

Making a person bankrupt and bankruptcy petitions

There are generally two main ways in which a person can be declared bankrupt by a Court. Firstly, the individual themselves, if they are unable to pay their own debts as and when they fall due, can petition for their own bankruptcy. Secondly, and more commonly, is where a person or company to whom the individual owes money (i.e. a creditor) petitions the Court to make that individual bankrupt. This guidance note deals with those situations, where a third party creditor wishes to make an individual bankrupt.

CREDITOR'S BANKRUPTCY PETITIONS

Before a bankruptcy petition can be presented to the Court by a creditor, a number of conditions needs to be fulfilled:

- The amount of the petition debt (or total amount of petitions debts, if more than one debt) is equal to or higher than the bankruptcy level, which is presently £5,000. As such, you have to be owed at least £5,000 by the debtor in order to make them bankrupt. If they owe you less than £5,000, you cannot use the bankruptcy route.
- The debt owed to the creditor must be for an unsecured, liquidated sum. This means that the creditor does not have any security that they could use to pay the debt. The debt must also be for a liquidated sum. This means that it must be for a specific amount and must not be disputed (or the undisputed amount must exceed £5,000).
- The debtor must appear to be unable to pay the debt or have no reasonable prospect of being able to repay the debt.
- There must be no outstanding applications to set aside a statutory demand served on the debtor in relation to the debt.

HOW DO I SHOW THE DEBTOR IS UNABLE TO PAY THE DEBT?

There are generally two different ways in which a creditor is able to show to the Court that the debtor is unable to pay the debt they owe. Where the debt is payable immediately and is based on a Court judgment and the creditor has not been able to enforce that debt in full or in part (by the various enforcement methods available), then this is proof to the Court that the debtor cannot pay the debt.

More commonly however, the creditor establishes that a debtor is unable to pay his/her debt by serving a statutory demand on the debtor and at least 21 days have passed since the statutory demand was served and the debtor has not complied with the demand or sought to set it aside. This applies if the debt is payable immediately.

In cases where the debt is not payable immediately, the creditor can still serve a statutory demand and if the debtor fails to provide satisfactory proof that they will not be able to pay the debt when it falls due, then the creditor is entitled to rely on this as evidence that the debtor will not be able to pay.

If however the debtor disputes the debt, and such dispute is on genuine grounds, then the creditor is not able to prove to the Court that the debtor is unable to pay the debt and the Court should dismiss the petition, as the Insolvency Courts are not the correct forum when debts are disputed. In such cases, the correct approach is via litigation in the Courts, not through the bankruptcy process.

As such, before a bankruptcy petition is issued, it is likely that the creditor will have already served a statutory demand on the debtor (which has gone unsatisfied) or will already have a judgment against the debtor, which they have been unable to enforce.

Prior to issuing a petition however, a creditor will need to carry out a bankruptcy search to ensure that there are no existing petitions issued against the same debtor. This is because you cannot have more than one bankruptcy petition against the same debtor at any one time. The bankruptcy search needs to be carried out with the Chief Land Registrar and is a relatively straightforward search your solicitor will carry out for you. There is a small fee for the search (currently £2).

DRAFTING THE BANKRUPTCY PETITION

Whilst there is no prescribed form of bankruptcy petition, the Insolvency Rules 2016 set out what information a bankruptcy petition needs to contain.

Firstly, the petition needs to correctly identify the debtor. This means that the debtor's full name, address and occupation should be included, together with any other names which the debtor may use and also any other addresses where the debtor is known to have resided in the six months prior to the petition. If you are aware that the debtor is represented by a solicitor, you should also include their details on the petition.

Second, the petition should set out in detail the amount of the debt and the circumstances of how it became due. For example, if it is based on a Court judgment, details of the Court proceedings, including the claim number and date of the judgment should be included.

If a statutory demand has been served, full details of the demand should be set out, including the date of the demand, how it was served and by whom. The petition also needs to confirm that the statutory demand has not been complied with and that there are no outstanding applications to set the statutory demand aside. A copy of the statutory demand and certificate of service should also be provided to the Court along with the petition.

The petition also need to be verified by a statement of truth, confirming the information contained in the petition is true and accurate and this should be signed by the creditor or their solicitor.

WHICH COURT DO I PRESENT THE PETITION TO?

Where a debtor lives in England and Wales and does not come within the London Insolvency District, the bankruptcy petition should be presented to the debtor's local hearing centre. To find out the nearest hearing centre for the debtor, a creditor should visit the government's website and find the Court closest to where the debtor has carried on business in the six months preceding the petition or if they have not carried on business, the Court closest to where the debtor has resided for the longest period in those six months. The Court has to have an insolvency jurisdiction. If in doubt, it is best to contact that Court to check that they will hear bankruptcy cases.

If however the debtor resides within a London district (or their place of business within the last six months) is within the London district, then the petition should be presented to one of the following Courts:

- The High Court if the petition debt is above £50,000.
- The County Court at Central London where the debt is less than £50,000.

If the debtor is subject to an Individual Voluntary Arrangements (IVA), then the petition should be presented to the Court to which the IVA's nominee report was submitted.

