

## PROPERTY AND THE INSOLVENT “ESTATE”

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### INTRODUCTION

As a teacher, researcher and practitioner of both insolvency and property law over the last twenty years, I have found that insolvency law is an ideal vehicle for exploration of fundamental questions surrounding the nature of property, including, of course, security interests. In the case of bankruptcy of individual insolvents, and liquidation of corporate entities, these state-endorsed procedures involve the need to demarcate property or assets of the debtor which will be made available for distribution to creditors. Both procedures, through different conceptual routes, involve a change in the status of the debtor with respect to the demarcated assets, and both involve a third party into whose custody and control such assets are placed and who, while appointed for the benefit of creditors, stands in the debtor’s shoes with regard to the debtor’s property or assets.

The concept of an “estate” is used to demarcate the aggregated pool of property. The meaning is also used for a deceased estate, to identify what property of a deceased person passes to their beneficiaries, through the hands of the deceased’s personal representatives. While the general principle in both situations is that nearly all property belonging to the bankrupt or deceased passes into the respective estate, the difference is that in bankruptcy, the bankrupt is still alive, and therefore has a personal and human interest in retaining some property during the undischarged bankruptcy period.

This paper will examine some difficult issues which have faced courts in recent years in the demarcation of the bankrupt estate.

References to the *Insolvency Act* (New Zealand) are (unless specifically stated) references to the 1967 Act which, at the time of writing, is still in force. However, references to the *Insolvency Act 2006*, which is due to come into force in December 2007, are also given in parentheses. The 2006 Act, insofar as relevant to this article, replicated most of the provisions of the 1967 Act, though where there are substantive differences these are noted at the appropriate point in the article.

### THE “PROPERTY” OF A BANKRUPT

In a voluntary bankruptcy the debtor can be viewed as giving up most of his property for distribution, among his creditors, and submitting to other restrictions and obligations, in return for being discharged after a number of years and obtaining a “fresh start”. This contractual analysis works less well with involuntary bankruptcy, but in that situation the system can be seen as a benevolent State framework for a collective compulsory debt collection to replace the inefficient free-for-all of individual creditor remedies, or as something contractual in that the risk is factored into the price of credit transactions which the debtor has freely entered into.<sup>1</sup> Either

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<sup>1</sup> Jackson, *The Logic and Limits of Bankruptcy Law* (1986).

way, giving up property is probably preferred by most debtors to giving up their liberty in a debtor's prison, and of course, bankruptcy is seen these days as very much a last resort - alternatives to bankruptcy are developing all the time.<sup>2</sup>

Having said that most debtors would probably prefer to give up property than give up their liberty, it should be pointed out that giving up property is of course a surrender of an important aspect of their liberty, as recognised in human rights legislation, though tempered in most jurisdictions by statutory exemptions which are designed to safeguard some of the domestic, business and family needs of the bankrupt. Secondly, bankruptcy still involves considerable restrictions and obligations in addition to the surrender of his property, and these too may impact upon a bankrupt's human rights.<sup>3</sup>

In the UK, the 'bankrupt's estate' includes (unless exempt) 'all property belonging to or vested in the bankrupt at the commencement of the bankruptcy'.<sup>4</sup> The reference to property also includes references to any power exercisable by him over or in respect of property.<sup>5</sup> Property held by the bankrupt on trust for any other person is excluded.<sup>6</sup>

The wide definition of property in section 436 *Insolvency Act 1986* (UK) applies here:

"property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.<sup>7</sup>

Although this is stated to be inclusive rather than exhaustive, it is difficult to comprehend anything that has been omitted.<sup>8</sup>

It is a feature of the bankruptcy process that from commencement of bankruptcy, all such property vests automatically in the trustee.<sup>9</sup> The bankrupt does not retain any ownership interest in property comprised within the estate. (This is in contrast to the position with companies - there is no vesting of the company's property in the liquidator though there are controversial issues surrounding what happens to the equitable interest in the latter situation.<sup>10</sup>)

... in bankruptcy the entire property of the bankrupt, of whatever kind or nature it be, whether alienable or inalienable, subject to be taken in execution,

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<sup>2</sup> For example, see the new No Assets Procedure in New Zealand's *Insolvency Act 2006* (Part 5, subpart 4, sections 361-377), and the consultation presently under way in the UK, DTI, *Tackling Over-indebtedness* <http://www.dti.gov.uk/consumers/consumer-finance/over-indebtedness/index.html>.

<sup>3</sup> For example bankrupts must still submit to a public examination if required, s 69 *Insolvency Act 1967* (NZ), s 173 *Insolvency Act 2006*, and have restrictions on conduct of business while undischarged (s 62 *Insolvency Act 1967*, s 149 *Insolvency Act 2006*).

<sup>4</sup> Section 283(1) *Insolvency Act 1986* (UK).

<sup>5</sup> Section 283(4).

<sup>6</sup> Section 283(3)(a).

<sup>7</sup> In New Zealand the definition (applicable for bankruptcy, s 2 *Insolvency Act 1967* (s 3 *Insolvency Act 2006*) is similarly inclusive but non-exhaustive.

<sup>8</sup> *Bristol Airport plc v Powdrill* [1990] Ch 7 (Browne-Wilkinson VC); *Patel v Jones* [2001] EWCA Civ 719 <http://www.bailii.org>.

<sup>9</sup> Section 42 *Insolvency Act 1967* (NZ) (s 101 *Insolvency Act 2006*); Section 306 *Insolvency Act 1986* (UK).

<sup>10</sup> Compare *Ayerst v C & K Construction Ltd* [1976] AC 167 with *Commissioner of Taxation v Linter Textiles Australia Ltd* [2005] HCA 20 <http://www.austlii.edu.au>.

legal or equitable, or not so subject, shall, with the exception of some compassionate allowances for his maintenance, be appropriated and made available for the payment of his creditors.<sup>11</sup>

Property acquired by the bankrupt after the commencement of the bankruptcy, but prior to discharge, is sometimes, as in New Zealand,<sup>12</sup> brought within the definition of property vesting automatically in the Official Assignee (trustee-in-bankruptcy). In the UK, this used to be the case, but in 1985 this was altered so that now the trustee has to issue a notice claiming after-acquired property which, had it been property of the bankrupt at commencement, would have fallen within the estate.<sup>13</sup>

### **Exempt Property**

Property which would otherwise fall within the estate is exempt if it falls within certain categories designed to safeguard the needs of the bankrupt in relation to living conditions and business.<sup>14</sup> In relation to business, the traditional exemption has been for “tools of the trade”. Difficult questions of interpretation have arisen as to what constitute tools.<sup>15</sup> In the UK the business exemption extends to ‘tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation’, so issues of the meaning of tools of trade are less significant now.

