Debt Agreements move online

Practitioners are now able to complete and submit debt agreement forms online. Later in the year we will open up online payment options and an online claim and vote functionality for debt agreements.

Release of AFSA's Corporate Plan 2016–17

AFSA released its Corporate Plan 2016–17 on 31 August 2016. The corporate plan sets out our focus over the next four years, our strategies for achieving our purpose and how we will measure our success. You can view our corporate plan on the AFSA website (www.afsa.gov.au).

Insolvency Law Reform Act 2016

The *Insolvency Law Reform Act 2016* (ILRA) will amend and streamline the *Bankruptcy Act 1966*, the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001.* A key objective of the reforms is to more closely align the regulatory frameworks for personal and corporate insolvency.

On 23 August 2016, the Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, announced a change in the timeframe for implementation of some of the reforms.

The reforms to insolvency administration processes to enhance efficiency, improve communication and increase competition, are now scheduled to commence on 1 September 2017. This timeframe is designed to provide more time for the industry to update software systems and business processes.

The timeframe for commencement of other reforms, such as the practitioner registration and discipline provisions, and enhancements to the Australian Securities and Investments Commission's powers, remains unchanged at 1 March 2017.

AFSA recognised with recent awards

In the last issue I mentioned that AFSA had received a Merit Award from the International Association of Commercial Administrators (IACA). Our Chief Finance Officer Rob Hanlon presented at the IACA conference and accepted our award from Allison DeSantis, President, IACA.

(Photo by Joe Ross https://www.flickr.com/photos/joeross/27450272622/)

AFSA was also recently announced as a finalist in the inaugural Institute of Public Administration Australia's Innovation Awards, for the Personal Property Securities Register (PPSR) Quick Motor Vehicle Search. To be one of only three finalists in the Digital Transformation category, from over 80 award nominations, is a result we're very proud of.

Recent statistical releases

AFSA published three personal insolvency statistical releases in July 2016, which received widespread media attention, through print, television and radio coverage. On 13 July, we released the personal insolvency statistics for the June quarter 2016 and for 2015–16, and on 26 July, we released the regional personal insolvency and business related personal insolvency statistics for the June quarter 2016.

Personal insolvencies increased 4.4% in 2015–16 compared to 2014–15. Queensland and Western Australia were the main contributors to this rise. This is the first annual rise since 2009–10.

Bankruptcies increased 0.2% in 2015–16 compared to 2014–15. Western Australia and Queensland were the only states or territories where bankruptcies increased.

The rise in bankruptcies in 2015–16 is the first rise since 2008–09.

Debt agreements in 2015–16 were the highest level on record. There were record debt agreements in all states and territories except the Australian Capital Territory, Victoria and Tasmania.

Debt agreements increased 11.4% in 2015–16 compared to 2014–15. Queensland and New South Wales were the main contributors to this rise.

Personal insolvency agreements fell 18.2% in 2015–16 compared to 2014–15. The main contributors to this fall were Victoria, New South Wales and South Australia.

Personal Property Securities statistics

On 9 August 2016, we released the Personal Property Securities Register statistics for the June quarter 2016.

There were 2,178,875 searches conducted on the PPSR in the June quarter 2016, an increase of 7.6% compared to the June quarter 2015. The number of searches conducted on the PPSR in the June quarter 2016 increased 10.7% compared to the March quarter 2016.

PPSR registrations

There were 544,847 new, non-transitional registrations created on the PPSR in the June quarter 2016. This is a 10.4% rise compared to the March quarter 2016, when 493,302 new, non-transitional registrations were created on the PPSR. New, non-transitional registrations increased 4.9% in the June quarter 2016 compared to the June quarter 2015, when 519,335 new, non-transitional registrations were created.

There were 1,024,927 registrations amended on the PPSR in the June quarter 2016.

In the June quarter 2016, 356,820 registrations were discharged or removed from the PPSR.

Motor vehicles are the most common collateral class listed on registrations on the PPSR. As at 30 June 2016, there were 4,477,409 current registrations for motor vehicles, which represents 49.6% of 9,021,771 total registrations on the PPSR.

Commercial property is the most common type of collateral. As at 30 June 2016, 6,593,810 current registrations on the PPSR were of this collateral type.

Full details of AFSA's statistics are available on our website (www.afsa.gov.au).

Veronique Ingram PSM
Chief Executive and Inspector-General, AFSA

Inspector-General practice documents re-released

You may be aware that in recent months we have consulted with stakeholders about our practice documents—in particular, Inspector-General Practice Statement (IGPS) 1: regulatory framework and Inspector-General Practice Guideline (IGPG) 1: guidelines relating to advertising and marketing of debt agreements.

IGPS 1 describes our approach to regulating the personal insolvency profession and highlights the importance of our collaborative, risk-based and agile approach, while IGPG 1 outlines the Inspector-General's expectations and best-practice principles regarding advertising and marketing of debt agreements.

Both practice documents have been updated following wide consultation and feedback, and are now available on the AFSA website.

Proactive monitoring of annulment and personal insolvency agreement proposals

During the 2015–16 compliance programme, AFSA focused on the veracity of related party claims, adequate disclosure and the thoroughness of a practitioner's investigations prior to making a recommendation on a bankrupt's proposal for annulment or a debtor entering into a personal insolvency agreement.

A total of 30 high risk proposals were reviewed during the period and 15 meetings were attended as a result of the risk assessment. Of the meetings attended, nine proposals were accepted, four were rejected, one was adjourned and one was withdrawn.

Non-compliance was identified in 75 per cent of the 30 high risk administrations reviewed. The majority of the non-compliance findings related to inadequate investigations or inadequate reporting.

AFSA intervened in seven instances, most commonly seeking additional reporting or further investigations to be undertaken by practitioners.

AFSA reviews non-professional expenses charged by practitioners

One of the focus areas in AFSA's 2015–16 compliance programme was on non-professional expenses charged by trustees in an insolvency administration. This focus was aimed at ensuring that any expenses taken were reasonable, necessary and proper.

Non-professional expenses are generally of two types—those incurred with external providers, for example advertising, travel and accommodation; and those incurred internally, for example, telephone, photocopying and printing—where these are not already included in overheads.

