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Consumer insolvency (introduction, deed of arrangement, who qualifies as “debtor”, general requirements for entering bankruptcy, voluntary and compulsory bankruptcy, interim relief, commencement of bankruptcy, consequences of the bankruptcy order, provisional and final trustee, property of the bankrupt estate)

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Relevant legislation

- The Bankruptcy Act (1997 Revision)
- The Grand Court (Bankruptcy) Rules (2021 Revision)

Debtor

Section 2 of the Bankruptcy Act

Any person who, at the time when any act of bankruptcy was done or suffered by him, -

- was personally present in the Islands;
- ordinarily resided in, or had a place of residence in, the Islands;
- was carrying on business in the Islands, personally or by means of an agent or manager; or
- was a member of a firm or partnership which carried on business in the Islands.

* No restrictions on location creditor

Acts of Bankruptcy

12 acts:

- a) the debtor has, in the Islands or elsewhere, made a conveyance or assignment of their property to a trustee or trustees for the benefit of their creditors;
- b) that the debtor has, in the Islands or elsewhere, made a fraudulent conveyance, gift, delivery or transfer of their property or any part thereof;
- c) that the debtor has, with intent to defeat or delay their creditors, departed out of the Islands, departed from their dwelling-house, otherwise absented themselves, begun to keep house or begun to sell their stock-in-trade at an under-value;
- d) that the debtor has, by any act, declared themselves unable to meet their engagements;
- e) that the debtor has presented a bankruptcy petition against themselves;
- f) that execution issued in the Islands against the debtor on any legal process for the obtaining of payment of any sum of money has been levied by seizure and sale of their goods, or enforced by delivery of their goods;

Acts of Bankruptcy (continued)

- g) that the creditor has served on the debtor a summons in an action in the Grand Court wherein the creditor claims payment of a liquidated sum of not less than KYD 40;
- h) that the creditor presenting the petition has obtained final judgment against the debtor for not less than KYD 40 and has served on the debtor in the Islands a bankruptcy notice in writing and the debtor has not, within seven days after the service of notice, paid such amount;
- i) that the debtor has not paid an obligation of not less than KYD 40 upon a negotiable security within 14 days
- j) that the debtor has, in the Islands or elsewhere, made any conveyance or transfer of their property which would be void as a fraudulent preference if they were adjudged bankrupt;
- k) that the debtor has, in the Gazette and in a newspaper circulated in the Islands, given notice of their intention to convey, assign or transfer their stock-in-trade, debts or things in action relating to their business to any other person; and that the creditor, having a demand against the debtor of not less than KYD 40, has served on the debtor in the Islands a bankruptcy notice in writing, and that the debtor has not, within seven days after the service of such notice, paid such amount
- l) that the debtor has paid money to or given or delivered any satisfaction or security for the debt of a petitioning creditor, or any part thereof, after such creditor has presented a bankruptcy petition against the debtor.

Commencement of proceedings

The Grand Court is the Chief Court of Bankruptcy - it hears all applications for personal bankruptcy

Proceedings may be commenced by filing a petition with the Grand Court.

A debtor may present a bankruptcy petition against themselves.

Alternatively, a single creditor, or two or more creditors, may present a bankruptcy petition to the Court against a debtor, provided the aggregate amounts of debt owing are not less than KYD 40.

Grounds for petition

- A debtor may present a bankruptcy petition against himself without alleging any grounds. However, the petition must be accompanied by a statement setting out details of the debtor's financial affairs
- Creditors applying for the bankruptcy of a debtor must allege at least one "act of bankruptcy" from the list
- In addition to establishing one of the above acts of bankruptcy:
 - the alleged act of bankruptcy must have occurred within six months before the presentation of the petition; and
 - the debt of the petitioning creditor must be a liquidated sum due, or growing due at law or in equity, and must not be a secured debt.

Provisional order

After the presentation of a petition, if the Court is satisfied of the evidence of the creditor's debt, the Court will make a provisional order that the affairs of the debtor must be wound up and their property administered under the Act

Service and notice to show cause

- The provisional order is served on the debtor, together with a notice that within a specified number of days the debtor may show cause why the provisional order should be revoked

Revocation of provisional order

- If the debtor, within the time appointed, shows to the satisfaction of the Court that either the proof of the petitioning creditors debt, or of the act of bankruptcy, is insufficient, the Court must revoke the provisional order and, unless it sees good cause to the contrary, will order costs to be paid to the debtor.

