FortyTwo Talks:
Bankruptcy 101

James Hoile & Lucas Nacif

James Hoile: Hello and welcome to *FortyTwo Talks*. This is the second podcast in our latest mini-series covering topics related to Insolvency.

Today we'll be covering insolvency under the headline of '*Bankruptcy 101*'.

I'm James Hoile, a member of 42's Business and Property team, and today I'm joined by Lucas Nacif.

Lucas Nacif: Thank you, James. How are you?

James Hoile: I'm very well, and I suspect you're also a member of the Business and Property team here at 42?

Lucas Nacif: That's absolutely correct.

James Hoile: So, what are we here to discuss today, Lucas?

Lucas Nacif: We're going to talk about the exciting topic of personal bankruptcy.

We're going to follow the individual through the entirety of the bankruptcy process, from being served with the bankruptcy petition, through the making of the order and the practicalities of becoming bankrupt. For example, we will address the role of the trustee and what life is like as a bankrupt individual.

So, we're going to start by talking about the circumstances to which one can be made bankrupt. Now, James, how much in debt do I have to be before I need to worry about becoming bankrupt?

James Hoile: So, the current level is set at £5,000, so a creditor may present a bankruptcy petition if the debt owed is equal to or exceeds that figure.

Now, it's also worth noting that this was increased from £750 in 2015. I suspect it was much easier to be made bankrupt then, Lucas.

Lucas Nacif: Absolutely, and it's worth noting that as matters stand, the threshold for personal bankruptcy is far higher than the threshold to liquidate a company.

Now, of course, apart from being presented with a bankruptcy petition from a creditor, something that we'll discuss in greater detail in this podcast, it is worth noting that you can make an individual request via an online application.

James Hoile: Yes, so a debtor may make an online application on the grounds that they're unable to pay their debts. This is then reviewed by an adjudicator who looks at the application and has to be satisfied that the individual is cash flow insolvent when making the application.

Lucas Nacif: And the important thing to note is that if you decide to make an application to make yourself bankrupt, there is the possibility that the application will be refused because the adjudicator, for example, concludes that you are actually able to pay your debts.

And in order to apply to become bankrupt, you need to establish one of the three jurisdictional grounds in Section 263 (I) of the Insolvency Act.

So, the first is that your centre of main interests, or COMI is in England and Wales, or your COMI is in an EU member state other than Denmark and you have an establishment in England and Wales, or you're domiciled in England and Wales, or been ordinarily residing or carrying on business in England and Wales for a period of three years ending on the day which you've made the application to the adjudicator.

So, James, how can we summarise these technical requirements in layman's terms?

James Hoile: Well, Lucas, in essence, the adjudicator and indeed the court will look at where it is an individual exercises their independent business or professional activity and also their habitual residence.

Lucas Nacif: And the reason why the concept of COMI and residence is so important, it's because the bankruptcy courts want to avoid something called ‘bankruptcy tourism’, which is where an individual from a less debtor-friendly jurisdiction, can take advantage of the bankruptcy proceedings in England.

So, James, we've spoken about the ability to declare oneself bankrupt, but let's now talk about the bankruptcy petition, shall we?

James Hoile: Yes, Lucas. I suspect there aren't too many listeners here looking to get themselves adjudged bankrupt voluntarily. So, we're now going to focus on the most common situation that we encounter in practice, which is where a creditor presents a bankruptcy petition against a debtor.

Lucas Nacif: So, as previously explained the first hurdle is that the creditor needs to satisfy that the debt or the aggregate amount of debt is equal to or exceeds the bankruptcy threshold of £5,000. Ordinarily you might get a statutory demand as the first step, which is addressed in a separate episode of this mini-series, or you might have an underlying judgment debt.

James Hoile: So, this is important.

We are going to be talking about presenting a bankruptcy petition, but this is on the basis, as Lucas has identified, that you've already served a valid statutory demand or you have a judgment in your favour, and this should be covered in the first episode of this podcast. Is that correct, Lucas?

Lucas Nacif: Well, it's covered in an episode that Paul Fuller and I have done, which is titled '*Statutory Demands and Winding Up Petitions*'.

James Hoile: Okay, so working on the basis we have that, what's the next step?

Lucas Nacif: So, assuming that you've met the bankruptcy threshold of £5,000, Section 265 of the Insolvency Act sets out the jurisdictional grounds, which is identical to the jurisdictional grounds on making an application to adjudge yourself as bankrupt, i.e., your COMI is in England and Wales, or it's in the European Union other than Denmark, but you have an establishment in England and Wales, or the debt has been domiciled in England, or ordinarily residing or carrying on a business for a period of three years ending on the date the petition was presented.

