

INSOLVENCY IN PI / CLINICAL NEGLIGENCE LITIGATION: A DEFENDANT'S PERSPECTIVE

Anthony Reddiford, Guildhall Chambers
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Insolvency of...

- The Claimant.
- The Defendant.
- The insurer.



The bankrupt Claimant

Q: Why does it matter that the Claimant is bankrupt?

A: Insolvency Act 1986: s. 306:

(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.



The bankrupt Claimant

Insolvency Act 1986:

S. 283:

(1)...a bankrupt's estate...comprises:

- (a) *all property belonging to or vested in the bankrupt at the commencement of the bankruptcy....*



The bankrupt Claimant

Insolvency Act 1986:

S. 436:

"property" includes ...things in action...every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property..."



The bankrupt Claimant

Ord v Upton [2000] 2 W.L.R. 755:

- a cause of action where the only damage is PSLA is personal and does not vest in the trustee;
- all other conventional heads of damage are 'property' and do vest in the trustee.



The bankrupt Claimant

Ord v Upton (cont'd):

- a cause of action where PSLA and heads of `property` damage are brought ("hybrid") vests in the trustee.
- the trustee holds the PSLA award on trust for the bankrupt Claimant.



The bankrupt Claimant

Ways round the problem for the Claimant:

- obtain an assignment of the cause of action from the trustee (not straightforward – Defendant may wish to buy it).
- limit the claim to PSLA (see *Khan v Trident Safeguards* [2004] ICR 1591)?



The bankrupt Claimant

Procedural points:

- Commencing an action when the Claimant knows that it vests in the trustee is an abuse of process and the proceedings will be struck out:

(*Pickthall v Hill Dickinson LLP and Martindale* [2009] EWCA Civ 543).



The bankrupt Claimant

- Substitute the trustee for the Claimant if the claim was valid when brought (CPR Part 19.2(4));
- This is permitted, even where limitation has expired (CPR Part 19.5(3)(c)).



The insolvent Defendant

Getting to the insurer:

- Third Parties (Rights Against Insurers) Act 1930;
- European Communities (Rights Against Insurers) Regulations 2002;
- Third Parties (Rights Against Insurers) Act 2010.



The insolvent Defendant

Third Parties (Rights Against Insurers) Act 1930:

- Upon its insolvency, the insured's rights under the policy pass to third parties;
- Third Party has to obtain judgment against insured to enforce against insurer;
- Insurer has same rights against third party as against insured.



The insolvent Defendant

Third Parties (Rights Against Insurers) Act 1930 (cont'd)

- Thus, insurer can rely on:
 - policy excess/deductible;
 - non-notification by insured; and
 - any other policy defence.



The insolvent Defendant

Third Parties (Rights Against Insurers) Act 1930 (cont'd)

Procedure:

- If Defendant is in CVA, need agreement of CVA supervisor/permission of court to bring proceedings.
- If Defendant is in administration, need agreement of administrator/permission of the court to bring proceedings.



The insolvent Defendant

Third Parties (Rights Against Insurers) Act 1930 (cont'd):

- If winding up order made or liquidator appointed, need permission of the court to bring proceedings.
- No permission needed to bring proceedings if liquidation voluntary.
- If Defendant dissolved/struck off, need to restore to register.



The insolvent Defendant

Third Parties (Rights Against Insurers) Act 1930 (cont'd):

- If a company is restored to the register, the court has power to order that the period of dissolution should not count for limitation but should only do so if a s.33 application is bound to succeed (*Smith v White Knight Laundry Ltd* [2002] 1 W.L.R. 616).



The insolvent Defendant

Direct liability of the insurer:

- European Communities (Rights Against Insurers) Regulations 2002 – RTAs only;
- Third Parties (Rights Against Insurers) Act 2010 – due for implementation April 2011.



The insolvent Defendant

Third Parties (Rights Against Insurers) Act 2010

- Simplifies procedure: no need for judgment against insured.
- Therefore no need for permission of court/restoration to register.
- The Claimant can preclude a no/late notification defence if the Claimant notifies the insurer.



The insolvent insurer

- The Financial Services Compensation Scheme under the Financial Services and Markets Act 2000:
 - provides 100% protection for claims under compulsory insurance (RTA and EL claims for torts after 1/1/1972);
 - Provides 100% protection for the first £2k and then 90% protection for other insurance.



Tactics for Defendant

- Check that Claimant not bankrupt;
- Check proceedings are validly brought;
- Negotiate to buy the cause of action from the trustee?


