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Bankrupts Behaving Badly: A brief guide to the criminal liability of individuals under the Insolvency Act 1986

By Cameron Scott

Introduction

Although it is still possible to be jailed for non-payment of fines, council tax and TV licences, it has been over 150 years since the Debtors Act 1869 abolished debtors' prisons in the UK and ended the practice of throwing debtors, including Daniel Defoe and Charles Dickens' father, in jail until they paid up or, not infrequently, died. It was replaced by a personal bankruptcy regime which, over the years, has developed to include Individual Voluntary Arrangements and Debt Relief Orders. While the process may not be completely painless, it is designed to allow individuals in financial difficulty to have their debts discharged, reduced or compromised and to start again with a, relatively, clean sheet.

However, the system depends on debtors honestly disclosing their financial position and making their assets available to creditors or a trustee in bankruptcy as required. As a result, the insolvency legislation contains a number of criminal offences dealing with conduct before, during and after an application for bankruptcy.

Bankruptcy Offences

Chapter 6 of part 9 of the Insolvency Act 1986 sets out the offences in relation to bankruptcy (equivalent offences in relation to Debt Relief Orders are set out in part 7A and the offences in relation to IVAs are contained in part 8). In addition, it should be remembered that, as a bankrupt person comes under the jurisdiction of the Bankruptcy Court, failure to comply with the court's orders and to cooperate with the trustee or Official Receiver can, in some situations, be punishable as a contempt of court.

In summary, the main statutory offences are:

1. Making false representations or omissions in relation to a bankruptcy application (section 263O)
2. Failing to disclose all property to the Official Receiver or Trustee in bankruptcy (section 353(1)(a))

1. Failing to inform the official receiver or trustee of disposals of property (section 353(1)(b)).
2. Concealing property comprised in the estate (section 354). This offence can be committed both during the period of the bankruptcy and in the 12 months leading up to a bankruptcy application or the initial period.
3. Failing, without reasonable excuse, to provide an account of or explanation for a loss incurred in the 12 months before the making of the bankruptcy application when asked to do so by the Official Receiver, Trustee or the Bankruptcy Court (section 354(3))
4. Failing to deliver books and records required by the Official Receiver or trustee (section 355(1))
5. Concealment, destruction, or falsification of books and records (section 355(2) and (3)). This offence also applies in the 12 months leading up to the bankruptcy application or the initial period. However, in relation to trading records (defined in section 355(5)), that period is extended to two years
6. Material omissions in statements made in the course of the bankruptcy (section 356 (1))
7. False debts, fictitious losses or expenses and any other false representations or fraud (section 356(2)and (3)). False representations or fraud can be caught under this section regardless of when they were committed.
8. Fraudulent gifts or transfers of property (section 357)
9. Taking property worth not less than £1000 outside England and Wales (section 358)
10. Fraudulently disposing of property obtained on credit in the 12 months before the bankruptcy application or the initial period (section 359)
11. Obtaining credit of £500 or more or engaging in business under a different name without disclosing his bankrupt status (Section 360).

Some of the offences, for example under section 353, can only be committed during the period of bankruptcy. Others apply both during that period and in the 12 months leading up to the bankruptcy application (2 years in the case of concealment etc. of trading records) and the period between the application and the bankruptcy order (the “initial period”). Fraudulent gifts and transfers made within the 5 years prior to the commencement of the bankruptcy are caught by section 357.

Defences

Section 352 of the Act provides a statutory defence of “innocent intention” , to all of the offences with the exception of those in sections 263O, 354(3), 355(3), 356(2) and 360:

... a person is not guilty of the offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud or to conceal the state of his affairs

The statutory defence puts the burden of proof onto the defendant. This was considered by the five-judge Court of Appeal in *AG’s Reference No 1. Of 2004* [2004] EWCA Crim 1025, in particular whether it imposed an evidential burden or a legal burden on the defendant. The difference being that, if an evidential burden, the defendant only has to ensure that there is some evidence before the court on the basis of which a reasonable jury could find in the defendant’s favour.