In terms of meeting the jurisdictional requirements at Section 265, the creditor needs to show that there's a good arguable case that the bankruptcy court has jurisdiction to hear the petition, and it's important that the creditor satisfies themselves that the jurisdictional requirements have been met, otherwise the petition will be set aside or annulled, which we'll discuss later on in this podcast.

Now, James, assuming that the creditor has met all these jurisdictional requirements, what happens next?

James Hoile: So, and this is, any practitioner following along at home should look at Rule 10.12 of the Insolvency Rules 2016, but essentially the creditor should file the petition at court, which can be done electronically with the CE file system if the bankruptcy petition is being presented in the High Court, which is the appropriate venue for cases where the bankruptcy amount exceeds £500,000.

Other than filing electronically, the petitioner is able to file the petition directly to the court, which might be necessary if the creditor is required to file the petition in the County Court where they do not have the sophisticated filing system, or electronic filing system, of the High Court.

Lucas Nacif: And afterwards, the sealed copy of the petition must be personally served on the debtor unless the court directs otherwise.

Where personal service is impracticable, for example because the debtor is trying to hide themselves, the petitioning creditor may apply to the court for an order that service be affected in an alternative manner.

It's worth noting, James, that Rule 10.2.1 of the insolvency rules state that a petition may not be heard until at least 14 days have elapsed since it was served on the debtor. So, the creditor needs to ensure that service is affected at least 14 days before the date listed for the hearing, and in the context of Rule 10.2.1, days include bank holidays and weekends.

Now, if you're the petitioning creditor and you fail to serve the petition within the 14-day period, or at all, then you may apply for an extension of the hearing date under Rule 10.2.2 of the Insolvency Rules.

However, the cost of the application will not be allowed if the application to postpone is made less than two clear working days before the hearing date.

James Hoile: It's important just to note at this stage that quite often it's no fault of the practitioner involved, these deadlines are missed. As Lucas has already indicated earlier, quite often you will have a judgment debtor who will put themselves out of reach of service.

So don't be afraid to apply for a substituted service or an extension of service. I think the most practical point is just to get your applications in early to avoid cost consequences. Would you agree with that, Lucas?

Lucas Nacif: Absolutely, absolutely.

James Hoile: So, we then get to the hearing where the court hears the petition.

Now, the court may make the usual order whereby an individual is adjudged bankrupt at the exact time in court, but it may also, under Section 266 of the Insolvency Act, exercise its general powers to dismiss the bankruptcy petition or generally stay the petition.

What are some examples of situations where the court, in your experience, will dismiss the petition, Lucas?

Lucas Nacif: An obvious example is the court's satisfied that the debtor is actually able to pay their debts, in which case the petition ought to be dismissed, but there are other scenarios where the petition should be dismissed. The debtor may, for example, establish that the petition is based on a disputed debt, in which case the bankruptcy court may dismiss the petition because it's fairly well established that a creditor using a bankruptcy petition to place pressure on a debtor to pay a disputed debt is an abuse of the courts process.

So just following back on, James, you may receive a statutory demand and fail to set aside the statutory demand, but nothing stops you from then saying at the hearing that the court should not make the bankruptcy order because the petition's founded on a disputed debt.

James Hoile: Yes absolutely.

And essentially the sole focus of the court when that issue arises is whether, based on the evidence, there is a genuinely tribal issue.

Now, this dispute must have a realistic prospect of success, so not being merely fanciful, which is similar to the test the court applies when determining an application for summary judgment under Part 24.

Lucas Nacif: Now as we discussed, James, oftentimes in practice the bankruptcy petition is based upon either a statutory demand or a judgment debt.

The judge may decide not to make a bankruptcy order where there's an outstanding application to set aside a statutory demand, or indeed there's an outstanding application to set aside a default judgment.

James Hoile: Yes, although I would say crucially, the judge may decide to adjourn the bankruptcy petition instead where there is a pending application.

Lucas Nacif: And in addition, adjournments are normally sought and granted where the debtor requests extra time to pay the petition debt or perhaps makes an offer to pay the debt in instalments.

But James, what happens if the judge ultimately decides to make the bankruptcy order?

James Hoile: So, once a bankruptcy order is made, the official receiver is typically appointed as the first trustee.

The bankruptcy estate vests in the trustee on their appointment, which essentially consists of all assets and property belonging to or vested in the bankrupt at the commencement of the bankruptcy petition.

Lucas Nacif: And there's a lot of restrictions that a bankrupt faces. They cannot, for example:

- Borrow more than £500 without telling the lender that they are bankrupt.

- They cannot act as a director of a company.

- They cannot create, manage, or promote a limited company without the court's permission.

- And, crucially, if you're made bankrupt, your bank account is frozen and the trustee in bankruptcy decides how much money you can spend to cover expenses.

