Australian Government
Australian Financial Security Authority

OFFICIAL RECEIVER PRACTICE STATEMENT 2

Bankruptcy by debtor's petition

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Contact: practice@afsa.gov.au

PERSONAL INSOLVENCY

Our vision: To be a firm and fair regulator and world-class government service provider that delivers improved and equitable financial outcomes for consumers, business and the community.

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1. INTRODUCTION

1.1. The *Bankruptcy Act 1966* enables a person who is in financial difficulty to present a petition (that is, an application) to the Official Receiver for his or her own bankruptcy. A debtor's petition may also be presented by one or more members of a partnership, or by joint debtors who are not partners.

1.2. The policy underpinning the legislation and the Official Receiver's practice is that a debtor is entitled to seek relief from unmanageable debt through bankruptcy if the debtor is unable to resolve his or her financial difficulties through other means. Bankruptcy is regarded as an option of last resort and has serious consequences.

1.3. While the debtor will be released from certain types of debts at the end of his or her bankruptcy, there are some debts that will still need to be paid. More information about debts that are covered by bankruptcy and debts that are not is available in Official Trustee Practice Statement 8 – Treatment of debts in bankruptcy.

Summary of the application process

1.4. A debtor who is in financial difficulty who wishes to become bankrupt will need to:
- be eligible to lodge a debtor's petition
- satisfy proof of identification checks
- complete and lodge a Bankruptcy Form.

1.5. A debtor who wishes to have a registered trustee appointed to administer his or her bankrupt estate will need to lodge a completed consent to act from the nominated trustee with his or her Bankruptcy Form. Refer to paragraph 2.16 below for more information about having a registered trustee appointed.

1.6. Upon receipt of a completed Bankruptcy Form, the Official Receiver must make a decision whether to:
- accept the petition
- reject the petition, or
- in certain circumstances, refer the petition to the court for direction.

1.7. The decision to accept or reject a petition is made with reference to a number of considerations that are outlined in this practice statement.

Scope of this practice statement

1.8. This practice statement is a guide to dealing with debtors' petitions for bankruptcy and how the Official Receiver[1] makes an assessment to accept or reject them.

1.9. This practice statement does not deal with petitions for administration of insolvent deceased estates, as they are lodged with the Federal Court or the Federal Circuit

[1] A reference to the Official Receiver in this paper also refers to a delegate of the Official Receiver

Court. More information about these is contained in Official Receiver Practice Statement 5 – Administration of estates of deceased persons.

2. THE BANKRUPTCY FORM

Completion and lodgment of the Bankruptcy Form

2.1. Subsection 55(2) of the Bankruptcy Act requires a debtor to use the "approved form" when lodging a debtor's petition.

2.2. The debtor is encouraged to complete and lodge the Digital Bankruptcy Form available via AFSA's Insolvency Services portal. If the debtor is unable to lodge the form via the portal, a paper copy can be obtained by contacting AFSA on 1300 364 785 or at registry@afsa.gov.au.

2.3. A trustee will be appointed to administer a bankrupt estate upon acceptance of the debtor's Bankruptcy Form.

2.4. Subsection 55(3) of the Bankruptcy Act allows the Official Receiver discretion to reject an application if it does not comply substantially with the approved form. This means that the Official Receiver may reject an application if the debtor does not use the current version of the Bankruptcy Form.

2.5. Debtors wishing to lodge their applications jointly with someone else or as a partnership will need to create their own separate accounts and complete separate applications and lodge these on the same day. Each debtor will need to state that he or she is applying jointly or as part of a partnership and provide the names of the related parties.

2.6. Offline joint applications should be posted or emailed together.

2.7. The Official Receiver will not be able to process a joint application unless all joint parties lodge their applications together or within the same day.

Adequate completion of the Bankruptcy Form

2.8. Subsection 55(3) of the Bankruptcy Act allows the Official Receiver discretion to reject an application if the Official Receiver thinks it has not been adequately completed. A Bankruptcy Form is not considered to be adequately completed unless:

- the debtor has adequately answered all questions relevant to the debtor
- there is sufficient information to identify the debtor
- in the case of an offline form, it is legible, signed and dated
- it accurately reflects the debtor's current affairs.

2.9. Whether a Bankruptcy Form is adequately completed will depend on the information provided based on the debtor's circumstances as set out on the form.