AFSA reviewed 125 reports from 65 trustees to creditors. Of the trustees, 60 were Australian Restructuring Insolvency and Turnaround Association (ARITA) members. Over 80 per cent of the practitioners sampled referenced the ARITA Code of Professional Practice in relation to non-professional costs—all ARITA members have an obligation to do so.

There is considerable variation in how firms deal with non-professional expenses. Some firms include non-professional expenses in overheads, charge at cost or charge at an internally determined rate. The rates charged for photocopying, printing and stationery also vary considerably. In a number of cases, firms were found to charge an internally determined rate for expenses that was well above the rate that would be charged by an external party offering the same service. The most frequently charged non-professional expenses related to photocopying, printing and searches.

AFSA is following up instances of non-compliance with individual practitioners. We are also consulting with ARITA on how to provide further guidance on best practice for non-professional expenses, including clearer disclosure regarding expenses that might be included in overheads rather than directly expensed.

AFSA review of independence and pre-insolvency advisers

During the 2015–16 compliance programme, AFSA focussed on compliance with the Trustee Performance Standards and the ARITA and Personal Insolvency Professionals Association (PIPA) Codes of Professional Practice, to ensure practitioners remain at arm's length in relation to pre-insolvency dealings.

AFSA asked a selection of registered trustees and all registered debt agreement administrators to provide information on the written or informal arrangements that they had in place with third parties.

In total, 27 registered trustees and 37 registered debt agreement administrators (RDAAs) were asked to provide a response on the level of interaction with pre-insolvency advisers or other referrers.

Of those contacted, 98 per cent complied with the request for information. One RDAA did not respond but their registration lapsed during the survey period.

Of those who responded, 18 per cent said they had some form of written or informal agreement with pre-insolvency advisers or referrers and 82 per cent said they had no agreements in place.

AFSA is undertaking further investigations into 14 per cent of respondents (seven trustees and two RDAAs), based on the information provided.

AFSA will continue to monitor and investigate the level of independence associated with agreements provided by practitioners during the current 2016–17 compliance programme.

AFSA continues to place high importance on the independence of those practising in the personal insolvency industry to protect the integrity of the industry and those affected in these matters, particularly debtors, bankrupts and creditors.

AFSA rules on trustee's remuneration

From time to time AFSA is asked to approve a trustee's remuneration. As trustees are aware, a number of requirements must be met before seeking AFSA's approval. The following example highlights some of those requirements.

AFSA recently decided on a registered trustee's request for remuneration approval, under subsection 162(4) of the *Bankruptcy Act 1966* (the Act).

Upon reviewing the request, a number of administrative errors were identified.

The correct priority of payments under section 109 of the Act had not been followed.

Creditors had not been given an opportunity to approve the trustee's remuneration before their debts were paid in full.

The trustee had made errors in the estimate required to annul the bankruptcy. These errors were compounded by the trustee's objection to discharge and a caveat lodged on jointly owned property.

The request for remuneration approval also included charges for work that was not deemed necessary, reasonable or commensurate with the nature and complexity of the administration.

After discussions with the trustee, the request was withdrawn and a new request was submitted to AFSA for approximately 50 per cent of the original request—representing $24,000 less than the original remuneration amount. This naturally increased the amount of the surplus returned to the bankrupt.

The trustee also agreed to withdraw both the objection to discharge and the caveat on the jointly owned property.

Paul Shaw, National Manager
Regulation and Enforcement

Is lodging a caveat a 'claim' by a trustee under section 127 of the *Bankruptcy Act 1966* (Cth)?

Section 127 provides that 'after the expiration of 20 years from the date on which a person became bankrupt, a claim shall not be made by the trustee to any of the property of the bankrupt'. This restriction applies to property where section 129AA does not apply the 'six-year-rule'.

A typical example of when section 127 is relevant is where the trustee has conducted investigations and found that the bankrupt had interests in real property that were not disclosed in the statement of affairs (SOA), nor advised them to the trustee in writing. In those circumstances the trustee is restricted to only bringing a 'claim' prior to 20 years expiring. Absent such a claim, the property will revest in the bankrupt or a person claiming through or under him or her, as the case may be.

In *Re Quirk* (1968) ALR 53 Gibbs J, (who went on to become Chief Justice of the High Court) made the following observations in relation to the provision in the 1924 Bankruptcy Act equivalent to section 127 in the 1966 Act:

> *'Demand' perhaps best expresses the meaning of 'claim' in the subsection, and what is intended is that the trustee shall not be able after twenty years to do anything to obtain a proprietary interest in land which is not completely vested in him, as, for instance, by requiring the bankrupt to execute a conveyance, or by seeking to become the registered proprietor of the land.*
>
> *After twenty years, if the trustee is not registered as proprietor he cannot become registered; if he is registered, his title has been perfected and he no longer needs to make a claim to the land.*
>
> *It may be that the object of the subsection is to protect third parties, although its terms seem to be wider than is necessary for the purpose. Whatever be its object, however, its effect is to prevent a trustee from doing anything active to enable him to obtain a title to land the property of the bankrupt after twenty years from sequestration, but not to prevent him from retaining a title which has been perfected. It provides a period of limitation in respect of claims by the trustee, but it does not divest title from a trustee whose claim has already been completely established.*

His Honour teased out at [57] what was meant by the word 'claim':

> *The word 'claim' as a noun is defined in the Shorter Oxford English Dictionary as follows: '(1) A demand for something as due; an assertion of a right to something. (2) Right of claiming; right or title (to something).'*
>
> *In the context of [bankruptcy], the second group of meanings is not appropriate, for the subsection provides that no claim shall be made, and not that the trustee shall have no claim. The distinction is important, for when the subsection says that no claim shall be made by the trustee, it suggests that what is barred is positive action to demand or enforce a right, rather than that a right already acquired is divested...*

This concept was further explored in the decision *Madden v Official Trustee in Bankruptcy* [2014] FCA 446, which is authority for the proposition that lodging a transmission application to be registered on title is sufficient to constitute a 'claim' by the trustee for the purposes of s127. *Madden* also referenced *Re Quirk* in establishing that where the trustee has done all that it can to perfect its title to property on the Torrens system (i.e. lodging of a transmission application), there is no need for the trustee to make any further claims as section 127 will not apply. The rationale being that a section 127 claim will only be relevant where the trustee does not have legal title to the property. Where the property is already held by the trustee, it cannot be divested.

