

Enquiry of the month

Bankruptcy and benefit overpayments

We occasionally deal with enquiries where the client has gone bankrupt and the local authority / DWP decides to pursue the client for an outstanding benefit overpayment after the bankruptcy. The creditor might claim that where the overpayment period ends after the bankruptcy that the entire overpayment is not a provable debt in bankruptcy.

The above position was previously correct in the case of *R (Steele) v Birmingham City Council and the Secretary of State for Work and Pensions* [2005] EWCA Civ 1824. The Court of Appeal found that where there is a benefit overpayment but no formal recovery decision had been made before the bankruptcy order was made, the overpayment was not a bankruptcy debt, and therefore, the bankrupt individual was not discharged from liability for the overpayment upon discharge from bankruptcy.

However, the *Steele* case was reversed by the Supreme Court in *Re Nortel; Re Lehman* [2013] UKSC 52, the Supreme Court confirmed that bankruptcy includes all liabilities that arose from a statutory or contractual relationship that existed before the date of the bankruptcy as per [s382\(1\)\(b\)](#) of the Insolvency Act 1986, which states:

“382“Bankruptcy debt[F1, “liability”]”

(1)“Bankruptcy debt”, in relation to a bankrupt, means (subject to the next subsection) any of the following—

(a)any debt or liability to which he is subject at the commencement of the bankruptcy,

(b)any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy,”

Therefore, provided it was not incurred fraudulently, the debtor is discharged from liability for the overpayment on discharge from bankruptcy. This applies to all benefit overpayments including tax credits.

The Insolvency Service Technical Manual provides general information on overpayments of benefit and bankruptcy, [Chapter 40](#). Note that the Technical Manual has not been updated for several years and is likely to be withdrawn from the public domain, and therefore, should be used with caution. We are not aware of any significant changes in this area.

“40.44 Overpayment of state benefits

Overpayment of state benefit, such as housing benefits, jobseekers allowance or tax credits may be made as a result of mistakes, change of circumstances or fraud.

It has been held by the Supreme Court [note 23] that overpayments of benefits are contingent liabilities (see [paragraph 40.9](#)) and, as such, are provable debts. This decision over-ruled earlier decisions generally declaring such debts as non-provable [note 24] [note 25].

Such a debt incurred through fraud would not however be released upon discharge (see [paragraph 40.178](#)).”

“40.46 Post-bankruptcy benefit overpayments

It is considered that overpayments which are made after the date of the bankruptcy order are a post bankruptcy liability, for which the bankrupt would be liable to repay, even if they arose following an error (the decision to overpay) which occurred before the order.”

“ 40.47 Summary of position re overpayments of benefits

The following table provides a quick reference guide for dealing with overpayments of state benefits in relation to the making of the bankruptcy order (“BO”):

<i>Benefit paid</i>	<i>Recovery decision made</i>	<i>Treatment in Bankruptcy</i>
<i>Before BO</i>	<i>Before BO</i>	<i>Provable Debt. No recovery.</i>
<i>Before BO</i>	<i>After BO</i>	<i>Provable debt. No recovery.</i>
<i>After BO</i>	<i>After BO</i>	<i>Not provable. DWP can recover.</i>

Successful outcome

Mark Wickenden from **Citizens Advice Havant** successfully argued that benefit overpayments up to the date of bankruptcy are contingent liabilities provable in bankruptcy. ‘

The client was made bankrupt on 08/01/18 for a Housing Benefit (HB) overpayment of £1924.49 for the period 09/05/16 to 14/01/18. However, the local authority was taking the view that where the overpayment period ends after bankruptcy that the entire debt is not provable in bankruptcy.

A letter was written to the local authority quoting s382(1)(b) of the Insolvency Act 1986 and referred to the *Nortel* case that stated that the narrow interpretation of contingent liability in the *Steele* case (and *Glenister & Rowe* [\[1999\] EWCA Civ 1221](#)) was incorrect. It was also highlighted to the local authority that the majority of the overpayment was for a time period prior to the bankruptcy.

The local authority responded stating that as they have found nothing within their legal department’s research to challenge or contradict the *Nortel* case, the HB overpayment prior to the bankruptcy would be written off.