2.10. A Bankruptcy Form may be rejected if it is incomplete or illegible and cannot be reliably used to enter the debtor's information on the National Personal Insolvency Index ("NPII").

Prescribed information

2.11. As part of the application process, the Official Receiver must give a debtor information regarding the alternatives to and consequences of bankruptcy. This is called prescribed information and is a requirement of the Bankruptcy Regulations.

2.12. The debtor must acknowledge having read the prescribed information on the Bankruptcy Form before lodging his or her application. A debtor will not be able to lodge a Digital Bankruptcy Form unless he or she has made this acknowledgement. The Official Receiver cannot accept an offline Bankruptcy Form where the debtor omits to make this acknowledgement.

Proof of debtor identity

2.13. The debtor must satisfy proof of identity checks, either online via Document Verification Service or; for offline submission, by having his or her identification verified by an authorised witness, as part of the Bankruptcy Form submission process.

2.14. If the debtor does not have sufficient identification to complete the proof of identity checks, he or she should contact AFSA on 1300 362 785.

2.15. Where a debtor who is incarcerated wishes to lodge a Bankruptcy Form, he or she will need to lodge a Bankruptcy Form offline (paper form). The debtor's prisoner identification card will satisfy the proof of identity requirements where it is verified by an authorised witness.

3. AUSTRALIAN CONNECTION

3.1. Each application is checked to ensure that the debtor has an Australian connection. To satisfy the Australian connection requirement, a debtor must:

a. be personally present or ordinarily resident in Australia, or
b. have a place of residence ("dwelling-house") in Australia, or
c. be carrying on a business in Australia (i.e. carries on business in Australia, either personally or by means of an agent or manager) or be a member of a firm or partnership that carries on a business in Australia.

3.2. Annexure A contains guidelines used to determine whether a person can be considered ordinarily resident in Australia, to have a "dwelling-house" in Australia or to be operating a business in Australia.

3.3. Where a debtor is unable to satisfy the Australian connection requirement, the Official Receiver **must** reject the application, in accordance with subsection 55(2A) of the Bankruptcy Act.

4. CURRENT DEBT AGREEMENT OR PERSONAL INSOLVENCY AGREEMENT

4.1. Subsection 55(5A) of the Bankruptcy Act states that a debtor who has a current debt agreement must not present an application without the permission of the court. Similarly, subsection 55(6) states that a debtor who has a current personal insolvency agreement cannot present an application without the permission of the court.

4.2. The Official Receiver will check the NPII in relation to every debtor who presents an application to determine the debtor's eligibility.

4.3. Subsection 55(7) of the Bankruptcy Act states that a debtor who is a party to a current debt agreement or personal insolvency agreement (i.e. the agreement has not been set aside, terminated or completed) does not become bankrupt on the presentation of an application. This means that the Official Receiver does not need to reject the application in these circumstances. The application will be returned to the debtor in these instances.

5. THE DEBTOR APPEARS ABLE TO PAY HIS OR HER DEBTS

5.1. The Bankruptcy Act provides the Official Receiver with a discretionary power to reject an application where, for example:

- it appears that the debtor may have the capacity to pay his or her debts immediately or within a reasonable period of time, and
- is using the bankruptcy system as a means to avoid paying those debts.

5.2. The Official Receiver is not required to determine whether or not the debtor is actually insolvent. However, the application may only be rejected if it appears from the information provided by the debtor that:

A. the debtor is likely to be able to pay all their debts immediately or within a reasonable time if he or she did not become a bankrupt, AND

B. EITHER

- the debtor is unwilling to pay a particular creditor or creditors, or is unwilling to pay creditors in general

OR

- the debtor has previously been bankrupt on a debtor's petition at least three times overall or once in the five years prior to the current petition. (A

debtor is considered to have been bankrupt in the prior five years if the date of that bankruptcy falls within the five years.)

5.3. When a Bankruptcy Form is received, it is assessed for information that may indicate that the debtor is able, but unwilling, to pay all his or her debts immediately or within a reasonable amount of time. Where further information is required to make an assessment, the Official Receiver will make a request to the debtor before accepting or rejecting the application. The Official Receiver may make reference to the previous bankruptcies and/or previously rejected petitions.

5.4. If the debtor is contacted to discuss the application and the possibility of its rejection, the Official Receiver may suggest to the debtor that he or she contact a financial counsellor and can provide contact details for this purpose. The debtor may also choose to withdraw his or her application at this stage.