With this in mind, what legal consequences ensue if the trustee lodges a caveat purporting to make a claim under section 127?

In the absence of a clear precedent, the better view is to interpret 'caveats' as contestable interests lodged against a title. The lodgement of a caveat does not perfect the title of the caveator nor does it absolutely and definitely attach itself as a surety against the property. Caveats can become stale or be removed by the Registrar or the court. Therefore, it fails the standard set in *Madden* where the trustee had done all it could to perfect its title.

The extent to which a caveat makes a claim can be best explained by understanding the purpose for which it is lodged; outlined by Mason CJ, Dawson and McHugh JJ in *Leros Pty Ltd v Terrar Pty Ltd* (1992) 174 CLR 407 at [28] as being:

> *to operate as an injunction against registration of an inconsistent dealing otherwise than in accordance with the caveat so as to enable, in the ultimate analysis a determination of the conflicting claims.*

Therefore, a caveat does not make a 'demand for something as due or an assertion of a right to something' as posited by the court in *Re Quirk*.

The better view is that lodging a caveat, of itself, would not mean that the trustee has done all that is necessary to completely establish title—at least in respect of Torrens title land, which requires registration on title before the legal interest passes. A caveat does no more than notify parties seeking to deal with land that the caveator claims an interest, but this is not sufficient to amount to a 'claim' to the property as contemplated by section 127.

Zannie Zaidi, Insolvency Services Officer
Insolvency and Trustee Services

Dave Maher, Senior Legal Officer
Legal and Governance

Controlling trustee's recommendation on a personal insolvency agreement proposal

Section 189A of the *Bankruptcy Act 1966* (Act) provides that the controlling trustee must prepare a report on the personal insolvency agreement (PIA) proposal that includes a statement as to whether the controlling trustee believes that creditors' interests would be better served by accepting the proposal or by the bankruptcy of the debtor. This is often referred to as the controlling trustee's 'recommendation' on the proposal.

AFSA is of the view that, to meet the performance standard in clause 2.2(1) of the Bankruptcy Regulations 1996 (Schedule 4A—Performance Standards) requiring trustees to act impartially, the controlling trustee's recommendation on the proposal should not be based on what the controlling trustee thinks would be acceptable to creditors or how the controlling trustee thinks creditors would vote on the proposal. The controlling trustee cannot take on a role of extracting a better deal for creditors.

The matter below recently considered by AFSA illustrates this issue:

a. The debtor, represented by a financial adviser, proposed a contribution of $23,740 payable over four years and the assignment of all divisible property to the trustee, except shares held in his employer, a listed company, the debtor's family home and an overseas property.

b. In his report to creditors, the controlling trustee estimated the return to creditors in the proposed PIA would be 11.5c/$ and the return to creditors in the bankruptcy would be nil. The controlling trustee estimated that the debtor's equity in the family home was $40,000, the debtor's equity in the overseas property was $5,000, and the value of the shares was $5,500 (subsequently sold for $2,000). The controlling trustee stated that he was unable to recommend the PIA proposal as being in the best interests of creditors 'due to the significant value of the property retained under the PIA, the value

of the proposed PIA contributions relative to the value of the property retained, the four year term of the PIA proposal and that the retained property would be available sooner to creditors in a bankruptcy administration.' The controlling trustee stated that a proposal providing for the contribution of $25,000 over a shorter period of two years together with an assignment of all divisible property for realisation (apart from the debtor's family home) would be in the best interests of creditors. The controlling trustee also advised creditors that prior to the meeting, he would discuss an amended proposal with the debtor.

c. The controlling trustee emailed the debtor's adviser outlining an amended proposal that he thought would be acceptable to creditors and that he could recommend.

d. Subsequently, the debtor amended his proposal. The amended proposal varied the original proposal by increasing the contributions to $25,000, changing the payment schedule for the contributions to a total of two years and making available the debtor's interest in the overseas property and shares.

e. The amended proposal was accepted by the debtor's creditors.

f. After two months of the proposal being accepted, the PIA was varied to increase the payment schedule to three and half years due to the debtor's incapacity to pay the PIA contributions.

AFSA took the view that the controlling trustee did not make the recommendation required under section 189A of the Act. Instead of stating whether the controlling trustee believed that the creditors' interests would be better served by accepting the debtor's proposal or by the bankruptcy of the debtor, the controlling trustee made his recommendation based on what he thought would be acceptable to creditors or how he thought creditors would vote. In effect, the controlling trustee compared the debtor's proposal to a proposal of his own that would provide a better outcome for creditors. The controlling trustee took on a role of extracting a better deal for creditors. AFSA considered this to be a breach of clause 2.2(1) of the Performance Standards that requires trustees to act impartially.

Helen Cao, Senior Inspector
Regulation and Enforcement

Filing personal insolvency agreement proposals with the Official Receiver

Subsection 218(1)(b) of the *Bankruptcy Act 1966* (the Act) requires a trustee to give a copy of a personal insolvency agreement to the Official Receiver (OR) within two days after the execution of the agreement by the debtor and the trustee. Failing to comply with this requirement is an offence that incurs a penalty.

As part of the assessment of alleged offence referrals made by the OR regarding section 218(2) of the Act, AFSA investigators assess the information provided by the Official Receiver and in circumstances where it is unclear when the debtor and/or trustee signed the agreement, make further inquiries with the trustee's office to establish these details. Some agreements provide clear dates indicating when both the debtor and the trustee signed the agreement.

To save time for AFSA and trustees, in circumstances when the debtor and trustee sign an agreement on different dates, trustees are encouraged to include both dates in the agreement, the two day period within which to lodge running from the latter date. This will also ensure that the National Personal Insolvency Index (NPII) contains accurate information.

Gemma Denton, Assistant Director
Regulation and Enforcement

Reminder to utilise AFSA's publications to resolve administration queries

AFSA provides information to assist our stakeholder's understanding of the many aspects of personal insolvency administrations through various publications, such as the Inspector-General practice statements and directions, the annual estate return (AER) online guide, fact sheets and this newsletter. As you would be aware, it is not AFSA's role, as the regulator, to provide advice to practitioners, or their staff.