In the domestic sphere, clothing, bedding, furniture and provisions ‘as are necessary for satisfying the basic domestic needs of the bankrupt and his family’ are protected.<sup>16</sup> In some jurisdictions medical aids and equipment are exempt.

The purpose of these exemptions is to provide a safety-net for the bankrupt and, in relation to personal life, his family. In relation to the business exemptions, the reasoning is that if a bankrupt is not able to retain the minimum necessary to make his living, he will never be able to utilise his human capital to contribute income to repay creditors, and will also be hindered in his “rehabilitation” and “fresh start” at the end of the discharge period. Indeed, given the emphasis on enterprise in the UK *Enterprise Act 2002*, which reduced the general discharge period to one year, though with more severe restriction orders for dishonest bankrupts, the need for bankruptcy law to allow for a bankrupt in business to be able to make ongoing and future contributions to the economy is explicit.

In relation to domestic circumstances, the exemptions recognise that, unlike a company in liquidation, a bankrupt is an individual with human needs, and also seem to give recognition to the family’s interests. Of course, the need to safeguard a minimum of domestic needs is related to the debtor’s ability to contribute to the economy too.

In other jurisdictions, further exemptions are common. The three most common

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<sup>11</sup> *Hollinshead v Hazleton* [1916] 1 AC 428 at 436 (Lord Atkinson).

<sup>12</sup> Section 42(2)(a) *Insolvency Act 1967* (NZ) (s 102 *Insolvency Act 2006*).

<sup>13</sup> Section 307 *Insolvency Act 1986* (UK).

<sup>14</sup> Section 283(2) *Insolvency Act 1986* (UK); s 52 *Insolvency Act 1967* (NZ) (s 158 *Insolvency Act 2006*).

<sup>15</sup> *re Sherman* [1916] WN 26; *re Lamacchia* [1933] NZLR 616 (fishing boat); *re Douglas* [1959] NZLR 1214 (cash register, radio, heater (all doubtful); barber’s chairs, combs and dressings (permissible tools of trade). A lawyer’s library is probably not a tool of the trade, *Pennell v Elgin* [1926] SC 9, 12.

<sup>16</sup> Section 52 *Insolvency Act 1967* (NZ) (s 158 *Insolvency Act 2006*).

are a vehicle, the so-called “homestead” exemptions such as in various states of the United States, and increasingly, protection for pension plan benefits.

While in the UK the previous financial limits on specific categories of exempt property have been removed, the trustee has the ability to replace the property with a more modest item of that type, where, in the trustee’s opinion, the original item has a realisable value that exceeds the costs of a reasonable replacement.<sup>17</sup> Thus the bankrupt is prevented from retaining luxury items. Furthermore, the trustee may apply for an income payments order, provided that it would not reduce the income below that which would be necessary for meeting the reasonable domestic needs of the bankrupt and his family.<sup>18</sup>

In other jurisdictions there are financial limits in place, designed to ensure that retained property represents the minimum the bankrupt needs, and no more. Thus in New Zealand the current limits are \$500 for tools of trade, and \$2000 for furniture etc, and up to \$400 of money. Unless there is some mechanism for these to be regularly reviewed to keep pace with the cost of living<sup>19</sup> these limits rapidly become out of date and have to be tempered with the discretion or the ‘blind eye’ of the Assignee/trustee-in-bankruptcy. In New Zealand, the Assignee may allow the bankrupt to retain items above the limits with the consent of creditors expressed by resolution.<sup>20</sup>

In recognition of the difficulties of fixed financial thresholds, the *Insolvency Act 2006* in New Zealand has provided that in respect of tools of trade and necessary furniture and household effects, the Official Assignee can now fix a maximum value, in his or her discretion in each bankruptcy case.<sup>21</sup> Creditors can still resolve to allow the bankrupt to retain more than the fixed value in these categories.<sup>22</sup>

In recognition of the fact that a vehicle is not only an essential for most bankrupts and their families, but often essential as a means of earning income, the New Zealand legislature has, for the first time, introduced a provision allowing retention of a vehicle, but in this case has imposed a \$5000 limit. This limit may be increased from time to time by Order in Council to take account of consumer price index rises.<sup>23</sup> However, the limit still gives rise to definitional issues, for example does a \$5000 limit on a vehicle mean the equity in a financed vehicle, and does it mean that the bankrupt can buy a more expensive vehicle if he can find the excess from elsewhere? The retention of assets under these provisions does not ‘affect the rights’ under a valid charge or hire purchase agreement in respect of the asset,<sup>24</sup> though that does not seem to deal directly address the question of whether the financial limit refers to the value of the car or merely the equity in it.

It has now been made clear in New Zealand that a bankrupt cannot argue, for example, that he has not used up his furniture limit so should be able to put some

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<sup>17</sup> Section 308 *Insolvency Act 1986* (UK).

<sup>18</sup> Section 310 *Insolvency Act 1986* (UK).

<sup>19</sup> The Governor-General may increase the limits by Order in Council - this has not happened frequently, the last increase being in 1986. However, the draft *Insolvency Law Reform Bill* proposes a new mechanism for more regular inflation-proofed increases (clause 156).

<sup>20</sup> Section 52(2) *Insolvency Act 1967* (NZ).

<sup>21</sup> Section 158 *Insolvency Act 2006*.

<sup>22</sup> Section 159 *Insolvency Act 2006*.

<sup>23</sup> Section 158(3)(c),(5) *Insolvency Act 2006*.

<sup>24</sup> Section 161 *Insolvency Act 2006*.

more towards the car or some other retained asset<sup>25</sup>

Homestead exemptions, where they exist, recognise the significance attached to a home as a place of residence, distinct from other types of property. Furthermore, they often emphasise the “family” nature of the home.<sup>26</sup> Many jurisdictions do not have homestead exemptions, though some, such as the UK, have special provisions dealing with occupation of a family home in relation to the trustee’s application to sell it to realise the bankrupt’s interest in it.<sup>27</sup> While New Zealand does not have a homestead exemption, it has the *Joint Family Homes Act 1964*, which allows married couples to register their home as jointly owned and thereby gain protection from creditors. There is an effective equity ceiling,<sup>28</sup> but provided the registration as a joint family home was not within two years prior to bankruptcy, the home will be protected from creditors, and is exempt from the scope of “property” forming part of the insolvent estate.<sup>29</sup> The Act has been remarkably little used, and the Law Commission has recommended its repeal.<sup>30</sup> Now that New Zealand has legislation which gives de facto couples the same property rights on relationship breakdown and death as married couples, the Act in its present form is anomalous. Furthermore, it treats bankrupts who happen to be married more favourably than single bankrupts.