It's worth noting, however, that not everything from the bankrupt will vest in the trustee in bankruptcy. In broad terms, Section 283 of the Insolvency Act makes clear that items needed for work, such as tools, books, vehicles, and other items required for the bankrupt's employment, business, or vocation, is expressly excluded from vesting in the trustee. Similarly, everyday household items such as clothing, bedding, and furniture is excluded.

However, if the value of those assets exceed the cost of a reasonable replacement, Section 380 of the Act tells us that the asset may be claimed by the trustee and replaced by the cheaper alternative.

James, as a family practitioner, can you tell me something about the family home?

James Hoile: So importantly, Section 306 tells us that the bankrupt's beneficial interest in the family home automatically vests in the trustee immediately upon their appointment. Although, the trustee is given a three-year limit under Section 283 (A) to realise the bankrupt's interest in the family home, apply for an order for possession, an order for sale, a charging order, or agree with the bankrupt to incur a specified liability in the bankrupt estate, in return for which the trustee's interest in the property will cease and go back to the bankrupt.

Essentially, the trustee is given three years to take any steps to deal with their interest in the bankrupt's home.

Lucas Nacif: And the case of *Re Khilji [2023] EWHC 298, Chancery Division*, the High Court clarified that in the absence of an express notification, a trustee is not considered to become aware of an interest if that awareness relies on certain, not necessarily logical inferences that must be made from an assortment of facts pertaining to the bankrupt's involvement in a property.

Such approach was then confirmed on appeal, the neutral citation being *[2025] EWHC 548, Chancery Division*. I should note, however, that under Section 283A (6), the three-year time limit may be extended by a court order, but it's likely only to be made in exceptional circumstances.

In any event, a trustee may seek further time by applying for an order for possession and sale and then agree to a consent or suspended order seeking an extension of time subject to the court's approval. This might be beneficial where the trustee is waiting for a specific payment, which might mean that they do not need to realise their interest in the bankrupt's home.

So, James, what can you tell us about the extent to which a bankrupt must cooperate with a trustee in bankruptcy?

James Hoile: Lucas, this is covered by Section 291 of the Insolvency Act.

Essentially, the bankrupt is required to give the official receiver a full inventory of his or her estate and such other information as the official receiver may reasonably require. Failing to comply with any obligation under Section 291, without reasonable excuse, might result in the bankrupt being guilty of contempt of court.

A bankrupt should cooperate with the official receiver or the trustee because otherwise the official receiver or trustee may make an application under Section 366 of the Insolvency Act to summon the debtor, their spouse or former spouse, or indeed anyone else to provide information about his or her dealings, affairs, or property.

And if a debtor, or indeed anyone else, is summoned under Section 366 and fails to attend court, then the court may issue a warrant for their arrest.

Lucas Nacif: And significantly, a bankrupt that is not forthcoming might lead the official receiver or the trustee in bankruptcy to make an application to suspend the discharge of bankruptcy under Section 279 of the Act.

The general position is that a bankrupt is discharged from bankruptcy at the end of the period of one year, beginning with the date on which the bankruptcy commences. However, if a bankrupt is not complying with their duties in relation to the official receiver or the trustee, then the official receiver or the trustee may make an application under

Section 279 (3) to suspend the discharge of the bankruptcy to a later date or until the fulfilment of a specified condition.

The application to suspend the discharge of bankruptcy is made where the court is satisfied that the bankrupt has failed or is failing to comply with the obligations set out at Part 9 of the Insolvency Act.

There is a recent authority, *Becker & Ford 2024 BPIR 695*, where ICC Judge Briggs considered the case law under Section 279 and stated that the purpose of the power to suspend discharge was to achieve compliance of the bankrupt's obligations because it provides with two incentives:

One is the prolongation of the possibility of criminal proceedings, which may arise if a bankrupt is not complying with the obligations at Part 9 of the Act, and the second incentive is the various lifestyle restrictions that comes along with being bankrupt.

Somewhat amusingly, the example ICC Judge Briggs had in mind is that if you're bankrupt, you cannot run for Parliament.

James Hoile: That certainly is interesting, Lucas.

So, for all those listeners wanting to stand for Parliament, just try and keep away from being judged bankrupt, I guess.

It's also worth noting that a trustee in bankruptcy or the official receiver has powers to set aside certain transactions in the interest of creditors of the bankruptcy estate.

For example, Sections 339 and 340 of the Insolvency Act allows a trustee in bankruptcy to apply to the court for an order setting aside a transaction at an undervalue or a transaction which results in the debtor giving a preference to any person who is a creditor, surety, or guarantor.

The purpose behind these two sections is to protect the bankruptcy estate and the interest of the creditors, given the bankruptcy proceedings is essentially a collective endeavour.