AFSA Regulation receives many queries concerning issues that come up in an administration. We have found that a number of queries from practitioners' staff relate to issues that we consider the practitioner would have been able to answer or are already addressed in an AFSA publication.

To ensure that only relevant enquiries are made to AFSA, we ask that practitioner's promote AFSA's publications and the AER support form with their staff. Any queries lodged with AFSA should be submitted directly by the practitioner.

Practitioners may forward any feedback or suggestions in relation to the above mentioned AFSA publications, to the Assistant Director, Practice, Regulation and Enforcement.

Kim Newland, Assistant Director
Regulation and Enforcement

Helen Cao, Senior Inspector
Regulation and Enforcement

Pre-referral enquiry update

It has now been over a year since the pre-referral enquiry (PRE) initiative was put in place and it is good to see it has been widely used by practitioners, their staff and AFSA staff. The intention for introducing PREs was to create greater efficiency for practitioners and their staff in meeting their section 19 requirement to refer to the Inspector-

General any evidence of an offence by a bankrupt in breach of the *Bankruptcy Act 1966* (the Act). As evidenced by the information and statistics recorded to date, PREs are saving referrers a considerable amount of time in reporting alleged breaches of the Act to AFSA.

In the 2015–16 financial year, AFSA Enforcement received 778 PREs from referrers, of which 533 were advised not to refer, 216 were told to refer and 29 matters were registered as offence referrals. The below table provides a snapshot of which offences against the Act the majority of PREs were received about:

Offence section	Number of PREs
267(2) false declaration by debtor or bankrupt	281
272(1)(c) leave Australia without written consent of the trustee	48
265(1)(a) fail to disclose property to the trustee	41
265A(1) person fails to comply with a requirement under section 77A or 130	40
265(4)(a) concealing or removing property to the value of $20 or more	38
54(1) fail to file statement of affairs	23

Alleged breaches of subsection 267(2) were by far the most reported offence and typical examples were bankrupts failing to include information relating to bank accounts, assets such as old cars or previous directorships in companies within five years of going bankrupt. In the majority of instances the omissions had no bearing or impact on the administration. If you are reporting a PRE and the omission of information has had little impact on the administration, please advise of this as it will assist the investigator assessing the matter.

Those referring are also reminded to use the AFSA PRE template and to include the bankruptcy number, address of the person who is the subject of the PRE and summary of information including any relevant documents, such as bank statements or registration certificates that prove ownership. Should the assessing investigator require any further information they will contact you by email or phone.

Thanks to everyone who has used the PRE initiative to date.

John Maloney, Assistant Director
Regulation and Enforcement

Outstanding statement of affairs?

Are you administering an estate and the bankrupt hasn't filed a statement of affairs (SOA)?

A person who fails to file a SOA within 14 days of being notified of their bankruptcy and the requirement to file a SOA commits an offence under section 54(1) of the *Bankruptcy Act 1966*.

If you answered yes to the question above and have evidence that the bankrupt has been notified of their bankruptcy and the requirement to file a SOA, we encourage you to submit an alleged offence referral to AFSA Enforcement.

Sufficient evidence includes:

- an affidavit of personal service detailing the personal service of a letter outlining the bankrupt's obligation to comply with section 54(1)
- a registered post delivery confirmation receipt signed by the bankrupt for the delivery of a letter outlining the bankrupt's obligation to comply with section 54(1) or
- a file note of a phone conversation during which the bankrupt has confirmed receipt of written correspondence (letter or email) outlining the bankrupt's obligation to comply with section 54(1).

If a referral is accepted by us, in the first instance we will try to locate the bankrupt and attempt to obtain compliance. If the bankrupt fails to comply, we will assess all relevant factors and consider submitting a brief of evidence to the Commonwealth Director of Public Prosecutions with a view to initiating immediate prosecution action.

Please do not submit an offence referral if the Official Receiver has issued a 77CA notice to the bankrupt and is waiting on compliance.

If you have any questions about submitting alleged offence referrals regarding section 54(1) please email us at fraud.enquiries@afsa.gov.au.

Gemma Denton, Assistant Director
Regulation and Enforcement

Income contributions and grounds of objection

If a bankrupt is required to make contributions from income to his or her bankrupt estate and (despite warnings to do so) does not do so, or not as required, the trustee can consider entering an objection to discharge under the ground described at paragraph 149D(1)(f) of the *Bankruptcy Act 1966* (the Act), which states:

> *(f) the bankrupt failed to pay to the trustee an amount that the bankrupt was liable to pay under section 139ZG*

Section 139ZG in turns states at subsection (1):

> *(1) Subject to subsection 139ZI(3), a contribution that a person is liable to pay under subsection 139P(1) or 139Q(1) is payable at such time as the trustee determines or, if the trustee permits the contribution to be paid by instalments, at such times and in such amounts as the trustee determines.*

Subsection 139ZI(3) relevantly states (with emphasis added):

> *(3) The time at which a payment is to be made by a person as a result of a determination made under section 139ZG* ***must not be earlier than 14 days after notice in relation to the determination is given to the person under subsection (1) of this section.***

In *Phillips and Inspector-General in Bankruptcy* [2012] AATA 788, the Administrative Appeals Tribunal (AAT) considered the requirements of section 139ZI of the Act when determining whether there was sufficient evidence to support a ground of objection in paragraph 149D(1)(f). The AAT found at paragraphs 469 and 470 (with emphasis added):

> *469. We have also referred previously to Project Blue Sky. Unlike our earlier assessment of its application, we consider that its principles, when read with the Bankruptcy Act, do require strict compliance with the notice provisions of s 139ZI. The period of 14 days between being given notice of the determination and the date of payment has been judged by Parliament as sufficient to allow a person to arrange his or her affairs to make the payment.* ***It is not to the point that a particular person, such as Mr Phillips, did not end up making the payment at all. He was not given the time stipulated in s 139ZI(3).***
>
> *470. As the notice of determination has not complied with s 139ZI(3), Mr Phillips' liability to pay the instalment of the contribution did not arise. It seems to us that ss 139ZG(1) and 139ZI must be read together so that liability does not arise until the trustee has both made the relevant determination and given the relevant notice of it. As Mr Phillips' liability did not arise, the ground specified in the notice under s 149D(1)(f) has not been made out. This means that there is insufficient evidence to support the existence of that ground, which is a special ground. Therefore, we are not prevented from cancelling the objection by s 149N(1A) and must cancel the objection on that ground under s 149N(1).*

As can be seen above, the AAT relied on a failure to strictly comply with section 139ZI of the Act to invalidate the entire ground of objection. Similarly, if an objection to discharge grounded on paragraph 149D(1)(f) is reviewed by the Inspector-General in Bankruptcy and subsection 139ZI(3) has not been complied with, the objection will be cancelled.