5.5. Examples of situations where the Official Receiver may consider exercising discretionary powers to reject an application are contained in annexure D.

6. ACCEPTANCE OF A DEBTOR'S PETITION

6.1. The Official Receiver will check the Bankruptcy Form as outlined above. If no reason to reject the application is identified, it will be accepted. A debtor becomes bankrupt when the Official Receiver accepts his or her application. Mere lodgment of an application by a debtor is not sufficient to make the debtor bankrupt.

6.2. The Official Receiver must refer an application to the Federal Court or Federal Circuit Court for direction on whether to accept or reject it if the debtor has lodged an application in his or her own name only and is subject to a pending creditor's petition along with another person(s) (subsection 55(3B)).

Joint administrations

6.3. The Official Receiver will create a joint administration (i.e. a bankruptcy involving more than one bankrupt debtor) where two or more debtors have presented debtors' petitions and they have indicated in their application that they are joint debtors and:

- and a review of their statements of affairs indicates that there are joint assets that must be dealt with, and/or
- a registered trustee has consented to administer the estates of joint debtors and has asked that a joint administration be created.

Appointment of a trustee

6.4. A debtor has the option of choosing a specific registered trustee to administer his or her estate. Creditors may choose to appoint a different trustee at a later date. If the estate is to be administered by a registered trustee, a properly-completed

Form 12 – Trustee consent to act declaration must accompany the Bankruptcy Form.

6.5. If a completed consent to act form is not received with the application, the Official Trustee will be appointed trustee.

6.6. Contact details for registered trustees in each State and Territory can be found on AFSA's website.

6.7. Copies of the Bankruptcy Form and any attachments are forwarded to the trustee.

6.8. Following the appointment of a trustee, creditors may request that the trustee be replaced or the trustee may arrange for the estate to be transferred to another trustee. After the date of bankruptcy, the debtor does not have the ability to change the trustee or prevent the appointment of another trustee.

The National Personal Insolvency Index and requesting suppression of information

6.9. The acceptance of the application is recorded electronically and a bankruptcy number is assigned to the debtor's bankrupt estate. The debtor's name, any alias(es), date of birth, date of bankruptcy, address and occupation are entered on the NPII. The trustee's details are also entered.

6.10. Bankruptcy records entered on the NPII are permanent.

6.11. A debtor may apply to have his or her address suppressed or not entered on the NPII either at the time of presenting an application, if the debtor believes that publishing this information on the NPII will put his or her safety at risk.

6.12. The Official Receiver will consider these requests in limited circumstances and where the debtor has provided adequate evidence to support the request.

6.13. A debtor must make a request at the same time as making his or her bankruptcy application or his or her full details may be published on the NPII if the application is accepted.

6.14. More information about the NPII is contained on AFSA's website and in Official Receiver Practice Statement 8 – The National Personal Insolvency Index.

Inspection of documents filed with the Official Receiver

6.15. When an application is accepted by the Official Receiver, those parts of the Bankruptcy Form, other than questions or sections that are marked as confidential, that make up the bankrupt's statement of affairs can be inspected by the general public.

7. REJECTION OF A DEBTOR'S PETITION

7.1. When an application is rejected, a letter will be sent to the debtor explaining the basis of the decision to reject it.

7.2. Where an application was filed with a registered trustee's consent to act, the registered trustee will also be advised that the petition has been rejected.

7.3. If the Official Receiver rejects the application pursuant to subsection 55(3AA) of the Bankruptcy Act (see part 5 above), the debtor is notified of the decision in writing and is provided with the reasons for the rejection. The debtor is also advised of his or her right to apply to the Administrative Appeals Tribunal ("AAT") for a review of the decision. Only the debtor can apply to the AAT for a review of a decision to reject an application – neither a creditor or other party can apply for a review.

7.4. When an application is rejected, an administrative record of the rejected application and the reason for its rejection is created. Electronic images of the documents are retained by the Official Receiver as part of this administrative record.

8. JOINT DEBTORS' PETITIONS AND PARTNERSHIPS

8.1. An application that is presented jointly or against a partnership must be accompanied by more than one Bankruptcy Form.

8.2. An application presented against a partnership must include a Bankruptcy Form from each partner that addresses his or her personal affairs and a statement of the partnership affairs.