Increasingly, exemption is being extended to various pension and retirement plans, and sometimes to life insurance “endowment” plans. The Senate Standing Committee in Canada’s review of bankruptcy law<sup>31</sup> discussed in some detail the various types of scheme, in light of Government policy to encourage savings for retirement. It even recommended that, as with retirement savings plans, provided they were “locked-in” schemes that could not be used for other purposes, and save for premiums paid in the year preceding bankruptcy (to prevent abuse in the period of likely insolvency), even education savings schemes to save for children’s education should be exempt. The report stressed the fact that the recommended exemptions reflected Government policy and with those restrictions, could not be easily abused as a channel for off-loading wealth prior to bankruptcy. In the UK, the *Welfare Reform and Pensions Act 1999*<sup>32</sup> reversed the effect of *Re Landau*<sup>33</sup> and later cases extending it to different types of pension plan, where the court found that the benefit of annuity payments passed to the trustee as part of the estate. In some cases, whether or not the pension benefits vested in the trustee-in-bankruptcy turned on the construction of a forfeiture clause.<sup>34</sup> The Act recognised

<sup>25</sup> See now s 161 *Insolvency Act 2006*; *re Lamacchia* [1933] NZLR 541 in *re DaimlerChrysler Financial Services(Debis) Canada Inc* [2004] OJ No 1924 (Ont. CA).

<sup>26</sup> Lorna Fox, ‘Creditors and the concept of family home: a functional analysis’ (2005) 25(2) *Legal Studies* 201, 210-227.

<sup>27</sup> Sections 335, 336 *Insolvency Act 1986* (UK).

<sup>28</sup> Currently \$103,000 (clause 3 *Joint Family Homes Act (Specified Sum) Order 2002*).

<sup>29</sup> *Official Assignee v Noonan* [1988] 2 NZLR 252 (no exemption where home sold and no replacement purchased with proceeds).

<sup>30</sup> New Zealand Law Commission, *The Future of the Joint Family Homes Act 1963* Report 77 (2001).

<sup>31</sup> Standing Senate Committee on Bankruptcy and Insolvency Act and Companies Creditors Arrangements Act, *Debtors and Creditors: Sharing the Burden* (2003) (‘the Kroft Report’).

<sup>32</sup> Section 11.

<sup>33</sup> See also *Krasner v Dennison* [2001] Ch 76; *Patel v Jones* [2001] EWCA Civ 779 <http://www.bailii.org>. For a review of the different treatment of different types of policy, see *Malcolm v Benedict McKenzie* [2005] 1 WLR 1238. In *Rowe v Saunders* [2002] BPIR 847, the Court of Appeal followed *Krasner* and held that the provisions were not inconsistent with the *European Convention on Human Rights*.

<sup>34</sup> For a case where the benefits were held not to pass to the trustee, see *re The Trusts of the Scientific Investment Pension Plan* [1998] BPIR 410. In such cases the trustee may apply to have

that there should be no differential treatment as far as bankruptcy exemption was concerned, according to the type of policy.

Aside from the statutory approaches, the common law seems to support a minimum safety net in bankruptcy.<sup>35</sup> At least as regards income, a bankrupt has always been entitled to retain such amount of his income as is reasonably necessary for the maintenance of himself and his family. In the New Zealand case of *Re Bertrand*<sup>36</sup> it was confirmed that while notionally, after-acquired income vested in the Assignee, the common law meant that earnings needed for living expenses were subject to the bankrupt's use. Section 45 *Insolvency Act 1967*<sup>37</sup> provides that a bankrupt must pay any amount required by the Assignee during the bankruptcy, but inter alia the Assignee must make reasonable allowance for the maintenance of the bankrupt, his spouse and family. This is regarded as a machinery provision only, which accommodates the common law rule.<sup>38</sup> The 2006 Act seems to take a more holistic approach to the notion of 'family', so that the Assignee can now make such allowance to cover 'relatives and dependants'.<sup>39</sup>

In jurisdictions with federal insolvency law and state property law, different exemptions exist in different states. Thus, notoriously in the United States, states such as Florida have very generous homestead exemptions which are abused by individual debtors.<sup>40</sup> In Canada, recent calls for law reform have suggested that there should be a federal list of exemptions which could be optional on entry into bankruptcy as an alternative to the state exemptions.<sup>41</sup> At present under the Canadian system, the federal insolvency statute exempts any property exempted under the provincial/territorial legislation relevant to the bankrupt. One reason for retaining provincial/territorial exemption lists is said to be to take account of regional differences in prices, but balanced against that is the need to have equality of treatment under federal insolvency law irrespective of location.

There is no doubt that the present systems depend on a certain amount of goodwill by trustees in exercise of their discretion. Although the new system in New Zealand allows the Assignee more discretion to determine what are appropriate values for retained property and allowances to the bankrupt and his relatives and dependants, given that bankruptcy is a State-sanctioned mechanism for dealing with insolvent debtors and their creditors, it is arguable that any decisions about whether the debtor and his family have sufficient property and income for their reasonable domestic needs should be seen within the context of the state's operation of a welfare safety net. In relation to domestic living needs as opposed to business needs, this might provide a more stable and consistent basis than the discretion of the trustee and a residual common law principle to keep people from penury. The trend of legislative

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benefits vested in him as after-acquired property under s 308, or apply for an income payments order under s 310.

<sup>35</sup> *Re Roberts* [1900] 1 QB 122.

<sup>36</sup> [1980] 2 NZLR 72 (CA).

<sup>37</sup> See also s 310(2) *Insolvency Act 1986* (UK) - income payments orders.

<sup>38</sup> *Re Dransfield, ex parte Official Assignee* (Unreported, High Court Auckland, B1540/90, 26 August 1993, Anderson J); *re Bertrand* [1980] 2 NZLR 72 (CA).

<sup>39</sup> Sections 162-164 *Insolvency Act 2006*.

<sup>40</sup> See Lorna Fox, 'Creditors and the concept of family home: a functional analysis' (2005) 25(2) *Legal Studies* 201, 210-227; the continued availability of unlimited homestead exemptions in some states such as Florida and Texas has been the subject of comment in the light of the recent bankruptcy reforms in the United States.

<sup>41</sup> See note 26 above. Standing Senate Committee on Bankruptcy and Insolvency Act and Companies Creditors Arrangements Act, *Debtors and Creditors: Sharing the Burden* (2003) ('the Kroft Report').

policy is to provide alternatives to bankruptcy, and for the state to facilitate debt management. It is consistent with this that where bankruptcy is used, hopefully as a last resort, the consequences for a bankrupt and his family should be more closely tied to the state's safety net provisions, rather than seen as some private scheme between creditors and debtors.

### **“Property” of the bankrupt**

Other than exempt property, including property held on trust, and, in the case of UK, the right of nomination to a vacant ecclesiastical benefice(!),<sup>42</sup> all other property vests in the trustee-in-bankruptcy. Given the wide definition of property in the UK Act, it is clear that all real and personal property is within this. However, there has been plenty of litigation around the penumbra of property, particularly in relation to licences and litigation rights.