Ground of objection under Paragraph 149D(1)(e)

Another ground of objection used by trustees in relation to the income contributions regime is that under paragraph 149D(1)(e), which states:

> *(e) the bankrupt failed to disclose any particulars of income or expected income as required by a provision of this Act referred to in subsection 6A(1) or by section 139U;*

Subsection 6A(1) is a reference to the statement of affairs.

Section 139U(1) states (with emphasis added):

> *(1) A bankrupt must,* ***as soon as practicable, and in any event not later than 21 days, after the end of a contribution assessment period****, give to the trustee:*
>
> *(a) a statement:*
>
> *(i) setting out particulars of all the income that was derived by the bankrupt during that contribution assessment period; and*
>
> *(ia) setting out particulars of all the income that was derived by each dependant of the bankrupt during that contribution assessment period; and*
>
> *(ii) indicating what income (if any) the bankrupt expects to derive during the next contribution assessment period; and*
>
> *(iii) indicating what income (if any) the bankrupt expects each dependant of the bankrupt to derive during the next contribution assessment period; and*
>
> *(b) such books evidencing the derivation of the income referred to in subparagraph (a)(i) as are in the possession of the bankrupt or the bankrupt can readily obtain.*

If a trustee is contemplating objecting to the discharge of a bankrupt under the above ground at paragraph 149D(1)(e) for a failure to comply with section 139U, it is expected that the bankrupt would be warned about the consequences of not complying with the provision preferably in sufficient time for him or her to comply. Ideally, the trustee should be sending the bankrupt an income questionnaire before the end of the contribution assessment period allowing sufficient time for its return within 21 days ***after*** the end of the period and with a written warning that the bankruptcy may be extended for non-compliance.

Mark Findlay, Director
Regulation and Enforcement

AFSA's regulatory performance framework—an update

AFSA has prepared a self-assessment report against the performance measures in the regulatory performance framework for the full 2015–16 financial year. This report will be provided to the Bankruptcy Reform Consultative Forum (BRCF) for validation in September 2016. Any feedback received from the BRCF will be considered before finalising the report and submitting to the Attorney-General's Department for approval by 31 December 2016.

AFSA's Insolvency practitioner compliance programme 2016-17

On 29 July 2016, AFSA released its 2016–17 Insolvency practitioner compliance programme.

See the finalised programme on the AFSA website: Insolvency practitioner compliance programme 2016–17.

The risk-based programme focuses on early resolution of systemic issues by adopting a proactive and preventative regulatory approach wherever possible.

This financial year, AFSA's focus will be on three key areas:

1. **Independence**
   We will focus on compliance with the trustee performance standards and the ARITA and PIPA Codes of Professional Practice to ensure practitioners remain independent including with pre-insolvency advisers.

2. **Engagement with creditors**
   As the ultimate beneficiaries in any personal insolvency administration, creditors—and the quality of the outcomes they receive—are at the heart of an efficient and effective system. AFSA will continue to engage with creditors with a view to learning in greater detail, from the creditor perspective, what aspects of practitioner practice are capable of improvement.

3. **Through the eyes of the debtor**
   Attention will be drawn to review a practitioner's first point of contact with debtors and bankrupts to ensure advice provided is within legislative and best practice guidelines, in particular in relation to debt agreements.

AFSA is committed to raising the standards of insolvency administration to ensure that the interests of creditors, debtors and bankrupts are protected.

Paul Shaw, National Manager
Regulation and Enforcement

AFSA's income contributions guidance video series

AFSA has released a guidance video series on income contributions. The series is an introduction to the contributions regime and will cover a broad overview of how it operates. Part one of the series includes:

- the contribution assessment process
- calculation of contribution liability
- what constitutes income
- hardship relief
- a bankrupt's review rights
- the collection of a contribution liability.

Part two of the income contributions series goes into more detail and deals with some of the more complicated aspects of the regime. This podcast includes:

- inclusions to income
- common errors made in assessing income contributions.

AFSA Guidance video:
Income contributions part one [YouTube]

AFSA Guidance video:
Income contributions part two [YouTube]

Please visit the guidance video series on the AFSA website for more information.

Mark Findlay, Director
Regulation and Enforcement

CENTSABLE—National website to assist women on low income

CENTSABLE is a national website to assist workers in the community services sector to have informed financial conversations with women on low incomes.

Women's Health Goulburn North East (WHGNE) is the Victorian government-funded specialist women's health service for the Goulburn Valley and North East Victoria. WHGNE has provided effective no interest loan schemes (NILS) programmes since 2007. With funding from the Ian Potter Foundation, WHGNE has recently launched CENTSABLE, which is a national website to assist workers to access information about NILS and other financial options to benefit women on low incomes.

Why use CENTSABLE?

CENTSABLE provides workers with easily accessible information to have informed financial conversations with women. Providing disadvantaged women with relevant options, at a time when they are more likely to be receptive to strategies and ideas to better manage their limited income will make the most of this unique opportunity.

What does CENTSABLE offer?

CENTSABLE has gathered handbooks, videos, posters, checklists and web-links all in one place for workers to inform clients about the following:

- concessions and helplines
- smart loans and budgeting
- managing bills and money traps
- domestic and financial abuse.

How does CENTSABLE work?

Workers can:

- use the interactive guide 'Let's talk about' to have conversations with clients to identify issues and challenges that reduce their capacity to manage their money well
- raise awareness of money traps with posters about payday loans and rent-to-buy compared to a no interest loan
- get the conversation started with posters about financial abuse
- learn about the four steps to respond effectively to domestic violence
- hand out to clients the tip sheet for less financial stress
- listen to one woman's story of financial abuse. http://centsable.org.au/domestic-violence/ financial-abuse/a woman's experience of financial abuse audio
- keep up-to-date with what is happening in the community sector by subscribing to the e-newsletters listed.

