

Obtaining a declaration *en désastre*

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One of the options available to clients seeking recovery of an unsatisfied debt owed by an individual, or company, or other entities linked with the Island is an application for a declaration *en désastre*. The local equivalent of a bankruptcy or winding-up petition under English law, the availability of this statutory discretionary remedy is governed by the provisions of the Bankruptcy (Désastre) Jersey Law 1990.

Who can apply?

You may apply to the court as of right if you are either a creditor with a certain claim (to which there is no arguable defence) against a debtor in a liquidated sum of not less than £3,000 or the debtor himself. The Jersey Financial Services Commission also has standing to apply in relation to banking, funds, insurance, financial services or foundations.

The Debt Remission (Individuals) (Jersey) Law 2016 provides that an individual who is a debtor and who is unable to pay his or her debts may apply to the Viscount for a debt remission order to be granted in respect of his or her qualifying debts.

Before granting a declaration, the court must be satisfied that the debtor is insolvent on the cash flow test but has realisable assets, subject to limited exceptions.

Against whom can an application be made?

A declaration *en désastre* can be made against:

- a debtor who was ordinarily resident in the Island at any time in the 12 months leading up to the application;
- a debtor who carried out business in the Island at any time in the three years leading up to the application;
- a debtor who owns realisable immoveable property in Jersey;
- a Jersey registered company (which may have been dissolved);
- a Jersey incorporated limited partnership; and
- a Jersey limited liability partnership.

How quickly can the court application be made?

48 hours' notice must generally be given to the Viscount's Department and any creditors with security over the debtor's immoveable property. In practice, the application is usually made on an *ex parte* basis in the debtor's absence in open court but whether it is appropriate to proceed *ex parte* in any particular case will depend on the circumstances. There is accordingly a duty to give full and frank disclosure to the court when making the application.

The application is made by a document known as a *demande* with a supporting affidavit setting out, among other things, details of the applicant's belief that the debtor is insolvent on the cash flow test but has realisable assets and, if the applicant is a creditor, details of the debt owed to him. It is important to

remember that, even if the statutory requirements are made out, the court still retains discretion as to whether or not to grant the relief.

Subsequent challenges by the debtor

The court has the power to adjourn the application. This is generally exercised by the court to enable the debtor to be heard if the judge considers that the application could be resisted (unless the creditor would be unjustly prejudiced by giving notice to the debtor).

Where the court proceeds to make the declaration, the debtor or the shareholders of a debtor company can subsequently apply for a recall of the *désastre* at any time. The court may exercise its discretion to order a recall only if satisfied that the assets vested in the Viscount are sufficient to pay all claims filed in time, applying the balance sheet test, and that a recall is in the interests of all the creditors.

In addition, the debtor can call for an *inter partes* hearing if the matter was dealt with *ex parte* and appeal the Royal Court's decision to the Court of Appeal. The debtor also has a right of action for compensation for consequential loss against a creditor applicant who is shown to have obtained a declaration when the debtor was not in fact insolvent. This action is not available if the creditor acted in good faith and reasonably.

The Effects of a Declaration

The debtor's property, wherever situate, at the date of the declaration vests automatically in the Viscount with the exception of property held on trust for another. The debtor owes duties of cooperation and assistance to the Viscount. Third parties may also find themselves summonsed by the Viscount to provide information or documents which will assist him. The Viscount acquires all the debtor's powers over his property and proceeds to gather in the assets for distribution as soon as practicable amongst the creditors.

The purpose of the procedure is to achieve a fair distribution of the property to all creditors who will rank equally (*pari passu*). This is subject to the preferential treatment of any creditors whose debt is secured on the debtor's property by *hypothec* (Jersey equivalent of a mortgage) or security interest. However, if insufficient proceeds are released from the secured property to discharge the secured claims in full, the unpaid balance of their debts then ranks alongside the other unsecured creditors.

The Viscount's Role

Whilst you may have been the petitioning creditor who secured the declaration from the court, the control of the process is placed firmly in the Viscount's hands. The Viscount, in realising and protecting the assets of the debtor, has wide statutory powers to, for example, bring proceedings in the debtor's name, refer matters to arbitration, make compromises with creditors, exercise voting rights of any shares owned by the debtor, appoint professional agents in complicated matters such as forensic accountants and carry on the debtor's business. He will investigate the circumstances which led up to the declaration and consider whether the provisions relating to transactions at an undervalue and preferences should be used to obtain court orders restoring the position for the benefit of the creditors. He will examine and adjudicate on the creditors' claims. He has a duty to report any possible criminal offences which may have occurred. He will also consider whether orders should be sought against company directors for fraudulent or wrongful trading.

The petitioning creditor is also likely to have to give an indemnity to the Viscount against his costs and expenses. If there is sufficient liquidated value in the debtor's assets, these fees, as well as an additional commission, are paid first before any distributions to creditors. Depending on the complexity of the *désastre*, this can be a substantial sum.

The resolution

Once the Viscount has realised all of the debtor's assets, he must supply the creditors with a report and accounts and pay the final dividend. If the debtor is a company, the Viscount will also notify the registrar of companies and the company is dissolved. Four years after the declaration *en désastre* the Viscount has an obligation to apply for a discharge of the debtor. It is only at this point that the debtor is released from all his debts.

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