8.3. The Official Receiver must refer an application to the Federal Court or Federal Circuit Court for direction on whether to accept or reject it if:

- a number of debtors who represent a partnership have presented an application against that partnership and not all partners are a party to the petition (paragraph 56C(1)(a))
- debtors have presented an application against a partnership and one or more (but not all) are subject to a creditor's petition (paragraph 56C(1)(b))
- two or more debtors have lodged an application in their own names and at least one (but not all) of them is subject to a pending creditor's petition (subsection 57(3B)).

8.4. Where the Official Receiver considers that referral of an application to the court is required, the debtor(s) will generally be contacted and given the option of withdrawing the application.

8.5. If the debtor cannot be contacted or the debtor insists on presenting his or her own application, the formal process of referral to the court must take place. The court referral procedure is at annexure B.

8.6. Where a debtor presents an application and there is a creditor's petition outstanding in his or her name only, there is no requirement to refer the matter to the court. However, the Official Receiver will write to the court and the solicitors for the petitioning creditor giving them notice that an application has been accepted.

9. PRESENTATION OF A PETITION UNDER A POWER OF ATTORNEY OR A GUARDIANSHIP BOARD ORDER

9.1. A situation may arise where an application is presented on behalf of a debtor by a person acting under:

a. a Guardianship Board order (the terminology may differ slightly from State/Territory to State/Territory), or

b. a power of attorney.

9.2. In *Orix Australia Corporation Limited v McCormick* [2005] FCA 1032 (28 July 2005), the court considered the scope of an enduring power of attorney under Queensland law and found that it did not enable the presentation of a debtor's petition by the attorney. This decision potentially limits the ability of the Official Receiver to accept a bankruptcy application that is presented by the holder of a power of attorney granted by the debtor.

9.3. Australian States and Territories have guardianship legislation that provides powers for guardians to act on behalf of persons who may have a mental incapacity (the "protected person"). Some jurisdictions' legislation specifically allows for bankruptcy proceedings to be taken on behalf of the protected person by their appointed guardian. It is also possible that the guardianship board or tribunal that appoints the guardian could provide the guardian with specific power to make a bankruptcy application on the protected person's behalf.

9.4. The Official Receiver will need to give consideration to each application presented on behalf of a person where there is a guardianship appointment/order in place to determine whether a bankruptcy application can be accepted.

ANNEXURE A – AUSTRALIAN CONNECTION

Subsection 55(2A) of the Bankruptcy Act provides information regarding an Australian connection, which is applicable to declarations of intention/temporary debt protection. This provision states:

"The Official Receiver must reject a debtor's petition unless, at the time when the petition is presented, the debtor:

(a) was personally present or ordinarily resident in Australia; or

(b) had a dwelling-house or place of business in Australia; or

(c) was carrying on business in Australia, either personally or by means of an agent or manager; or

(d) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager."

When is a debtor considered to be "ordinarily resident"?

The term "ordinarily resident" is not defined in the Bankruptcy Act. There is no common list of criteria that can be used to determine whether a person is ordinarily resident. Every case needs to be assessed based on the debtor's individual circumstances.

There are case law decisions that assist in deciding whether a debtor can be said to be ordinarily resident in Australia and, in general terms, these cases provide that:

- the concept of "ordinarily resident" cannot be stated in definite terms
- each case must be determined on its facts and after taking into account all relevant matters
- the concept of "ordinary residence" connotes a place where in the ordinary course of a person's life he or she regularly or customarily lives and there must be some element of permanence (contrasted with a place where the debtor stays only casually or intermittently)
- a person may be "ordinarily resident" in more than one country at a given time.

The requirement to have both "a place where in the ordinary course of a person's life he regularly or customarily lives" and "some element of permanence, to be contrasted with a place he stays only casually or intermittently" was outlined in the case *Mathai v Kwee* [2005] FCA 932, where the court found that there is a difference between simply being "resident" in Australia and being "ordinarily resident" and that being "ordinarily resident" connotes more than just owning a house in Australia. The court ruled that Mr Mathai was ordinarily resident in Australia at the time of his act of bankruptcy, notwithstanding that he:

- held a Malaysian drivers licence
- held a Malaysian identity card
- held both Malaysian and Australian passports
- did not hold an Australian Medicare card
- was a Malaysian taxpayer
- was involved in the affairs of the Cathedral of St John in Kuala Lumpur
- spent much of each year living overseas (in accommodation owned by friends).