Karen O'Connor*
Women's Health Goulbourn North East

WOMEN'S HEALTH GOULBURN NORTH EAST
Challenging inequity, embracing diversity.

CENTSable

The Ian Potter Foundation

(This article reflects the views of the authors and does not necessarily reflect the position of AFSA or the Inspector-General in Bankruptcy).*

Australian Taxation Office (ATO) update

Australian Government
Australian Taxation Office

Insolvency practitioners' design workshops

As part of the 'Reinventing the ATO' programme of work, we have undertaken extensive consultation to gain an understanding of the interactions people have with the tax, super systems and other government services. Through this work, we are looking for opportunities to improve the experience for insolvency practitioners as clients within the tax and super systems.

Recently, we held contextual research sessions with the insolvency industry and a workshop in June 2016.

The workshop brought together insolvency professionals and representatives from government agencies that regularly interact with the ATO. The purpose was to explore the client experience for insolvency practitioners interacting with the tax and super systems and to co-create the characteristics of their future experience.

Feedback from the workshop indicated the following key themes would improve and transform the experience for insolvency and turnaround practitioners when interacting with the ATO.

Make it easier—integrated digital services

I can easily fulfil my clients' tax and super obligations through integrated practice software which links with the ATO's software.

Better services across government—single entry point

I engage with government and link clients to my practice through a single and secure digital entry point.

Getting what I need when I need it—right service, right time

I can access tax and super information across a range of channels at a time that suits me.

My circumstances are understood—tailored engagement

Service offerings and communications are easy to understand, timely and tailored to my circumstances and preferences.

The value of conversation—excellent working relationships

I have an excellent working partnership with the ATO and we work together in supporting the tax and super systems, and influencing compliant behaviour.

The ATO will continue to work with the insolvency industry to ensure the best outcomes possible for business, creditors, debtors and the Australian community as whole.

Electronic funds transfer (EFT) for preference payments

EFT refunds were introduced in September 2014 and the majority of refunds are now issued using this method. The process of issuing a manual cheque is no longer required in the majority of instances and is at a high cost to the ATO.

From 1 July 2016, the ATO ceased issuing cheques for the payment of unfair preference claims. This change is aligned with the ATO digital transformation programme, reduces costs and provides a more efficient process for payment of unfair preference claims.

Unfair preference payments are now paid to insolvency practitioners via EFT. Practitioners are now required to provide bank details for a nominated account where the claim can be paid; this is usually provided when advising the ATO of 'acceptance of offer'. A confirmation will issue to advise of the payment details.

Manual refunds by cheque will only be considered in exceptional circumstances where an EFT refund is not possible.

Authorisation to act on behalf of clients—information for debt management firms and financial counsellors

The ATO frequently interacts with debt management firms and financial counsellors to assist clients who:

- are dealing with financial hardship
- are entering formal debt agreements.

Before debt management firms and financial counsellors can act on behalf of their client, the ATO must receive a completed Change of details for individuals form. This ensures the ATO holds the necessary information to add the authorised representative's details to the clients' records.

Alternatively, clients can add a debt management firm or financial counsellor as an authorised contact by:

- phoning the ATO
- accessing their myGov account
- submitting a request via the business portal.

The ATO is committed to working in partnership with our key stakeholders in meeting the needs and expectations of the community.

For more information on authorised contact, please visit ato.gov.au/tax-professionals/your-practice/tax-and-bas-agents/primary-contact-and-authorised-contacts/

More information

All feedback is welcomed and can be provided to InsolvencyPractitionerServices@ato.gov.au.

If you would like to find out more about using the business portal within your firm, please send a request to InsolvencyPractitionerServices@ato.gov.au.

For general information regarding insolvency matters, refer to the insolvency practitioners section on **www.ato.gov.au/insolvency**

Bronwyn du Mont, Director
Debt - Significant Debt Management,
Australian Taxation Office

New Zealand Insolvency and Trustee Service update

The first major law reform since the start of the *Insolvency Act 2006* was implemented on 24 March 2016. The biggest legislative change was to the threshold amount of debt allowable for entry into the no asset procedure (NAP) and summary instalment order (SIO). The amount increased from $40,000 to $47,000.

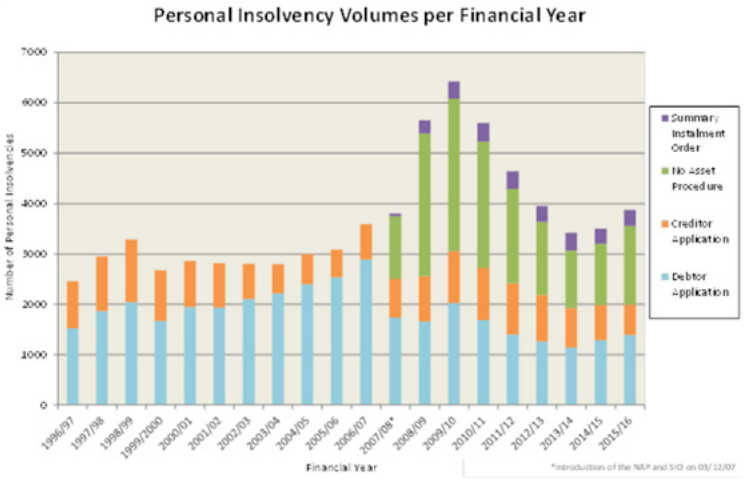
There were also changes to the statutory limits a bankrupt is able to retain for a bank account (increasing to $1,200) and a motor vehicle (increasing to $6,000).

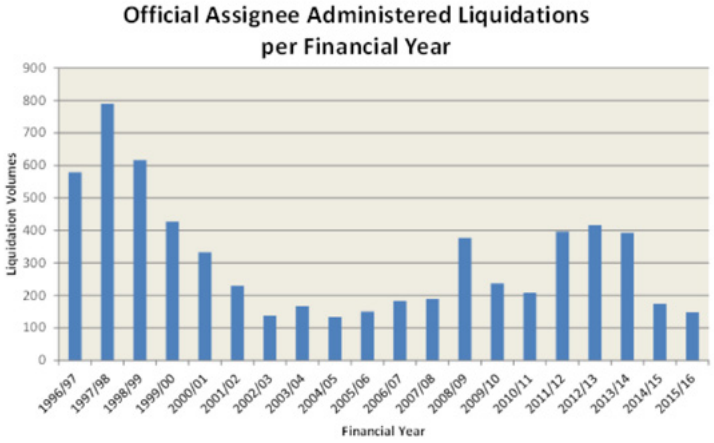
Some minor changes were made, for example, to the Assignee's remuneration rates, debtors having to disclose name and contact details of their creditors, and lump sum contributions made to KiwiSaver or any superannuation schemes in the past five years to be disclosed by the bankrupt.