WHAT SHOULD I SEND TO COURT WITH THE BANKRUPTCY PETITION?

Once you have identified the correct Court to send the bankruptcy petition to, you need to send the following to the Court in order for them to be able to issue the petition:

- The original petition and two copies (one for the Court's file and one to be served on the debtor). If the debtor is subject to an IVA, a copy of the petition must also be set to the IVA supervisor, so an additional copy will be needed to be served on them.
- The verification of the petition in the form of a statement of truth.
- If the petition is based on an unsatisfied statutory demand, a copy of the statutory demand, together with proof of service of the statutory demand, such as a certificate of service.
- The petition Court fee of £302 (as at December 2022).
- The Official Receiver's Deposit of £990 (as at December 2022).
- Confirmation that the creditor has carried out a bankruptcy search within the previous seven days and that there are no existing petitions against the debtor – this is often set out on the petition itself.

SERVICE OF THE PETITION

If all of the paperwork is in order and the fees have been paid, the Court will issue the petition and send you back two sealed copies, with a claim number on them. The Court will also list a hearing date for the bankruptcy petition.

The bankruptcy petition then needs to be personally served on the debtor. It cannot be served by post or another method at this time.

As such, lots of creditors will use the services of a process server to formally serve the petition on the debtor. The process server will then also provide a witness statement confirming that service has taken place, which will also need to be provided to the Court.

If you are unable to personally serve the debtor, or the debtor seeks to evade service of the petition, then the creditor is able to make an application to the Court to serve the petition by way of substituted service. However, the creditor will need to show the Court that they have taken a number of separate steps to try to serve the petition personally and that the debtor has not attended an appointment with the process server.

The petition cannot be heard until at least 14 days after it was served on the debtor. As such, personal service must take place at least 14 days before the first hearing. If this is not going to be possible, due to the debtor evading service, then the petitioner should apply to adjourn the first hearing. If they are having problems in personally serving the debtor, they may also wish to consider making an application for substituted service at the same time as seeking the adjournment.

If a Court grants an application for substituted service, then the petitioner will be able to serve the petition on the debtor by another method, as set out in the Court's order. This may be by first class post or by an electronic method, such as email, if you can show to the Court that the debtor has an active email address.

WHAT HAPPENS BEFORE AND AT THE BANKRUPTCY HEARING?

Prior to the bankruptcy hearing, the petitioning creditor needs to provide a number of documents to the Court:

A copy of the certificate or witness statement of service, confirming the petition was personally served on the debtor (or served by substituted service, is ordered by the Court). This prevents the debtor from arguing that he was not properly served, or did not receive notice of the petition.

A List of Appearances. Once a petition is issued by a Court, a note of the petition will be entered against the debtor's name at the Land Registry and therefore anyone carrying out a bankruptcy search will be able to see that there is an existing petition. If there are any other creditors of the debtor who wish to support the bankruptcy petition, they are able to notify the petitioning creditor and the petitioning creditor must provide their details to the Court. The other creditors may then attend the hearing to make representations if they so wish, but only if the Court has been given notice within the List of Appearances.

Certificate of continuing debt. This is a statement provided by the creditor confirming that their debt that they are owed is still outstanding and has not been paid.

Both the List of Appearances and Certificate of Continuing Debt need to be provided to the Court on the day before the bankruptcy hearing. Whilst there is no time frame to provide the certificate of service, it is advisable to send that the Court as soon as you have received the same from the process server.

At some Courts, you may be obliged to provide the Court with a separate bundle of papers, containing all the key documents. This is to ensure that the Court have all the papers in one place, as sometimes documents do not make it through to the judge. If you wish to seek your costs of the hearing too, then you should also file a statement of costs.

THE HEARING

The hearing of the bankruptcy petition will take place in public, unless the Court orders otherwise.

At the hearing, the judge will listen to arguments from both the creditor and the debtor. Initial bankruptcy hearings are often only listed for 10 minutes as they are usually part of a long list of other bankruptcy petitions to be heard on the same day. As such, if the parties wish to make detailed submissions, the Court may adjourn the hearing until the entire list has been dealt with, or adjourn it to a longer hearing on another day. At the end of the hearing, the Court will make one of three orders at the hearing. They will either:

- Make a bankruptcy order.
- Adjourn the hearing.
- Stay or dismiss the petition.

A petitioning creditor who does not attend the bankruptcy hearing may not present another petition (either alone or jointly with another person) against the same debtor, for the same debt, unless the Court gives permission to do so. As such, it is important that a creditor (or their legal representative) attends the bankruptcy hearing. By not attending, you also face the possibility of a costs order against you.

GET IN TOUCH



Mark Ovenell

PARTNER

Dispute Resolution

E: mark.ovenell@bindmans.com

T: +44 20 7833 4433



The lawyers have incomparable client service skills. They are very clear and always make sure they understand the picture, even if it is a complicated one.

CHAMBERS AND PARTNERS 2022

BINDMANS LLP

236 Gray's Inn Road | London | WC1X 8HB

T: +44 20 7833 4433 | E: info@bindmans.com | W: bindmans.com