The court found that, even when the above points were considered, Mr Mathai also had an element of permanence to his residency in Australia that was evidenced by:

- his keeping of a wardrobe of clothes at his Australian address was strongly indicative of an ordinary residence
- a spontaneous response from Mr Mathai where he named his Australian residence as "home"
- having unrestricted access to a property in Australia and paying for the maintenance of that property
- while absent from Australia, there was an intent to return to the relevant residence (i.e. the property had not been abandoned).

In *Gainsford v Tannenbaum* [2012] FCA 904, the court examined the closely-related concept of "habitual residence". The court relied on *LK v Director-General, DOCS* [2009] HCA 9 (11 March 2009), in which the High Court considered that "the ordinary meaning of the composite expression" is to be regarded as a question of fact. The High Court accepted that "[h]abitual residence…identifies the centre of a person's personal and family life as disclosed by the facts of the individual's activities" (paragraph 25).

Other case law

Other relevant case law includes:

- *Re Kenneth Dudley Taylor v Natwest Australia Bank Limited* [1992] FCA 505 (16 October 1992)
- *Re Ian James Meredith Ex Parte: Commonwealth Bank of Australia* [1993] FCA 101 (19 March 1993)
- *Anthony Ginnane Ex Parte: Diners Club Limited* [1993] FCA 413 (30 August 1993).

The Official Receiver can look at a range of relevant factors to determine whether or not the person was "ordinarily resident", at the relevant time, according to the ordinary meaning of that term. Some of these factors include:

- the nature and scope of a person's ties to Australia (friends/relatives)
- the amount of time the debtor has spent within and outside Australia during the period in question and also the frequency of visits
- the reason(s) for the debtor travelling overseas
- the extent to which the debtor has (and could) become attached to his or her new place/country of residence
- residency status of the individual (for example immigrant, work permit periods and conditions, study visa etc.)
- the nature and scope of any continued business dealings or commitments within Australia
- whether the debtor has retained any property in Australia (particularly places of residence).

Some useful advice can also be obtained from other agencies' residency material including the Australian Taxation Office (Taxation Ruling IT 2650: Income Tax: Residency – Permanent place of abode outside Australia).

When is a debtor considered to have a "dwelling-house"?

The term "dwelling-house" is not defined in the Bankruptcy Act. Although there are some similarities between having a dwelling-house and being ordinarily resident in Australia, the issue of whether a debtor has a dwelling-house in Australia should be considered on its own because, if a debtor does have a dwelling-house, he or she will have met the requirements of the Bankruptcy Act.

The main difference between being ordinarily resident in Australia and having a dwelling-house is that having a dwelling-house focuses on the rights that an individual has to occupy or otherwise use a house if he or she wants to. For example, if an individual is away from his or her dwelling-house for a temporary purpose but has an intention to return, he or she may still have a dwelling-house. However, if an individual has the right to reoccupy a dwelling-house but has abandoned its use as a residence, it is likely that he or she will not have a dwelling-house.

There is no common list of criteria that can be used to determine whether a debtor has a dwelling-house. Each situation needs to be assessed based on the debtor's individual circumstances.

In the case of *Mathai v Kwee* [2005] FCA 932 (discussed above), the court ruled that the debtor had a dwelling-house because:

- he was involved in the purchase and finance of the relevant house
- the house was a nominated as his intended address
- he declared that he "lived" in Victoria and intended to return
- he maintained a wardrobe at the home
- it was undoubtedly his wife's "home", he was in frequent contact with her in relation to family matters and he did not need permission to stay there
- he used the house as his residence when in Australia.

When is a debtor considered to be "carrying on business"?

One of the more difficult decisions for the Official Receiver can be whether to accept a debtor's petition where the debtor's only connection with Australia is "carrying on a business". This is not a particularly unusual situation – affordable air travel and modern communications technology make it possible for Australians to conduct business here while residing offshore. Such arrangements can be further complicated if a debtor conducts business through a company or multiple companies (see *Commonwealth Bank of Australia, in the matter of Oswal v Oswal* [2013] FCA 391 (13 April 2012)[2]).

Where a debtor conducts business through a company structure, it can be difficult to know whether it is the company or the debtor who is carrying on a business in Australia. This is because, at law, a company is an entity in its own right and hence debtors relying upon company structures to conduct business may not have the requisite connection with Australia to

[2] In this case, the question considered was the jurisdictional foundation for the making of a sequestration order and whether this would arise under subparagraph 43(1)(b)(iii) of the Bankruptcy Act

declare bankruptcy by a debtor's petition.