One of the main boundary disputes between contract law and property law in the latter half of the twentieth century has been in the area of licences to use or occupy land. The general principle is that licences are permission to do something that would otherwise be a trespass.<sup>43</sup> Where a licence does not involve land, for example a vehicle licence or licence to sell liquor, it would be regarded as personal in nature, and often made expressly non-transferable. Thus in *Russell v Ministry of Commerce for Northern Ireland* it was held that a road carriage licence was personal, and not transferable.<sup>44</sup> In *Griffiths v Civil Aviation Authority*<sup>45</sup> a non-transferable aviation licence was held to be personal to the bankrupt, so that a right of appeal in relation to withdrawal of that licence did not pass to the trustee. In relation to land, any suggestion that licences per se were interests in land was scotched by the Court of Appeal in *Ashburn Anstalt v Arnold*,<sup>46</sup> and this reflected the orthodoxy at the turn of the century.<sup>47</sup>

In light of that orthodoxy in relation to land law, it is somewhat surprising to find that in the context of bankruptcy, courts have held that licences which are not even connected with land can form part of the property of a bankrupt licensee. In the most extreme of these cases, in *Re Rae*,<sup>48</sup> the Ministry of Agriculture issued seafishing licences under conservation legislation, in the name of individuals but “attached” to a specific vessel. Rae owned four such vessels and licences. While the vessels vested in the trustee on his bankruptcy, the licences actually terminated on bankruptcy. However, the Ministry had an express policy that, in order to control the number of licences/vessels, it would recognise that someone who had previously held a licence in relation to a vessel had an “entitlement” to another licence, or to waive their entitlement in favour of someone else. Rae refused to waive his entitlement in favour of the trustee, even though the entitlements in relation to the four vessels added about £300,000 to their sale value.

Warner J pointed to the contextual nature of “property”<sup>49</sup> and to the purpose of the

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<sup>42</sup> Section 283(3)(b) *Insolvency Act 1986* (UK).

<sup>43</sup> *Thomas v Sorrell* (1673) Vaugh 330; 24 ER 1098.

<sup>44</sup> [1945] NILR 184.

<sup>45</sup> [1997] BPIR 50.

<sup>46</sup> [1989] Ch 1 (CA, Eng).

<sup>47</sup> *King v David Allen & Sons, Billposting* [1916] 2 AC 54.

<sup>48</sup> [1995] BCC 102.

<sup>49</sup> *Kirby v Thorn EMI plc* [1988] 2 All ER 947 at 953, Nicholls LJ.

*Insolvency Act*. In an earlier case, *Bristol Airport plc v Powdrill*<sup>50</sup> Browne-Wilkinson VC had, in the context of a question as to the scope of the moratorium against enforcement of security against “property” within an administration order, emphasised the statutory purpose of the provisions. Browne-Wilkinson VC commented that it was ‘hard to think of a wider definition of property’ than section 436. In this case, Warner J pointed to the purpose of bankruptcy, the limited statutory exemptions, and then stated, ‘There is no example...of the bankrupt being entitled to retain for his own benefit a purely financial or commercial asset capable of realisation for the benefit of his creditors and not necessary for his personal use in his employment, business or vocation’. To exclude the entitlement from the bankrupt estate would be contrary to the purposes of the Act, because while being relieved of liability to his creditors, he would be able to retain an asset that was not retainable by reason of his needs as a human being. (It was conceded in argument that the entitlement was not a tool of the trade.)

Warner J rejected the notion that any asset which the trustee could realise for the benefit of creditors must be within the meaning of “property”, even if the converse was true. Unlike an earlier case involving capital gains tax legislation where it was provided ‘all forms of property shall be assets for the purposes of this Part of the Act’, His Lordship commented that in that case, he regarded the word property as subordinate to assets, and the latter wording was not used in the *Insolvency Act*. Therefore he concluded that not every asset that could be realized or turned to account was “property” within the *Insolvency Act*. This suggests that despite the wide definition of property, “asset” is even wider.

Nevertheless, this was obiter dicta since he went on to hold that the Ministerial entitlement (a sort of legitimate expectation) in Mr Rae to apply for a fresh licence, was within ‘every description of interest... arising out of or “incidental” to property within section 436.’ The word “interest” was not confined there to interests in property, since it included interests arising out of or incidental to property. Could such an “interest” extend beyond one enforceable in a court of law to something which had a market and was therefore capable of being converted into money for the benefit of creditors? The words “every description of interest” could be given a wide meaning, or confined to interests enforceable through legal proceedings (other than judicial review). However, the meaning which would uphold or not frustrate the statutory purpose should be given, and that was the wide meaning.

Thus, the court did not even find that fishing licences were property, since that was not the issue, the licences themselves having terminated. It found that an “entitlement” dependent on Ministerial discretion in favour of the bankrupt was “property” within the bankrupt estate. While Warner J states that he was not deciding that everything that could be turned into money for creditors was “property” for this purpose, the construction of “every description of interest...incidental to property” almost has that effect. His Lordship was very influenced by the judgment of Browne-Wilkinson VC in *Bristol-Airport v Powdrill*, in which case a wide purposive interpretation was given to the word “property” in a different insolvency context. This approach was followed in *Patel v Jones*,<sup>51</sup> where the Court of Appeal stated that non-assignable pension annuities which were rights to future payments vested in the trustee-in-bankruptcy at the commencement of bankruptcy, and this even extended to discretionary payments that might be made in future. The Court expressly referred to

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<sup>50</sup> [1990] BCC 130.

<sup>51</sup> [2001] EWCA Civ 179 <http://www.bailii.org>.



*Re Rae* as authority for the latter proposition.

However, what all three decisions have in common is the identification of Parliament's intention to cast the net of "property" widely, and wider than "orthodox" property law principles might suggest. Reliance on *Powdrill*, a case on the moratorium on administration orders, is all the more surprising in light of the view of Lord Robertson, obiter, in the Scottish Court of Session in *Air Ecosse Ltd v Civil Aviation Authority*<sup>52</sup> that an air transport licence was not property within section 11(3)(d) of the *Insolvency Act*, so that an administrative claim in relation to revocation of such a licence could not, in any event, be proceedings "against the property" of the insolvent company. Insofar as this takes an orthodox view of the personal and non-transferable nature of such licences,<sup>53</sup> this is hard to reconcile with the wider approach in *Powdrill*, which concerned the same section of the Act, and of course the approach in *Re Rae*.