Lucas and Paul Fuller will discuss the transactions at an undervalue and preferences in greater detail in their podcasts on '*Directors in Trouble*', which will be released at a later date.

Lucas Nacif: Section 342 of the Insolvency Act sets out the orders that can be made under Section 339 and 340. The list is very broad and includes orders such as to release or discharge in whole or in part any security given by the individual, which might be sought for example, if the trustee in bankruptcy can establish that the intention to grant a security was to prefer a creditor over others.

And, similarly, the court may require any person to pay in respect of benefits received by him or her from the debtor such sums to the trustee of his estate as the court may direct.

There are a plethora of other applications a trustee in bankruptcy may make. For example, under Section 343 of the Insolvency Act, where a bankrupt has been a party to a transaction involving the provision of credit which is extortionate and entered into within three years of the commencement of the bankruptcy, the trustee may make an application where one of the orders in Section 343 is to set aside or vary the terms of the transaction. So, loan sharks beware.

Now, James, what should a debtor do if they are made bankrupt, but they want to set aside the bankruptcy order?

James Hoile: So, under Section 282 of the Act, the bankrupt may make an application to annul the bankruptcy order if it appears to the court that on the grounds existing at the time the bankruptcy order was made, the order ought not to have been made, or where the bankruptcy debts and expenses of the bankruptcy have all, since the making of the order, been paid or secured to the satisfaction of the court.

Even if it appears to the court that such grounds exist for an annulment order, the court ultimately has the discretion whether or not to annul the same.

An example of a debtor who successfully annulled their bankruptcy can be found in the case of *1st Credit (Finance) Limited v Carr*. This is a 2013 case, the reference BPIR 1012, where an annulment was granted in respect of a debtor who had informed the court at his bankruptcy hearing that he was able to pay the debt, although such suggestion had been rejected as the debtor did not provide supporting evidence.

The debtor, at a later stage, provided bank statements showing he had sufficient funds, and on the basis of that later evidence, the court exercised their discretion to annul the bankruptcy.

Lucas Nacif: We're now going to briefly discuss what happens when a debtor is discharged from bankruptcy.

So, as previously explained, the general position is that the bankrupt is discharged from bankruptcy on the first anniversary of the commencement of bankruptcy, assuming that you don't become subject to an application to suspend the discharge.

Once the bankrupt is discharged, they're released from the statutory bankruptcy restrictions and their liability for bankruptcy debts.

However, Section 281 of the Insolvency Act and Rule 10.146 of the Insolvency Rules tells us that there are certain debts which a bankrupt will not be released from. For example, debts gained by fraud, money owed under family proceedings, which my dear friend James is a specialist, debts created after the bankruptcy order, court fines, obligations under criminal confiscation orders, and so on.

James Hoile: Just to clarify, Lucas, I might be a family practitioner, but I don't owe money under family proceedings.

Lucas Nacif: That's correct. I should've made that clearer, James.

James Hoile: Moving on, it is worth noting, however, that although an individual may be discharged from bankruptcy, this does not mean the process of asset realisation and distribution comes to an end.

The trustee may remain in office to complete the realisation of assets, and any creditor owed a debt under the sums due may still claim their share of the asset realisations available from distribution.

Now, the final step that a trustee in bankruptcy must do is compile a report to creditors enclosing their notice of their intention to vacate office, which must be sent at least eight weeks before the dates on which they intend to vacate.

Now, Rule 10.87 of the Insolvency Rules states that the notice must also state, amongst other things, that the creditor has a right to challenge the trustee's remuneration and expenses under Rule 18.34, and that the creditor may object to the trustee's release by giving notice in writing. Following the trustee's release from office, the official receiver remains trustee of the bankrupt's estate and may make further or informal inquiries of the discharged bankrupt.

Lucas Nacif: So, this gives us a good snapshot about bankruptcy and the process. Of course, we could probably spend the whole day, couldn't we, speaking about the exciting topic of personal bankruptcy.

James Hoile: Again, Lucas, not from personal experience, it's from knowledge as a practitioner.

Lucas Nacif: Absolutely. That is very important.

So, without further ado folks, thank you all for tuning into this episode of *FortyTwo Talks*. We hope you enjoyed it, and we hope you found bankruptcy quite exciting.

The next episode will be coming out in a week or so discussing '*Winding Up 101'* with Iris Ferber KC and Alex Bailey.

James Hoile: Definitely one to watch, Lucas.

Lucas Nacif: Absolutely.

So, to listen to all of our great podcasts, you can find us on Apple Podcasts, Spotify, the Chambers website, or wherever else you get your podcasts.

Thank you all for tuning in.

James Hoile: Goodbye.

Lucas Nacif: Goodbye.