We also took the opportunity to reword and clarify parts of the statement of affairs (SOA) form, which a debtor is required to complete in all three insolvency options—bankruptcy, NAP and SIO and this included the removal of some previous questions. The SOA is now shorter and more simplified than before.

If you would like more information on these changes, please visit our website at www.insolvency.govt.nz.

Statistics:





Joanne Basher, Central Regional Manager/Official Assignee,
Insolvency and Trustee Service, Ministry of Business,
Innovation & Employment

(Cruickshank)—Bankrupt pleads guilty to two offences under the Bankruptcy Act

On 14 June 2016, Mr Hilton John Douglas Cruickshank was sentenced in the Goulburn Local Court for failing to provide full details of his affairs to his trustee.

Mr Cruickshank omitted to disclose that he had been a director of SYMFY Pty Ltd and had earned an income from the company.

Mr Cruickshank failed to disclose information about 'A Window to Your Womb', a business carried on by SYMFY Pty Ltd.

Mr Cruickshank was convicted on both charges.

He was sentenced to ten months imprisonment for failing to correctly disclose to his trustee, information relating to his company and the income he received from this and eight months imprisonment for failing to disclose his directorship of SYMFY Pty Ltd.

Mr Cruickshank was ordered to serve both sentences concurrently by way of an intensive corrections order.

In passing sentence, Magistrate Huntsman emphasised the need to deter other bankrupts from engaging in the same conduct, noting that bankrupts failing to disclose information to their trustees could bring the whole system 'grinding to a halt'.

The matter was prosecuted by the Office of the Commonwealth Director of Public Prosecutions.

(Hall)—Repeat bankrupt sentenced to imprisonment, released on a bond

Ms Clare Hall, also known as Clare Niarchos, was prosecuted in the Whyalla Magistrates Court on 21 July 2016 for making a false declaration, obtaining property by fraud after becoming bankrupt and obtaining goods or services without advising she was an undischarged bankrupt.

Ms Hall has declared herself bankrupt on four separate occasions. When becoming bankrupt for the second time, Ms Hall failed to disclose information about her financial affairs, including that she was operating a home-based wedding business providing customised goods and services.

Ms Hall continued to operate her business, Beautiful Delights, during her bankruptcy and obtained goods from various suppliers to the value of approximately $14,500 without advising that she was an undischarged bankrupt. Ms Hall also provided false information to suppliers inducing them to believe that she had paid for the goods in advance.

During her bankruptcy, Ms Hall changed her business name to Memorable Occasions and then again to Agape Weddings.

Ms Hall pleaded guilty and was convicted on all charges. She was sentenced to three months imprisonment but released on a $100 good behaviour bond for 18 months.

She was also required to make a reparation payment of $175.15 to one of the suppliers—Goody Goody Gum Drops Pty Ltd, in accordance with Section 21B of the *Crimes Act 1914*.

Magistrate Kitchin stated that Ms Hall's acts in providing false invoice numbers were deliberate, dishonest acts and her offending was not unintentional.

He agreed with the prosecution's submission that personal and general deterrence were important sentencing considerations and that innocent parties had been impacted by her conduct.

Magistrate Kitchin stated that the purpose of the Bankruptcy Act is to protect creditors from those who declare themselves bankrupt. He commented that had it not been for Ms Hall's guilty plea she would have been sentenced to four months imprisonment.

The matter was prosecuted by the Commonwealth Director of Public Prosecutions.

Paul Shaw, National Manager
Regulation and Enforcement

Quin (Trustee) in the matter of Rowe [2016] FCA 823 (18 July 2016) (Moshinsky J)

Summary

The decision of Moshinsky J in *Quin (Trustee) in the matter of Rowe* [2016] FCA 823 (18 July 2016) illustrates that a Court will not give directions so that a trustee may continue to act notwithstanding a conflict of interest. Such an application may be beyond the scope of section 134(4) of the *Bankruptcy Act 1966* (the Act).

Background

On 9 September 2014 and 6 November 2014, Adrian Rowe, Amanda Rowe, Colin Rowe and Cheryle Rowe (the bankrupts), who are members of one family, were made bankrupt by sequestration orders. Mr David Quinn and Mr Stephen Michell (Applicants) were appointed as the joint and several trustees in each of their bankrupt estates.

On 2 September 2009, the bankrupts had previously jointly purchased a property at 8 Lawsons Lane, Mansfield, Victoria (Property). On 17 July 2012, Colin Rowe and Cheryle Rowe transferred their interest in the Property to Amanda Rowe and Adrian Rowe for no consideration.

The Applicants, in their capacities as the trustees of the bankrupt estate of Cheryle Rowe, wanted to make a claim under section 120 of the Act against the bankrupt estates of Adrian Rowe and Amanda Rowe (Claim). The Applicants recognised that by being joint and several trustees of each bankrupt estate, they were in a position of conflict if they wanted to make the Claim.

The Applicants filed an application to the Court seeking the following directions under section 134(4) of the Act:

a. the Applicants continue to act as trustees of each of bankrupt estates under the Court's supervision notwithstanding a potential conflict of interest in the Applicants acting simultaneously as trustees of each bankrupt estate.

b. the Applicants, in their capacities as trustees of the bankrupt estate of Cheryle Rowe may settle the proposed Claim in relation to the Property.

Issues

The issues to be determined by Federal Court were:

a. whether the Court has the power under section 134(4) to give such directions that the Applicants can continue to act as trustees of each of bankrupt estates notwithstanding a conflict of interest?

b. whether it would be appropriate to give the direction sought by the Applicants?

Decision

Moshinsky J dismissed the application. The Applicants provided an undertaking that the estates would be transferred under section 181A of the Act.