### **Waste management licences**

The second area of insolvency law where the courts have examined licences as property is in the area of waste management licences. In the absence of statutory priority on insolvency, (such as exists in Canada), for public agencies who are left with the remediation costs, where a debtor with statutory duties with regard to contamination or hazardous waste initiates a voluntary liquidation, it can avoid the clean-up costs, by the liquidator (and this also applies in bankruptcy) using the power of disclaimer of onerous obligations. This could even happen in the case of a solvent liquidation where the debtor has ample money to fund any remediation. The disclaimer power enables the liquidator or trustee to disclaim onerous contracts or "property" carrying onerous obligations, so the issue has arisen whether licences issued by environment agencies within a statutory framework of conditions attached to the licences, could be "property" for this purpose, and then secondly, if it could be property, whether in any event it the liquidator should be permitted to disclaim it in view of the public policy stemming from the environmental protection legislation.

In *Re Celtic Extraction Ltd*<sup>54</sup> the Court of Appeal held that the waste management licences, which can be transferred by a statutory mechanism involving surrender to the Government Environment Agency, which then reissues them, were "property" for the purposes of disclaimer.<sup>55</sup> Morritt LJ examined the issue of whether licences could be "property" for the purposes of the insolvent estate. First he noted that in successive statutes dealing with bankruptcy and insolvency the definition of "property" had been progressively extended.<sup>56</sup>

In *National Provincial Bank Ltd v Ainsworth*, Lord Wilberforce said:

Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties,

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<sup>52</sup> (1987) 3 BCC 492 at 500.

<sup>53</sup> As also taken in *Griffiths v Civil Aviation Authority* [1997] BPIR 50.

<sup>54</sup> [2001] Ch 475.

<sup>55</sup> In *Tubbs v Futurity Investments Ltd* [1998] NZLR 417 the issue was not the definition of "property" but whether the liquidator should be given leave to disclaim hazardous waste in a solvent voluntary liquidation - the court refused on public policy grounds, in a decision similar to, though less well-reasoned than, that of Neuberger J in *Re Mineral Resources Ltd Environment Agency v Stout* [1999] 1 All ER 746.

<sup>56</sup> *Morris v Morgan* [1998] CA Transcript 524.

capable in its nature of assumption by third parties, and have some degree of permanence or stability.<sup>57</sup>

In *De Rothschild v Bell (a bankrupt)* the Court of Appeal considered that the right to continue to occupy premises conferred by Part I of the *Landlord and Tenant Act 1954*, though not derived from any legal status under the former contractual tenancy, was property for the purposes of the 1986 Act.<sup>58</sup> Buxton LJ regarded the key issue as assignability, and doubted whether it mattered whether the right, once in the hands of the bankrupt, had any value to the creditors. Even if he was wrong on the latter, he did not rule out the possibility that it might have value to the creditors in some circumstances. The important factor in this case seemed to be that the statutory continuation of the contractual tenancy, from which the Court derived the assignability, was distinguishable from a statutory tenancy which was agreed to be non-assignable and personal to the statutory tenant.<sup>59</sup>

Reviewing the authorities on either side of the line in *Re Celtic Extraction Ltd*, Morritt LJ, whilst cautioning that “property” was not a term of art, summarised as follows:

First, there must be a statutory framework conferring an entitlement on one who satisfies certain conditions even though there is some element of discretion exercisable within that framework. This condition is satisfied by the provisions of ss 35(2), 36(3) and 43 of the 1990 Act...

Second, the exemption must be transferable. This is satisfied by the terms of s 40(1). The requirement that the transferor and transferee should join in the application demonstrates the transferability of the waste management licence even though it takes the form of a surrender and regrant by the agency...

Third, the exemption or licence will have value ... In *Re Mineral Resources Ltd*,<sup>60</sup> Neuberger J commented that there is a market in waste management licences. There was no evidence to that effect in these cases and the agency did not agree that there was any market. However it was common ground that money does change hands as between transferor and transferee. Further the very substantial fees the agency is entitled to charge and in fact receives is a good indication of the substantial value a waste management licence possesses for the owners or occupants of the land to which it relates.

He therefore held that in the waste management licence was “property” properly so called within section 436, but if not, it was an “interest ... incidental to property”, namely the land to which it relates.

However, what seemed to make the licences “property” for these purposes was the fact that they were transferable, even if the substance of the transaction was that the transfer was not by the licensee, albeit he might have to be a party to it. It is trite to observe that the “hallmarks” of proprietary interests as discussed by the House of Lords in *National Provincial Bank v Ainsworth*<sup>61</sup> are somewhat circular, as

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<sup>57</sup> [1965] AC 1175 at 1247-1248.

<sup>58</sup> [1999] 2 WLR 1237.

<sup>59</sup> *London Corporation v Bown* (1990) 60 P&CR 42.

<sup>60</sup> [1999] 1 All ER 746 at 753.

<sup>61</sup> [1965] AC 2275.

is the statutory definition in insolvency legislation, but a licence issued to a named party which cannot be transferred by that party does not seem to exhibit any of the characteristics identified in that case.

In these cases the courts have been concerned with the final outcome of whether they had jurisdiction to prevent the disclaimer, and thus the abrogation of the company's responsibility for its environmental obligations. Nevertheless, there is a clear trend between cases such as *Re Rae*, *Patel v Jones* and *Re Celtic Extraction Ltd* which all show that precarious rights given to individuals, which would not normally be regarded as property rights, are within the wider scope of the meaning of "property" in insolvency legislation.

### **Expectancies**

Another example of the willingness of bankruptcy courts to take an expansive and non-orthodox approach to proprietary interests for the purpose of delineating the insolvent estate is where a bankrupt is named as a beneficiary in a will. The orthodox position is that until the executors have administered the estate and determined the residue, the beneficiary does not have property that can pass to the trustee, but does have a chose in action to see that the executor properly administers the estate.<sup>62</sup>

In the New Zealand case of *Re Cameron, ex parte Commissioner of Inland Revenue*<sup>63</sup> Gallen J held that where the bankrupt became executor of the testatrix, his interest as beneficiary devolved upon him prior to discharge for the purposes of section 42, since it fell within the description of 'every description of estate present or future vested or contingent arising out of or incident to property'.

### **Litigation rights**

Choses in action are within the definition of "property".<sup>64</sup> However, at common law, some causes of action have remained with the bankrupt where they are for damages are to be estimated by immediate pain felt by the bankrupt in respect of his mind, body or character and without immediate reference to his rights of property.<sup>65</sup> The reasoning is because the damages are to compensate the bankrupt for personal loss and the concluding words, 'without immediate reference to his rights of property', indicate that this does not include compensation for loss of earnings, property damage, even if related to some personal injury. Examples of cases covered by the exception are damages for personal injury, either in tort or some other compensation (for example criminal injury compensation),<sup>66</sup> or defamation.