However, even if a reasonable degree of information is provided in the debtor's petition, it still may not be obvious whether the debtor is carrying on a business and is utilising a company or companies to do so. Fortunately, Australian courts have given some guidance.

Australian courts have followed a line of authority commenced in 1978 in the English Court of Appeal decision *Re Brauch; ex parte Britannic Securities & Investments Ltd* [1978] Ch 316. This decision established a company's actions are not acts of the debtor, but can form part of a debtor's overall business activity. The court bankrupted a property developer who resided in the Channel Islands but frequently stayed in English hotels to engage in property speculation. The developer used a separate company structure for each property purchase (90 of them). The court decided it was not sufficient to show the developer simply controlled the companies by being the director or owner – what was important was whether the developer was applying the companies toward an overall business purpose of his own. In this instance, the developer was applying the multiple companies toward an overall business of purchasing and developing property.

In summary, it is not a simple process to confirm whether a debtor is carrying on a business where company structures are employed. Decision-makers need to assess the debtor's petition to determine whether it shows a debtor carrying on business in his or her own right – even where a company or companies are used. Or, to put it another way, whether the information in the debtor's petition shows the company's business is actually part of an overarching business conducted by the debtor. If the information included in the debtor's petition is too scant or incomplete to base a decision upon, then the petition must be rejected.

However, each case needs to be considered on its own merits and there are exceptions which can come in to play. Some of these exceptions are:

- where a debtor receives a salary from a corporate structure as an employee, he or she is not carrying on a business for the purpose of accepting a debtor's petition
- if the corporate structure which the debtor was operating, still owes money and a winding up order has been made, then there may not be sufficient business activity to say the debtor is carrying on a business for the purpose of accepting a debtor's petition.

Evidence Australian courts have considered when deciding whether a debtor is carrying on a business includes whether the debtor:

- held director, secretary or other company officer positions
- was a sole shareholder in the company
- offered financial guarantees to the company.

ANNEXURE B – PROCEDURE FOR REFERRAL TO THE FEDERAL CIRCUIT COURT

Where the Official Receiver or delegated officer refers a matter to the court for a decision on whether or not to accept a petition, the following processes apply:

1. the petition is not registered on the NPII
2. an application form is completed. The form is the Federal Court (Bankruptcy) Rules 2016 – Form 8, which is the same form used under the Federal Circuit Court (Bankruptcy) Rules 2016. This form is signed by the Official Receiver or a delegate of the Official Receiver
3. a Form 8, a copy of the Bankruptcy Form(s) and a covering letter to the Registrar of the Federal Circuit Court are filed with the Court Registry
4. the court will fix a time date and place for the hearing and will provide the Official Receiver with a sealed notice of filing and hearing, attached to the Form 8
5. notice of the hearing, together with a sealed copy of Form 8, is served by the Official Receiver on the relevant parties via post at least **three days before the date of the hearing**. The relevant parties are:
   a. each debtor named in the petition
   b. each debtor listed in any relevant creditor's petition
   c. each creditor named in the creditor's petition
6. an affidavit must be completed by the person who arranged service (e.g. if by post) or served on the people listed in point 5 above
7. once the court makes a decision, a copy of the sealed order is sent to the Official Receiver
8. if the petition is to be accepted by the Official Receiver, the result is entered on the NPII.

ANNEXURE C – THE DUBOW CASE

In the matter of *Dubow v Official Receiver & Anor* [2013] FMCA 217 (28 March 2013), the court was asked to consider annulment of a bankruptcy pursuant to section 153B of the Bankruptcy Act as the applicant (Ms Dubow) claimed that it should not have been accepted by the Official Receiver. The reasons that Ms Dubow provided to support her claim and the court's findings dismissing each are outlined below.

Is the Official Receiver required to scrutinise the bankruptcy paperwork?

Ms Dubow believed that she did not have outstanding debts that were either not being paid or were not being paid as and when they fell due. She further claimed that neither her debtor's petition nor statement of affairs[3] reflected otherwise and that the Official Receiver ought to have enquired as to whether the debts disclosed by her were paid up to date when she presented her petition.

The court commented that the statement of affairs does not ask when debts are due or what overdue amounts are involved, so this is not something that the Official Receiver can, should or may consider. Further, the court found that the Official Receiver is not obliged to scrutinise a debtor's petition to the extent that Ms Dubow suggested.