Legal principles

Moshinsky J stated that it is not clear whether the Court has the power under section 134(4) to give the directions that the Applicants sought. His Honour noted that generally a proper subject matter for directions sought would be to authorise the trustees to act in carrying out their statutory functions and exercising or not exercising their powers under the Act. The effect of the directions sought would be to authorise the Applicants to act notwithstanding a conflict of interest.

His Honour concluded that even if the Court has the power to give the directions under section 134(4) or section 30(1) or a combination of those provisions, it would not be appropriate to give the directions sought by the Applicants as it would be contrary to the general principle that a trustee should not act in circumstances where there is an actual or potential conflict of interest.

Helen Cao, Senior Inspector
Regulation and Enforcement

Berryman v Zurich [2016] WASC 196 (1 July 2016) (Tottle J)

Summary

In the decision of *Berryman v Zurich* [2016] WASC 196, his Honour Justice Tottle considers the definition of divisible property for the purposes of bankruptcy. The case also seeks to clarify what a personal injury claim is for the purposes of the *Bankruptcy Act 1966* with specific reference to bankrupts continuing actions in their own name post-bankruptcy.

Background

Mr Berryman was a carpenter, who entered into a life insurance policy with Zurich in June 2009. The policy provided, amongst other things, that if Mr Berryman become totally or permanently disabled (TPD), Zurich would pay him a total of $2 million. In July 2009, Mr Berryman suffered an injury while at work that crushed his foot. He made a claim upon Zurich for the TPD, which was declined. In August 2014, he commenced action for breach of contract, but was declared bankrupt on 10 August 2015.

Legal Issues

The issue in question concerned whether or not Mr Berryman could continue the action in his own name. In considering the issues, his Honour considered section 60(4) and section 116(2)(g) of the Act.

Section 60(4) provides:

> *(4) Notwithstanding anything contained in this section, a bankrupt may continue, in his or her own name, an action commenced by him or her before he or she became a bankrupt in respect of:*
>
> *(a) any personal injury or wrong done to the bankrupt, his or her spouse or de facto partner or a member of his or her family; or*
>
> *(b) the death of his or her spouse or de facto partner or of a member of his or her family.*

Whereas section 116(2)(g) provides an exception to property divisible amongst creditors:

> *(g) any right of the bankrupt to recover damages or compensation:*
>
> *(i) for personal injury or wrong done to the bankrupt, the spouse or de facto partner of the bankrupt or a member of the family of the bankrupt; or*
>
> *(ii) in respect of the death of the spouse or de facto partner of the bankrupt or a member of the family of the bankrupt;*
>
> *and any damages or compensation recovered by the bankrupt (whether before or after he or she became a bankrupt) in respect of such an injury or wrong or the death of such a person.*

Zurich contended that any right that Mr Berryman had to sue would be considered as a chose in action that vested in his trustee in bankruptcy, since his claim was founded upon rights conferred upon him by the contract. To further their argument, they relied upon *Cox v Journeaux (No 2)* [1935] 52 CLR 713, which established that for damage to fall within the meaning of section 60(4) and section 116(2)(g), the damages are to be estimated by immediate reference to the pain felt by the bankrupt in respect to his mind, body or character and without reference to his rights of property. Zurich asserted that as Mr Berryman's claim is not in respect of a personal injury or wrong, but rather a contractual breach, it doesn't satisfy the Cox v Journeaux test, and as such should not fall within the section 60(4) exception.

Mr Berryman argued that the wording in section 60(4), specifically the phrase 'in respect of' is broad enough to encompass his claim, as it requires no more than a relationship, direct or indirect between two subject matters. Due to the relationship between the injury and the action commenced for damages, specifically the fact that without the injury, he would have no action at all, it should fall within section 60(4). Berryman claims that the fact that the action was brought in contract does not exclude it from being 'in respect of' his personal injury.

Decision

In coming to a decision, Justice Tottle considered submissions from both sides along with a large number of relevant precedents, but noted that the matter had not previously been considered by an Australian court. He noted though, that both section 60(4) and section 116(2)(g) embodied the common law of bankruptcy as developed by the English courts.

In *Beckham v Drake* [1849] 2 HLC 579, the plaintiff had been dismissed from employment, brought a claim of damages for breach of contract and then became bankrupt. In that instance, the judges held that the right of action vested in the assignee of the estate unless it was to recover damages for bodily or mental sufferings or personal inconvenience sustained by the bankrupt.

In *Wilson v United Counties Bank* [1920] AC 102, the bankrupt had a mixed claim in which part of the damages award related to an injury to the bankrupt's property and part to an injury to his person, including his credit and reputation. In that instance, their Honours separated the two claims and allowed the bankrupt damages attributable to his reputation.

The set of facts in *Cork v Rawlins* [2001] Ch 792 were very similar to the current circumstances, where the bankrupt was a gardener who had taken out an insurance policy that would pay him upon permanent disablement. He was then injured and made a claim but then became bankrupt. In that case, the insurer did not dispute that the claim was payable, but the issue was whether the funds vested in the trustee or remained with the bankrupt. In that case, the judges considered that the benefit payable did not fall within the common law exception, and as such the trustee was entitled to the benefit.

Having considered the above reasoning and submissions, his Honour found for Mr Berryman for the following reasons:

- Just because Mr Berryman is suing for a contractual right does not compel the conclusion that the action falls outside the section 60(4) exception.
- While authorities draw a distinction between damages to the bankrupt's property as contrasted to the bankrupt's person, in this case the value of the benefit is to be directly drawn from the damage suffered to the bankrupt's person.
- The substance of the bankrupt's claim, rather than the formulation of the cause of action ought to play the determinative role.
- While *Cork v Rawlins* was founded on common law principles, the legislative intervention in the form of section 60(4) and section 116(2) applies in this instance, and as such the case is bound to the relevant construction of the statutory regime.

As such, his Honour held that Mr Berryman was allowed to continue the action in his own name, despite his bankruptcy.

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Proceeds of Crime and Special Administrations
Insolvency and Trustee Services

Regulation and Enforcement

For Regulation and Enforcement locations and contacts, please view the Regulation and Enforcement web page on AFSA's website.

Personal Insolvency Regulator (PIR) editors

If you would like to submit an article for inclusion in the next edition of the PIR, please forward it to one of the following:

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