Whilst the general principles have become clear, there are always difficult borderline cases. In some cases it is hard to pigeonhole the claim as falling within the general principle or within the "personal" exception. For example, in *Rose v Buckett* the bankrupt was allowed to retain damages for inconvenience to himself and his family and loss of quiet enjoyment stemming from a wrongful entry to his premises and conversion of his goods.<sup>67</sup> A more difficult instance arose from the New Zealand

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<sup>62</sup> *Commissioner of Stamp Duties v Livingston* [1965] AC 694.

<sup>63</sup> (1987) 9 NZTC 6, 187.

<sup>64</sup> Section 2 *Insolvency Act 1967* (NZ) (s 3 *Insolvency Act 2006*); s 436 *Insolvency Act 1986* (UK).

<sup>65</sup> *Beckham v Drake* (1849) 2 HL Cas 579 at 604 per Erie J.

<sup>66</sup> *Re Campbell (A Bankrupt)* [1997] Ch 14.

<sup>67</sup> [1901] 2 KB 449.

legislation<sup>68</sup> which provides for compensation for informal testamentary promises in return for services. If the bankrupt claimant had received something in the testatrix's will, this would clearly have passed to the Assignee.<sup>69</sup> But the Court treated the claim under the Act as akin to breach of contract for provision of personal services, so the right to pursue the claim remained with the bankrupt.<sup>70</sup>

Another difficult example which turned on subtle distinctions in relation to the relief sought was *Grady v Prison Service* where the applicant claimed unfair dismissal.<sup>71</sup> The principal relief sought was reinstatement to her old job, or re-engagement in a similar one, but the argument turned on the fact that the statute in question provided for compensation in lieu, which recognised the practical difficulties with reinstatement or reengagement in many such cases. However, notwithstanding that the litigation might result in a sum of money, Sedley LJ stated that the primary purpose of the unfair dismissal remedy (as opposed to wrongful dismissal), was to restore a relationship which depended on the applicant's personal qualities. Of course, it could be said that restoring the applicant to the workforce so that she could earn income would also benefit her creditors, but nevertheless, the Court of Appeal felt that the primary purpose of the legislation fell on the "personal" side of the line notwithstanding the practical reality that compensation was far more common than reinstatement or re-engagement.

### **Investment of "personal" damages**

One question that arises is what happens to the proceeds of a successful "personal" claim. The implication of *Beckham v Drake* would be that the bankrupt is able to keep the proceeds. Indeed, Cooke J has held that a trustee would not be able to recover proceeds invested by the bankrupt (although if they earn income, presumably they could be the subject of an income payment order under English law, or an application for contribution under New Zealand law).<sup>72</sup> However, the law on investing proceeds is not clear. In *Re Wilson, ex parte Vine* James LJ stated that whilst there was no justification for intercepting money paid to a bankrupt as damages for some personal wrong, if the bankrupt had invested the money, the trustee would be able to reach them.<sup>73</sup> In *Re Rae* there was an obiter suggestion that there were "limits" upon the bankrupt's ability to retain such proceeds, though these were not spelt out further.<sup>74</sup> Perhaps these dicta are indicative of the fact that one might balk at a once-wealthy, but now bankrupt, public figure receiving substantial damages for defamation while creditors go begging. One suspects that a trustee in such a case would attempt to use after-acquired property provisions to recover some of the proceeds, but it is not at all clear that he would succeed under current law - indeed the logic of the authorities is against it.

Where a bankrupt is defendant to proceedings, the possibility of a set-off or counterclaim could give rise to the same issue of who has standing to pursue the proceedings. In this situation, the bankrupt will have no standing to defend or counterclaim unless there are actions seeking *in personam* relief against the bankrupt, for example injunctive relief.

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<sup>68</sup> *Law Reform (Testamentary Promises) Act 1949*.

<sup>69</sup> See above note 59.

<sup>70</sup> *Re Gadsby (decd)* (Unreported, High Court Wellington, CP 354/94, 10 August 1999, Gendall J).

<sup>71</sup> [2003] 3 All ER 745.

<sup>72</sup> *Leach v Official Assignee* [1975] 1 NZLR 83.

<sup>73</sup> (1878) 8 Ch D 364.

<sup>74</sup> [1995] BCC 102.

## Appeals

Appeals are treated in the same way. A bankrupt cannot appeal from a judgment which is enforceable only against the estate. If the judgment consists of personal orders, the bankrupt can appeal.<sup>75</sup> In the High Court of Australia case of *Cummings v Claremont*, one issue was whether the statutory right of appeal from a judgment was “property”.<sup>76</sup> The Court of Appeal had been divided on this issue, and the High Court was split 3-2. The majority, preferring the judgment of Hill J, dissenting below, found that since the liability contained in the judgment debt could not be “property”, an appeal against it, though it might be a “right”, could not be a property right, and certainly was not property divisible among creditors. The minority, Dawson and Toohey JJ, started from the wide interpretation given to “property” within the *Bankruptcy Act 1966*, and stated that it was not a question of whether the right of appeal would be property according to orthodox concepts, but whether in the statutory context, which vested the bankrupt’s rights including some which would not traditionally be thought of as proprietary, subject only to the statutory exceptions. In particular, the minority, as with Gummow and Whitlam JJ in the court below, stated that whereas assignability was a normal characteristic of a property right, the statutory definition of property encompassed rights which would clearly not be assignable, such as a bare right of action for personal injury.<sup>77</sup>

While the question of whether a right of appeal could be “property” was interesting and controversial in this case, the High Court ultimately held, unanimously, that it was not necessary to decide, because, following *Heath v Tang*,<sup>78</sup> the important point was whether control of the litigation vested in the trustee. Where the appeal related to judgments for breach of fiduciary duty and fraud, the fact that the bankrupt directors wished to clear their name did not detract from the reality that the judgments would be liabilities of the estate, and therefore only the trustee had the right to decide whether or not to appeal. The appeals related to judgments against directors for breach of fiduciary duties and fraud, and were liabilities against the insolvent estate. It is suggested that the better view on the question of whether a right of appeal is “property” is that of the majority in the High Court, but that the important point is the question of control - a bankrupt can retain the right to appeal where it relates solely to a liability or relief which affects him personally, such as injunctive relief or damage to his reputation,<sup>79</sup> or in relation to a personal matter such as the revocation of a personal licence.<sup>80</sup>

As Hoffmann J stressed in *Heath v Tang*, the bankruptcy court in these cases ‘acts as a screen which both prevents the bankrupt’s substance from being wasted in hopeless appeals and protects creditors from vexatious challenges to their claims’. If a bankrupt wishes to pursue a claim, defence or appeal which the trustee does not deem it worth pursuing, then in appropriate circumstances the trustee may assign the claim to the bankrupt - this might also be done where the bankrupt can qualify for legal aid. However, a trustee has to reach a considered decision in the interests of creditors

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<sup>75</sup> *Dence v Mason* (1879) 41 LT 573; *Heath v Tang* [1993] 1 WLR 1421; *Griffiths v Civil Aviation Authority* [1997] BPIR 50.