Once this, relatively, low hurdle is overcome, the onus is on the prosecution to prove, to the criminal standard of proof, that the defence does not apply. If a legal burden were to apply, the onus is on the defendant to prove the defence, albeit to the lower, civil standard on a balance of probabilities.

The Court of Appeal decided that the same statutory defence could impose a legal burden in one situation but an evidential burden in others. In relation to most offences under the Insolvency Act, a legal burden was intended and did not offend Article 6 of the ECHR. However, for offences under section 357 (fraudulent transfers), fraud was an essential ingredient of the offence. Imposing a reverse legal burden would offend Article 6 and so only an evidential burden was imposed. For a section 353 (failure to disclose property) offence, therefore, the prosecution must prove beyond reasonable doubt (a) that the bankrupt failed to inform the Official Receiver of a disposal and (b) that the disposal was not made in the ordinary course of business or in payment of normal living expenses. Once it has done this the burden passes to the defendant to prove, to the civil standard, that there was no intent to defraud or conceal. To succeed under section 357, however, the prosecution must prove an intent to defraud.

A further statutory defence is provided to section 353(1)(b) (failure to inform of disposals) which does not apply to disposals made in the ordinary course of a business carried on by the bankrupt or to any payment of the ordinary expenses of the bankrupt or his family. Similarly, the offence at section 359 does not apply to disposals made in the ordinary course of business.

Sentencing

There are currently no sentencing guidelines for any of the offences. Schedule 10 of the Act helpfully sets out a table of all offences under the Act and the maximum penalties. Most of the offences attract up to 7 years on Indictment and 6 months on summary conviction and/or a fine. The offences under sections 345(3), 357, 358 and 360 attract up to 2 years/ 6 months.

There are a few reported appeal cases in which custodial sentences have been imposed, notably: *R v Mungroo* [1998] 5 WLUK 420 (2 months' imprisonment on a guilty plea upheld for a defendant with no previous convictions who deliberately concealed £31,000); *R v Brownlees* [2005] EWCA Crim 532 (12 months after trial reduced on appeal to 8 months for obtaining credit of £59,000); *R v Vanderwell* [1997] 10 WLUK 555 (4 years and 3 months for 5 offences. This was an extreme example of dishonest conduct by a recalcitrant bankrupt who had previously been imprisoned for similar offences); and *R v Hussain* [2013] EWCA Crim 2243 (40 weeks after a plea reduced to 6 months for what was described by the trial judge as a "deliberate and blatant attempt to cheat the creditors" by failing to disclose the gift of a property worth £69,000).

In addition, the Crown will often seek confiscation orders under the Proceeds of Crime Act 2002 and a disqualification order under the Company Directors Disqualification Act 1984. The average length of disqualification in 2020/21 was 5 years 6 months.

Prosecutions will almost invariably be conducted by the Insolvency Service, part of the Department for Business, Energy and Industrial Strategy, rather than the CPS. Its most recent reported figures show that, in 2020/21 it charged 56 individuals under the Insolvency Act (in relation to both corporate and individual insolvency offences), all of whom were convicted. There were 17 custodial sentences, 4 of which were for over 2 years. On successful prosecutions, orders for costs will normally be sought under section 18 of the Prosecution of Offenders Act 1985 and the Insolvency Service is not bound to the CPS costs scale (*Rahal* [2017] EWCA Crim 1779).

Conclusion

The Insolvency Service is not a prolific prosecutor but it does bring criminal charges which have potentially serious consequences for the individuals involved and which may, in the more serious cases, lead to custodial sentences, confiscation and lengthy periods of directors' disqualification. It is therefore worth being aware of the law in this area not least during turbulent economic times when the risks of personal and corporate insolvency are on the rise.

Cameron Scott is an experienced barrister and former solicitor with extensive experience of cases involving fraud, money laundering, corporate crime, insolvency and professional regulation. He acts for both defence and prosecution and has been appointed to the CPS Specialist Fraud Panel and the Serious Fraud Office's Proceeds of Crime Panel.

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