Statement of affairs

- If the debtor does not show cause why the provisional order must be revoked, an order is served on the debtor requiring them to file, within the specified number of days, a statement of their affairs.

Failure to file Statement of Affairs

If the debtor fails to comply with the order to file their statement of affairs, or to show a sufficient excuse for not having complied with it, the Court may, on the application of any creditor, make an absolute order for bankruptcy against the debtor.

Stay

All proceedings to recover debts are stayed upon the making of a provisional or absolute order unless leave of the Court is obtained.

The effect of the provisional order (and therefore the stay) is retroactive (to the date of the proven "act of bankruptcy").

Secured creditors: The stay does not affect the power of any secured creditor to realise or otherwise deal with their security in the same manner as they could have done prior to the making of the provisional or absolute order. Secured creditors may appoint receivers to enforce security rights.

Property vests in Trustee in Bankruptcy

Upon a provisional or absolute order being made, the property of the debtor immediately passes to, and vests in, the Trustee in Bankruptcy (Trustee).

The Trustee is attached to the Court.

The Trustee administers the estates of debtors in bankruptcy subject to the Bankruptcy Act.

Powers and duties of Trustee

Until the provisional order is made absolute, it is the duty of the Trustee to preserve the property such that it may be returned to the debtor in the event the provisional order is revoked.

The Trustee may carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the business.

The Trustee may bring or defend any legal proceedings relating to the property of the debtor.

The Trustee must receive and adjudicate the proof of debts. The way proof of debts must be filed is set out in the Grand Court (Bankruptcy) Rules 2021.

Once an absolute order has been made, the Trustee must proceed to administer the debtor's estate for the benefit of the creditors

Allowances to debtor for support

The Trustee may, from time to time, make such allowances to the debtor as the Trustee thinks just (out of the debtor's property):

- for the support of the debtor and their family, or
- in consideration of the debtor's services (if the debtor is engaged in the winding up of their own estate)

Onerous and unprofitable property

The Trustee may disclaim onerous and unprofitable property in certain prescribed circumstances.

These circumstances, and the effects of such disclaimer, are set out in section 105 of the Bankruptcy Act.

Duty to aid Trustee

The debtor has a duty to aid the Trustee in the realisation of their property and the distribution of the property among their creditors.

Failure to do so amounts to contempt.

Meetings of creditors

The Court must, as soon as practicable after the provisional order, summon a general meeting of the creditors of the debtor. Such a meeting will not take place if an absolute order has been made.

Various rules, which are beyond the scope of this module, govern such meetings. These rules include:

- A person is not entitled to vote at such a meeting unless they have, in the prescribed manner, proved a debt that is due to them.
- A secured creditor will only be deemed to be a creditor for the purposes of voting in respect of any balance due to the debtor.
- At the meeting, the creditors may, by the votes of a majority in value of the creditors present, personally or by proxy, resolve that:
 - the petition be stayed, the affairs of the debtor wound up and their property administered under a "deed of arrangement"; or
 - that an adjudication of bankruptcy be made.

Deed of arrangement

- A deed of arrangement may be entered into between a debtor and their creditors, provided the deed is assented to by a majority in number (more than 50%) representing 75% in value of the creditors of the debtor who have proved their debt.
- The deed of arrangement must be taken into consideration by the Court but, before the deed is considered by the Court, the debtor must submit themselves to the public examination of the Court and the Trustee must make a report to the Court under section 67 of the Bankruptcy Act.
- The Court will confirm the deed if it appears to be in the interest of the creditors generally that it should be so confirmed. Only then will the deed become binding on all creditors and the debtor.
- If a deed is so approved, the terms of the deed will provide for the date and circumstances in which the debtor will ultimately be discharged

Absolute orders

- When an absolute order for bankruptcy has been made against a debtor, a public examination of the affairs of the debtor must take place. The debtor must attend and submit to examination.
- If it appears to the Court that the debtor has failed to keep proper books of account or that they have incurred debt by breach of trust or without having had any reasonable expectation of being able to repay such debt, the Court has the discretion to imprison them

Trustees report

- It is the duty of the Trustee, as soon as possible after the close of the public examination of the debtor, to make a report as to the state of the debtor's affairs and as to the conduct of the debtor before and during the bankruptcy.
- In particular, the Trustee is required to note in its report any matters which might constitute offences under the Bankruptcy Act and / or which would justify the Court refusing, suspending or qualifying an order for the debtor's discharge.