Solvency

Following on from the previous point, Ms Dubow claimed that she was therefore solvent at the time she presented her debtor's petition and, as a result, she was "not eligible to be declared bankrupt".

The court did not accept this position and even commented that *"Presenting a debtor's petition when the debtor knows that he or she is not insolvent is an abuse of process."*

The court found Ms Dubow's case inconsistent as, on the one hand, she presented a petition to the Official Receiver to be accepted and to bring an end to some ongoing litigation with which she was involved; yet, on the other hand, she says that the Official Receiver should have picked up on the fact that she was solvent. Further, at the time the petition was filed, some debts could not be quantified and, therefore, Ms Dubow could not be certain that she was in fact solvent.

Prescribed information

Ms Dubow contended that she had not read the prescribed information (being the information that the Official Receiver is required to supply all debtors pursuant to the Bankruptcy Regulations) and that this was relevant to her debtor's petition being accepted. The court found that the evidence did not establish this and looked at the fact that Ms Dubow indicated along that process that she had read the prescribed information on the back of the debtor's petition form. The court also found that the prescribed information on the back of the debtor's petition

[3] As Mrs Dubow lodged her bankruptcy paperwork prior to the introduction of the Bankruptcy Form on 1 January 2020, she filed a debtor's petition on the old Form 6 and a statement of affairs on the old Form 3

form did comply with regulation 4.11.

Overall

The court's overall findings were that it would not exercise its discretion to annul the bankruptcy under section 153B because:

- Ms Dubow's bankruptcy has come about upon her own application, which she made after soliciting advice about her affairs
- Ms Dubow had stated that she lodged her debtor's petition to avoid legal proceedings being pursued by one of her creditors, yet she later said that her petition ought to have been rejected
- the evidence established that Ms Dubow was insolvent.

The court commented at paragraph 37 that:
"… there is no obligation upon the Official Receiver to scrutinise the debtor's petition in the way in which Ms Dubow suggests. The Official Receiver may do so, and may reject the petition if it appears from the information in the statement of affairs (and any additional information supplied by the debtor) that, if the debtor did not become a bankrupt, the debtor would be likely (either immediately or within a reasonable time) to be able to pay all the debts specified in the statement of affairs: s.55(3AA)(a) of the Act, but there is no obligation upon the Official Receiver to subject the petition to such scrutiny: s.55(3AB) of the Act."

ANNEXURE D – EXAMPLES OF SITUATIONS WHEN THE OFFICIAL RECEIVER MAY REJECT A PETITION

In applying the court's findings in the Dubow case, the Official Receiver will consider the discretionary power to reject a petition if it appears that the debtor may be abusing the bankruptcy system by using it as a means to avoid paying debts that he or she has the capacity to pay over a reasonable period of time. The Official Receiver is not required to make a decision as to whether the debtor is insolvent or to examine the documentation provided in minute detail; nor is the Official Receiver required to reject a petition when it could be rejected under subsection 55(3AA) (given that it is a discretionary power).

Following are some instances where the use of the discretionary powers can be considered:

- the debtor has an ability to pay **all** of his or her debts immediately, for example from existing cash reserves or by selling an asset
- the debtor appears to have been making payments to some but not all of his or her creditors
- the debtor has incurred debts within a very short period of time prior to lodging the petition and his or her stated income indicates there may be capacity to pay
- the debtor has not explored the alternatives available to deal with his or her financial difficulties
- the debtor's opinion as to the cause of his or her insolvency.

There may be other factors affecting the debtor's ability to pay all of his or her debts either immediately or within a reasonable time. The following factors should be taken into account in each case:

- the debtor's ongoing commitments (e.g. number of dependants)
- recent changes in the debtor's circumstances which reduced his or her capacity to pay debts owed (e.g. loss of a job)
- any exceptional circumstances affecting ability to pay (e.g. ongoing or sudden serious illness, special needs of dependants, loss of a second income in the household, sudden and unexpected loss of major assets including the debtor's home).

It should also be noted that there are no grounds in the Bankruptcy Act to reject a debtor's petition for the following reasons:

- the debt(s) disclosed do not appear provable
- in the case of a single petition, there is a creditor's petition pending
- the debtor has been bankrupt before (once in the past five years or more than three times overall) BUT does not appear to be able to pay disclosed debts within a reasonable time period.