<sup>76</sup> [1995-6] 185 CLR 124.

<sup>77</sup> See in this context *Re Landau* [1997] 3 All ER where pension annuities which were expressly non-assignable were held to pass to the trustee.

<sup>78</sup> [1993] 1 WLR 1421.

<sup>79</sup> *Re Wilson, ex parte Vine* (1878) 8 Ch D.

<sup>80</sup> *Griffiths v Civil Aviation Authority* [1997] BPIR 50.

before assigning litigation rights to the bankrupt or anyone else, and the most important consideration will be that the insolvent estate is not exposed to any liability for costs.

Indeed, this general principle, reflected in the statutory definition of “property”, is of such force that a bankrupt does not have standing to bring proceedings which, if successful, would establish that the bankruptcy order should be annulled and that there might in fact be a surplus. This might be, for example, if the bankrupt alleged that a creditor and the trustee were colluding to stifle a claim due to the estate. The apparent injustice of this is now ameliorated by the ability of the bankrupt to appeal against the original order, but also to apply to court to challenge any decision of the trustee. However, the common law has always allowed the court to act to prevent a “gross injustice” upon the bankrupt in this way.

### **Hybrid claims**

Successful litigation may lead to relief under different heads, some which are compensation for pain and suffering, and others for loss of earnings or cost of care. This often happens in personal injury litigation, but could arise in other contexts. In such a situation, it is impracticable to separate the actions, since they stem from the same cause of action (for example negligence). This has required the court to analyse the concept of a “cause of action” in more detail.

In *Wilson v United Counties Bank Ltd* the bankrupt was suing his bank for breach of a contract in which, inter alia, it agreed to maintain his credit and reputation, and he alleged that the bank had negligently caused his bankruptcy.<sup>81</sup> It was held that the sum awarded in respect of injury to credit and reputation vested in the bankrupt. Lord Atkinson addressed the practical problem that arose where there was also loss caused to the bankrupt’s estate. He speculated that there would be two separate actions, one vested in the trustee and the other in the bankrupt. In the actual case, both the bankrupt and trustee had jointly sued the bank, and the only issue before the House was the question of damages for the bankrupt’s injury to reputation and credit.

This was the central issue in the English Court of Appeal’s recent decision in *Ord v Upton*.<sup>82</sup> Ord sued a medical practitioner for negligent surgery in respect of back pain. The damages were sought for loss of earnings, pain and suffering. It was argued that according to *Beckham v Drake*, in order for the cause of action to vest or remain with the bankrupt, both limbs of Erie J’s principle had to be satisfied, namely damages referable to injury to mind, body or character *and without reference to his rights of property*. The Court of Appeal stated, in agreement, that this was a “hybrid” claim, but that, unlike the view expressed in *Wilson*, there was only one cause of action, with different heads of damages.<sup>83</sup> At the time of *Wilson* it would have been possible to plead two causes of action to recover the separate heads of damage, but that should not be the modern approach. The cause of action was negligence. It vested in the trustee, but he would hold the “personal” damages on constructive trust for the bankrupt. This not only reflects the strict application of the *Beckham* exception, but also the policy rationale that control of the litigation is important, and that, following *Heath v Tang’s* approach, this should vest in the trustee, not least because of the cost implications of litigation by the bankrupt.

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<sup>81</sup> [1920] AC 102 (HL).

<sup>82</sup> [2000] 1 All ER 193 (CA, Eng).

<sup>83</sup> [2001] BPIR 222 (CA, Eng).

However, the “personal” exception was not extended further in *Cork v Rawlins* where the bankrupt was “disabled” by an accident, within the terms of two life policies prior to bankruptcy. His trustee argued that the proceeds formed part of the estate. The Court of Appeal rejected the argument that the policy was paid out primarily due to the pain and suffering involved in the accident. The primary reason for payment was that the bankrupt was unemployable due to the accident, so that the *Beckham* exception did not apply.

More recently, the House of Lords, though largely on procedural grounds, has had to consider a hybrid claim similar to that in *Wilson*, though this time, a woman was suing her accountants for negligence which she alleged led to her bankruptcy.<sup>84</sup> She alleged that, after advising her that she might be able to avoid bankruptcy through an individual voluntary arrangement (IVA) their actions or omissions led to a bankruptcy order being made before an IVA could be concluded.<sup>85</sup> Lord Millett, obiter, expressed the view that it was arguable that the district judge, in proceedings between the trustee and the bankrupt only, had been correct that the cause of action, albeit for financial loss, remained vested in the bankrupt. It would be strange if the trustee could pursue an action for the very negligence which resulted in his appointment, and in this case, the damages for loss of the business, which was closed down by decision of the trustee, could not be claimed by the trustee, especially since the administration of the bankruptcy and distribution to creditors had already been finalised. Although this obiter statement suggests that it cannot be assumed that all claims for financial loss, even if not within *Beckham*, will vest in the trustee, the circumstances in *Mulkerrins* were very unusual, namely a claim for loss occasioned by the bankruptcy.<sup>86</sup>

## **THE BANKRUPTCY ESTATE AND HUMAN RIGHTS**

The general principle enshrined in statute that all property, subject to the exceptions previously mentioned, passes to the trustee, leads to the conclusion that everything else is “up for grabs” as the price that the bankrupt pays for availing himself of the opportunities of credit in the first place, or voluntarily submitting to the bankruptcy process in return for discharge.

Yet are there any limits to the nature of property that can be vested in the trustee and sold for the benefit of creditors? Is the only limit the availability of a market? In the case *Haig v Aitken*,<sup>87</sup> the trustee-in-bankruptcy of Jonathan Aitken, a former junior minister in Mrs Thatcher’s Government, who had unsuccessfully defended defamation proceedings involving allegations of corruption, wished to sell correspondence with leading international politicians and royalty, for which there was apparently a market - the letters might fetch 100,000 pounds. The value of the correspondence was no doubt enhanced by the media spotlight which he had been under over the last few years. Mr Aitken argued that some categories of documents

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<sup>84</sup> *Mulkerrins v Price Waterhouse Coopers* [2003] 4 All ER 1.

<sup>85</sup> See Part I *Insolvency Act 1986* (UK).

<sup>86</sup> This is different to claims that a creditor and trustee colluded so as not to resist litigation against a bankrupt, or a claim that the bankrupt should have been allowed to defend or appeal proceedings relating to the underlying judgment debt which led to the bankruptcy order and thereby get it annulled - as we have seen above, these claims were dealt with in *Heath v Tang*, and there are other ways in which a bankrupt can proceed.