Divisible property

When a provisional order has been made against a debtor, their property becomes divisible between their creditors in proportion to the debts owed.

The property of the debtor divisible amongst their creditors and vesting in the Trustee will be comprised of:

- a) all such property as may belong to, or be vested in, the debtor at the commencement of the bankruptcy or which may be acquired by, or devolve on, them at any time previous to their discharge;
- b) the capacity to exercise, and to take proceedings for exercising, all such powers in, or over, or in respect of, property as might have been exercised by the debtor;
- c) all goods and chattels being at the commencement of the bankruptcy in the possession of the debtor.

Non-divisible property

The following property of the debtor is not available to satisfy claims:

- a) property held by the debtor on trust for any other person; or
- b) the tools, if any, of their trade, the clothes and bedding of the debtor, their spouse and children to a value not exceeding KYD 60 in the whole.

In addition, marital property may be exempt depending on the date and circumstances of its settlement

Priority creditors

The following debts are paid in priority to all other debts:

- a) all public taxes imposed by law due from the debtor at the date of the provisional order not exceeding one year's taxes;
- b) all wages or salary of any clerk or servant in respect of services rendered to the debtor for four months preceding the date of the provisional order, not exceeding KYD 100; and
- c) all wages of any labourer or workman in respect of services rendered to the debtor for four months preceding the date of the provisional order.

These debts rank equally.

The debts must be paid in full unless the property of the bankrupt is insufficient to meet them.

Preferences and void payments

Part XVII of the Bankruptcy Act.

Any conveyance, transfer, charge or payment made by a debtor in favour of any creditor, with a view to giving such creditor a preference over the other creditors, must, if a provisional order takes effect within six months, be deemed fraudulent and void as against the Trustee.

Any disposition, made by any trader unable to pay their debts, of their stock-in-trade or things in action relating to their business, otherwise than in the ordinary course of business, must, if a provisional order or an absolute order takes effect within six months, be deemed fraudulent and void as against the Trustee, except in the following circumstances:

- a) if the dispositions were made and executed with the assent of 75% in number and value of the creditors;
- b) the same were made and executed after not less than 21 days' notice in the Gazette and in a newspaper circulated in the Islands of the intention of the trader to make such disposition.

Bailiff

When the goods of a debtor have been taken in execution in respect of a judgment and sold, the bailiff must, if it has notice of a petition filed against the debtor, hold the balance of the proceeds of the sale, after deducting expenses, upon trust to pay the same to the Trustee.

When the goods of a debtor have been taken in execution in respect of a judgment and not sold before the bailiff or officer executing the process receives notice of the appointment of a receiver or Trustee under a bankruptcy petition, the bailiff after receipt of the notice, must deliver up such goods to the receiver or Trustee

Creditor that has executed on property

A creditor who has levied execution on the property of a debtor, or has made an attachment thereof, is not entitled to retain the benefit of such execution or attachment unless and except insofar as they have, before the filing of a petition against or by such debtor, enforced such execution by sale of the property seized, or enforced such attachment by actual possession of the moneys attached or, as the case may be, by sale of the property attached

Landlord

A landlord to whom any rent is due from the debtor may, at any time, either before or after the commencement of the bankruptcy, distrain upon (seize) the goods or effects of the debtor for the rent due to them.

If such distress for rent is levied after the commencement of the bankruptcy, it will be available only for one year's rent accrued due prior to the date of the provisional order.

After notice received by the person making the distress of the appointment of the Trustee or receiver, no sale may be made of the goods distrained, unless the Court otherwise orders, except by the Trustee or receiver

Netting-off

Where there have been mutual credits, mutual debts, or other mutual dealings, between the debtor and any person having a debt provable under the bankruptcy petition, netting-off is allowed

Debtor's discharge

The debtor may, at any time after the filing of such report, apply for an order of discharge.

The Trustee or any creditor may oppose the discharge and may show cause why it should be refused, postponed, or made subject to conditions.

The Court may grant the discharge unconditionally or conditionally or it may suspend or refuse the discharge.

The discharge, if made, releases the debtor from their debts (subject to any conditions set out by the Court and subject to the *caveat* that it must not release a bankrupt from any liability incurred by means of fraud).

Questions

Contact details below for anyone who may have follow up questions

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