<sup>87</sup> [2001] 2 Ch 110.

were confidential, for example with his spiritual advisers, and that in other cases with political and royal figures, the correspondents would have not expressed themselves with candour had they thought that the letters would ever run the risk of being publicised. The court was sympathetic to that argument. Rattee J, though acknowledging that correspondence was prima facie “property” within section 436, stated that it was repugnant and unattractive to argue that the letters could be sold to the highest bidder for the benefit of creditors. He prayed in aid the line of cases from *Beckham* and *Heath*, stating that the “personal” nature of the correspondence made it analogous to the causes of action for personal injury to mind, body or character excepted by common law.

Secondly, although the case was decided after the passing of the *Human Rights Act 1998*, which effectively imported into British law the *European Convention on Human Rights*,<sup>88</sup> the Act did not come into force until October 2000. Article 8 provides that ‘everyone has the right to respect for his private and family life, his home and his correspondence’. Nevertheless, the judge drew upon the 1998 Act as confirmation for his decision. Given that there was not, and still is not, a right to privacy in UK law, the judge was simply imposing his own sense of repugnance, no doubt shared by others.

Unlike England, New Zealand does have privacy legislation, the *Privacy Act 1993*, but it is by no means clear that sale of the letters for the benefit of creditors would be contrary to any of the privacy principles. Principle 11 prevents disclosure of information, and there is an exception where there is a sale of a business as a going concern.<sup>89</sup> While this may protect certain disposals, perhaps of client lists, as part of a sale of a business, that would not cover the trustee’s proposed sale in *Haig*.

The letters in *Haig* were clearly property, but were not clearly within the ratio of *Beckham* and other cases on litigation rights. While many people might feel that the result was correct on its merits, it is difficult to see where the line would be drawn, since the “personal” nature of some property, for example artistic or cultural artefacts might be quite a subjective matter. In a more recent case of *Cork v Rawlins* the Court of Appeal rejected counsel’s analogy with *Haig* when it was argued that accident insurance proceeds were somehow personal.<sup>90</sup> While Rattee J referred to the forthcoming *Human Rights Act*, it is by no means clear what the outcome would be if that Act were applied. In many human rights cases in insolvency cases, both personal and corporate (against directors of insolvent companies) the courts have pointed out the qualified nature of the right to respect for property, privacy or family life in the Convention. Art. 8(2) provides the qualification that interference with these rights may take place where ‘in accordance with the law and necessary in a democratic society in the interests of... economic well-being of the country... or for the protection of the rights and freedoms of others’. The complete code of insolvency law contained in the 1986 Act has been said to provide internal checks and balances and, given the purpose of the insolvency procedures, some dilution of those rights is compatible with the interests of creditors. It may well be that *Haig*, where the merits clearly lay with Aitken, will not be extended much beyond personal communications.

Nevertheless, there is precedent in the field of bankruptcy law for the application of

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<sup>88</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969).

<sup>89</sup> Section 4, Principle 11(g).

<sup>90</sup> [2001] BPIR 222.



human rights legislation to a bankrupt's correspondence. In the *Insolvency Act 1986*, a trustee is given power to apply to court for redirection of the bankrupt's correspondence<sup>91</sup> which he can then open.<sup>92</sup> This power has led to litigation where it is alleged that the trustee has exceeded the power, and ultimately the European Court of Human Rights has ruled against the UK Government in *Foxley v UK*.<sup>93</sup> The Court there found that the statutory power was justifiable in itself, but in that case the trustee had continued to open post after the court order had expired, and had also opened clearly privileged correspondence. This was found to be in breach of article 8, set out above. Moreover the opening of legal correspondence was said not to be 'necessary in a democratic society' within art 8(2) or a proportionate response.

However, New Zealand had an almost identical provision in its legislation until recently;<sup>94</sup> moreover, the provision explicitly stated that any property contained in any post opened by the Assignee shall be retained and 'form part of the bankrupt's estate', and it has not been found to be contrary to the *Privacy Act 1993* or the *New Zealand Bill of Rights Act 1990*. While section 21 of the latter Act protects against unreasonable search and seizure of correspondence, the opening of mail pursuant to a redirection order of the court would probably be regarded as reasonable, provided the power was not used in a manner which went beyond the purposes for which the Assignee needed access to the correspondence.<sup>95</sup> However, the *Insolvency Act 2006*, due to come into force in December 2007, appears to have repealed this provision, without any express comment in the Government commentary on the Bill. This would suggest that the Government's advisers were concerned about the compatibility of the provision with the Bill of Rights legislation.

Of course, since the provisions in the UK, and the New Zealand 1967 Act, are limited to "postal articles" and since so much important correspondence is now conducted by e-mail, the matter may have little relevance until the legislature catches up with modern communication methods.

## CONCLUSION

The main purpose of this paper was to alert the audience of property law teachers that insolvency law as an advanced level subject, is an ideal platform for building upon concepts and knowledge learned in a basic property law course. Indeed, a large percentage of a basic course could be taught in an insolvency context. Secondly, many of us would recognise the difficulty of trying to disabuse students of the notion that there are clear answers, particularly in property law where clear answers seem somehow to be expected more than in other areas. Again, insolvency is an ideal vehicle for continuation of the work; concepts as fundamental as "property" itself have no set meaning and much depends on the context, and the perceived policies and influences at work behind legislation or judicial decisions.

In terms of the substance of this paper, the tentative conclusion at this stage is that in relation to cases involving either delineation of the insolvent estate, the width of a moratorium, or the power of disclaimer, the courts have used a purposive

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<sup>91</sup> Section 371 *Insolvency Act 1986* (UK).

<sup>92</sup> Section 365 *Insolvency Act 1986* (UK).

<sup>93</sup> European Court of Human Rights, 20/6/00.

<sup>94</sup> Section 65 *Insolvency Act 1967* (NZ).

<sup>95</sup> *R v H* [1994] 2 NZLR 143 - lawfulness is highly relevant to reasonableness.

interpretation to justify, a non-orthodox approach to property law concepts. The cases have hopefully highlighted that, though the constant theme of the courts has been to give effect to the purpose of the bankruptcy regime, namely for the collective interests of creditors, these cases and the statutory framework within which they operate have very real impact on the rights, including the human rights, of debtors. Furthermore, given that insolvency is one of the most important contexts in which property rights, as opposed to mere contractual or personal rights, are asserted, it is suggested that the courts in some of these cases have departed too far from the characteristics of property rights identified in such cases as *National Provincial Bank v Ainsworth*.<sup>96</sup>

If we make the meaning of “property” wholly a slave to the different contexts in which it arises, we rob it of any core of certainty, and dwell in the dimness of its penumbra.

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<sup>96</sup> [1965] AC 1175.